

IN SEARCH OF A TREATY PARTNER:
WHO, OR WHAT, IS 'THE CROWN'?

by

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ABSTRACT

In New Zealand, 'the Crown' is frequently referred to in contemporary discourse relating to the Treaty of Waitangi. This thesis investigates the identity of 'the Crown' as a treaty partner with Māori.

There are major problems in identifying the Crown, and these problems have serious implications for the 'Māori' treaty partner. First, there is a problem of consistency in the identity of the Crown. Analysis shows that a range of institutions and individuals involved in the negotiation of treaty issues in contemporary New Zealand society is identified as 'the Crown'. The application of theoretical analysis of the role of symbols in politics shows that the Crown symbol is frequently used and widely applied in treaty debate. This is, it is argued, because use of 'the Crown' brings legitimacy and authority to the actions and policies of those entities it identifies. The flexibility and popularity of 'the Crown' symbol creates a problem for Māori, however, because 'the Crown' is not consistently naming the same thing.

There is a second major and interrelating problem: the evolution of the Crown. In 1840, 'the Crown' title was used in relation to the Queen, and later was used to describe settler government. Most recently 'the Crown' has come to incorporate local and regional as well as central government. This evolution in the identity of the Crown has frustrated attempts by Māori to identify and negotiate with their treaty partner. In particular, case studies of local government and resource management law reforms in New Zealand demonstrate that Māori themselves have attempted to resist the evolution of the Crown and assert their own interpretation of the appropriate identity for their treaty partner.

Having demonstrated the problems of 'the Crown' as well as the frequency of its use, there is the question of the broader constitutional relationship between Māori and the Crown to consider. A discussion of the role of the Crown in Canada illustrates some of the points made earlier in the thesis and demonstrates the unique position of the Crown in New Zealand. In addition, it is argued with regard to constitutional reforms facing New Zealand in the 1990s, that the future development of New Zealand's rapidly evolving constitution must consider the particular relationship between Māori and the Crown.

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Mate atu he tete kura.

Ka ara mai ano he tete kura.

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INTRODUCTION

As a consequence of the signing of the Treaty of Waitangi in 1840, and following a renaissance of the Treaty in the 1970s, there has been much discussion and debate in New Zealand, both within government and in society in general, about the place of the Treaty in contemporary New Zealand society. Fundamental to this debate is a common conception that the contemporary treaty partners are 'Māori' and 'the Crown'. This thesis argues that, despite the frequency with which 'the Crown' appears in treaty discourse, there are significant problems in identifying exactly who or what the 'Crown' partner is in contemporary New Zealand society. Furthermore, the problems relating to the symbol of the Crown have had serious implications for the Māori treaty partner attempting to negotiate and resolve treaty grievances.

Although there have been occasions in the past where the identity of the Crown has been called into question, no comprehensive examination of the nature and scope of the problem has, to my knowledge, been attempted. At the same time, the need for such an investigation has been widely apparent. For example in 1988, it was noted that:

[t]he question arises within the context of constitutional recognition of the Treaty as to a precise definition of Crown and Maori. In 1840 these parties were distinct – 148 years later the boundaries of each are somewhat blurred. The Crown can operate at a number of different levels from the Governor-General to government ministers to officials in government departments.¹

In accepting the challenge to produce a better understanding of and definition for 'the Crown' this thesis also redresses a certain imbalance. Previously, attention has

¹ Centre for Resource Management in Association with the Centre for Maaori Studies and Research, *Resource Management Law Reform. The Treaty of Waitangi and its Significance for the Resource Management Laws*, Working Paper No. 8, Ministry for the Environment, August 1988, p. 22. Other examples of attempts to define the Crown or highlight the complexities of the identity are included in Chapter One of this thesis.

focused on the Māori treaty partner, and questions have been asked such as: 'who is Māori'? How will 'Māori' organise themselves politically? Who are the appropriate representatives for Māori under the Treaty? In sum, as one newspaper heading stated, the question has typically been, 'who is the Crown's Treaty of Waitangi partner?'² While these problems relating to the identity of 'Māori' in contemporary society must be addressed and resolved in the interests of future treaty relations, this thesis is concerned with directing these questions at 'the Crown' treaty partner. In particular, it asks, who or what is 'the Crown'? How does 'the Crown' organise itself as a treaty partner and who are its representatives? Most importantly, why is the Crown so frequently used in treaty discourse? Finally, what are the implications of this identity for Māori?

This thesis is based on two assumptions which should be recognised. The first assumption is that the Treaty of Waitangi is a fundamental constitutional document in New Zealand because it allowed for the settlement of New Zealand by Pākehā and the establishment of legitimate government by cession (as opposed to by military conquest). Therefore, while it is not officially recognised within constitutional law,³ the Treaty is assumed to provide an important framework in contemporary society through which the development of this country should be viewed. It is also assumed that grievances which arise out of the Treaty require immediate and appropriate resolution.

The second assumption upon which this thesis is based is that a relationship exists between the public's conception of events and the language used to describe and explain events which, in turn, influence the nature of future events. Therefore, the identity of the Crown is examined in this thesis, for the most part, through the

² 'Who is the Crown's Treaty of Waitangi partner?', *The Press*, 20 February 1993, p. 3.

³ Margaret Wilson, 'Constitutional Recognition of the Treaty of Waitangi', in M. Wilson and A. Yeatman (eds.), *Justice and Identity. Antipodean Practices*, Bridget Williams Books, Wellington, 1995, pp. 1-18.

language of public discourse in New Zealand, in particular the language of the mass media and members of the political Executive. In this thesis, the Crown is perceived as a symbolic identity which is legitimately interpreted in a number of ways by different groups in New Zealand, including lawyers, bureaucrats, politicians, Māori and the general public. Therefore, while 'the Crown' is a legal concept, definable and understandable through the legal lens as the Queen, the Governor-General and the Executive, this is not the only interpretation of the Crown. Furthermore, regardless of the definition of 'the Crown' according to the law, it is argued here that government officials, the public and Māori interpret and apply the Crown identity in significantly different ways. This thesis is interested in determining which interpretation dominates and why. Also it is concerned with understanding the implications of this for those (such as Māori) who support less popular conceptions of the Crown.

Also, in introducing this research, something should be said briefly regarding the place of Māori in contemporary New Zealand society. By the mid-1990s, and prior to the first election using the mixed member proportional (MMP) system, Māori constitute a political minority in New Zealand which is significantly under-represented in Parliament. Despite the four Māori seats which effectively guarantee Māori permanent representation, and the imminent increase to five Māori seats with the introduction of MMP, there is widespread debate amongst Māori and the wider public regarding the lack of acknowledgment and representation of Māori interests in government generally. Also, increasingly in the 1990s, Māori have staged protests against alleged breaches of the Treaty of Waitangi, most commonly through occupation of buildings and land over which they claim ownership. Such protests aside, Māori grievances continue to be heard in the courts while the Waitangi Tribunal (established to investigate and make recommendations to government on Māori grievances under the Treaty) as the main avenue of redress for Māori has an overwhelming backlog of claims still to be heard. In recognising this, some Māori have chosen to deal directly

with the government in negotiating their claims under the Treaty of Waitangi, some with considerable success.⁴

However, the identity of the Crown has proven problematic for Māori in a contemporary political setting. The issues under negotiation such as resource ownership and distribution, the development of the constitution and economic development, are significant, and discourse to resolve these issues will require clarity and consistency if they are to be successfully, appropriately and irrevocably resolved. This can only be achieved if the Crown partner is appropriately identified and represented from the perspective of Māori in particular.

Having recognised the assumptions and background of this research, attention can turn to its content. This work is divided into three sections. The first two sections identify two major problems with the identity of the Crown and consider the implications of these problems for Māori. The first section argues that there is a problem of consistency in the identity of 'the Crown'. Chapter One introduces the many faces of the Crown: the Queen, the Governor-General and the Ministers of the Crown as well as legal interpretations for the Crown. It poses the question, which of these 'Crown' identities represents the Crown as the treaty partner in contemporary New Zealand society? The second chapter answers this question in part with an empirical investigation of the Crown as it was used in newspapers in New Zealand from 1987 to 1993. On the basis of the findings in this chapter it is argued that, while 'the Crown'

⁴ Further discussion of the Waitangi Tribunal and the courts in dealing with Treaty grievances can be found in Chapters Six and Seven respectively. Direct negotiations with the government, which are not discussed in detail in this thesis, have increased in number since the release of the National Government's 'fiscal envelope' policy in 1994, which proposed a full and final settlement of all outstanding grievances with a \$1 billion limit to the financial compensation available to Maori. Despite being soundly rejected by Māori, the National Government continued with its policy which has been largely responsible for the increase in the number of iwi (tribes) willing to negotiate directly with the Government. For further discussion of the place of Maori in contemporary politics generally, see Andrew Sharp, *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s*, Oxford University Press, Auckland, 1990. and Andrew Sharp, 'The Problem of Maori Affairs, 1984-1989, in M. Holland and J. Boston (eds.), *The Fourth Labour Government: Politics and Policy in New Zealand*, 2nd edn., Oxford University Press, Auckland, 1990, pp. 251-269.

was most often used as a metonym for government, it was also applied to a wide range of individuals and institutions involved in treaty negotiations. Chapter Three then reviews the theory about the function and use of symbols (such as the Crown) in political discourse. This reveals, amongst other things, that political symbolism is most often about legitimating authority and action. This theory is then tested against ministerial statements made in New Zealand between 1987 and 1993 and, on the basis of these findings, it is further argued that the Crown symbol is applied to a variety of identities in an attempt to legitimate their actions and authority with regard to the Treaty of Waitangi. Throughout these four chapters, the problem of inconsistency in the Crown's identity is seen to create serious implications for those Māori trying to identify and negotiate with an appropriate authority under the Treaty of Waitangi. The urgency with which the negotiation process is proceeding from the perspective of government and Māori serves to highlight the importance in clearly identifying the appropriate parties for negotiation of treaty claims.

In order to comprehend fully the problem of the contemporary identity of the Crown, the evolution of the Crown in New Zealand since 1840 must be closely examined. In doing so, the second section of the thesis argues that there is also a problem with the evolution of the Crown and again demonstrates the implications of this problem for the Māori treaty partner. Chapter Five discusses the events surrounding the signing the Treaty of Waitangi. It argues that, at that time, Māori were encouraged to conceive of their treaty partner as the Queen. Subsequent to the signing of the Treaty, the authority vested in the Queen was transferred to the settler government and the Crown treaty partner became obsolete. Both this transfer of power and the subsequent disappearance of the Crown were resisted by Māori and are seen to have created significant problems for them. Chapter Six goes on to argue that the dormant Crown identity was revived by the Treaty of Waitangi Act 1975 and the work of the Waitangi Tribunal (established under the Act). Both the Act and the Tribunal identified a contemporary treaty partner as 'the Crown'. However, the 1975 Act (and subsequent

amendments to the Act) provided no interpretation of the Crown. A case study in Chapter Seven reveals that the identity of the Crown in the Act, complicated by the evolution of the Crown, was examined in a Tribunal ruling. Chapter Eight extends the argument that the evolution of the Crown is problematic by demonstrating that the local government reforms of the late 1980s and the Resource Management Act 1991 have recently reinterpreted the Crown in a way considered inappropriate by those Māori who resisted the reforms. Once again, it is demonstrated that the evolving identity of the Crown, from 1840 to the mid 1990s, has frustrated Māori attempts to identify and address their treaty partner.

Having identified the two major problems of the Crown and the implications of these problems for Māori, the final section of this thesis places these arguments in the context of New Zealand's developing constitution. Chapter Nine compares the New Zealand experience with Canada's use of the Crown symbol. The comparison serves to help substantiate the arguments presented in the first two sections of this thesis and, moreover, emphasises the importance of the relationship between Māori and the Crown in New Zealand within the constitution. The final chapter then investigates the constitutional reforms facing New Zealand in the mid 1990s which impact on the identity of the Crown. In particular, it examines the new Mixed Member Proportional system of electoral representation, republicanism, the future of the Privy Council in New Zealand, and the possibility of including the Treaty of Waitangi in a written constitution in New Zealand. In keeping with the overall objectives of the thesis, this chapter considers whether any of these reforms might resolve the problem of the Crown, impact on its popularity as a political symbol, or have implications for Māori in negotiation with their treaty partner.

There is an urgent need for rigorous public debate of the use and meaning of 'the Crown' symbol in treaty discourse and in more general political debate. Passive acceptance of 'the Crown' symbol, which has meant that this issue has not been

addressed in the past, should be avoided in the future. In particular, the application of a better understanding of the Crown to constitutional reforms facing New Zealand in the mid 1990s can help New Zealand avoid a recurrence of problems which have historically complicated the relationship between Māori and the Crown treaty partner, at the expense of the ability of Māori to identify and negotiate with their treaty partner.

As F.W Maitland once observed:

There is one term against which I wish to warn you, and that term is 'the crown'. You will certainly read that the crown does this and the crown does that. As a matter of fact we know that the crown does nothing but lie in the Tower of London to be gazed at by sight-seers. No, the crown is a cover for ignorance: it saves us from asking difficult questions. ... I do not deny that it is a convenient term, and you may have to use it; but I do say that you should never be content with it. If you are told that the crown has this power or that power, do not be content until you know who legally has the power ...⁵

⁵ F.W. Maitland, *The Constitutional History of England: A Course of Lectures*, reprinted edn., Cambridge University Press, Cambridge, 1963, p. 418.

SECTION ONE

The Problem of the Identity of the Crown:

Symbolism and the Crown

ONE

INTRODUCING THE CROWN: BUT WHICH ONE?

As F.W. Maitland observed, there is nothing complicated about the crown, which sits in the tower of London to be gazed upon by sightseers.¹ It is, however, an appropriate introduction to this chapter to note that the crown on display is a replica of the real crown which is safely locked away. It seems that even at its most fundamental level, the crown is a representation of something else. As a prolific and time honoured symbol, 'the Crown' (original or replica) represents a complex web of historical, political and legal institutions, people and ideas. As the political theorist, Murray Edelman explains, a symbol such as the Crown is created and used in order to explain an overall, often complex, political picture in a simplified and manageable form.²

The purpose of this chapter is to begin to investigate the symbolic role of the Crown and in doing so to introduce a general problem of consistency in the identity of the Crown. It is first demonstrated that the Crown has historically been a popular symbol in Britain, the Commonwealth and New Zealand also. However, it is argued that despite (or perhaps as a result of) its popularity, the Crown can be problematic both in terms of the breadth of its identity and its variety of meanings. In short, there is a problem of consistency in the identity of the Crown. It is also observed that the Crown, while a central and important constitutional legal identity, poses problems for the law in determining the exact identity of the Crown, particularly as the process of governing becomes increasingly complex.

¹ F.W. Maitland, *The Constitutional History of England: A Course of Lectures*, reprinted edn., Cambridge University Press, Cambridge, 1963, p. 418.

² Murray Edelman, *Politics as Symbolic Action: Mass Arousal and Quiescence*, Markham Publishing Company, Chicago, 1971, p. 2.

Later in the chapter, and having established the general problem of consistency in the identity of the Crown, focus turns specifically to the problem of the Crown in New Zealand with regard to the Treaty of Waitangi. Here it is explained that Māori signed a Treaty with the British Queen (otherwise identified as the Crown) whose authority in New Zealand was subsequently exercised by British and then settler government in New Zealand. The problem this creates with regard to the treaty partner is also established. Second, the Queen's authority under the Treaty is vested in contemporary New Zealand society in 'the Crown'; usually said to encompass the Queen, the Governor-General and Ministers of the Crown. There is also, therefore, a problem in determining the Crown's parameters and in maintaining consistency in the identity of the Crown. The Crown, as it appears (undefined) in treaty related statutes, is seen to introduce the potential for confusion and disagreement over the identity of the Crown.

Finally, having established the problem of consistency in the identity of the Crown in relation to the Treaty, this chapter ends with a brief review of ideas from individuals and institutions in New Zealand regarding their own interpretations of 'the Crown' and (where appropriate) solutions to the problem the Crown identity presents. This literature review demonstrates first and foremost the need for a comprehensive investigation into the problem of 'who or what is the Crown' such as is undertaken in this thesis. It also raises a concomitant question; does (or indeed can) the contemporary Crown identity constitute an appropriate expression of the original function of the Crown under the Treaty of Waitangi?

The Birth of a Symbol: The British Origins of 'The Crown'

The history of the British monarchy is, in many respects, distinct from the development of the symbol of the Crown. The notion of 'the Crown' did not emerge until the monarchy was well established in Britain and, it might also be argued, did not flourish as a political symbol until the actual power of the monarchy was declining. However, this is not to underestimate the important relationship between Crown and

monarchy. The survival of the monarchy through centuries of treacherous constitutional change has often been attributed to its relationship with the flexible and enduring notion of the Crown. As King George VI once acknowledged, the Crown is:

the historical symbol that unites this great family of nations and races [of Great Britain]. The complex forms and balanced spirit of our constitution were not the discovery of a single era, still less of a single party or a single person. They are the slow accretion of centuries, the outcome of patience, tradition and experience.³

Indeed, as the history of the British monarchy reveals, when kings⁴ were most popular, the Crown symbolised the king. When a king failed and the monarch's popularity was low, the Crown could be distanced from the person of the king, thereby ensuring the stability of the institution. Then, when representative government finally prevailed, the monarch became the head of state and the Crown became a constitutional identity deeply embedded in modern British society. Ironically, however, the very qualities which have made the Crown a robust and accommodating symbol have also posed the greatest threat to its continued survival. This discussion reveals that the Crown has, down through the ages, come under attack as an unnecessarily ambiguous and troublesome British symbol which could and should be removed.

Understanding the contemporary significance of the Crown symbol requires an appreciation of both its earliest origins and its extensive history. Prior to the Crown there was only the king. From as early as 400 AD the notion of kingship was developing in Britain through a patchwork of kingdoms. However, by the tenth

³ John Cannon and Ralph Griffiths, *The Oxford Illustrated History of the British Monarchy*, Oxford University Press, Oxford, 1988, p. 600.

⁴ 'King' is used here in recognition of the fact that, until Mary I's rule in the late 1500s, the monarchy was male. Discussion of the period following Mary I will refer to the 'monarchy'.

century a single permanent kingdom had developed.⁵ With it came a concentration of power in the authority of the king which allowed (in fact required) the king to retain possession of the kingdom's territories while conquering new lands and protecting the security of his people.⁶ The entire kingdom was under royal control.⁷ From its earliest beginnings the monarch also became inextricably linked with Christianity. The king was exalted by the Church in return for his patronage, and the position of the king was upheld as being akin to that of a priest. In addition, the religious consecration of the king furthered heightened his early profile in the kingdom – the king was believed to serve God's purpose as well as his own.⁸

A succession of kings ruled in England between the fifth and eleventh centuries. This was a time of great uncertainty and turmoil for any monarch. As succession to the throne was not yet an accepted birthright, leadership was fraught with arguments, competition and tragedy. In order to compensate for the tenuous nature of the monarch's rule, kings and their supporters promulgated pomp and ceremony which promoted the stability, status and reputation of the monarchy and protected its future. In short, they created 'a myth of order, continuity and antiquity' which would surround the monarchy down through the ages and from which the symbol of 'the Crown' would later arise.⁹

From 1000 to 1200 AD, an extended struggle between England and France for power over both countries stressed the limitations of the king's authority and an increasing

⁵ King Alfred of Wessex won his title as earliest recognised king in England when he threw back the Viking invasion in the tenth century and allowed for a single permanent kingdom in England. See Cannon and Griffiths, *History of the British Monarchy*, pp. 12-13.

⁶ Cannon and Griffiths, *History of the British Monarchy*, p. 65.

⁷ Cannon and Griffiths, *History of the British Monarchy*, p. 61.

⁸ Cannon and Griffiths, *History of the British Monarchy*, pp. 30-32. Association with the Church also extended the king's powers and rights in a more practical manner, enabling him to appoint judges and impose fines.

⁹ Cannon and Griffiths, *History of the British Monarchy*, p. 78.

need for him to co-operate and communicate with royal subjects.¹⁰ The absolute rule of the monarch was under increasing pressure from within the kingdom which made kings more dependent on their nobility to justify royal power and authority. In response to this pressure and in an attempt to secure the king's position and authority, the act of crowning the king became a highly spiritualised and symbolic act of 'coronation'. As one writer notes, '[r]egardless of when it took place [sometimes months after his succession to the throne] the king was not fully or lawfully king until he was crowned.'¹¹ This focus on the king's coronation was accompanied by increasing attention to the regalia associated with the person and institution of the monarchy, including the crown, the sceptre and the rod which represented the glory, virtue, equality and justice of an anointed king.¹² Even up until the fifteenth century, crown wearing occasions and ceremonies were a popular way for a king to confront challenges to his authority and assert the importance of his coronation and rule.¹³ And behold, a symbol is born.

During the eleventh and twelfth centuries the Crown provided the basis for a new ideology which enhanced the status and dignity of the monarchy's special powers or 'royal prerogatives'.¹⁴ The royal prerogatives (some of which are still in existence today) are powers allowed only the king which traditionally allowed him to hold and acquire territory while protecting the welfare of his subjects. The king enjoyed 'ordinary' prerogative powers which he executed through the courts and other intermediary bodies, and 'extraordinary' or 'absolute' prerogative powers which the king executed personally at his own discretion such as pardoning a criminal or granting a peerage. As the absolute powers of the monarchy increased, a distinction began to appear between the office of the king and the person of the king. This

¹⁰ Cannon and Griffiths, *History of the British Monarchy*, p. 101.

¹¹ Cannon and Griffiths, *History of the British Monarchy*, pp. 113 - 114.

¹² Cannon and Griffiths, *History of the British Monarchy*, p. 118.

¹³ Cannon and Griffiths, *History of the British Monarchy*, p. 121.

¹⁴ Cannon and Griffiths, *History of the British Monarchy*, pp. 123 - 124.

distinction has been described as 'the king's two bodies'.¹⁵ It meant that the king's identity as private person became almost a shadow to a second *persona ficta* through which the king was perceived to be immortal and incapable of thinking or doing wrong (as the source of all justice). It has been argued that the development of the king's two bodies, while seemingly ludicrous and awkward in many respects, provided an important fiction at a critical time which allowed lawyers to 'harmonise modern with ancient law', or to put it differently, to bring into agreement the personal authority of the king with the new and more impersonal concept of government.¹⁶ 'The Crown' subsequently came to symbolise the office of the monarchy rather than the king himself and it became possible to distinguish between the Crown and the king.¹⁷

Between the thirteenth and sixteenth centuries parliament continued to be predominantly a royal creation. However, there were notable attempts by various parliaments to criticise the king (at its own risk) in order to modify his management of government and wrest some control from the monarchy.¹⁸ Such endeavours met with some measure of success in the mid-1340s, after which time government extended its independence, forcing the king to rely further on the advice of his councillors in order to legitimise his authority. With the king's real power diminishing, the king's two bodies became more clearly distinguishable as royal authority became less personal to the monarch himself. However, government continued to be conducted in the name of the king.¹⁹ Furthermore, as government became increasingly representative, the Crown provided an essential bridge between the old and emerging orders of government. It did so by extending its mantle to include both the monarchy and the

¹⁵ Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology*, Princeton University Press, New Jersey, 1957.

¹⁶ Kantorowicz, *The King's Two Bodies*, pp. 4-5.

¹⁷ Cannon and Griffiths, *History of the British Monarchy*, p. 125.

¹⁸ One such attempt to wrest control from the king was with the Provisions of Oxford in 1258, which sought to place the king's power in the hands of the council. The proposal, not surprisingly, had limited success. See, Cannon and Griffiths, *History of the British Monarchy*, pp. 206-208.

¹⁹ Cannon and Griffiths, *History of the British Monarchy*, pp. 211 - 213.

developing constitutional government which was exercised in the name of the Crown. Ironically, it was when the king's real power began to decline (although this was not altogether a permanent loss of authority) that the Crown symbol flourished and in doing so, protected the monarchy from criticism within the emerging political order.²⁰ For example, during the thirteenth and fourteenth centuries the Crown was used to separate an unsatisfactory king from the crown he wore. This meant that, while the Crown was inviolable, the king himself could be corrected and even removed. With this further evolution of the Crown symbol, the king himself became custodian and servant to the Crown.²¹ Appropriately worn above a king's head, his crown now represented perfect, incorruptible and perpetual leadership, far superior to the notion of government or the fallible person of the king.

By the early 1500s the royal court was still very much the centre of political and social life. Ceremonies associated with royalty were also a focal point. During this period the sovereign retained, potentially at least, the right to make all fundamental political decisions, and parliament existed at the king's pleasure. However, by the sixteenth and seventeenth centuries, parliament was secure enough to limit the sovereignty of the absolute monarch. The monarchy's new role allowed him or her the power of law-making but at the same time required that the monarchy ruled by consent.²²

From 1688, the monarchy was required to summon parliament annually and, despite the monarch's continued centrality, parliament was accepted as a permanent constitutional feature in Britain.²³ Furthermore, political parties began to develop

²⁰ Cannon and Griffiths, *History of the British Monarchy*, p. 213.

²¹ Cannon and Griffiths, *History of the British Monarchy*, p. 217.

²² Cannon and Griffiths, *History of the British Monarchy*, pp. 299 - 300. In retrospect, it is difficult to gauge how much power the monarchy had at this time. Parliament often attempted to oppose the royal policy, which was a treacherous business as the monarch retained and often used his powers of dissolution, and his limitations of free speech. Also, parliament was not blessed with the routine of frequent sessions. These were called at the king's discretion. See Cannon and Griffiths, *History of the British Monarchy*, pp. 303-304.

²³ Cannon and Griffiths, *History of the British Monarchy*, p. 433.

along with the notion of popular elections, which further challenged the real power of the monarchy.²⁴ Once again, despite such substantial constitutional reform, the Crown's significance as a central political construct endured. Some writers have suggested that individual monarchs (particularly queens) were critical in maintaining and even promoting the place of royalty and the Crown in the developing political order. For example, Elizabeth I (1558-1603) was renowned for expounding her lofty powers²⁵ and Queen Victoria (1837-1901) has also been noted for her considerable success in preserving and promoting the little power the monarchy still enjoyed.²⁶

The other suggestion has been that the monarchy remained popular because it appealed to the public in ways that the government could not. For example, Walter Bagehot reviewed the place of the Crown in Britain in 1867 and argued that the success of 'the Crown' down through the ages, and particularly its success in surviving the threat of representative government, was due to the fact that parliament and cabinet constituted the 'efficient' part of government, while the monarchy represented the 'dignified' part. He said that people could understand leadership by a single person, such as 'the Crown', whereas leadership by an assembly and political parties was not so easily conceived of by the 'ignorant masses'. He described the monarchy as 'intelligible government where other forms are not well understood'. The Crown, according to Bagehot, was a necessary channel for popular support and was useful to government because it deflected attention from the true central power of government. He said, '[the Crown] enables our real rulers to change without needless people knowing it. The masses of Englishmen are not fit for an elective government; if they knew how near they were to it, they would be surprised, and almost tremble',²⁷ adding that 'men are

²⁴ Cannon and Griffiths, *History of the British Monarchy*, pp. 435-436.

²⁵ Cannon and Griffiths, *History of the British Monarchy*, p. 351.

²⁶ Cannon and Griffiths, *History of the British Monarchy*, p. 553. Despite Queen Victoria's efforts, 'the Crown' was destined to become more of a chairperson or negotiator in politics than a superintending authority, a position it had enjoyed in the past.

²⁷ Walter Bagehot, *The English Constitution*, Oxford University Press, London, 1942.

ruled by the weakness of their imagination.'²⁸ Bagehot concluded, 'so long as the human heart is strong and the human reason weak, royalty will be strong because it appeals to diffused feeling, and republics weak because they appeal to the understanding.'²⁹ His comments reflect the views of many contemporary theorists who also identify the power of a symbol such as 'the Crown' which can represent, in a manageable form, the complexities of modern government.³⁰

From around 1820, the monarchy was reduced in function and authority to that of a popular monarch in Britain, a role it still enjoyed by the end of the twentieth century. In the capacity of popular monarch, the king or queen compensates for the loss of formal political power by distancing themselves from government politics and concerning themselves with promoting a public image to a much wider range of subjects.³¹ By the end of the nineteenth century the Crown played a less expansive, although not altogether less significant, role as a symbol of British unity, the unchallenged head of state and the head of the moral order.³² However, while the political role of the *monarch* had declined by the twentieth century, the *Crown* was set to rise in its popularity and significance, this time within the British Commonwealth. Increasing demands from Commonwealth member countries for independence from Britain were qualified by an equally strong desire to retain Commonwealth membership and a common association with the Crown. Achieving this request presented a dilemma to constitutional lawyers: how to divide the previously indivisible Crown in order to accommodate independent, equal Commonwealth nations.

²⁸ Bagehot, *The English Constitution*, p. 31.

²⁹ Bagehot, *The English Constitution*, p. 35.

³⁰ A similar statement by Murray Edelman will be recalled from the beginning of this chapter. Refer to footnote No. 1. Also see Chapter Three of this thesis for further discussion.

³¹ Cannon and Griffiths, *History of the British Monarchy*, p. 530. For example Queen Victoria, as a popular monarch, took a keen interest in her most recently acquired subjects in Australia and later in New Zealand and insisted on maintaining Crown control of colonial affairs. See Cannon and Griffiths, *History of the British Monarchy*, p. 568.

³² Cannon and Griffiths, *History of the British Monarchy*, p. 577.

Accommodating the Commonwealth: The Divisible Crown.

By the twentieth century British imperialism had resulted in a Commonwealth of nations established under British rule. In particular, Australia, New Zealand and Canada (as the focus of later discussion) underwent the process of demanding legislative independence from Britain. However, in doing so, these countries and other Commonwealth nations expressed a desire to exercise parliamentary sovereignty within the security of the Commonwealth of British Nations and to retain their link with the British Monarch as the sovereign of their own independent nation.

These nations' desires to retain their attachment to the Crown are indications that it had been a popular and important symbol amongst most nations within the Commonwealth. This popularity is well documented. For example, in the preamble to the Statute of Westminster 1931 it was declared that, 'the Crown is a symbol of the free association of the Members of the British Commonwealth of Nations' (which at that time included the United Kingdom, Canada, Australia, New Zealand, South Africa, Newfoundland, and the Irish Free State).³³ Similarly in 1949, a communiqué by Commonwealth Prime Ministers read, '[t]he Governments of the United Kingdom owe common allegiance to the Crown, which is also the symbol of their free association.'³⁴ Later still in 1960, and following the independence of Commonwealth nations from Britain, it was observed that '[i]n the Commonwealth as it is organised at present, the members have decided that there shall be a symbol of their association and that symbol should be what they either describe as 'the Crown' or 'the Queen'.'³⁵

Despite the popularity of the Crown, its usefulness was challenged by the developing Commonwealth. As Geoffrey Marshall, British constitutional theorist, has explained,

³³ K.C. Wheare, *The Constitutional Structure of the Commonwealth*, Clarendon Press, Oxford, 1960, p. 150.

³⁴ Wheare, *The Constitutional Structure of the Commonwealth*, p. 150.

³⁵ Wheare, *The Constitutional Structure of the Commonwealth*, p. 150.

the Crown raised awkward conceptual queries in relation to the future of the Commonwealth in the early twentieth century because the Crown, which was 'one and indivisible' in England, had to become a multiple 'divisible' Crown in order to accommodate the independent Commonwealth states.³⁶ In order for Commonwealth states to retain their link with Queen Elizabeth II, and at the same time achieve independence from Britain, the Queen would have to become the Queen of Australia and of Canada and of New Zealand, thereby creating an equality between Britain and the other member countries under the Crown. As challenging as this problem was, the Crown once again proved itself a symbol capable of accommodating even the most significant of constitutional changes proving that it was as flexible outside the United Kingdom as it had been inside it.³⁷

The process by which the Crown was divided unfolded as follows. In 1927, prior to the division of 'the Crown', the monarch was identified by all Commonwealth nations as being, 'by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the seas, ... Defender of the Faith.' In the Royal Titles Act 1947 (passed by the British Parliament), changes were made to reflect India and Pakistan's new identity as republics within the Commonwealth, with their own presidents as the head of state. In 1953, the Royal Titles Act 1947 was repealed following agreement by Commonwealth member countries that the Crown's title should better reflect the independence of the Commonwealth nations from each other and, more importantly, from Britain. Accordingly, following the coronation of Queen Elizabeth II in 1953, Commonwealth Nations were able to adopt their own royal title. In doing so, New Zealand and Australia elected to retain the phrase 'Head of the Commonwealth', making New Zealand's Crown, 'Elizabeth the Second, by the Grace of God of the United Kingdom, New Zealand and Her other Realms and Territories Queen, Head of

³⁶ Geoffrey Marshall, *Constitutional Theory*, Clarendon Press, Oxford, 1971, p. 20. Also see Philip Joseph, *Constitutional and Administrative Law in New Zealand*, The Law Book Co., Sydney, 1993, p. 492.

³⁷ Sir Ivor Jennings, *The Queen's Government*, Penguin Books, London, 1952, p. 37.

the Commonwealth, Defender of the Faith...' In 1974, the Act was amended again to describe the Queen as, 'Elizabeth the Second, by the Grace of God, Queen of New Zealand and Her other Realms and Territories.'³⁸ Canada, on the other hand, chose to immediately assert a greater degree of independence from Britain and the Crown after 1953, by not acknowledging the Queen as the Head of the Commonwealth.³⁹ However, New Zealand, Canada and Australia commonly acknowledged their Commonwealth connection by identifying their queen as the Queen of the United Kingdom.⁴⁰ Once each Commonwealth nation had established its own appropriate title for the Crown, including the United Kingdom, they were effectively under the rule of an equal, but separate 'Crown'.

This process, as New Zealand's constitutional lawyer Philip Joseph explains, is the notion of the 'divisible Crown' by which the Crown became a legally divisible entity throughout the Commonwealth, thereby ensuring the survival of the Crown in most Commonwealth nations well into the late twentieth century.⁴¹ In New Zealand, the Constitution Act 1986 most recently reaffirmed the existence of the Crown in New Zealand by stating that '[t]he sovereign in right of New Zealand is the Head of State of New Zealand, and shall be known by the royal style and titles proclaimed from time to time.'⁴²

However, while an established tradition in both Britain and the Commonwealth, the Crown has not escaped criticism from contemporary writers. Most frequently 'the Crown' has been charged with having become an 'unnecessarily ambiguous and troublesome identity' which can and should be replaced by a more appropriate symbol

³⁸ Further discussion of the reasons for and implications of this amendment are discussed in Chapter Six.

³⁹ Wheare, *The Constitutional Structure of the Commonwealth*, pp. 164-165.

⁴⁰ Wheare, *The Constitutional Structure of the Commonwealth*, p. 167.

⁴¹ Joseph, *Constitutional and Administrative Law in New Zealand*, p. 492.

⁴² *The Constitution Act 1986*, Section 2 (1).

or word, such as 'the State'.⁴³ In 1952, Sir Ivor Jennings considered this suggestion and defended the Crown by arguing that the concept was useful specifically because it is personal and flexible, real and tangible.⁴⁴ Similarly, Geoffrey Marshall, British constitutional theorist, argued that 'the state' and 'the Crown' have important distinctions in use and meaning.⁴⁵ In looking to clarify what those distinctions might be, New Zealand political commentator, John Martin, has provided some insights. Martin advised that the debate between 'state' and 'Crown' has also reached New Zealand's shores, where 'the Crown' is the preferred term in both politics and law, making it symbolically and practically of greater significance than the state.⁴⁶ Martin supported Marshall and Jennings in arguing that 'the state' is different from 'the Crown' in that the former refers to more than one government institution or government as a whole. He argued that when considering the relative popularity of the terms Crown and state in constitutional and administrative discourse in New Zealand, the preference for the Crown could be explained by the fact that there is 'perhaps something vaguely alien and threatening about 'the State'.'⁴⁷ While this may be true, the Crown's popularity in New Zealand draws attention to the problem of the Crown and makes clarity in respect of the identity of the Crown all the more essential.

Having identified the flexibility and complexity of the Crown in Britain and the Commonwealth, historically and in a contemporary sense, it should come as no surprise to learn that similar complexities and problems can be identified in the meaning and uses of the Crown in New Zealand, where the symbol poses not only a conceptual, but also a more practical, legal dilemma.

⁴³ Marshall, *Constitutional Theory*, p. 24.

⁴⁴ Jennings, *The Queen's Government*, p. 35.

⁴⁵ Marshall, *Constitutional Theory*, pp. 24-25.

⁴⁶ John Martin, 'The Role of the State in Administration', in Andrew Sharp (ed.), *Leap into the Dark: The Changing Role of the State in New Zealand Since 1984*, Auckland University Press, Auckland, 1994, p. 42.

⁴⁷ Martin, 'The Role of the State in Administration', p. 42.

The Crown(s) in New Zealand

In New Zealand in the 1990s, the Crown is most often identified as a concept incorporating the Sovereign, the Governor-General and the Ministers of the Crown. The 'Crown' originally arrived in New Zealand in the form of Her Majesty the Queen of England, as identified in the Treaty of Waitangi, 1840. However, following the signing of the Treaty the Queen's authority was exercised by British and subsequently colonial Ministers of the Crown. Furthermore, as the activities of government in New Zealand became more complex, 'the Crown' has incorporated increasing numbers of government departments and other bodies contracted by the Crown to carry out specific functions. Consequently, the question 'who or what is the Crown' has also become a matter of considerable legal significance.

At its most fundamental level, the Crown represents the Queen in contemporary New Zealand society as the source from which government authority originates. The Queen is a figure who has traditionally attracted tremendous support from the New Zealand public.⁴⁸ As the Head of State, the Queen also occupies a pivotal political position in New Zealand. While the role is largely symbolic (as the Queen would only act – if at all – on the advice of her Governor-General in New Zealand) her role is an important one which is supported by the majority of New Zealanders who wish to retain the constitutional monarchy.⁴⁹ However, the Queen, as the Head of State, has long since abdicated her responsibilities in New Zealand. For practical purposes, the functions of the Queen are now executed by her representative in New Zealand, the Governor-General.

⁴⁸ For further discussion on the contemporary relationship between the Crown and the people in New Zealand, see D.L. Stevens, *The Crown, the Governor-General and the Constitution*, A thesis submitted for the completion of Master of Arts, Victoria University of Wellington, 1974, p. 338.

⁴⁹ In 1993, a survey by the *National Business Review* revealed that 56% of New Zealanders were opposed to New Zealand becoming a republic, with 27% supporting the idea.

As the Queen's representative, the Governor-General is the second layer of the identity of the Crown in New Zealand. The Governor-General has 'central symbolic, unifying, and representative roles' as well as 'important legal powers' in New Zealand.⁵⁰ While originally acting on the advice of the British Government, the office of the Governor-General has, through time, become accountable to government in New Zealand. This transfer of power began almost as soon as the Office of the Governor-General was established in the colony's early years under the Letters Patent. From 1856, a representative legislature in New Zealand gave the Governor-General's function a clear 'dualism' as both the constitutional head of the local colonial government and an intermediary between the New Zealand government and the imperial authorities who appointed the Governor-General.⁵¹ At this time the Governor-General was essentially a British position. From 1910, New Zealand Ministers were able to choose the Queen's representative from a list of British candidates.⁵² The Governor-General's actions at this time were still subject to direction from the British government.⁵³ However, at an imperial conference in 1926, it was declared that the Governor-General should no longer be considered an agent or representative of the British government, and that Great Britain and the Dominions should be equal under the monarchy.⁵⁴ (This ruling was a further result of those reforms which created a divisible Crown within the Commonwealth.) Subsequently, as explained earlier, New Zealand became a member of the Commonwealth of equal status to Britain under the Crown. Throughout the 1960s, the Governor-General was more frequently a New Zealand appointment made according to Ministerial advice.⁵⁵ Anthony Wood has observed that between 1972 and 1983 it became the convention that the Governor-General be a

⁵⁰ *The Cabinet Office Manual*, New Zealand Cabinet Office, Government Printer, Wellington, 1991, pp. 3-4.

⁵¹ D.L. Stevens, *The Crown, The Governor-General and the Constitution*, Thesis Submitted for Masters in Law, Victoria University of Wellington, 1974, p. 7.

⁵² Stevens, *The Crown, The Governor-General and the Constitution*, p. 29.

⁵³ G.A. Wood, 'New Zealand's Patriated Governor-General' in *Political Science*, Vol. 38, No. 2, 1986, p. 127.

⁵⁴ Stevens, *The Crown, The Governor-General and the Constitution*, p. 29.

⁵⁵ Stevens, *The Crown, The Governor-General and the Constitution*, p. 33.

New Zealander, chosen by the New Zealand cabinet, and that cabinet also determined the Governor-General's functions.⁵⁶ With this development the New Zealand Governor-General, once a British appointment, had effectively been 'patriated' or 'brought home'.⁵⁷ The Governor-General was no longer 'on loan' from Britain. As Wood pointed out, '[p]atriation, in short, completes New Zealand's formal transition from colonial dependency.'⁵⁸ Wood explained:

[p]atriation has made the office of Governor-General a genuinely and completely New Zealand office. The effect, simply, has been a symbolic change for the people, and a real gain of power for the government ... [I]n effect the patriated executive power in New Zealand is self-created, self-defined and self-perpetuating.⁵⁹

Particularly once the office was patriated, the Governor-General, (much as was expected of the monarch the previous century) was expected to distance itself from politics. On this matter, Wood noted:

More visible, and more clearly required of a Governor-General is his [her] social role. He [she] expresses the levelling, unifying position of the Crown ... [d]ivorcing head of state from head of government, New Zealand like Great Britain enhances the former by distancing it from politics. Distancing requires that in his [her] social activities the Governor-General is clearly not the servant of ministers – in direct contrast to performance of governmental and political acts when he [she] should be.⁶⁰

The patriation of the Governor-General meant that the authority originally ceded to the Office by the Queen eventually came to rest on the Ministers of the Crown in New Zealand on whose advice (by convention) the Governor-General acts. While the title 'Ministers of the Crown' acknowledges the original source of ministerial authority, the

⁵⁶ Wood, 'New Zealand's Patriated Governor General', pp. 113-135.

⁵⁷ Wood, 'New Zealand's Patriated Governor General', p. 113.

⁵⁸ Wood, 'New Zealand's Patriated Governor-General', p. 113.

⁵⁹ Wood, 'New Zealand's Patriated Governor-General', p. 119.

⁶⁰ Wood, 'New Zealand's Patriated Governor-General', p. 127.

Cabinet Office Manual clearly dispels any notion of ministerial accountability to Her Majesty. In acknowledging the symbolic significance of the Queen's status as Head of State, the manual emphasises that the British Crown is no longer an active part of New Zealand politics. It stipulates that the Queen reigns; meaning that as a matter of law the monarchy (or the Governor-General as her representative) may appoint and dismiss officials, summon and dissolve parliament and assent or decline Bills and Orders. However, by convention this is done only on the advice of the Prime Minister or Ministers, with the support of the House of Representatives. Parliament is in fact supreme.⁶¹ It is important, for the sake of later discussion, to note that with the transfer of power from Queen, to Governor-General and finally to the Executive, New Zealand lost a layer of accountability which, as Wood observed earlier, divorces Head of State from head of government. This point is particularly important in light of later discussion of the Crown in relation to the Treaty of Waitangi, and again in relation to the Crown in Canada.

In a practical sense, therefore, the Executive, the Sovereign and the Governor-General combined represent 'the Crown' in contemporary New Zealand society. However, this description is not entirely satisfactory in the scope it allows in interpretation and in the potential it creates for inconsistency in the identity of the Crown. The Crown may represent any one element in the trinity (Queen, Governor-General, Executive) or some combination of the three. Furthermore, the Ministers of the Crown have been merely the core of an ever expanding system of government supported by departments and parliament. Also, as the business of government extends itself into all aspects of society and increasingly contracts groups or individuals to perform what were once governmental functions, the identity of the Crown is called into question and clarity becomes a matter of immediate and practical importance. This matter has greatly preoccupied the law in New Zealand.

⁶¹ *The Cabinet Office Manual*, p. 3.

The Crown is a significant and central construct in constitutional law. Much of Westminster constitutional government is bound up in the notion of the Crown.⁶² 'The Crown' has appeared in statutes because the Crown's servants and advisers in parliament assembled are known to the law, while 'the government' and 'the state' are not.⁶³ As Marshall observed, the term 'Crown' is preferred in modern statutes and judicial usage when the Queen's servants, or ministers, are obviously or primarily involved.⁶⁴ Indeed, while the Crown is frequently used in constitutional law in New Zealand, it has also been criticised for not being a 'carefully worked legal creation'.⁶⁵

While it would be neither appropriate nor possible to review the legal debate over the Crown in any detail here, it is important to outline some key factors which contribute to the complexity of the Crown under the law. In particular, it is important to recognise the work in progress by the Law Commission in New Zealand to lay out in statute the identity of the Crown in New Zealand according to common law (that is, that part of the Crown identity not already defined by statute). This action is prompted by widespread concern that, as mentioned earlier, the government is increasingly contracting out government functions and, as a result, serious legal problems are raised regarding who the Crown (as the contracting party) actually is. In addition to this concern, two other related legal questions raised by constitutional lawyer Philip Joseph should also be acknowledged. The first question is whether the Crown obtains the necessary characteristics to be considered a legal entity.⁶⁶ The details of this technical legal debate will not recounted here, but readers are directed to Joseph's discussion of this matter. The second question Joseph has raised and debated which is more

⁶² Joseph, *Constitutional and Administrative Law in New Zealand*, p. 490.

⁶³ Marshall, *Constitutional Theory*, p. 15.

⁶⁴ Marshall, *Constitutional Theory*, p. 21.

⁶⁵ Joseph, *Constitutional and Administrative Law in New Zealand*, p. 490.

⁶⁶ For further discussion see Philip Joseph, 'The Crown as a Legal Concept', *New Zealand Law Journal*, April, 1993, pp. 126-129. Also, in a similar debate in Canada in the mid 1980s, the legal community observed some unnecessary problems with the term 'Crown' in statutes and suggested replacing the term with that of 'administration'. See; Law Reform Commission of Canada, 'The Legal Status of the Federal Administration', Working Paper No. 40, 1985.

immediately relevant to this thesis, is 'who or what is the Crown' according to the law in New Zealand. His response to this question will be briefly outlined.

Joseph found that 'the Crown can be anything (or anyone) Parliament chooses'. He explained that 'Australian and New Zealand Courts ... have held that persons or bodies discharging public or quasi-public functions, though not in a generic sense 'the Crown', may grasp at the Crown's mantle for escaping some statutory liability or detriment.'⁶⁷ Joseph explained that while the Crown in New Zealand is now generally accepted and understood as an embodiment of Executive government, the Crown actually has two distinct personae – one which is identifiable and a second which is much less so. In this sense, the Crown can be either the person of the Queen, or some other (much more elusive) entity. As a result, it is not always possible, according to Joseph, to determine legally exactly who or what the Crown is.⁶⁸

Moreover, statutes are far from consistent in who or what they identify as the Crown. First, the Crown can, in law and in fact, be a personification of the monarch.⁶⁹ For example, in the Crown Proceedings Act 1950, the Crown means 'Her Majesty in right of Her Government in New Zealand'. Also, in the State Owned Enterprises Act 1986, the Crown is defined as 'Her Majesty the Queen in right of New Zealand', and in the Ministry of Agriculture and Fisheries Act 1990, the terms 'the Crown' and 'Her Majesty' are used interchangeably. However, it would not be correct to assume that the Crown is simply the monarch in the law as it can also be an 'indeterminate entity'.⁷⁰ According to Joseph, '[i]n theory, anyone may be the Crown qua servant or agent when the Crown's interests are affected or threatened, as may any public body administering a service within the 'province of government'.' For example, when the Crown is not meaning 'Her Majesty the Queen of New Zealand', it can encompass not

⁶⁷ Joseph, *Constitutional and Administrative Law in New Zealand*, p. 503.

⁶⁸ Joseph, *Constitutional and Administrative Law in New Zealand*, p. 490.

⁶⁹ Joseph, *Constitutional and Administrative Law in New Zealand*, pp. 490-491

⁷⁰ Joseph, *Constitutional and Administrative Law in New Zealand*, p. 491.

only the Sovereign as the Head of State, the Governor-General as her representative and the Ministers of the Crown in New Zealand, but also central government departments.⁷¹ For example, in the Public Finance Act 1989 the Crown was defined as 'Her Majesty the Queen in right of New Zealand', as well as Ministers of the Crown and government departments. In addition to this, the Sovereign is the Head of State, which means that 'the Crown' has come to embody the state itself. Consequently, the Crown has also been interpreted as broadly as being 'the state' in New Zealand law.⁷²

Even from this brief discussion of the Crown under the law, the problem of finding consistency in the Crown's identity is further substantiated. Not only has the symbol challenged British and Commonwealth lawyers abroad, it has also captured the attention of lawyers here in New Zealand. However, despite its complexity, the Crown is central to New Zealand's entire constitutional system as the essential source of all law in this country. It must therefore be borne in mind throughout this thesis that the Crown symbol has a legitimate and highly significant place in New Zealand within the constitution, while also remembering the problematic nature of the Crown under the law.⁷³

In reviewing the problem(s) of the Crown in New Zealand, it is evident that the term exhibits the full complexity of an age old symbol which has represented a range of authorities on a number of levels down through the ages in Great Britain, the Commonwealth and now also in New Zealand. 'The Crown in right of New Zealand' can equally legitimately be interpreted as the Queen, the Governor General, and/or the

⁷¹ Joseph, *Constitutional and Administrative Law in New Zealand*, p. 494.

⁷² Joseph, *Constitutional and Administrative Law in New Zealand*, p. 492.

⁷³ In Chapter Seven it is noted that the High Court and the Waitangi Tribunal were forced to interpret the meaning of the Crown in the Treaty of Waitangi Act 1975 – a decision which generated much debate and criticism and further emphasised the problem of the Crown in that particular statute.

Executive⁷⁴ or any combination of this trinity. Furthermore, the law appears limited in its ability to untangle the mystery of the Crown as it struggles with its own conundrum about the meaning and identity of the Crown in a constitutional and legal sense.

Yet despite the complexity of this symbol, later research in this thesis will reveal that the Crown enjoyed unprecedented currency in New Zealand in the later 1980s and early 1990s and its popularity showed no signs of abating. Most often, it will also be revealed, the Crown appeared in relation to matters relating to the Treaty of Waitangi. In the interests of treaty negotiations it is critical that the treaty partners, as Crown and Māori, are established with clarity and certainty. However, the breadth of the Crown's contemporary identity, it is argued in the next section, creates a problem of inconsistency in the identity of the Crown which has serious implications with regard to the Treaty of Waitangi.

The Treaty of Waitangi and the Problem of the Inconsistent Crown

The problem of the Crown from a treaty perspective can be attributed to the three qualities of the Crown previously identified; its history in Britain and the Commonwealth; its diffuse meaning in contemporary New Zealand society; and the constitutional/legal challenges posed by the Crown. Before applying these ideas, it is important to introduce the Treaty of Waitangi and to consider its terms of the agreement as well as the relationship it proposed between various groups in the new settler colony.

The Treaty of Waitangi was an agreement between Her Majesty the Queen of England and Māori rangatira (chiefs) in New Zealand in 1840. While the Treaty is discussed in more detail in subsequent chapters, here it is important to note that the Treaty guaranteed the protection of Māori rights to maintain control of their resources and

⁷⁴ Note that the term 'Executive' is fairly elastic. It incorporates the 'political executive' (Cabinet) and the public service. Unless otherwise specified, the term 'Executive' in this thesis refers specifically to the political executive, while acknowledging the complexity of its identity.

culture, while allowing the British to establish legitimate government in New Zealand, and in doing so to introduce the necessary laws and institutions in New Zealand required to maintain peace and protect rights and property. In addition to recognising the Treaty's intentions, it is important to understand the relationship the Treaty proposed between the Māori people and British settlers. According to the letter of the Treaty, (both English and Māori versions) the Queen herself would prevail as the treaty partner for Māori, and would personally provide an avenue of redress for Māori should conditions in New Zealand threaten the exercise of their treaty rights. With regard to protecting Māori rights it was critical (as later discussion also reveals) that the treaty partner was something other than settler government. In signing the Treaty, Māori chiefs expected the Queen to extend her protection to Māori should the need arise. With this expectation in mind, the problem of the Crown treaty partner (particularly from the perspective of Māori) can be better understood.

The first characteristic of the Crown which creates the problem of inconsistency relates to the identity of 'the Queen' in the Treaty and the reality of her position in Britain at the time. As earlier discussion of the monarchy indicated, by 1840 the Queen was removed from the major functions of government in Britain. However, it was still the monarch's prerogative (as opposed to the government's) to treat with indigenous peoples in order to acquire new territories. The Queen consequently is identified in the Treaty when, in fact, the British government would largely control the colony in its earliest years. As discussion in Chapter Five reveals, this state of affairs was not entirely satisfactory for Māori who understood the Queen to be an active political leader, a British rangatira.

However, as is discussed in more detail in Chapter Five, settler government in New Zealand was gradually awarded authority over New Zealand's affairs. Having attained complete sovereignty from Britain, New Zealand was governed by the Executive, with the symbolic support of the Governor-General as the Queen's representative in New

Zealand. The most immediate and serious implication of this transfer of authority from the perspective of Māori rights was that the hierarchy established under the Treaty collapsed, leaving Māori with the New Zealand government as its treaty partner. For reasons also later discussed, this was far from a satisfactory arrangement for Māori. In addition to causing problems for Māori in the past, the inconsistency of the Crown's identity has proven equally complex in a contemporary sense as the trinity of Queen, Governor-General and Executive. Furthermore, as the next chapter demonstrates, the Crown title has been applied to a range of individuals and institutions involved in the treaty negotiation process.

Finally, with regard to the Crown in the law, the uncertainty surrounding the Crown's legal identity (particularly where this is not clarified by statute) is also cause for concern. The Crown identity has been used in legislation relating to the Treaty of Waitangi (namely the Treaty of Waitangi Act 1975, as discussed in Chapter Six) without specification as to the meaning or identity of the Crown. Once again, the inconsistency of the Crown has created legal problems for Māori (in particular see Chapter Seven).

While there has not, to my knowledge, been a comprehensive discussion of the identity of 'the Crown' such as this thesis provides, various problems with the Crown/Māori relationship under the Treaty have occasionally been identified and discussed by individuals and institutions in New Zealand. The purpose now is to bring together the disparate ideas about the identity of the Crown with regard to the Treaty which have arisen within a variety of contexts. The commentary used to link these ideas should in no way imply that the authors were engaged in an extended or organised debate about the Treaty and the identity of the Crown. Rather, it should emphasise the fact that the ideas are united by a common acknowledgment of the problem of the Crown treaty partner in contemporary New Zealand society and, on some occasions, represent an attempt to solve this problem.

The first observations considered here came from the Parliamentary Commissioner for the Environment in a report on the adequacy of the Treaty settlement process.⁷⁵ In the report, the Commission asked the question 'What is the Crown?' and subsequently identified it at the formal level as the Queen or her representative, the Governor-General, acting on advice of the Ministers of the Crown. At the practical level, however, the Commission advised that the Crown was the ministers who form the Cabinet or, if appropriate, individual ministers or officials with delegated responsibilities.⁷⁶ While the Commission did not examine the issue in great depth, the comments in the report demonstrate the problem of consistency with regard to the Crown also poses significant problems for environmental policy concerning the Treaty of Waitangi.

A second commentary on the problem of the Crown came from Robert Mahuta, from the Centre for Māori Studies and Research at Waikato University. In 1989, Mahuta similarly posed the question, 'who is the Crown?' He said, 'the belief that Crown and Government were synonymous underpinned the several deputations our [Māori] ancestors made to England.' However, he warned, the buck has been passed backwards and forwards between the two Crowns – Queen and Government throughout New Zealand's history. It remains little wonder, Mahuta said, 'that [Māori] people continue to be confused over who they deal with' as the Crown.⁷⁷ He contended that there should be clarification of the use of the term 'the Crown' which Māori understood to mean 'the Queen' at the signing of the Treaty, and called the Crown a 'slippery entity in New Zealand more abstract than real.'⁷⁸ Mahuta's

⁷⁵ The Parliamentary Commissioner for the Environment is an independent 'watchdog' organisation established under the Environment Act 1986, charged with the responsibility of reviewing the government's institutions, policies and statutes relating to environmental policy.

⁷⁶ Parliamentary Commissioner for the Environment, *Environmental Information and the Adequacy of Treaty Settlement Procedures*, September 1994, p. 14.

⁷⁷ Robert T. Mahuta, 'Race Relations in New Zealand, 150 Years After the Treaty', a Commemorative Synopsis in association with the Centre for Māori Studies and Research, University of Waikato, Hamilton, New Zealand, 30 November 1989, p. 7.

⁷⁸ Mahuta, 'Race Relations in New Zealand', p. 7.

comments demonstrate concern amongst Māori in particular that the inconsistency in the Crown's identity can have serious implications for the Māori treaty partner in negotiation with the Crown.

Third, a sociologist, Peter Cleave, addressed the issue he described as the 'shifting Crown' within the context of questions regarding taxation. Cleave acknowledged that through the process of colonisation in Aotearoa after 1840, the Queen ceded, in some sense, the notion of 'the Crown' to the new settler state. Cleave said, '[t]he Crown, in this sense, becomes the administrative and executive apparatus of the Monarch of New Zealand as opposed to the Monarch of Great Britain.' According to Cleave, the settler state consequently took the concept of the Crown to itself. 'The Crown became a symbol of unity and a legal fiction in whose name executive power was exercised.'⁷⁹ Cleave added that constitutional language continues to draw on notions of the Crown although the Crown has ceased to be a major element in the real use of power.⁸⁰ He also observed that devolution, a popular government policy in New Zealand over the last decade, has decreased direct central (or Crown) authority and increased the role of regional authorities. Thus the Crown had 'shifted' once again, this time from the nation's capital to the regions. In light of this finding, Cleave asked, '[w]hat is acceptable evolution' of the Crown?⁸¹ Cleave's ideas draw attention to the various interpretations for the Crown, as well as the idea that the Crown has evolved through time, which is investigated in more detail in the second section of this thesis.

Despite the difficulties he identified with the contemporary Crown, Cleave was adamant that the contractual partners remain Crown on one hand and Māori iwi (tribes) on the other despite the temptation to 'modernise' them. It would be a mistake to try and resolve the problem of the Crown, according to Cleave, by reinterpreting the

⁷⁹ Peter Cleave, *The Sovereignty Game: Power, Knowledge and Reading the Treaty*, Victoria University Press, Wellington, 1989, p. 51.

⁸⁰ Cleave, *The Sovereignty Game*, p. 51.

⁸¹ Cleave, *The Sovereignty Game*, p. 52.

partners as Māori and Pākehā, as has been suggested.⁸² Other writers appeared not to agree with Cleave on this point. Kaye Turner, for example, considered the question, 'Who are the Treaty Partners?' and displayed none of Cleave's hesitancy in renaming the partners.⁸³ She referred to the Report of the Royal Commission on Social Policy, and observed that 'Māori' and 'Crown' as Treaty partners create a problematic tension because the Crown includes Māori as it represents the legal entity of the state. She asserted that this problem of identity 'blurs, even collapses the 'Pākehā' part of the Treaty compact into some distanced nominalised concept, the Crown'.⁸⁴ In contrast to Cleave, Turner argued that the treaty partners should be rebuilt as Māori and Pākehā, while recognising the need for these identities to be contestable and flexible.⁸⁵

The Royal Commission's report to which Turner referred, had earlier investigated the identity of the Treaty partners and found that, while they were clearly definable in 1840, they were much less distinctive by 1988 (the time the report was released). The report described 'Māori' as 'all Maori as represented by all tribes and all individual Maori', and acknowledged some difficulty in determining appropriate Māori representatives for matters of national interest.⁸⁶ With regard to the 'Crown' partner, the report accepted that the Crown has many levels of identity, including the Queen, the British government, William Hobson (signatory to the Treaty on the Queen's behalf) and the New Zealand government, all of whom have acted as the Crown at some point in New Zealand's history. According to the report, the contemporary Crown is 'the New Zealand Government, representing all settlers and, ironically, Maori people as well.' The report also observed, as Cleave had done, that devolution

⁸² Cleave, *The Sovereignty Game*, p. 53.

⁸³ Kaye Turner, 'The April Report of the Royal Commission on Social Policy: Treaty Partnership as a Framework for a Politics of Difference?' in M. Wilson and A. Yeatman (eds.), *Justice and Identity. Antipodean Practices*, Bridget William Books, Wellington, 1995, p. 80.

⁸⁴ Turner, 'The April Report of the Royal Commission on Social Policy', p. 80.

⁸⁵ Turner, 'The April Report of the Royal Commission on Social Policy', p. 81.

⁸⁶ Report of the Royal Commission on Social Policy, *The April Report*, Vol. II 'Future Directions', April, 1988, pp. 50-51.

(in the 1980s) had significantly changed the Crown's identity and warned that it was not well established whether local bodies operating under statute and receiving public funds could legally be regarded as the Crown.⁸⁷ The devolution of government authority to sub-national bodies identified by Cleave and by the Royal Commission was evidently an issue of considerable controversy in relation to the identity of the contemporary Crown treaty partner. This issue is considered more fully in Chapter Eight.

A fifth investigation of the Crown was undertaken by Treasury (the government's financial advisers) in a brief to the incoming Government in 1987. In the brief, Treasury acknowledged that it did not have expertise in history, law or Māori culture, but felt that it had a contribution to make to the treaty debate from the vantage point of central government policy.⁸⁸ Treasury accepted that both parties to the Treaty have changed enormously since 1840. According to Treasury, the Treaty was a partnership between its signatories as the Crown and certain Māori chiefs.⁸⁹ Treasury consequently questioned the most appropriate form of partnership between the contemporary parties, but did not indicate exactly who those parties were.⁹⁰ Following some discussion of partnership under the Treaty, which made frequent unqualified reference to the Crown, Treasury argued that the Crown and the Māori people seem to be more precise treaty partners in a legal sense than does an interpretation of the Treaty being between two peoples (whereby the Crown represents British subjects or Pākehā). According to Treasury, the difference between Pākehā and Crown was significant enough to alter the nature of the partnership although the authors of the report did not specify what this meant.

⁸⁷ Royal Commission on Social Policy, *April Report*, p. 51.

⁸⁸ The Treasury, *Government Management. Brief to the Incoming Government 1987*, Vol. I, p. 320.

⁸⁹ The Treasury, *Government Management*, p. 326.

⁹⁰ The Treasury, *Government Management*, pp. 323-326.

Finally a political scientist, Richard Mulgan, has considered the question of partnership – ‘between who?’⁹¹ He asserted that ‘the Crown’ partner creates more practical difficulties in identity than does the Māori party to the Treaty. Mulgan explained that in 1840 Māori made an agreement with ‘the Queen’ as the Crown, and maintained for many years that the Queen was the only appropriate partner. Through constitutional developments, however, the Crown identity has changed. Today, Mulgan advised, the Crown is the government of New Zealand. He noted also that ‘Pākehā’ has been suggested as an appropriate partner for Māori instead of ‘the Crown’. In response to this, Mulgan argued that Crown and Pākehā are not interchangeable terms. In Mulgan’s words:

The non-Māori people are by no means the same as the Crown. The Crown cannot be identical to a section of its citizens. ... The Treaty can be seen as a partnership between the Māori authorities representing their people, on the one hand, and the British authorities and their people on the other. ... But in this case, the Crown is no longer one of the partners. Rather the partners are the two indigenous peoples of Aotearoa-New Zealand, each of which accepts the sovereignty of the Crown. ... In this sense of partnership all citizens, non-Māori as well as Māori, may be said to be partners with the Crown; that is, all citizens obey the law and pay their taxes in return for government protection of their rights and welfare.⁹²

However, Mulgan also explained that while the Crown/Māori partnership was appropriate immediately following 1840, it is less appropriate in contemporary society where Māori and Pākehā live under the same government and the Crown has responsibilities to both groups. The true treaty partnership, he argued, was now between two peoples, not between one people and government. His comment returns us to the suggestion that the partners could be identified as Māori and Pākehā. However, in repeating his earlier message, Mulgan warned that to translate the partnership in this way implies that the Crown/government is solely the agent of the

⁹¹ Richard Mulgan, *Māori, Pākehā and Democracy*, Oxford University Press, Auckland, 1989, pp. 110-112.

⁹² Mulgan, *Māori, Pākehā and Democracy*, p. 111.

Pākehā.⁹³ This is clearly not in keeping with the original relationship established under the Treaty. Mulgan's comments emphasise most clearly perhaps the need to establish the identity of the Crown in a manner appropriate in terms of the intentions of the Treaty.

The commentaries on the Crown presented here, in combination with the earlier discussion of the many interpretations for the Crown, demonstrate that the Crown is problematic in that there is scope for inconsistency in its identity. As a result of its history, the Crown is now subject to a wide range of interpretations and uses in New Zealand. While a central and prominent constitutional identity, the Crown also poses problems of inconsistency within the law. Those New Zealand commentators who have observed the inconsistency of the Crown have emphasised the need to comprehensively address this issue with a view to better understanding the identity of the Crown and resolving the problems it creates with regard to the Treaty of Waitangi. Their comments also highlight a need to identify the contemporary Crown partner in a manner which is consistent with the original purpose and function of the Queen within the Treaty of Waitangi. However, suggestions to rename the Crown treaty partner should not be entertained, it is argued here, until a better understanding of the Crown's identity and function is obtained.

Recognising that there are a number of possible identities for the Crown, the next chapter investigates how the Crown is identified and interpreted in public communication in New Zealand. It is the first of three chapters which investigate in some detail the role and identity of the Crown as a political symbol in treaty discourse and further substantiate the problem of consistency with regard to the Crown.

⁹³ Mulgan, *Māori, Pākehā and Democracy*, p. 112.

TWO

WHO OR WHAT IS 'THE CROWN' IN MASS COMMUNICATION?

The purpose of this chapter is to investigate who or what is the Crown in contemporary New Zealand society, given the potential for inconsistency in the identity of the Crown raised in the previous chapter. It does so through an empirical investigation of how the Crown was identified in mass communication in New Zealand from 1987 to 1993. On the basis of the findings presented in this chapter it is argued that the Crown identity is inconsistent in two ways. First, it is used to identify a number of institutions and individuals in New Zealand and second, there is considerable inconsistency in the language of the mass media regarding whether the Crown is the same as, or different from, the notion of government in New Zealand. The implications of both these inconsistencies are finally considered with regard to the relationship between Māori and the Crown under the Treaty of Waitangi.

Mass communication, or the mass media, is a fundamental source of information for the New Zealand public. It is also, therefore, a reservoir of information about the meaning and uses of words such as 'the Crown' in public communication and debate in New Zealand. However, in order to be a useful tool in language analysis, the characteristics, strengths and weaknesses of mass communication must be understood. First, 'mass communication' is the process of communicating information to a large audience, most commonly through television, radio or newspapers. Allan Bell, media language analyst in New Zealand, has further characterised mass communication as having multiple originators (as the individuals involved with the organisation, production and presentation of news information), a mass simultaneous audience (in this case the New Zealand public), an absence of feedback (the information flows in

one direction only) while at the same time being generally accessible to the public.¹ Second, the process of mass communication, according to other theorists, satisfies many of contemporary society's functions and needs. Perhaps most importantly it provides a critical communication link between the public (or various publics) and the government.² In performing this function, mass communication is believed to have a tremendous impact on policy making and the nature and content of public deliberation.³ As one Member of Parliament in New Zealand has explained, '[p]oliticians, and those who seek to influence their decisions, have identified the media as central to political debates and their outcome.'⁴ Finally, the implications of mass communication are important. It has been suggested that written or spoken words generated at the level of mass communication, are assimilated and used by the public regardless of their accuracy, thereby creating 'political truth'.⁵ Also, Bell has argued that mass communication, whether reliable or accurate, is pervasive in modern society and is believed to play a part in affecting the meanings and uses of words in the wider society.⁶ In choosing to focus on the mass media, this chapter therefore seeks to identify those meanings and uses of the Crown which have been presented to the New Zealand public by the media.

Because of the critical and often controversial role it plays, mass communication has been heavily criticised, particularly in its political function. Claus Mueller, a political language analyst, has described the mass media as a chain of connections whose links are highly susceptible to distortion.⁷ In doing so, Mueller drew attention to the ways

¹ Allan Bell, *The Language of the News Media*, Blackwell Inc, Oxford, 1981, p. 2.

² Claus Mueller, *The Politics of Communication*, Oxford University Press, New York, 1973, p. 95.

³ Martin Linsky, 'The Media and Public Deliberation', in Robert Reich (ed.), *The Power of Public Ideas*, Ballinger Publishing Company, Cambridge, 1988, pp. 205-206.

⁴ Steve Maharey, 'Politicians, the News Media, and Democracy', in M. Comrie and J. McGregor, (eds.), *Whose News?*, Dunmore Press, Palmerston North, 1992, p. 92.

⁵ Rt Hon Mike Moore, 'The Reporting of New Zealand Politics', in M. Comrie and J. McGregor, (eds.), *Whose News?*, Dunmore Press, Palmerston North, 1992, p. 83.

⁶ Bell, *The Language of the News Media*, p. 3.

⁷ Mueller, *The Politics of Communication*, p. 96.

information can be changed or ignored in mass communication thereby impacting on public perception of political issues. The mass media in New Zealand has similarly been criticised as having biased interpretations of the political news, particularly in emphasising Pākehā perspectives and values at the expense of Māori interpretations of political issues and events.⁸ It has often been suggested that a general lack of understanding of Māori issues and tikanga Māori (Māori protocol) in the media circuit has encouraged, or failed to correct, an inaccurate portrayal of cultural issues in New Zealand. Some critics have even suggested that the media can never be an effective tool for Māori to express their views and ideas because it only attracts those Māori already influenced by Pākehā values. Rather the media, it has been suggested, is destined to present an inaccurate and generalised picture of Māori thoughts, feelings and Māori themselves, on any issue.⁹ Criticisms such as these draw attention to the fact that the language of mass communication, while persuasive and significant in public debate is not representative of the attitudes of all groups in society. In particular, it must be remembered that the use and meaning of the Crown in New Zealand's mass communication, may not be shared with other Māori or non-Māori groups in New Zealand. The relevance of this point in particular stretches beyond this chapter to the general argument of the thesis and is returned to in later discussion.

In addition to failing to represent all views, mass communication has been described, most often critically, as a process which summarises, condenses and simplifies vast amounts of political information 'leaving only vague outlines and symbolic representations of complex political events'.¹⁰ The previous chapter argued that a symbol such as the Crown conveys complex ideas in a manageable form. This is a particularly useful device in mass communication, a fact which may in part explain the

⁸ Derek Fox, 'The Maori Perspective of the News', in M. Comrie and J. McGregor (eds.) *Whose News?*, Dunmore Press, Palmerston North, 1992, p. 170.

⁹ Stephen Levine and Raj Vasil, *Maori Political Perspectives*, Hutchison Group, Auckland, 1985, pp. 66-67.

¹⁰ C.D Elder and R.W Cobb, *The Political Uses of Symbols*, Longman Press, New York and London, 1993, p. 12.

popularity of symbols in mass communication. Michael Parenti, outspoken critic of American media, has argued that, as a result of the media's ability to process and produce neatly packaged information, people no longer undertake the important process of sifting through that information for themselves.¹¹ While this criticism, and others like it, are discussed in more detail in the next chapter, it is important to note here that the Crown may be used in mass communication in a symbolic capacity to simplify the communication process. In other words, referring to 'the Crown' may allow commentators to avoid conveying the complex details of certain identities in political events.

The primary methodological question is how best to conduct an investigation of the use and meaning of 'the Crown' in mass communication. While recognising that there is a variety of forms of mass communication, the more substantive part of this study concentrates on written media, more specifically newspapers or press communication. As an easily accessed and abundant resource, newspapers have been widely identified as an excellent resource for language analysis.¹² There are two levels to this investigation. The first is a survey of one million words drawn from various written sources of New Zealand language in 1986 including sources other than the media. The Wellington Corpus of Written New Zealand English, which provides the database for this survey, was created to allow direct comparisons with similar databases of American, Australian and British English.¹³ The data come from material published between the years of 1986 and 1990.¹⁴ For the purposes of this research, the database provided an excellent introduction to the uses and meanings of 'the Crown' in New

¹¹ Michael Parenti, *Inventing reality. The Politics of the Mass Media*, St Martin's Press, New York, 1986, p. 51.

¹² Bell, *The Language of the News Media*, p. 3.

¹³ Laura Bauer, *Manual of Information to Accompany The Wellington Corpus of Written New Zealand English*, Department of Linguistics, Victoria University of Wellington, Wellington, 1993.

¹⁴ The year 1986 was the only year available for the sort of analysis which suited the purposes of this investigation because it allowed a 'snapshot' of the year immediately prior to the substantial investigation which begins with the year 1987.

Zealand. Further information on the Corpus database is provided later in the chapter.¹⁵

The second part of the discussion presents further empirical evidence drawn from an investigation of the uses and meanings of 'the Crown' in the New Zealand press from 1988 to 1993. In this case the database was Index New Zealand (INNZ), one of the databases compiled by the National Library of New Zealand.¹⁶ The database can be accessed in a number of ways. For the purposes of this study it was most appropriate to conduct a 'key word' search using the key word 'Crown' to obtain detailed bibliographical information for primary sources. Unfortunately, INNZ provides limited information about how the key words and related information are selected. However, the scope and quantity of information relating to 'the Crown' using the key word search was sufficient enough to make such concerns largely immaterial.

The avenues available for analysis of political language on a substantial scale were (often frustratingly) limited at the time of writing. However, the combination of the Corpus database and the INNZ resources used here complement each other well in this study. The more detailed analysis with the Corpus data is a good introduction to the breadth of uses of 'the Crown' in sources which extend beyond the media. Also, the 'snapshot' is for the year immediately prior to the time frame for the substantial study, which also introduces the second part of the study and allows for analysis of the development of Crown symbolism through time.

¹⁵ The software used to take apart the Corpus data base was; Susan Hockey and Jeremy Martin, *Oxford Concordance Program Users' Manual Version II*, Oxford University Computing Service, Oxford, 1988.

¹⁶ INNZ is a bibliographical database which began in 1985. The information held in INNZ is updated nightly – over 2000 documents are added each month. The database draws material from around 300 journals and newspapers as well as other literary sources published in or about New Zealand and the South Pacific.

The Corpus Database: A Snapshot of the Crown

The Corpus database draws its information from ten sources of written New Zealand English: press reports, editorials, book reviews, religious writings, skills and hobbies, popular lore, biographies, government documents, academic sources, and imaginative literature. A search for references to 'Crown' in this database revealed some interesting preliminary results about the contexts in which the word appeared, as well as the frequency of use and variety of meanings for 'the Crown'. The word appeared in nine of the ten categories of use (absent only from religious writings) thus demonstrating the breadth of its use. Also, 'Crown' appeared on eighty-five occasions in thirty-two sources of written text (indicating the frequency of its use) most commonly in press reports, editorials and government documents. From this evidence it was found that in 1986 'the Crown' was used in a wide range of contexts, presumably with a variety of meanings, but was most popular in mass communication and political writings. Analysis of these thirty-two references revealed that three references were to the British Crown, such as a comment about, 'the failure of the British *Crown* and the New Zealand Government to honour te tiriti'.¹⁷ Eight other references were made to the Crown in a legal capacity, for example, 'the Court's disapproval of the manner in which a *Crown* witness had been briefed by the police.'¹⁸ A further four references to 'Crown' were in titles such as '*Crown* lands' and '*Crown* minerals', as in a comment about 'the sensitive design and management overall on *crown* land.'¹⁹ Furthermore, on eight occasions 'Crown' appeared in imaginative literature, indicating that it also had uses and appeal outside of law and politics. A typical example was this extract '[t]his *crown*, flickering dully in the light is made of real pewter...'²⁰ Finally, there were ten references to 'Crown' as a political entity, particularly in government documents discussing the use and management of

¹⁷ Reference line: 55269, G60 097. (Source: Biography)

¹⁸ Reference line: 76608, J49 005. (Source: Academic)

¹⁹ Reference line: 63693, H22 202. (Source: Government Document)

²⁰ Reference line: 88287, K21 157. (Source: Imaginative literature)

New Zealand's natural resources. For example, one government document stated that 'a simple title reserves mineral ownership to the *Crown*'²¹ while another spoke of 'tussock grassland landscapes under *Crown* ownership.'²² The 'Crown' also appeared as a political entity in reference to the Treaty, as in the example, 'the Treaty simply referred to giving the *Crown* the 'hokonga' (buying, selling and trade)...'²³

This preliminary 'snapshot' indicates the range of contexts in which the Crown symbol was used in New Zealand written English in 1986. It suggests that 'the Crown' was used in historical, political, legal and literary contexts and was not consistently naming the same thing. The variations on its use and meaning in these contexts will be further examined later. In the meantime it is important to note not only the range of its application outside of the media but also the relative frequency with which it appeared in press reports and government documents, in particular those relating to the Treaty of Waitangi and the use and management of natural resources. Keeping these preliminary observations and arguments in mind, the discussion now moves on to examine the meanings and uses of 'the Crown' specifically in mass communication.

Index New Zealand: A Qualitative study of the Crown

The second, more detailed, aspect of this inquiry, which builds on the information gathered above, is a qualitative survey of the uses of the term 'Crown' in New Zealand press from 1987 to 1993 inclusively. The methodology chosen for this survey was as follows. Using 'Crown' as the key word, a search was made through Index New Zealand for the years indicated above. Just over two hundred and fifty articles were identified as relating to the 'Crown' subject. The majority of these came from the leading metropolitan newspapers in New Zealand, including *The New Zealand Herald*

²¹ Reference line: 63861, H23 142. (Source: Government Document)

²² Reference line: 63702, H22 211. (Source: Government Document)

²³ Reference line: 78077, J56 028. (Source: Academic writings)

(Auckland), *The Dominion* and *The Evening Post* (Wellington), *The Press* (Christchurch) and the *Otago Daily Times* (Dunedin). *The Examiner* and the *National Business Review*, two national publications, were also often cited. These articles were then analysed and categorised according to the function and identity of the Crown in each case.

The discussion is divided into two sections based upon the two primary uses for the Crown evident within the analysis. In the first section, 'Crown' is used in titles for individuals or resources such as 'Crown Prosecutor' and 'Crown land'. In the second section, the 'Crown' appears as a 'personified' political entity, capable of thought and action. For example, comments were made in reports that, 'the Crown stated', 'the Crown decided' or 'according to the Crown'. The argument arising from this analysis is that the Crown demonstrates inconsistency in the ways it is used and what it is naming in newspaper reports. More importantly it highlights an inconsistency in whether the Crown is the same as or different from government. While the Crown is often used as a metonym for government, other uses for the Crown indicate that there is a philosophical distinction between the Crown and government in contemporary New Zealand society. The implications of these findings with regard to the relationship between Māori and the Crown require consideration.

The 'Crown' Title: Tradition and Trend

On many occasions, 'Crown' appeared in newspaper reports as a traditional title relating to the law in New Zealand, for example, Crown Prosecutor, Crown witness or Crown law. The meaning of the Crown in these contexts would have been interpreted by the public (whether they are conscious of this or not) according to their understanding that 'the Crown' is the legal person which acts on behalf of society in criminal proceedings. For example, when the headline 'Crown loses in Tricorp Trial'

led the report that, '[t]he Crown lost another white collar crime trial ...'²⁴ this 'Crown' was not likely to have been interpreted by the public as the Queen, the Governor-General or the Ministers of the Crown. However, it was also noted that the Crown symbol was not used to identify two different entities within the context of one report. For example, one article advised readers that, '[f]laws in the Companies Act leave the *government* without the means to legally define standards of behaviour for company directors, according to the *Crown Law Office*'.²⁵ It is possible, as this example indicates, to draw distinctions between the various 'Crowns', thereby avoiding confusion.

In addition to legal titles, 'Crown' also appeared in resource titles such as 'Crown land', 'Crown forests' and 'Crown minerals'. These titles were traditionally used to identify land, and other resources, which were not in private ownership. Historically, Crown lands, for example, were the demesne lands or lands reserved for the Sovereign in Britain. In a contemporary context, these 'Crown' resources are commonly understood to be held in public trust by the Crown.²⁶ An important aspect of this notion of public trust is the assumption that 'the Crown' in this context is something other than government, which in turn implies that government is not at liberty to dispose of Crown lands without public consent because it does not actually own the resource. The newspaper reports often used this conceptual difference between 'Crown' and 'government' in relation to resources in order to play on the difference between long term national interest, represented as 'Crown', as opposed to the decisions made by government during its short term in office. For example one article noted that, '[a] delay in payment for *Crown* forests would mean that the

²⁴ 'Crown loses in Tricorp trial', *The Dominion*, 4 July 1991, p. 1.

²⁵ 'Acts defects leave Palmer powerless', *National Business Review*, 29 April 1988, p. 1.

²⁶ The matter of whether 'Crown' implies public access is one under debate. For example, it has been suggested that 'pastoral leases may be 'Crown' land but not 'public' land and that, in any process of negotiation of land uses and property rights, public input should be restricted...' See: J.H. Holmes, 'Land Tenures, Property rights and Multiple land use: Issues for American and Antipodean Range lands' in Peter Haggett et al. (eds.), *Diffusing Geography*, Blackwell, Oxford, 1995, p. 284.

government would be charging interest on the delay.’²⁷ Similarly, another report stated ‘[t]he *Government* may avoid claims over *Crown* land by selling it directly rather than through state corporations.’²⁸ Another article more specifically identified government departments who had purchased ‘*Crown*’ land.²⁹

The use of traditional ‘*Crown*’ titles in the mass media introduces the argument which is substantiated later in the discussion that there are conceptual differences between the notions of *Crown* and *government* which can be used to emphasise the difference between short and long term considerations. This distinction, often used in relation to resource use, has been conveyed through the words *government* and *Crown*, the former implying the short term nature of *government* rule as well as the limitations to *government* authority, while the latter emphasised the long term implications of political decisions and the need to protect future public rights (with regard to the management and use of resources) against *government*.

In addition to traditional *Crown* titles, less traditional ‘*Crown*’ titles – *Crown* research institutes and *Crown* health enterprises – also featured highly in the newspapers from 1987 to 1993. Part of the reason for their frequent appearance in the media was the fact that both these institutions (remodelled from existing organisations) were established in the early 1990s. These titles, it is argued, represent a new trend in the naming of public institutions, made popular by the associations brought to the notion of the *Crown* by the public.

The establishment of *Crown* research institutes [CRIs] was first mooted in early 1991. In May 1991, *The Dominion* confirmed that CRIs, funded by the *government* and the

²⁷ ‘Carter debt on forest ‘most expensive’’, *The Dominion*, 6 April 1991, p. 12.

²⁸ ‘Loop-hole avoids land claims’, *The Evening Post*, 17 October 1988, p. 1.

²⁹ ‘Important *Crown* land still being flogged off’, *Dominion Sunday Times*, 23 September 1990, p. 5.

private sector, were to replace the traditional government scientific research agencies.³⁰ In a report on the history of DSIR (Department of Scientific and Industrial Research), one newspaper commented that DSIR had supported 'public good' research, which was a 'vague description for research that has been done historically in New Zealand.'³¹ It is argued here that the name Crown Research Institute indicated a similar focus on public good research because of the associations the public had with Crown entities as a result of the tradition of Crown resources in New Zealand.

However, the newspapers were soon questioning the government's commitment to the public interest with regard to CRIs as it was revealed that financial objectives appeared to have dominated the reforms. For example, under the headline 'Cautious reception for science reshuffle', it was explained that the 'proposed institutes would be completely new organisations with a company structure' and a 'Board of Directors appointed by Cabinet.'³² It was also reported that 'between 60% and 70% of [CRI] funding will be through the foundation for Research, Science and Technology on a competitive bidding basis, while the remainder is said to come from selling [CRI] output to the private sector.' It appeared that, despite the 'Crown' title, CRIs were intended to function as stand alone companies. 'They will have a commercial freedom never before available to the DSIR or MAF-Tech.'³³

When the staffing policy for the new institutes was released by the newspapers, the unpopularity of the restructuring was increasingly evident. One report stated that the proposed changes were 'causing deep mistrust among the scientific community.'³⁴ Further criticisms were 'that scientists [were] being excluded from consideration in

³⁰ 'CRIs in force', *The Dominion*, 1 July 1992, p. 11.

³¹ 'Science on the threshold of change', *The Dominion*, 15 January 1992, p. 6.

³² 'Cautious reception for science reshuffle', *The Dominion*, 12 July 1991, p. 2.

³³ 'Gov't unlikely to support R&D with tax incentives', *The Examiner*, 18 April 1991, pp. 20-21. (MAF stands for Ministry of Agriculture and Fisheries.)

³⁴ 'Scientists miss out on jobs, says federation', *The Dominion*, 30 September 1991, p. 1.

lieu of business enterprise.’³⁵ The CRI proposal was evidently moving research further from the public interest, rather than closer to it as the Crown title (which has traditionally represented the public interest) might suggest. Those supporting the reforms reinforced this view by advocating that, ‘anything with a commercial flavour about it needs to be freed from the structures of bureaucratic control and Parliament.’³⁶ Also, the loss of jobs, particularly science and research based positions, caused outrage. According to one report, up to 700 positions were at risk under the new regime.³⁷ The proposed reforms were generally seen to cause outrage and alarm. CRIs appeared to be threatening those values the DSIR had maintained in the past, in particular, the traditional focus on the public interest. Interestingly, the significance of the institution’s name was not lost on those who opposed the restructuring. Defenders of the old DSIR were reported as saying that ‘even the name, [DSIR] etched in the minds of the community and of important ... partners overseas ... was crucial.’³⁸

Crown health enterprises on the other hand, as a further example of a new ‘Crown’ entity, came into being in July 1993 amidst tremendous media coverage and nationwide debate. Earlier, in 1992, it was reported that National Prime Minister, James Bolger, had rejected the State-owned enterprise model for health reforms, recognising the ‘social responsibilities of the Crown health enterprises [CHEs].’ He advised, ‘[i]t was initially envisaged that the Crown health enterprises – the new name for public hospitals - would be driven by commercial objectives.’ However, according to Bolger, this policy was under revision. He explained that ‘[t]he prospect of public hospitals with clear commercial objectives and no social responsibilities is terrifying.’³⁹ In accepting the Prime Minister’s position, the title ‘Crown’ Health

³⁵ ‘Crown Institute convenors named’, *The Dominion*, 31 October 1991, p.15.

³⁶ ‘Power to the people’, *The New Zealand Herald*, 21 March 1992, p. 2:1.

³⁷ ‘Up to 700 research jobs at risk’, *The Dominion*, 29 April 1992, p. 1.

³⁸ ‘CRIs in force’, *The Dominion*, 1 July 1992, p. 11.

³⁹ ‘Health reforms’, *The Otago Daily Times*, 1 August 1992, p. 8.

Enterprises appropriately emphasised the objective to provide healthcare to all New Zealanders in the interests of public welfare.⁴⁰

However, newspaper reports soon revealed that, as with the Crown research institutes, the goal of each CHE would be to operate as a successful business.⁴¹ It became apparent that government policy was once again to come head-to-head with the notion of public interest. The cynicism surrounding the reforms was well demonstrated, as in this report which advised readers that under the new reforms:

[h]ospitals become Crown health enterprises, doctors and nurses are health providers, and patients consumers in a system riddled with corporate jargon and market philosophies. ... The system has been reprofiled to approach health care in a fiscal manner of affordability and user-pays. ... The public at present owns 155 hospitals. Under the new system, initially there will be between 20 and 25 CHEs throughout New Zealand ... run as profit-making businesses with profits invested in health care.⁴²

According to the press reports, the public's reaction to the government's scheme was sceptical at best. Ministers were quick to defend the government's policy. One minister commented that 'imposing business like principles on the public health system ... does not mean – as some have suggested – that the profit motive is now more important than a patient's health.'⁴³ A similar sentiment was echoed in a report which advised that 'CHEs ... will be allowed to go bust if they get in financial strife', but which also emphasised that the risks were 'more apparent than real'.⁴⁴ The public was assured that the new system would 'ensure all New Zealanders have affordable access to core health services.'⁴⁵ However, the unhappy marriage between affordable

⁴⁰ It has also been suggested that 'State Owned Hospitals' was an unpopular name because its acronym 'SHEs' would attract unwanted attention and criticism.

⁴¹ 'PM rejects SOE model for health', *The Dominion*, 7 April 1992, p. 1.

⁴² 'Operation health reforms', *The Otago Daily Times*, 2 May 1992, p. 21.

⁴³ 'Aiming at effective and quality health care', *The Otago Daily Times*, 3 October 1992, p. 8, also, 'A healthy process of reform', *The Dominion*, 20 October 1992, p. 7.

⁴⁴ 'Operation health reforms', *The Otago Daily Times*, 2 May 1992, p. 21.

⁴⁵ 'Operation health reforms', *The Otago Daily Times*, 2 May 1992, p. 21.

and reliable public services and efficiency driven private sector management was also widely reported. For example, one article noted that 'CHEs and community trusts ... will be autonomous, performance based and fiscally accountable.'⁴⁶ The public was warned that, '[i]f hospitals are going to have to compete with the private sector for business, they will have to be run like the private sector'. The same report reassured the public that 'Cabinet wanted reassurance on how hospitals' social objectives could be maintained.'⁴⁷ It was often predicted that Crown research institutes would result in the full privatisation of New Zealand's hospitals.⁴⁸

As with CRIs, the title of the new hospitals did not escape public attention. The Associate Health Minister, Maurice Williamson, admitted on National Radio that he was constantly being asked 'why are you calling them Crown health enterprises, why don't you just call them hospitals?' Williamson explained that there was:

a very good reason for that, they're more than just hospitals ... they're an enterprise, their business is health and they're owned by the Crown. ... [C]all them any thing you like, sick corp, or whatever you want to use, but they are a business owned by the Crown and their business will be the delivery of health.⁴⁹

The fact that the health enterprises were owned by 'the Crown' does not, in fact make their name a forgone conclusion as implied by the Minister. According to this logic, the enterprises might have also been called government, or state enterprises, as with the 'State-owned enterprises' established in the 1980s. Why then was there a preference to name these government institutions 'Crown' instead of 'state' enterprises?⁵⁰ The evidence from the newspaper reports indicated that the Crown title

⁴⁶ 'Private hospitals to benefit most', *National Business Review*, 15 May 1992, p. 29.

⁴⁷ 'In pursuit of a healthy profit', *The Evening Post*, 20 May 1992, p. 5.

⁴⁸ 'In pursuit of a healthy profit', *The Evening Post*, 20 May 1992, p. 5.

⁴⁹ Taken from a Newztel transcript of Radio New Zealand "Midday Report" Wednesday 19 May 1993.

⁵⁰ State Owned Enterprises were established under the Act by the same name in 1986, from the trading elements of government departments which were charged with the responsibility of operating as a successful business. For more detail, see, Judy Whitcombe, 'The Changing face of the New

was an attempt to emphasise the new institutions' social objectives over their financial and other objectives. David Bradshaw, of the State Services Commission, has similarly explained that the new title flowed out of the general shift from the business oriented objectives of state owned enterprises to the social objectives of 'Crown' entities.⁵¹ His explanation implies that the word 'Crown' connotes a notion of social responsibility not conveyed in the concept of the state. On this matter, John Martin has suggested (it will be recalled from the previous chapter) that the difference between state and Crown is that, '[t]here is perhaps something vaguely alien and threatening about "the state"'.⁵² Taking a different approach to the question of state and Crown, former Labour Prime Minister, David Lange, expressed the opinion that:

the current fad in rightwing circles of referring to the government as the 'Crown' sets up agencies of government as somehow 'remote, alien, and untouchable instead of being public property, the instruments of collective effort, answerable politically for their activities.'⁵³

When combined, these comments substantiate the argument developing here that Crown entities, be they land or hospitals, convey a notion of public interest and create a distance between the Crown entity and the government's authority. In establishing Crown hospitals and research institutes the government was able to promote public interest while at the same time distancing itself from responsibility for the entities' actions and management. Therefore, whether the result of tradition or trend the 'Crown' title implies that the Crown is not the same thing as government.

Zealand Public Service', in Hyam Gold (ed.), *New Zealand Politics in Perspective*, 3rd edn., Longman Paul Ltd, Auckland, 1992, pp. 216-232.

⁵¹ Interview, David Bradshaw, State Services Commission, Wellington, 21 June, 1993.

⁵² John Martin, 'The Role of the State in Administration', in Andrew Sharp (ed.), *Leap into the Dark; The State in the 1990s*, Auckland University Press, Auckland, 1995, p. 42.

⁵³ David Lange, 'Let Them Eat Cake', *Broadsides*, 1992, p. 118.

The Crown, the Government and Perpetual Succession

A distinction between Crown and government was also evident when the Crown played a more active role than that of a title. The Crown was 'personified' and therefore able to act, decide, admit and so on. However, in being personified, the Crown also became something other than government in that it represented the idea of perpetual succession of government. Two variations on the relationship between government and Crown as perpetual succession were observed. The Crown either represented the notion of perpetual succession in the past in contrast to the actions of the government of the day (particularly in identifying the Crown as the original treaty partner) or the Crown represented perpetual succession of government in the future, in contrast to the rule of a single government. In this respect, the philosophical difference between Crown and government could be used to distinguish between actions of the government of the day as opposed to the broader principles of the purpose and limitations of government authority (the Crown).

First, newspaper reports often used 'the Crown' to describe the responsibilities of government inherited from the past, or more precisely, particularly with regard to the Crown and the Treaty of Waitangi. For example, a report on Māori claims to broadcasting rights drew a distinction between government and Crown when it stated that, 'access rights [for broadcast frequencies] were not among resources transferred from Māori to the *Crown* under section two of the Treaty' and consequently advised that, 'urgent discussions with the *Government* [would] prevent the issues being addressed in an adversarial situation in court.'⁵⁴ Without delving into the details of the case, the language of the report, it is argued, implies that government and Crown were distinguishable with respect to their identity and function in that it was the Crown that had the authority to sign the Treaty and establish government, and the government

⁵⁴ 'Maori Council lays claim to radio waves', *The Dominion*, 30 May 1989, p. 2. Italics have been added to the words 'government' and 'Crown' in quotations from newspaper reports in this chapter in order to emphasise the use of these words.

now exercises its authority as a result of the Crown's actions. Similarly, a report on fishing quotas pointed out that, '[a]n agreement had been made with the *government* to have the [fishing] quotas returned.'⁵⁵ However, it was 'the Crown' which was subsequently identified as the owner and guardian of the resource in keeping with the Crown/government distinction suggested earlier in relation to natural resources.

The distinction between 'Crown' and 'government' was also used in press reports to draw a philosophical distinction between the actions of the government of the day and the ongoing authority of government, the latter being represented by the Crown. Once again, this meaning and use for the Crown most often appeared in the context of reports discussing the management and use of natural resources. For instance, one report stated, '[I]ast year losses from selling synthetic gasoline and the *government's* debt servicing commitments on the synfuels plant cost the *Crown* \$329 million.'⁵⁶ The implicit message of this report was that the government's actions would be inherited by subsequent governments. This was simply conveyed to the public through the use of the words 'government' in the short term, and 'Crown' as the notion of perpetual succession. In particular, the forestry industry was often discussed using the ideas of Crown and government in this way. For example, in a forestry report, it was advised that 'the *Crown's* plantation forests ... were the result of a *government* decision to nurture an 'infant' forestry industry over several decades.'⁵⁷ Similarly, in a report on forest sales, the 'government' was identified as being responsible for the sale of trees in the short term while the long term contract was said to be with 'the Crown'.⁵⁸ It was described as 'a contract which binds the *Crown* to supply timber to Tasman forestry for the next forty years.'⁵⁹

⁵⁵ '\$1.5m in fish quotas given up after conviction', *The Dominion*, 4 October 1990, p. 1.

⁵⁶ 'Crown seeks to reduce loses from synfuels', in *National Business Review*, 22 November 1988, p. 14.

⁵⁷ 'Forestry report backs sales plan', *The Dominion*, 10 May 1990, p. 13.

⁵⁸ 'NZ Post tests Crown's rights', *The Dominion*, 24 May 1989, p. 21.

⁵⁹ "'Jewels" in Forest Corp Crown held out of sale', *The Dominion*, 18 April 1990, p. 2.

Despite the usefulness of the Crown in indicating perpetual succession and therefore being something other than government, there were obvious difficulties in maintaining a Crown/government distinction, particularly in restricting the meaning of the 'Crown' to a notion of perpetual government. Most often in the context of treaty debate, the Crown would appear in a new role as a metonym for 'government'. For instance, in an article entitled 'The Case for Ngai Tahu',⁶⁰ the iwi were reported to claim that 'the *Crown* [had historically] failed to allocate lands to the tribe after it had promised to set them aside' and to have subsequently stated that 'the *government* had [in the past] failed to fulfil its Treaty promise of protecting the Tribe's interest.'⁶¹ Unlike the previous examples, the terms Crown and government were used here as though they were synonymous. This is evident again in a later comment in the same article about a 'misunderstanding over the nature of the relationship between the *Crown* and the Tribe. The Ngai Tahu clearly expected the *Government* to take an active role in its development and maintenance.'⁶² The following section discusses similar examples of the Crown as a metonym for government which, it is argued, demonstrates further inconsistency in the identity of the Crown, with serious implications for Māori.

'Crown' as a Metonym for 'Government'

This final category of uses and meaning for 'the Crown' in mass communication discusses instances in which 'the Crown' was used in newspapers as a metonym for 'government of the day'. This most often occurred, it should be noted, in the context of treaty debate.⁶³ Where the Crown was used in this manner, it had the effect of collapsing the ideas of Crown and government together which demonstrates further

⁶⁰ 'The case for Ngai Tahu', *The Press*, 4 November 1989, p. 4. Ngai Tahu (or Kai Tahu) are an iwi situated over a great part of the South Island. See appendix C.

⁶¹ 'The case for Ngai Tahu', *The Press*, 4 November 1989, p. 4.

⁶² 'The case for Ngai Tahu', *The Press*, 4 November 1989, p. 4.

⁶³ There were exceptions to this generalisation. For example in an article entitled 'the Crown no Pseudo Parent', a Minister advised, with regard to the role of the government in social policy, that 'the Crown is very poor at caring' and 'it is not the role of the Crown to decide what is right.' See 'Crown no pseudo parent', *The Dominion*, 27 November 1990, p. 10.

inconsistency in the identity and meaning of the Crown in contemporary treaty debate. The implications of this for Māori are discussed at the end of this chapter.

There were many examples of articles where 'the Crown' was used as a metonym for government. First, this was frequently done without any reference to government at all. For example, one report stated, 'the *Crown* failed in its statutory obligation to obtain the Maori Land Board's consent' saying that 'the *Crown* clearly had information in its possession which contradicted representations made to the Hauai trustee.' It stated also that Māori felt they had been cheated by a party with whom they felt they had a special relationship, 'yet when they sought relief, the *Crown* proved steadfastly unsympathetic.'⁶⁴ As these references to the Crown were left unclarified, and as the Crown was acting in the present as opposed to the future or the past in previous examples, the reader (or public) could only assume that 'the Crown' was somehow related to, if not the same thing as, 'the government of the day'. Similarly, a report about the northern Tainui tribe and its land claims said 'the *Crown* believed the extended process had been worth while.'⁶⁵ An earlier report about the tribe's relations with its treaty partner had been headed '*Crown* rejects Tainui's bid to negotiate' and had contended that 'the Crown' had rejected an offer to negotiate with Tainui saying that 'the *Crown* would be abrogating its responsibilities to the public if it agreed to the proposal.' It also reported that 'the *Crown* believed it had the responsibility on behalf of all New Zealanders of making the ultimate decision as to whether or not the recommendations on the claims ... should be adopted.'⁶⁶ Once again, in the absence of clarification it could only be assumed that the Crown was the same thing as government, in some form or other. In relation to resources, another article reported, 'the recently passed *Crown* Minerals Act says access [to Crown minerals] is not the *Crown's* to sell.'⁶⁷ If the earlier pattern of use were in effect, the report would have

⁶⁴ 'Maori trust misled in deal with Crown', *The New Zealand Herald*, 2 June 1989, p. 1:9.

⁶⁵ 'Tainui claim', *The Dominion*, 12 September 1989, p. 7.

⁶⁶ 'Crown rejects Tainui's bid to negotiate', *The Dominion*, 29 August 1989, p. 2.

⁶⁷ 'Commerce Commission studies how to sell the unsaleable', *The Examiner*, 18 July, 1991, p. 4.

advised that the Crown minerals were not the *government's* to sell. Here again however, the inconsistency of the Crown is evident. Yet another article advised that, 'the [petroleum] company's immediate objective is to [acquire] the Crown's interests assuming that agreement can be reached with the *Crown* on satisfactory terms.'⁶⁸ Once again, in contrast to the pattern established whereby the Crown is something different from government, in these instances the Crown is a metonym for the government of the day. The question emerging which will shortly be examined is, what are the implications of this inconsistency regarding the meaning of the Crown in relation to government for Māori?

The newspaper coverage of the 'Principles for Crown Action' announced in 1989 provides an excellent case study of the use of Crown as a metonym for government and introduces a new argument, explored in the next two chapters, that the inconsistency in the Crown's identity is the result of a conscious decision by some speakers to identify the government of the day as the Crown. The Principles were released in November 1989 by the Labour Government as a part of its policy regarding Treaty issues. These 'Principles for *Crown* Action' were created by the Labour Government as a guide for future governments' treaty policies. The principles, which were clearly the Labour Government's policy, were nevertheless identified as 'Crown' rather than 'government' principles. In announcing their release Geoffrey Palmer, as the Minister of Justice, engaged in using the symbolism of the Crown by stating, '[t]he duty of the *Crown* is not merely passive but extends to active protection of Maori people.' He said also that 'the Treaty is regarded by the *Crown* as establishing a fair basis for two people in one country.' He referred to the *Crown's* commitment and the *Crown's* position.⁶⁹ In sum, Palmer clearly presented his government's policy as that of the Crown's.

⁶⁸ 'Southern not likely to match \$22.8m profit', *The Dominion*, 5 November 1991, p. 11.

⁶⁹ Rt Hon Geoffrey Palmer, 'The Treaty of Waitangi – Principles for Crown action', *National Business Review*, July 1989, p. 23;6.

The reply to this policy announcement from the National Party directly highlighted the use of Crown symbolism in Labour's policy. The spokesperson for National identified 'the Crown' as the original treaty signatory only and went on to refer to the contemporary partner specifically as the Labour Government. The Minister argued, for example, '[i]f we are truly to be one nation [the] key issue must be addressed ... and the *government* must respond.'⁷⁰

As mentioned previously, the language of these two speakers introduces a question about the function of the Crown as a symbol in treaty debate which will be examined in the next two chapters. In the meantime, it also demonstrates the use of the Crown as a metonym for government in treaty discourse. The implications for Māori of the inconsistent use of the Crown as, on the one hand a metonym for government and on the other hand a term for something other than government, will now be considered.

Crown and Government: The Significance of Difference

The evidence presented in this chapter has substantiated the argument introduced in the previous chapter that there are serious problems of consistency with regard to the identity of the Crown in the mass media in New Zealand. In particular, it has been argued here that there is inconsistency in the relationship between government and Crown in New Zealand. On the one hand, the Crown symbol is used in such a way as to distinguish the Crown from the government in much the same way as the Crown traditionally was perceived to sit above government in Britain and limit government authority and protect the public interest. In other words, the Crown was the guardian of the constitution. However, on other occasions the mass media also used the term 'Crown' as a metonym for government. The difference between government and Crown, as argued here, is particularly significant within the context of the Treaty of Waitangi.

⁷⁰ Winston Peters, 'Principles for Crown action on the Treaty of Waitangi', *National Business Review*, July 1989, p 23;7.

Other countries use similar icons and concepts to express the notion of perpetual succession. The United States of America, for example, refers to a single government as an 'administration' and reserves the word government to identify the ongoing process of governing. Also, the United States upholds the American flag as the timeless foundation of American society. The flag, in this respect (and more generally the constitution), is America's 'crown'. In interpreting the Crown as the same thing as government, as seems to have happened in New Zealand, this important and useful differences between the two are lost.

In general, the difference between Crown and government in New Zealand is important in maintaining the image of an authority which will, among other functions, protect the rights of its citizens from the actions of government. In other countries this function is fulfilled by an entrenched bill of rights or a written constitution. In New Zealand, which has neither of these, the Crown has historically been considered a guardian of the nation's constitution and therefore also the liberty of its subjects.⁷¹ In the Crown's traditional capacity as 'the Queen', the Crown was separate from and higher than government, in the sense that it was considered the duty of the Crown to ensure that her people were not subjected to unconstitutional government.⁷² However, as the previous chapter demonstrated, neither the Queen nor the Governor-General have real political power in New Zealand. Their power has been transferred to the Executive, or Ministers of the Crown. The implications of this shift in power are most evident when seen in relation to the Crown and government under the Treaty of Waitangi.

The distinction between Crown and government is a significant, if not essential, one to make in relation to the Treaty. Under the Treaty, the Crown agreed to protect Māori tino rangatiratanga (sovereignty) and taonga (treasures) from the influx of British

⁷¹ D.L. Stevens, *The Crown, the Governor General and the Constitution*, Masters thesis in Law, Victoria University of Wellington, 1974, p. xx.

⁷² Stevens, *The Crown, the Governor General and the Constitution*, p. 43.

settlers arriving in New Zealand. It was also the duty of the Crown to protect Māori interests against the actions of settler government. The fact that the Crown has come to be synonymous with government is a reflection of the fact that New Zealanders in general (and Māori in particular) do not have that layer of authority which can provide protection from government actions and authority in New Zealand. However, perhaps the most significant injustice is that the government, in assuming the position of the Crown, is playing two roles at once as both protector and accused subjugator of Māori rights under the Treaty.

The Chief Judge of the Waitangi Tribunal, Eddie Durie, has explained that the government's alter ego as the Crown has created concern amongst Māori themselves, some of whom oppose the Crown being used as a metonym for government. He tells of an incident at a hui in Rotorua in 1990 when he was approached by a group of Māori who were concerned by the fact that the Crown was being used to identify the actions of governments which had contravened the Treaty. Their message was that the honourable Crown (with whom Māori had signed the Treaty in 1840) should not be implicated in contemporary discussion of treaty breaches perpetrated by government.⁷³ If this concern is an indication of a wider opinion within Māoridom (and possibly non-Māori groups) then not only is the newspapers' use of the Crown as a metonym for government not representative of other interpretations of the Crown but also it is more seriously creating a new and inappropriate interpretation of the Crown treaty partner from the perspective of Māori.

Finally, in the process of substantiating the problem of consistency with regard to the identity of the Crown treaty partner, this chapter has demonstrated that the Crown symbol is often used as a metonym for government and suggested that this is a device by which the speaker gains some kind of political advantage. The next chapter more

⁷³ Interview, Chief Judge E.T.J. Durie, Wellington, 21 August, 1995.

thoroughly investigates the role and function of political discourse in order to understand more about the role of the Crown symbol in treaty debate.

THREE

SYMBOLS IN POLITICS: A THEORETICAL OVERVIEW

The question who or what is 'the Crown' in mass communication in New Zealand was answered in part in the previous chapter with the discovery that 'the Crown' was often used as a metonym for government, although there was inconsistency in its use in this way. This raised the question of why the Crown was used as a metonym for government, particularly when accepting the difference between Crown and government in contemporary society. In an attempt to answer this question, Chapter Three will discuss some theoretical perspectives on the nature and function of symbols in politics. It addresses four issues: the significance of symbols for politics; the receptiveness of publics to political symbolism; governments' use of symbolic language; and some of the implications of using symbols, such as 'the Crown', in political discourse. From this investigation, hypotheses are drawn which will then be tested against evidence of the use of the Crown in ministerial statements relating to the Treaty of Waitangi (see Chapter Four). These hypotheses include: that the public derives reassurance and a sense of identity from the Crown symbol; that a symbol such as the Crown can be applied to a variety of individuals and institutions as long as the context in which it appears is appropriate; and that the government can use the Crown symbol to legitimise actions and authority under the Treaty of Waitangi.

The contributions of a variety of theorists are included in this chapter. In particular, the views of Murray Edelman¹, who has written extensively on political symbolism and C.D. Elder and R.W. Cobb who have also investigated the role of symbols in politics, are discussed.² Other authors such as Seymour Lipset, William Connolly and John

¹ Murray Edelman, *The Symbolic Uses of Politics*, University of Illinois Press, Urbana, 1964.

² C.D. Elder and R.W. Cobb, *The Political Uses of Symbols*, Longman Press, New York, 1983.

Schaar provide valuable discussion of the function of symbols in legitimising government action and authority.³ It proved difficult to find New Zealand material specifically relating to symbolism in politics, although Les Cleveland's work which also includes useful discussion of political culture in New Zealand provided some interesting ideas.⁴ While the combination of these authors provides an interesting and diverse debate, it should be remembered that the nature and impact of political symbolism will vary between states. The experience of American theorists, such as these writers predominantly are, should not be assumed to be relevant to the New Zealand experience. As a result, the theorists' ideas have often been modified to make them appropriate to 'the Crown' in New Zealand.

The Significance of the Symbol for Politics

Symbols are found everywhere in modern society. From the stop sign on the street to the national flag, from a handshake to the word 'democracy', individuals and groups of people communicate with each other through the use of symbols. To a certain degree language itself is a string of words or symbols which evoke meaning. However, 'symbols' as identified here are distinguished from language per se as signs, objects, or acts which represent emotions, thoughts and facts.⁵ While all these kinds of symbols are considered in the discussion it is the function of objects (such as the Crown) which is of particular interest.

According to Dorothy Lee, the word 'symbol' was originally the Greek name for a part of a coin broken from the whole as a gift to a departing friend. This 'symbol' was to remind the friend of the hospitality and friendship of the giver. The 'symbol' was

³ See: Seymour Martin Lipset, *Political Man: The Social Bases of Politics*, John Hopkins University Press, Baltimore, 1981; W.E. Connolly, *The Terms of Political Discourse*, (2nd Edn.), D.C. Heath and Co., Massachusetts, 1983; John H. Schaar, 'Legitimacy in the Modern State', in Connolly (ed.), *Legitimacy and the State*, Basil Blackwell Publisher Ltd., 1984.

⁴ Les Cleveland, *The Politics of Utopia. New Zealand and its Government*, Methuen Publications Ltd, Wellington, 1979, p. 23.

⁵ Edelman, *The Symbolic Uses of Politics*, p. 6 and Elder and Cobb, *The Political Uses of Symbols*, p. 29.

not creating or evoking meaning so much as conveying it. Similarly the modern symbol, Lee argues, must be seen not just as a representation of ideas and meanings but as a real part of a whole.⁶ Lee explains that a symbol is not arbitrarily given meaning but rather, 'it contains the meaning of the concrete situations in which it participates and has participated and which it has helped create.'⁷ In other words, a symbol evolves from a specific context much as 'the Crown' came to symbolise the monarchy from around 1100 AD (see Chapter One) because it was the headdress of the king and a part of the royal context. Just as Lee's broken coin assumed meaning from its context, so 'the Crown' has come to represent those institutions from which it evolved. A more recent example of an object gaining symbolic meaning nationwide occurred in New Zealand in 1994, when a Member of Parliament tabled documents in the House of Representatives relating to a major tax scandal. The Minister carried the documents in a wine box. As a result of the media's attention to this fact, the wine box drew symbolic significance from its context and as a result, the scandal has since been referred to as 'the wine box affair'.

In order for an object such as a crown or a wine box to become a significant symbol, groups of people must relate common meaning to it. These 'meanings' must have both a cognitive and an emotional component in that they incorporate both what individuals 'know' to be true and what they feel.⁸ However, as the example of the broken coin has already demonstrated, the meanings and emotions people bring to a symbol do not need to be inherent in the symbol itself.⁹ Rather, individuals 'learn' through their own experience to associate common meanings, thoughts and emotions with symbolic objects, actions and words. In this respect, a symbol's meanings tend to be

⁶ Dorothy D. Lee, 'Symbolisation and Value', in L. Bryson et al. (eds.), *Symbols and Values: An Initial Study*, Cooper Square Publishers Inc., New York, 1964, pp. 73-74.

⁷ Lee, 'Symbolisation and Value', p. 74.

⁸ Elder and Cobb, *The Political Uses of Symbols*, p. 37. Also see Chapter Two 'Symbolic Attachments' in *The Political Uses of Symbols*, for a theoretical framework concerning varieties of symbols and discussion of how symbols acquire their meaning for individuals, pp. 33-56.

⁹ Elder and Cobb, *The Political Uses of Symbols*, p. 28.

associational rather than substantive.¹⁰ For example, a broken coin would only evoke thoughts and feelings about friendship to a citizen from ancient Greece, while at the same time, a crown would mean little to a culture which did not 'crown' its leaders. In addition to further demonstrating the significance of the context from which symbols develop, these examples also highlight the importance of socialisation in the creation and promotion of society's symbols.

Socialisation is the process by which members of society learn the rules and norms required to live in and be accepted by a particular society. Socialisation also plays a key role in developing and encouraging symbolic communication because it is through this process that individuals learn the common and prevailing ideas about their society and its symbols and through which they hand that information down through the generations.¹¹ For example, generations of people born after World War II have 'learnt' to associate the swastika with facts about Hitler's dictatorship as well as feelings of fear, anger or despair. Similarly, the act of shaking hands is in some cultures a symbolic gesture which internationally represents peace or agreement and which is learnt by subsequent generations. The term 'Watergate' on the other hand, immediately brings to mind notions of government corruption in the western world for people at the time of the political scandal in the USA, and for years afterwards. As socialisation is an ongoing process the information individuals relate to particular symbols will be gradually accrued throughout their lifetime. Furthermore, new symbols are constantly being generated within society, as the example of the 'wine box affair' demonstrates. Some symbols, such as the Crown, endure the test of time, while others do not. The question is, what makes an effective and enduring symbol?

Theorists have argued that the key to objects, actions and words becoming effective and popular symbols is that large groups of people, often entire nations, must attribute

¹⁰ Elder and Cobb, *The Political Uses of Symbols*, p. 50.

¹¹ Elder and Cobb, *The Political Uses of Symbols*, p. 47.

them with common meaning, value and significance.¹² For example, 'the Crown' is a useful and meaningful concept in Commonwealth nations because of a common history of association with the monarchy by all nations. However, it is also important to note that the profile of a symbol, as well as its associations and meanings, will differ between states, or between groups within states. For example, while some British-Canadian writers argue that 'the Crown' is central to Canada's unique political structure,¹³ French-Canadians consider it a symbol of oppression, as do the Irish who regard the Crown as a reminder of years of oppression under British rule. On the other hand, the Crown enjoyed unprecedented currency in New Zealand in the 1990s while Australia in the early 1990s was debating the possibility of removing the symbol from its constitution altogether and replacing it with a new republican charter.¹⁴ Indigenous groups within these two countries in particular have been diametrically opposed in their attitude to the Crown. Many Māori have historically upheld a partnership with the Crown under the Treaty of Waitangi, while Aboriginal and Torres Strait Island people in Australia have a history of resistance against the Crown.¹⁵ However, while nations or groups within states use symbols differently, according to some theorists, all societies have 'political mysticisms' and 'irrational strings' which exist on another plane as a result of their unique historical roots. It is only the myths and emotionally charged symbols of others that we find perplexing, while our own seem 'natural'. In fact, symbols can be so deeply rooted in a nation's mental landscape that they are scarcely paid any special attention.¹⁶ According to this logic, the Crown could be a prolific symbolic identity in New Zealand's public discourse whilst its function and implications may be barely recognised by either speaker or audience.

¹² Elder and Cobb, *The Political Uses of Symbols*, p. 29.

¹³ See Chapter Nine of this thesis for a further discussion.

¹⁴ See Chapters Nine and Ten for more discussion of the comparative role and profile of 'the Crown' symbol in Canada and Australia.

¹⁵ See Chapters Five and Ten respectively for further discussion.

¹⁶ Stephen Levine and Raj Vasil, *Maori Political Perspectives*, Hutchison Group, Auckland, 1985, p. 152.

While useful and popular tools in society generally, symbols are a particularly popular and effective device in political discourse. They are said to make powerful political tools because their common or universal 'meanings' can be used to convey information and emotion to large numbers of people with relative ease. They are also useful tools in the language of persuasion which is central to political communication because of their ability to convey both factual and emotional associations. According to Edelman, for example, words in the hands of political speakers are 'political weapons' used to muster support for certain causes.¹⁷ Connolly agrees that the language of politics is 'an institutionalised structure of meanings that channels political thought and actions in certain directions.'¹⁸ In particular, it is those symbols which span generations and have an emotional impact of their audience which make powerful political tools.

In addition to contributing to the persuasive nature of political language, symbols are thought to facilitate and 'simplify' political communication by reducing complex and ambiguous messages to a more manageable size, thereby making them more easily accepted and 'understood' by the public.¹⁹ However, in reducing politics to a symbolic level, symbols are also accused of 'changing' politics. Lyman Bryson explains that, because symbols appeal to individuals' emotions more than their rational mind, the public may understand that words are not a substitute for action, and that symbols are not a replacement for actual events, but on a more emotional level the public can be 'uplifted into higher courage by the sight of a flag, and stiffened by the strength of words.'²⁰ As a result, Bryson warns, where symbols impact emotionally

¹⁷ M. J. Edelman, *Constructing the Political Spectacle*, University of Chicago Press, Chicago, 1988, pp. 108-109.

¹⁸ Connolly, *The Terms of Political Discourse*, p. 1.

¹⁹ Edelman, *Politics as Symbolic Action*, p. 34.

²⁰ Lyman Bryson, 'The Quest for Symbols', in Lyman Bryson et al. (eds.) *Symbols and Values: An Initial Study*, Cooper Square Publishers, New York, 1964, pp. 7-8.

upon publics or individuals, they can distort political facts, and in a sense create their own reality.²¹ This point is discussed in more detail later in the chapter.

In attempting to understand the implications of symbols in politics, some theorists have offered categories for symbols based on their nature and function. Edelman, for example, distinguishes between condensational and referential symbols. He explains that referential symbols, such as statistics or graphs, economically represent information and facts. They encourage logical or manageable thinking about complex or sizeable issues. For example, the state of Māori health compared with non-Māori health in New Zealand can be easily conveyed to an audience in a graph or list of statistics which visually reveals the difference between the two groups. Condensation symbols, on the other hand, condense emotions into a single event, act or object.²² 'The Crown' is an example of a condensational symbol because (as established in the first chapter) it has developed through the centuries to represent thoughts, facts and emotions about a range of political individuals and institutions.

It is useful at this point to think more about the symbolic 'baggage' the Crown carries in New Zealand. New Zealand political scientist, Les Cleveland, writing in the late 1970s, gave considerable thought to the 'symbolic existence of New Zealanders' and argued that 'the Crown' signifies the history and tradition of the British monarchy and is a symbol of 'justice, the authority of the state and also the institution of the monarchy'.²³ In the previous chapter the Crown was also identified as representing a notion of perpetual succession and stability in New Zealand government, as well as being the guardian of the constitution and public interest. It was thought to be popular because it has more positive associations than does the alternative concept of 'the state'. Cleveland also argued that the Crown is popular in New Zealand because it

²¹ Bryson, 'The Quest for Symbols', p.8.

²² Edelman, *The Symbolic Uses of Politics*, p. 6.

²³ Cleveland, *The Politics of Utopia. New Zealand and its Government*, p. 23.

connects the country very strongly with a British heritage and a tradition of majesty. According to Cleveland, early settlers in New Zealand had a very strong sense of personal ambition which was (unusually) not coupled with any ambition to be an independent or progressive political nation. This is most clearly demonstrated by New Zealand's choice to establish the British style Westminster model for its political institutions.²⁴ Cleveland concluded that historically New Zealand generated a 'proud association with the Crown'.²⁵

While this is a generalised view of the facts and emotions the Crown represents in New Zealand, later discussion demonstrates that groups within New Zealand have their own particular associations which they bring to the Crown as a condensational symbol. As Richard McKeon explains, the different symbolic conception of groups within society creates another categorisation of symbols which can be seen as instruments of internal cohesion and/or external communication. He explains that symbols can express the intentions, attitudes and expectations of one group in relation to another, or they may be used as a means of communication within a group.²⁶ In relation to the Crown it will be interesting to determine, with the more detailed data of the next chapter, whether 'the Crown' symbol communicates an idea within one group or between groups in New Zealand.

This discussion of the categories of symbols is based on the assumption that symbols such as the Crown are readily accepted by the New Zealand public. It does not, however, explain how or why this acceptance should occur. What is it about certain symbols, the Crown in particular, that makes them popular with the public? The next section of this discussion addresses the nature of the relationship between publics and symbols.

²⁴ Cleveland, *The Politics of Utopia*, p. 3.

²⁵ Cleveland, *The Politics of Utopia*, p. 27.

²⁶ Richard McKeon, 'Symbols, Myths and Arguments', in Bryson et al. (eds.) *Symbols and Values*, p. 25.

Public Response to Symbols in Politics

Theorists have offered three possible explanations for the popularity of symbolic communication amongst publics. First, they suggest that people naturally think and reason symbolically and therefore respond well to information presented to them in symbolic terms. Second, some theorists have argued that publics are drawn to symbols which add to their own sense of identity.²⁷ Finally, it has been said that publics will accept political symbols which

which people try to understand and explain the overall political picture, however accurately or inaccurately, to themselves and to others.²⁹

Thus it appears that the Crown is a popular symbol in New Zealand because it is a familiar icon which is universally understood and which simplifies the public's conception of the political process. For example, in the newspaper articles discussed in the previous chapter, the Crown conveyed the appropriate impression of authority without requiring a detailed explanation of the actual individuals or institutions involved. In this respect, the process of communication becomes more manageable through the aid of the Crown symbol.

However, the danger inherent in publics accepting, even preferring, symbolic communication is that, once a symbol establishes itself within a group with a shared meaning, individuals will rationalise situations and information in order to accommodate the symbolic structure already in place. As Edelman explains:

Once accepted, a metaphorical view becomes the organising conception into which the public thereafter arranges items of news that fit and in the light of which it interprets the news. In this way a particular view is reinforced and repeatedly seems to be validated for those whose attitudes it expresses. It becomes self-perpetuating.³⁰

To explain Edelman's point further, symbols are thought to create their own political reality for those publics engaged in politics through symbolism. There is some concern that political reality is created by forcing complex situations into more manageable forms.³¹ Moreover, collectively, symbols are said to provide a structure or hierarchy for public perceptions.³² When faced with new information which contradicts the established norm, individuals (or publics) are less likely to modify their

²⁹ Edelman, *Politics as Symbolic Action*, p. 3.

³⁰ Edelman, *Politics as Symbolic Action*, p. 172.

³¹ Edelman, *Politics as Symbolic Action*, p. 66.

³² Edelman, *Politics as Symbolic Action*, p. 42.

assumptions about established symbols and more likely to ignore or manipulate the new information in order that it support the symbolic structure already in place. As Elder and Cobb note, 'people tend to perceive and interpret political stimuli in such a way as to make it consistent with their existing predispositions.'³³

Applying this argument to the Crown symbol suggests that once 'the Crown' became an established and accepted symbol in political discourse in New Zealand, it became part of a symbolic structure which would support and promote the role of the Crown in political discourse. In addition, new events and information which might challenge or contradict the role of the Crown will be ignored by the public or interpreted in such a way as to maintain the symbolic structure in which the Crown identity resides.³⁴ Aside from the implications of this with regard to the accuracy of the public perceptions of the political structures, this argument also introduces the possibility that symbols such as the Crown which shape present political realities will also help determine the nature of possible future events. Most often society's prevailing symbols are those which support the present regime and shut out alternatives.³⁵ As Mueller explains, '[p]olicies, explanations and data can be couched in a language which itself contains pre-definitions and interpretations that serve the purpose of maintaining an undisturbed exercise of power.'³⁶ In this respect, there is a possibility that 'the Crown' symbol serves to protect and promote an undisturbed exercise of power.

The second theoretical proposition to explain the popularity of certain symbols was that publics respond well to political symbols which develop the individual, or public,

³³ Elder and Cobb, *The Political Uses of Symbols*, p. 11, also see Edelman, *Politics as Symbolic Action*, p. 42.

³⁴ However, people's perceptions are also able to adapt and change. For example, there would presumably be few New Zealanders who believe that the Crown denotes real authority and power in New Zealand as opposed to symbolic authority.

³⁵ Edelman, *The Symbolic Uses of Politics*, pp. 173-174.

³⁶ Claus Mueller, *The Politics of Communication*, Oxford University Press, New York, 1973, p. 87.

sense of identity. Symbols are apparently 'selected' by people according to a role and identity they see for themselves.³⁷ For example, a person who is patriotic may respond positively to the national flag as an outward recognition of their own personal politics. The result of this sort of response to symbols may be seemingly unqualified attachment to a symbol (such as a flag) regardless of the context in which it is used. The dangers inherent in this type of symbolic attachment are not overlooked by theorists who have observed it. For example, Elder and Cobb warn that the more strongly a person associates himself or herself with a symbol, the more inclined that person will be to accept and support its use in political discourse without constantly reassessing the value and consequences of the symbol.³⁸ A symbol may therefore be used in subtly but significantly different ways without its new use being questioned or even recognised by individuals or entire publics. On the basis of this theory it is suggested that 'the Crown' symbol not only simplifies political communication for the New Zealand public but also contributes to the public's sense of identity.

In considering the possibility that individuals attach themselves to symbols according to their own sense of identity, it has also been suggested that '[t]he themes a society emphasises and re-emphasises about its government may not accurately describe [that government's] politics.' Rather, they indicate what various publics want to believe about themselves and their state.³⁹ Les Cleveland similarly observed with regard to New Zealand that a description of a country's political culture does not necessarily amount to an exact account of the actual working of its political institutions and processes. Rather, it deals principally with what people think about their political circumstances rather than with what actually exists.⁴⁰ 'The Crown' may therefore only exist in the minds of the public because they want, for whatever reason, to believe that it exists. While accepting that this would be an argument worth investigating further, it

³⁷ Edelman, *Politics as Symbolic Action*, p. 53.

³⁸ Elder and Cobb, *The Political Uses of Symbols*, p. 71.

³⁹ Edelman, *The Symbolic Uses of Politics*, p. 191.

⁴⁰ Cleveland, *The Politics of Utopia*, p. 23.

is equally important not to exaggerate the susceptibility of publics in general and the New Zealand public in particular. People can be remarkably astute when distinguishing political symbols from reality or context. Moreover, if symbol and context become too widely dissonant, the contradiction will become apparent to some people. In addition to this, in New Zealand, as evidenced in the first chapter, there is some logic to the identity of the Crown which often appears in statutes and other official documents and which finds expression as the Queen, Governor-General and/or Executive (although the previous chapter demonstrated problems of consistency with this). There is, therefore, some logic to the Crown's presence in New Zealand, although this only partly explains its frequent appearance in political discourse.

Finally, it has been proposed that publics respond well to symbols which appease public concerns and offer reassurances. As Elder and Cobb explain, in addition to pursuing a political identity, people will orientate themselves towards symbols as a way of externalising their own personal hopes, anxieties and fears.⁴¹ These feelings make up a substantial part of the 'political world'. According to Edelman, these feelings also provide a vital link between politics and symbolism, and are most often the result of social division or tension.⁴² Edelman argues that, 'internal or external conflicts and passions catalyse attachment to a selected range of myths and metaphors which shape the perceptions of the political world.'⁴³ He also notes that attachment to popular symbols can allay public anxiety when the symbol creates the impression of a collective course of action which will resolve tensions.⁴⁴ Furthermore, it is suggested that, in situations where tension levels, anxiety or the perception of threat are the greatest within society, symbolic cues and reassurances will be most readily accepted by publics.⁴⁵

⁴¹ Elder and Cobb, *The Political Uses of Symbols*, p. 50.

⁴² Edelman, *Politics as Symbolic Action*, p. 2.

⁴³ Edelman, *Politics as Symbolic Action*, p. 67.

⁴⁴ Edelman, *Politics as Symbolic Action*, p. 54.

⁴⁵ Edelman, *The Symbolic Uses of Politics*, p. 177.

This is a particularly interesting observation in relation to the Crown. In later chapters it is demonstrated that the negotiation of treaty claims and issues has created high levels of fear and anxiety within New Zealand society as well as creating division between groups who support and reject treaty negotiations. It would follow, therefore, in applying the theorists' argument, that the public will accept a symbol which appears to appease concerns and unite divided groups. The Crown, it is later argued, has the potential to unite groups otherwise divided on treaty issues because all groups respond positively to the Crown symbol. As was discussed earlier, the Crown's traditional British origins make it a representation of national unity, and the common good. The Crown has also been described as the 'guardian of the constitution'. Therefore, when faced with a constitutional challenge such as the Treaty has presented in New Zealand, the Crown can appease public concerns by representing absolute Pākehā sovereignty in New Zealand.

In looking to investigate this possibility further, political scientist, Raj Vasil, has considered the nature of political symbols in New Zealand and suggested that just as the major features of New Zealand government are British influenced, so too are its symbols which are based on British values.⁴⁶ According to Vasil, Māori do not envisage these symbols as their own. While this may generally be true, the Crown is an interesting exception because Māori also have a significant connection with the Crown through the Treaty of Waitangi (discussed further in Chapter Five). Despite its 'Britishness' therefore and its obvious association with Pākehā, the Crown also appeases Māori concerns because it represents the original treaty partner who can honour its treaty obligations and who has the authority (and responsibility) to fulfil the promises made to Māori in 1840. Therefore, in being able to appease the concerns of

⁴⁶ Raj Vasil, *What Do Maori Want? New Maori Political Perspectives*, Random Century Press, 1990, p. 42.

both Māori (or those who support the Treaty) and those who feel threatened by the treaty process, the Crown symbol unites groups otherwise divided by treaty debate.

To summarise the ideas presented so far, publics are considered naturally responsive to symbols in politics because people tend to think in symbolic terms, particularly in order to make sense of the complexity of politics. Also, publics or individuals select symbols in order to externalise personal political cognitions and reassure their collective political fears and anxieties. Unfortunately it is beyond the scope of this thesis to test all these theories against empirical evidence. However, subsequent chapters will discuss the significance of the Crown symbol for Māori in particular (see Chapter Five) and, also, the Crown's symbolic function in appeasing public concerns generated by the treaty negotiation process. Now, however, having established why publics respond well to some political symbols, the next section turns its attention to the matter of why governments use symbols in political discourse.

Government Use of Symbols

Having recognised that publics are generally responsive to symbolism in politics, it should come as no surprise to discover that governments frequently employ symbolic actions, words and objects in communicating political messages to the public. Quite apart from their public appeal there are two closely related explanations for the popularity of symbols in government language and action. First, symbols allow governments to create and control public cognitions. Language, in this respect, becomes a controversial political 'tool'. Second, symbols are a significant and effective way for governments to legitimise their actions and policies and, most importantly, their authority.

Before discussing these two explanations, it is important to note a point of tension which arises amongst theorists over whether or not government speakers are conscious of their use of symbolic language. While some theorists believe that

governments are able to use symbolism to their advantage in communicating with the public, other theorists are quick to assert that this kind of symbolic language is not a conscious plot or manipulation of cognitions but the product of very deep-rooted socialisation on the part of political commentators.⁴⁷ For example, Elder and Cobb suggest that symbolism associated with power is not inconsequential, but neither is it 'a plot to manipulate the unwary masses'. They argue that in fact some amount of symbolic thinking and communication is essential.⁴⁸ Other theorists reject the simplicity of this argument. Mueller, for example, argues that symbolism in politics is neither subconscious nor benevolent. He believes that private and governmental groups are able to structure and limit public communications through symbolic language and that they do so specifically to ensure that their own interests prevail. He calls this 'distorted communication' and suggests that in an ideal model of 'open non-distorted communication ... [d]efinitions and interpretations of symbols inherited from the past and emerging in the present would be independent of vested interests which bias communication.'⁴⁹ Elizabeth McLeay also warns, in relation to the rhetoric of housing policy in Britain, that government and other prominent political speakers 'capture' political language and consequently set limits to the policy agenda.⁵⁰ Both Mueller and McLeay recognise a point made earlier in the chapter, that in controlling the terms of discourse, governments and political commentators are also able to control the possible outcomes of the policy process.⁵¹

To resolve this debate, it is suggested here that symbols can be used unconsciously or with a conscious purpose by government. The Crown is a case in point. As Rodney Barker has explained in reviewing the contemporary role of the Crown in politics, the

⁴⁷ Edelman makes this observation in association with the use of metaphors in *Politics as Symbolic Action*, p. 79.

⁴⁸ Elder and Cobb, *The Political Uses of Symbols*, p. 21.

⁴⁹ Mueller, *The Politics of Communication*, p. 19.

⁵⁰ E. M. McLeay, 'Property, Housing, Citizenship and Political Argument', Conference on Citizenship and Social Welfare, University of Southampton, December, 1987, p. 11.

⁵¹ McLeay, 'Property, Housing, Citizenship and Political Argument', p. 11.

Crown is 'a legal person who can act in the courts, to whom public servants may owe and own allegiance, and who may act on all those exercises of authority, such as the making of treaties or the declaration of war ...'⁵² Therefore, 'the Crown' is a legitimate political identity which may appear in political discourse from time to time with no conscious intention or manipulation on the part of the speaker. However, as Barker further explains, the term was historically also used to provide legitimacy to the governors because of 'a belief that the principal duty and justification of office is the continuation of the Queen's government.'⁵³ Therefore, the Crown in Britain has appeared to play a more active role as a political tool in the past. The question of intent by political speakers can be more closely examined in the data of the next chapter.

In returning to the reasons for symbolism in government discourse, it has been suggested that symbols are used to reassure public concerns and needs. One might assume that government responds to the hopes, fears and needs which naturally develop within the public. However, Murray Edelman challenges this assumption and argues that public cognitions which governments appease may also have been created by government.⁵⁴ Governments are able to 'create' public cognitions through the frequency with which they use key symbols which encourage the public to think they need and want those things governments are most willing and able to supply.⁵⁵ It is argued that prevalent symbols emotionally engage the public in a political issue making it easier for the government to facilitate policy shifts.⁵⁶ McLeay argues (as mentioned earlier) that the British Conservative Party's use of the phrase 'property owning democracy', 'should be understood as a political device that captures a set of linguistic

⁵² Rodney Barker, *Political Legitimacy and the State*, Clarendon Press, Oxford, 1990, pp. 143-144.

⁵³ Barker, *Political Legitimacy and the State*, p. 144.

⁵⁴ Edelman, *Politics as Symbolic Action*, p. 41

⁵⁵ Edelman, *Politics as Symbolic Action*, p. 4.

⁵⁶ Edelman, *The Symbolic Uses of Politics*, p. 15. This idea is further discussed by Philip B. Heymann, 'How Government Expresses Public Ideas', in Robert Reich (ed.), *The Power of Public Ideas*, Ballinger Publishing Company, Cambridge, 1988, pp. 85-86.

advantages and builds on powerful historical associations.⁵⁷ Similarly, Robert Reich provides evidence that accomplished leaders in the United States have explicitly and purposively crafted public visions of what is desirable and possible within society. Speeches, interviews and press statements, Reich argues, are used to muster public support for those things the government wants to achieve.⁵⁸ It is easiest for governments to engage publics by using symbols which play on their hopes and fears. As Edelman observes, political issues, particularly the perception and naming of enemies, are ambiguous and tend to create public fear.⁵⁹ By reinforcing these fears with symbolic language, governments are able to create or enhance a perception of threat in order that the government might then take authoritative cues which provide, or rather appear to provide, security from the perceived threat.⁶⁰ Michael Parenti substantiates this theory with detailed discussion of the American government and media's language regarding the perception of a Russian threat during the Cold War period.⁶¹

The notion that governments use symbols to create needs and fears, is interesting and persuasive, but its relevance in this discussion of 'the Crown' must be questioned. There would seem to be little advantage in government creating or enhancing a perception of threat in the already volatile process of treaty negotiations. However, this suggestion will be considered later in conjunction with empirical data. Of more immediate relevance are two assumptions embedded within this argument; first, that governments use symbols to represent remote or omnipresent threats or reassurances; and second that symbols will often create an impression that aspects of government authority are beyond the influence of the individual.⁶² Just as important is Elder and

⁵⁷ McLeay, 'Property, Housing, Citizenship and Political Argument', p. 1.

⁵⁸ Robert Reich, 'Introduction', in Reich (ed.), *The Power of Public Ideas*, p. 4.

⁵⁹ Edelman, *Politics as Symbolic Action*, p. 11.

⁶⁰ Edelman, *Politics as Symbolic Action*, p. 8.

⁶¹ Michael Parenti, *Inventing Reality: The Politics of the Mass Media*, St Martin Press, New York, 1986.

⁶² Edelman, *The Symbolic Uses of Politics*, p. 5.

Cobb's extension of this second suggestion, that the more remote government power is and the greater its scope in dealing with an issue, the greater the need and possibility of using symbols to suggest and justify government authority.⁶³ It will be interesting to determine, with the benefit of empirical data in the next chapter, whether 'the Crown' symbol is used by government to justify the extent of its authority in treaty negotiations while at the same time giving the public the impression that that authority is beyond the reach of the individual.

In addition to reassuring public hopes and fears, it has been suggested that governments use symbolism to legitimise government policy, action and authority. According to some writers, most political language is about legitimising regimes⁶⁴ because legitimacy is essential to the maintenance of effective government.⁶⁵ A government must be seen to be legitimate in order to maintain the support of its public and ensure its own stability. The legitimacy of government authority has become increasingly significant as modern government has extended itself further into economic and social life. The more extensive government intervention becomes the more pressure there is for leaders to legitimise government power, rules and authority.⁶⁶ Barker suggests that states are active in their own legitimation, just as they are active in other aspects of government. He suggests that the state actively promotes its own legitimacy in three ways, through rituals, propaganda or language, and education. He gives Bagehot's 'Crown' as an example of an effective ritual used by government to protect and promote its own stability.⁶⁷ The more effectively government legitimacy is reinforced by either ritual, language, propaganda or education

⁶³ Elder and Cobb, *The Political Uses of Symbols*, p. 18.

⁶⁴ Edelman, *Constructing the Political Spectacle*, p. 106.

⁶⁵ Lipset, *Political Man: The Social Bases of Politics*, p. 64.

⁶⁶ William Connolly, 'Legitimacy and Modernity', p. 13 and J. Habermas, 'Legitimation Problems in Late Capitalism', p. 145, both in William Connolly (ed.), *Legitimacy and the State*.

⁶⁷ Barker, *Political Legitimacy and the State*, p. 145.

(or some combination of these tools), the less resistance there will be to government authority.⁶⁸

Legitimacy itself has been described as 'the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.'⁶⁹ Legitimacy is for the most part measured, according to Lipset, by the way in which key issues which divide societies are resolved. It is conflict, naturally inherent in democracy, which invariably poses the greatest threat to the legitimacy of a government. It is therefore the key purpose for democratic government to try and moderate or resolve partisan battles before they 'solidify' if the government is to maintain legitimate authority.⁷⁰ Symbolic language and actions can enhance legitimacy by providing a unifying experience which transcends the limitations of class, culture and personality.⁷¹ Mueller explains further that legitimacy is essential for effective government because the individual's tolerance of the shortcomings of a political order increases considerably if the individual considers the government's power or authority to be legitimate.⁷²

The issue of how publics gauge the legitimacy of their government is a point of debate and concern amongst theorists. As previously mentioned, the necessary precondition for a legitimate system of authority can be as simple as the public's belief that society's institutions are appropriate or morally proper.⁷³ The implication of this, according to Schaar, is that there is no independent means of assessing a system's legitimacy

⁶⁸ Mueller, *The Politics of Communication*, p. 131. Again I qualify this argument with the observation that there must be limits to the public's acceptance of symbolic language. For example, if language and reality become too disparate the public would seem likely to challenge the government's questionable use of symbols.

⁶⁹ Lipset, *Political Man*, pp. 70-71.

⁷⁰ Lipset, *Political Man*, pp. 70-71.

⁷¹ Harold Lasswell, 'Key Symbols, Signs and Icons', in Bryson et al. (eds.), *Symbols and Values: An Initial Study*, 1964, p. 201.

⁷² Mueller, *The Politics of Communication*, p. 129.

⁷³ Schaar, 'Legitimacy in the Modern State', p. 108.

outside of public opinion. Legitimacy becomes no more than the ability of a system to persuade its members of its own appropriateness. Legitimacy, Schaar consequently warns, when accepted as the belief of followers in their regime, may be little more than the 'fruit of symbolic bedazzlement'.⁷⁴ He further states:

[l]eaders lay down rules, promulgate policies, and disseminate symbols which tell followers how and what they should do and feel. ... The symbols become, in the minds of the followers, condensations of the practices and intensions of the rulers. Over time, if the rulers manipulate symbols skilfully, symbolic rewards alone may suffice to maintain supportive attitudes. The symbols may actually conceal rather than reveal the real nature of the regime's policies and practices.⁷⁵

Barker similarly observes:

For legitimacy is precisely the belief in the rightfulness of the state, in its authority to issue commands, so that those commands are obeyed not simply out of fear or self-interest, but because they are believed in some sense to have moral authority, because subjects believe they ought to obey.⁷⁶

Therefore, theorists argue, governments can maintain the support of their followers by emphasising the legitimacy of government authority, even when the decisions made by government favour the interests of particular individuals or groups. With respect to the policy process, for example, it is not uncommon for political commentators to use language and symbols which seem to favour one party in negotiation while the decision itself favours the other.⁷⁷ In fact, 'system legitimating rationales' are most often found, and most essential, when policies favour particular interests.⁷⁸ Some might call this 'paying lip-service' to the needs of some groups. Whatever its title, the

⁷⁴ Schaar, 'Legitimacy in the Modern State', p. 110.

⁷⁵ Schaar, 'Legitimacy in the Modern State', pp. 109-110.

⁷⁶ Barker, *Legitimacy and the State*, p. 11.

⁷⁷ Edelman, *The Symbolic Uses of Politics*, p. 39.

⁷⁸ Mueller, *The Politics of Communication*, p. 179.

process itself means that government officials imply that all needs have been fully considered and understood before a decision was made in an attempt to appease the demands of unsuccessful lobby groups. In recognising the attachment of both groups in the treaty debate to the Crown, it will be interesting to observe later whether the symbol is used to 'pay lip service' to unsuccessful groups within the negotiation process.

Most importantly, perhaps, symbols which are used to legitimate government (or other) authority are usually emotional in their impact and therefore do not require detail which might challenge or weaken their symbolic meaning.⁷⁹ The uses and contexts of many symbols do not need to be consistent for a symbol to fulfil its public 'meaning' and provide legitimacy for government. A political speaker is simply required to make the use of a symbol predictable by maintaining the context in which it appears. For example, while it might not (according to the previous chapter) be appropriate to associate 'the state' with public healthcare, neither would it be appropriate for 'the Crown' to be used in the context of more business oriented institutions such as state owned enterprises. It would, however, be appropriate for the Crown to appear in the context of treaty discourse, while 'the state' would not be an appropriate symbol in this case. This is because a symbol, as was mentioned above, will always carry a range of diverse and often conflicting meanings.⁸⁰ A symbol does not need to 'mean' the same thing all the time, but the public must be familiar with the ways in which it might be used.

On the other hand, it has also been suggested that the content, meaning and value of symbols can change according to the contexts in which it appears and the frequency of its use.⁸¹ Edelman believes that it is the public's estimation of the value of words and

⁷⁹ Edelman, *The Symbolic Uses of Politics*, p. 8.

⁸⁰ Edelman, *Constructing the Political Spectacle*, p. 8.

⁸¹ Lee, 'Symbolisation and Values', p. 74.

actions, not their accuracy, which is essential to politics.⁸² In explaining this comment, we return to the earlier observation that publics create symbolic structures which allow some flexibility in the way familiar and popular symbols are used. If a symbol is used in a predictable and familiar way, regardless of how accurately it is used, it may satisfy the audience's needs. Once again it is stressed that we should not exaggerate the susceptibility of the public, but at the same time, not underestimate the way symbols can be used in a variety of contexts to legitimate government action. This argument will also be tested against empirical data in the next chapter.

The conditions under which theorists generalise about the use of legitimating symbols are very similar to those found in New Zealand in relation to the Treaty of Waitangi. Debate surrounding the Treaty, as mentioned previously, has created a great deal of tension and division in New Zealand. This in itself would, according to Lipset and Schaar, bring the legitimacy of the government into question, should that tension remain unresolved. Attempts would consequently be made by government to moderate or resolve this division before it 'solidifies'. However, in the case of New Zealand, it was not solely social tension or division which challenged the government's legitimacy but also the Treaty itself. Allegations have been made that successive New Zealand governments have not upheld the promises made to Māori in the Treaty and therefore do not enjoy legitimate authority to govern. As a result, 'the Crown' may be an important symbol for government not only in resolving tension between divided groups (thus also ensuring the legitimacy of stable government) but also in enhancing the legitimacy the public associates with the actions and authority of the public under the Treaty.

If it can be substantiated in the following chapter that the Crown is operating in a symbolic capacity in legitimising government authority and action under the Treaty, there are some serious implications to consider. Some of these ideas have already been

⁸² Edelman, *The Symbolic Uses of Politics*, p. 115.

discussed, particularly with regard to the implications for public understanding of political issues. However, some equally significant issues remain which ought to be considered, particularly in relation to the implications of Crown symbolism in treaty discourse for the Māori treaty partner.

Some Implications of Political Symbolism

Political symbols, it has been suggested here, make publics 'lazy' observers in a political world. In addition, symbols have been seen to pervade politics to the point that publics do not study the detail of political events, but rather respond to the political symbols, objects or action which represent more complicated political issues.⁸³ Edelman, for example, argues that publics respond to conspicuous political symbols, gestures and speeches which make up the drama of the state rather than the facts of any situation.⁸⁴ For this reason, publics are not in touch with political situations first-hand but rather 'know' the situation through the symbols that engage it.⁸⁵ He warns that through symbolism, abstract concepts are reified and become tangible to the public accepting them.⁸⁶

Furthermore, once established, symbols become 'self-perpetuating' and are rarely publicly challenged. Consequently their significance can become exaggerated, especially the significance of symbols which appease public anxiety and fears. Under these circumstances political language and symbolic structures (as opposed to political facts) create their own reality for individuals. Once a symbol is established as a reassurance for a group, that symbol may begin to evoke emotion which is disproportionate to its meaning. It may evoke everything about the situation while at the same time abstracting, reifying and magnifying its actual meaning. As Edelman

⁸³ Edelman, *The Symbolic Uses of Politics*, p. 172.

⁸⁴ Edelman, *The Symbolic Uses of Politics*, p. 172.

⁸⁵ Edelman, *The Symbolic Uses of Politics*, p. 173.

⁸⁶ Edelman, *The Symbolic Uses of Politics*, p. 117.

warns, '[t]hat a term masquerades as a description while appraising and condensing doubtless heightens its emotional impact.'⁸⁷

It is also important to realise that popular symbols express and promote the prevailing ideology and protect it from criticism.⁸⁸ Therefore, the popularity of prevalent symbols creates an ongoing threat to political communication when publics develop expectations for the future according to their understanding of present possibilities and political arrangements which have, in turn, been shaped by political symbolism. Political symbols, particularly those which do not accurately describe political conditions, may create impediments or barriers to new political developments.⁸⁹

The suggestion that the Crown serves a symbolic function in treaty debate, when viewed in the context of this theoretical chapter, emphasises the need to investigate and establish the use of the Crown in treaty debate. The key concern is that governments use the Crown at the expense of the public's understanding of the detail of treaty negotiations and that the symbol protects the present power structure while also determining future possibilities. These implications are particularly serious for Māori, many of whom, it has been suggested, have an alternative conception of the Crown and whose progress in treaty negotiations may be inhibited by the prevailing interpretations of the Crown and the obstacles to future development which these interpretations create. The next chapter, in addition to discussing these ideas, tests other propositions raised in this chapter, namely: whether 'the Crown' is used by ministers to represent an omnipresent reassurance which is beyond the influence of the individual; and also whether 'the Crown' is used to justify the remote and expansive authority of the government in dealing with treaty issues. Finally, and most importantly, the next chapter makes use of empirical data to test the theory that 'the

⁸⁷ Edelman, *The Symbolic Uses of Politics*, p. 116.

⁸⁸ Edelman, *The Symbolic Uses of Politics*, p. 126.

⁸⁹ Lasswell, 'Key Symbols, Signs and Icons', p. 202.

Crown' is used by ministers to legitimate government action and authority in the treaty negotiation process.

FOUR

THE 'CROWN' SYMBOL IN TREATY DISCOURSE

The previous chapter provided a theoretical discussion of the function of symbols in politics, from which a number of hypotheses were drawn. The purpose of this chapter is to test the validity of these hypotheses against examples of the function and uses 'the Crown' as a symbol in treaty discourse. The data which provided the basis for this discussion were ministerial statements made between 1988 and 1993. Some interesting findings are established here. Specifically, it is argued that the Crown demonstrated many of the qualities of political symbols identified in the previous chapter, including the role of legitimating government action and authority under the Treaty of Waitangi. It is also demonstrated that the symbolic role of the Crown has further entrenched the problem of inconsistency with the identity of the Crown, first raised in Chapter One, because it was used by ministers to identify a variety of institutions and individuals in addition to the constitutional trinity of sovereign, Governor-General and Executive established in Chapter One.

This discussion is in four sections. The first section shows that ministers most often use the Crown symbol in discourse about the Treaty of Waitangi. It also identifies those ministers most likely to use 'the Crown' in this context and suggests possible reasons for their use of the symbol. The second section discusses the possibility that the Crown is used to legitimise action and authority under the Treaty of Waitangi. The third section indicates that, because the Crown is a symbolic entity, it can be used by ministers to identify a variety of identities. Finally, the implications of these findings are considered, particularly in relation to Māori, in order to introduce the issues discussed in the second section of this thesis.

The material gathered to test the theoretical principles established in the previous chapter came from ministerial statements (which include press statements, speech notes and press conferences) between the years 1987 and 1993. It was considered appropriate to study the language of a political 'elite' such as Cabinet Ministers (note that no non-Cabinet Ministers are included)¹ because of the widely reported and public nature of their discourse. Also, ministerial statements were considered an appropriate source of political language to be tested against the theorists' arguments because they are examples of elite 'political' discourse: ministers were either announcing a policy statement, defending a government initiative or reasserting government policy. The ministers were most likely, therefore, to be using the language of persuasion in which, according to theorists, symbols are most likely to appear. A second advantage in the use of ministerial statements was the fact that their language has not been interpreted or distorted by the chain of mass communication (see Chapter Two).²

As well as providing consistency with the time frame of Chapter Two, the time frame for this research was chosen to include one term of a Labour Government (1987-1990) and one of a National Government (1990-1993). This allowed for comparative language analysis between the two parties while in power.³ More specifically, the statements were drawn from the government departments of Māori Affairs (now Te Puni Kōkiri), Justice, the Environment and the Prime Minister's Office (which contains the Prime Minister's personal staff, political advisers and media staff.) These departments were chosen as a focus for the research after an initial investigation of all government departments for one year revealed that these offices were most concerned

¹ The distinction between Cabinet and non-Cabinet ministers was not an important one to make for the purposes of this analysis, although only statements by Cabinet Ministers provided the required material with regard to the use of the Crown in the context of treaty debate.

² The role of the speech writer for ministers should not be forgotten. While speech writers may have some influence over the vocabulary and tone of a minister's sentiments, ultimately, the minister is responsible for his or her own words and, we would assume, can be held accountable for his or her statements.

³ Note that a list of the names and portfolios of all the Ministers in Cabinet during this time are available in Appendix B of this thesis.

with treaty issues and, perhaps not coincidentally, also the offices making greatest use of the Crown symbol in their discourse.

The ministers' statements used in this research are housed in the United Nations' Collection and Official Publications Room at Victoria University in Wellington. This collection has been created by government departments forwarding ministerial statements to the Library. As a result, the information available in the collection is not complete, although it was the most substantial source of ministerial statements available at the time. More importantly, it provided more than enough material for the purposes of this research. Over 1300 statements were surveyed in search of material relevant to this investigation of the Crown in ministers' discourse. Around sixty examples of Ministers referring to the Crown in the context of treaty discourse were chosen from the surveyed material and have been used for the discussion below.

Before embarking on the textual analysis, some of the language used in this chapter requires clarification. In Chapter Three, theorists discussed 'government' in symbolic communication. In this chapter, the term 'government' is replaced by 'ministers' or 'Ministers of the Crown'. Also, the terms 'treaty debate' and 'treaty discourse' are used interchangeably in this discussion. Both refer to the policy statements and to more general discussion of treaty matters by government ministers. Furthermore, in envisaging a treaty 'debate', this discussion frequently refers to the 'sides' of the treaty issue as those who support and those who reject a place for the Treaty in contemporary New Zealand society. Obviously this oversimplifies the complexity of the treaty debate which is made up groups of opinion rather than two halves. However, it is useful in clarifying the arguments presented here. Similarly, while it is not appropriate to conceive of these groups as Māori and Pākehā, this is sometimes done, also for the sake of analytical clarity.

Who uses the Crown Symbol?

In order to adequately introduce the use of the Crown in treaty debate, this discussion begins by identifying those ministers who were most likely to engage in Crown symbolism in the years of the study. As Chapter Two established earlier, 'the Crown' was widely used as a title in mass communication in Crown law, Crown resource management, and Crown entities. However, in a more active capacity, the Crown was identified as a political entity capable of thought and action specifically in the areas of resource management and treaty negotiations. This chapter explores the possibility that ministers directly involved in treaty negotiations made greatest use of the Crown symbol between 1987 and 1993.

Former Minister of Justice and the Environment, as well as Prime Minister for Labour, Geoffrey Palmer, was distinctive in his extensive use of the Crown during his time in office. Two pieces of information are significant in explaining Palmer's frequent reference to 'the Crown'. First, Palmer's government undertook probably the most extensive policies in relation to Māori rights under the Treaty of Waitangi of any government in New Zealand history. Labour was responsible, for example, for the amendment to the Treaty of Waitangi Act 1975 which allowed claims to extend back to the signing of the Treaty in 1840.⁴ Second, it may also be significant to note that Palmer, prior to his time in office, trained and practised in law, which might have provided him with some clarity and consistency in his perception and use of 'the Crown' identity. Palmer's legal training and his support of the Treaty were evident in his comment as Prime Minister in 1989 that:

[t]he Crown has obligations under the Treaty of Waitangi. No government in the history of New Zealand has done more to honour those obligations than the present one. ... Further progress in these matters depends not only on cooperation between Maori and the *Crown* but also on the maintenance of the balance between the three

⁴ For further discussion of the 1975 Act and its amendment, as well as the policies of the Labour Government, see Chapter Six of this thesis.

branches of government - Parliament, the Executive, and the Courts. ... *The Crown*, represented through the Executive has obligations. Its actions must be scrutinised, tested and finally agreed to by Parliament.⁵

While Palmer was specific on this occasion as to the identity of the Crown, he was not always as definite. For example, on another occasion Palmer commented that:

[The Crown Task Force on Waitangi Issues] would be responsible for developing the Crown's position in respect of Waitangi Tribunal hearings, direct negotiations and Court proceedings. ... It must be made clear that the roles of Parliament, the Government and the Courts are understood and made clear. ... It must be made clear that the government will make the final decisions on Treaty issues.⁶

In this instance, Palmer did not clarify the relationship between the Crown and the other institutions he identified as he had done on other occasions. This fact highlights an important dilemma also demonstrated by other ministers' use of the Crown. If Palmer believed 'Crown' could be read as 'Executive', what was his purpose in using the metonym of 'Crown' when 'Executive' would suffice? On the other hand, if there is a significant difference between Crown and Executive, what is the nature of this distinction? When questioned on his interpretation and use of the Crown as the treaty partner, Palmer explained that he understands the Crown to embrace the Queen (the sovereign) and the Executive. He also expressed the belief that the distinction between Crown and Executive was not a significant one, although he acknowledged that in New Zealand, the Māori community sees the Crown as being politically neutral, while the government (or Executive) is bound up in party politics. He said that while the rhetorical and political significance of the Crown was marginal, it brings a legitimacy and mystery to New Zealand's jurisprudence which it might otherwise lack.⁷

⁵ Geoffrey Palmer, Prime Minister, Labour, Speech Notes, Te Awamāhari Marae, Port Waikato, Tuakau, 24 November 1989, p. 2. The italics have been added for emphasis as have all other italicised words in quotations in this chapter unless otherwise specified.

⁶ Geoffrey Palmer, Prime Minister, Labour, 'New System for Treaty of Waitangi Claims' Press Statement, 14 December 1989, pp. 2-3.

⁷ Interview, Professor Sir Geoffrey Palmer, Professor of Law, Victoria University of Wellington, 29 June 1993.

Therefore, on the basis of both Palmer's use of 'the Crown' and his comments, there appears to be room for personal interpretation in determining the difference between 'Crown' and 'government' as well as when it is appropriate to use each of these terms. Further investigation is required into the interpretations of the Crown by other ministers in order to test these possibilities.

While the Crown proved a popular symbol with Palmer, the language of other ministers indicated that his enthusiasm was not universal. For example, Koro Wētere, former Minister of Māori Affairs for Labour, demonstrated a clear preference for the term 'government' in treaty discourse where Palmer might have used 'Crown'. For instance, Wētere said, 'the [Maori Affairs Restructuring] Bill provides for a true partnership between *Government* and Maori people',⁸ while Palmer had described the treaty partnership as being between *Crown* and Māori. On another occasion, Wētere referred to the treaty partners by indicating '*Government's* willingness to deal fairly and justly with Maori on issues arising from the Treaty of Waitangi.'⁹ In this case, Wētere failed to mention the Crown once in a two-page statement on the treaty settlement process.

There are many possible explanations for the difference between Palmer and Wētere's language which has only briefly been demonstrated here. First, it could be suggested that a cultural variable was at work here which distinguished Palmer's conception of the Crown, as a Pākehā, from that of Wētere's, as a Māori. The logic behind this suggestion is that Pākehā generally feel more comfortable interpreting contemporary government as the Crown because it is an acceptable British legal tradition to do so. Māori, on the other hand, resist drawing this parallel because 'the Crown' was specifically 'the Queen' under the Treaty of Waitangi, which should not be confused

⁸ Koro Wētere, Minister of Māori Affairs, Labour, Speech Notes, Second Reading of the Maori Affairs Restructuring Bill, Parliament Buildings, Wellington, 5 September 1989, p. 4.

⁹ Wētere, 'Minister Advocates decision of Ngati Paoa Land Claim', Press Statement, 13 March 1989, pp. 1-2.

with government in identifying the treaty partner. More is said on this later in the chapter (and again in Chapters Five and Seven).

However, the theory that cultural perspectives might play some part in determining ministers' language is challenged by the observation that James Bolger, National's Prime Minister, is typical of many Pākehā ministers from both National and Labour who seldom referred to the Crown in the ministerial statements studied. For example, in a speech made in honour of the Māori Queen, Bolger made no reference to the Crown at all, only the government in relation to the Treaty. His choice of words would indicate that, while cultural factors may be of some influence, other variables are also at work in determining a minister's language. A clue to the nature of this variable is found in considering the different symbolic message conveyed within Palmer and Bolger's statements. Palmer, as minister in a party which was advocating support of treaty issues, appropriately couched his policy statements in terms of 'the Crown' which symbolically acknowledged the place of the Treaty of Waitangi in New Zealand society. Bolger, on the other hand, as the leader of a party which has shown significantly less support for Māori issues (and attracts less electoral support from Māori) distanced himself from the Treaty by failing to engage in symbols such as 'the Crown' which surround it. The Crown, it is argued, symbolically signifies sympathy for and commitment to the Treaty because 'the Crown' is the treaty partner with the authority (and the obligation) to protect and uphold Māori rights.

Further analysis of ministers' language supports the theory that ministers are able to symbolically acknowledge the Treaty through reference to the Crown, but also forces some modification of the argument. It was observed that Douglas Graham, National's Minister of Justice and Minister in Charge of Treaty negotiations (also a trained lawyer), frequently used the Crown symbol in his political discourse relating to the Treaty. He said at one time, for example, that a deal between the Crown and the Māori

Congress 'establishes a process for the resolution of longstanding Treaty grievances in a way which is acceptable to the *Crown* and can offer hope to Maori.' He went on to say, 'both the *Crown* and the Congress have approached the negotiating process in an atmosphere of good will and today's signing is the result of understanding and co-operation.'¹⁰ At a later date, Graham released a statement about South Island pastoral leases, in which he advised that, 'the *Crown* has purchased ... two pastoral leases.' He explained, '[the] Ngai Tahu negotiating team advised the *Crown* that it had an interest in [the pastoral leases]. Ngai Tahu had asked the *Crown* to negotiate to buy the leases ... Accordingly, the *Crown* entered into negotiation...'¹¹

When questioned on his interpretation and use of the *Crown* in interview, Graham advised that he regarded the *Crown* as the sovereign and the Ministers of the Executive Council. However, he qualified this by saying that in matters Māori, the link is not to the government (which has inherited certain obligations under the Treaty) but to the *Crown*. The Minister acknowledged that a conceptual difference between *Crown* and government strongly influenced his choice of words in treaty debate. He explained that where immediate action was required on treaty issues, he would identify 'government' as the acting authority. However, he explained, when speaking of contractual arrangements between his Government and Māori he would refer to 'the *Crown*'. The Minister admitted that this was a difficult rule to maintain consistently but he also stressed that it was important that he be as consistent as possible because it would be inappropriate to belittle a significant development in treaty negotiations by identifying the treaty partners as Māori and government. Graham gave the impression, as Palmer had also done, that while the minister could see no significant difference between government and *Crown*, he was aware that the distinction was important to Māori. It should also be noted (in relation to the question raised in the previous

¹⁰ Douglas Graham, Minister of Justice, National, 'Crown and Maori Congress sign deal for Railcorp Land', Press Statement, 10 October 1991, pp. 1-2.

¹¹ Graham, 'Crown buys two South Island Pastoral Leases', Press Statement, 7 July 1992, p. 1.

chapter) that the Minister's comments indicate a conscious use of the Crown symbol in statements relating to the Treaty.

Graham also identified other ministers from the National Government directly involved in treaty negotiations who, he suggested, were equally aware of appropriate contexts for the terms 'Crown' and 'government'.¹² One of these ministers was Douglas Kidd, Minister of Māori Affairs for the National Government. When investigated, Kidd's language in ministerial statements also demonstrated an interesting and arguably conscious pattern of use of the Crown symbol. In a speech he made in 1992, Kidd said, 'I would like to begin by talking about the direction this *government* is heading with its policies on Maori issues.' The Minister proceeded to discuss his government's treaty policy by referring specifically to government and emphasising that 'the *Government* makes the decisions.'¹³ However, Kidd's choice of words changed with the statement, '[i]t is important to realise that the claims by Maori people are against the *Crown*. They seek redress from the *Crown*.'¹⁴ On another occasion, Kidd similarly said, '[o]ver the next twelve months the *Government* will be working with Te Puni Kokiri [Ministry of Māori Affairs] on the consolidation of a sound working relationship between Maori and the *Crown*.'¹⁵

Some important points emerge from this discussion. First, the difference between ministers who refer to Crown and those who refer to government may be a result of cultural and political variables. For instance, there is a possibility that Māori and Pākehā generally differ in their perception and use of Crown symbol; this being a cultural variable. Also, political variation appears to influence ministers' choice of

¹² Interview, Douglas Graham, Minister of Justice and Minister in Charge of Treaty Negotiations, Parliament Buildings, 10 August 1995.

¹³ Douglas Kidd, Minister of Maori Affairs, National, 'Speech to the National Party Dominion Conference', delivered on 8 August 1992, p. 5.

¹⁴ Kidd, Minister of Maori Affairs, National, National Party Dominion Conference, 8 August 1992, p. 6.

¹⁵ Te Puni Kōkiri/Ministry of Māori Development, *Maori Affairs Corporate Plan 1992-1993*, 'Statement by the Minister', Douglas Kidd, Minister for Māori Affairs, National, p. 4.

words depending on each minister's relationship with or support of treaty negotiations. In identifying these variables, it is argued that a combination of the two produced a Māori Labour Minister for Māori Affairs (Wētere) who seldom spoke of the Crown and, on the other hand, a Pākehā Minister of Treaty negotiations for the National Government (Graham) who actively engaged in Crown symbolism in treaty discourse. This discussion has helped to resolve a theoretical question raised in the previous chapter by demonstrating that some ministers were conscious of their language in treaty discourse. Graham in particular said in interview that he was conscious of appropriate contexts for Crown and government in making policy announcements. Moreover, the distinction he drew was very similar to the philosophical distinction identified in Chapter Two between Crown and government. Finally, while this discussion gave some indication of *who* uses the Crown it only partly addressed the question of *why* the Crown is used in ministerial statements. This matter is addressed in the next section of the discussion.

The Crown Symbol: Issues of Legitimacy

The previous chapter showed that there are a variety of functions for symbols in political discourse, several of which related to the legitimization of government action and authority. In particular it was suggested that governments can maintain legitimacy in the eyes of their public by using symbols which allow them to pay 'lip-service' to disadvantaged groups. Also, the argument was advanced that governments use symbols to represent the abstract, remote and extensive power of government as a tangible commodity. Finally, theorists suggested that publics were more likely to perceive their government as legitimate if the symbols the governments use reassured their collective fears and anxieties and provided reassurances from perceived threats. In this section of the chapter, the ministerial statements are surveyed for evidence that 'the Crown' fulfils some or any of these symbolic functions in treaty debate.

Theorists argue, as noted in the previous chapter, that symbolic language can be used to pay lip-service to groups which are not favoured by the policy process, thereby aiming to ensure the continued support of disadvantaged groups in a system which they believe acknowledges and supports their needs. In reviewing ministerial statements with this function in mind, it was observed that 'the Crown' is unique in its ability to reassure both sides of the treaty debate when used as a symbol for authority. For example, when Bill Jeffries, former Labour Minister of Justice, announced the settlement of a Māori grievance, he stated, '[t]he Crown accepts that ... the Waitomo claim is legitimate. ... However the Crown does not accept that all compulsory acquisitions of land were improper.' Jeffries then went on to outline claims which he said 'the Crown' will not entertain.¹⁶ While the Minister's statement was unfavourable for supporters of the Treaty, the Minister's language implied that the Crown's responsibilities and obligations under the Treaty of Waitangi had been acknowledged and accepted and that the Minister was sympathetic towards Māori grievances. Taking the opposite position, former Labour Prime Minister, David Lange, spoke in favour of the resolution of treaty grievances but at the same time appeased broader public concerns when he said, '[f]irst, we want to deal in a practical way with grievances between the Crown and Maori people which arise from the Treaty. ... [W]e must [also] ensure that this country's resources are managed in the interests of all New Zealanders.'¹⁷ In this case, Lange was able to emphasise the Crown's role as protector of the national interest in order to appease the wider public concern that the resolution of treaty grievances would ultimately mean non-Māori New Zealanders would lose access to the nation's resources. This 'ambiguity' or dual meaning of the Crown as treaty partner and guardian of the national interest which was also identified earlier in the discussion, is shown here to have allowed ministers to acknowledge and

¹⁶ Bill Jeffries, Minister of Justice, Labour, 'Waitomo settlement terms announced', Press Statement, 17 June, 1990, p. 1.

¹⁷ David Lange, Prime Minister, Labour, Address to the Wellington District Law Society Seminar, 'The Treaty of Waitangi', 23 June 1989, p. 5.

appease both sides of the treaty debate, possibly without alienating or isolating either faction.

It was also suggested in the previous chapter that symbols could be used by government to legitimise its actions by identifying an omnipresent threat or reassurance which was beyond the reach or influence of the public and to which the government was obliged to respond. This device was thought to allow government to avoid having its action or authority challenged. This abstract argument makes sense when the Crown is seen as an omnipresent reassurance. For example, in the *Principles for Crown Action* (see also Chapter Two) announced by Labour Prime Minister, David Lange, the Crown appeared as an omnipresent reassurance identifying government action. Lange stated:

The *government* has decided to set out the principles by which it will act when dealing with issues that arise from the Treaty of Waitangi. ... These *Crown* principles are to help the *government* make decisions about matters related to the Treaty. For instance, when the *Government* is considering recommendations from the Waitangi Tribunal.
[sic]¹⁸

It was explained in Chapter Two that the Labour Government created principles which would guide its treaty policy. Here, the question is raised; why were these called 'Crown' and not 'government' principles. In applying the argument from Chapter Three, the Government chose to identify these as Crown rather than government principles because the title 'Crown principles' creates the illusion that the principles have been authorised by the remote and omnipresent Crown and therefore are beyond the influence of the public. Also, the title Crown, as a reassuring symbol for the New Zealand public collectively, (and one which denotes public interest as demonstrated earlier with titles such as Crown land) distances the policy from the government (again as demonstrated with Crown entities in Chapter Two). If the principles had been

¹⁸ Department of Justice, *Principles for Crown Action on the Treaty of Waitangi*, Government Printer, Wellington, 1989, p. 1.

called 'Government Principles' it would have emphasised the influence of party politics in establishing the principles. In addition, the Crown title implies that it is not only the Labour Government, but the perpetual succession of governments thereafter, which will be guided by these principles. Finally, as the theorists also predicted, in using the popular Crown symbol, the 'Crown Principles' served to reinforce the status quo. For example, the first principle, 'the Principle of Government' stated that the Government has the right to govern and make laws which immediately reaffirms British sovereignty in New Zealand.

The final proposition raised in the previous chapter in relation to symbols and legitimacy was the notion that publics will more readily accept symbols which will emotionally engage them or play on their collective hopes and fears. Once again, this is an interesting suggestion in terms of the role of the Crown in ministers' statements. First it should be remembered that the negotiation of treaty issues has generated fear and tension amongst the New Zealand public as the claims process has progressed. However, as was suggested in the previous chapter, the Crown can provide reassurances for public fears, as for example in former Labour Prime Minister Palmer's assurance that there was 'clarity and certainty' about the criteria the *Crown* will use in dealing with treaty issues, which he assured 'people can take comfort in.'¹⁹ The Crown also frequently appeared in emotive policy statements by ministers which appeared to be providing reassurance for public hopes and fears. For instance, in an official publication it was noted, '[t]he *Crown* accepts a responsibility to provide a process for the resolution of grievances arising from the Treaty. ... If the *Crown* demonstrates commitment to this process of redress then it will expect reconciliation to result.'²⁰ On another occasion a minister similarly spoke of 'the extent of Maori interest which the *Crown* has promised to protect.'²¹

¹⁹ Geoffrey Palmer, Prime Minister, Labour, Address to the Wellington District Law Society, 'The Treaty of Waitangi: Constitutional and Procedural Issues', Speech Notes, 14 December 1989, p. 5.

²⁰ *Principles for Crown Action on the Treaty of Waitangi*, p. 15.

²¹ Jeffries, 'Claims negotiation process', Press Statement, 21 July 1990.

In addition to representing reassurances, the Crown symbol commonly appeared in association with other emotive and reassuring concepts such as 'power', 'commitment', 'promise', and 'protection'. These added to a picture of a trustworthy, responsible and moral Crown authority in control of treaty negotiations. The phrase 'the honour of the Crown', was also frequently used in the ministers' discourse as in Wētere's statement that, '[t]he obligations of the Treaty are binding on the *honour of the Crown*'.²² Both the symbol of the Crown and the words which surround it will, according to the theorists, be responsible for emotionally engaging the public and further enhancing their acceptance of a 'Crown' symbol, particularly in times of political or social instability. In requiring reassurance and in finding it in the symbol of the Crown, the public, theorists argue, is unlikely to question the legitimacy of the Crown's actions and authority because it appeases their concerns. Furthermore, the government is less likely to encounter resistance to its policies and actions when they are presented to the public in association with the Crown.

In considering these uses for the Crown symbol in attempting to legitimate government action under the Treaty, it is important not to underestimate the more general significance of legitimacy for New Zealand government in dealing with treaty issues. In the previous chapter it was briefly suggested that, while division caused by the Treaty could jeopardise a government's legitimacy in New Zealand, the Treaty itself challenges the authority of government by questioning the means by which authority was attained in New Zealand in the colony's earlier years. To explain this further, it should also be recalled that New Zealand has no written constitution (although several important Acts are entrenched). Therefore, the actions of the government in New Zealand will be judged not by their constitutionality as such, but rather by their legitimacy. That legitimacy, as also mentioned earlier, is determined

²² Wētere, 'Address to the Annual Confederation of Farmers on the Waitangi Tribunal', Speech Notes, 30 June 1989, p. 15.

largely by public perception.²³ In particular, attempts by the government to undertake constitutional reform will be predicated by a question of legitimacy which will require public condonation of the government's actions. If the impetus for reform has not come from the will of the majority, as was the case with treaty legislation introduced in the 1970s in New Zealand, then the government must seek legitimacy for its action elsewhere in convincing the public of its right to act. For reasons explained later, the Treaty of Waitangi presented the New Zealand government with the need for significant and urgent constitutional reform in the 1970s. The general public was not well educated on treaty matters and generally displayed little sympathy and even less support for calls to accommodate the Treaty in contemporary New Zealand society.²⁴ Denied the option of undertaking constitutional reform in the name of public interest, government was forced to look elsewhere for the legitimacy it needed to ensure its own stability. The evidence in this section has suggested that 'the Crown' symbol was an essential tool in the legitimisation of government actions and policies regarding the Treaty from 1988 to 1993. 'The Crown' symbol, it is argued here, has allowed government to recognise the Treaty, promote public interest, distance government from the Treaty and attempt to reassure collective fears.

Moreover, due to a curious ambiguity, the Crown's authority is commonly accepted by groups otherwise divided by the treaty debate. Consequently, the symbol remains popular and largely unchallenged in political discourse.²⁵ As was also explained briefly in the previous chapter, those who support the resolution of treaty grievances identify with the Crown as the original treaty partner, while those who reject the place of the Treaty in New Zealand society relate to the Crown as a symbol of the

²³ Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Oxford University Press, Auckland, 1991, p. 13.

²⁴ Statistics gathered as late as 1989, demonstrate a clear disapproval of treaty rights for Māori in New Zealand by a substantial proportion of the population. See, Hyam Gold & Alan Webster, *New Zealand Values Today. The Popular Report of the November 1989 New Zealand Study of Values*, Alpha Publications, Palmerston North, 1990, pp. 29-34.

²⁵ Here I am of course ignoring the arguments of republicans. See Chapter Ten of this thesis for more discussion on the republican debate in New Zealand.

supremacy of British sovereignty in New Zealand. In using 'the Crown' symbol, ministers were not only sending a message to Māori that the Treaty was acknowledged, but at the same time were sending a message to others seeking reassurance that absolute and indivisible sovereignty in New Zealand would continue to reside in the Pākehā system of government. However, in lending legitimacy to government actions, and as a result of its popularity, the Crown symbol is also argued to have created significant problems of consistency in ministers' statements in relation to the identity of the Crown.

The Crown Symbol: Problems of Consistency

The Crown has been identified as the trinity of Queen, Governor-General and Executive. In this section it is argued that, specifically because the Crown identity is able to lend legitimacy to authority and action with regard to treaty issues, ministers have applied the identity to a much greater range of individuals, groups and institutions than the trinity previously identified. It was possible for ministers to do this because, as established in the previous chapter, symbols do not require detail or consistency; they need only satisfy the public's understanding of the context in which they should appear. The many meanings of the Crown made possible by its symbolic function have, it is further argued here, served to extend and entrench the problem of identifying a single and consistent Crown treaty partner for Māori. In the ministerial statements examined the Crown identity was used in relation to government generally, individual ministers, individuals and groups outside of government, and, as in the mass media, something other than government (although exactly what was not specified).

In some instances (as was also found in mass communication) the term 'Crown' was used in combination with the term 'government' implying that the two terms are names for the same institution. For example, Bill Jeffries, former Labour Minister of Justice, stated that a letter had been sent to Tainui iwi which 'identifies the areas where the

Government is prepared to advance negotiations. ... Tainui have been told that funds will be available to enable Tainui to further negotiate with the *Crown*.²⁶ Similarly, Graham said, 'the *Government* and the [Maori] Congress have reached agreement on a procedure by which surplus Crown land held by Railcorp, would be disposed of while enabling Maori interests to be protected. ... [The agreement] represents the most comprehensive series of Treaty of Waitangi negotiations between *Crown* and Maori in the history of this country.'²⁷ In both these Ministers' statements, *Crown* and *Government* were presented as different names for the same institution. Using the *Crown* as a metonym for government in this manner also, it should be noted, lends legitimacy to the Ministers' statements (for reasons discussed earlier).

However, the function of the *Crown* symbol is complicated by a second observation that, in addition to using *Crown* as a metonym for government, other ministers' statements created the impression that *Crown* and government are two separate and distinct institutions which simultaneously exist in contemporary politics. This second use of the *Crown* also further demonstrates the *Crown*'s function in distancing both the public and the government from the remote power of the *Crown* (as also demonstrated in Chapter Two with the *Crown* health enterprises and *Crown* research institutes.) For example, in a press statement about the return of Hopuhopu Camp in the North Island to the Tainui iwi, Graham stated, '[i]n 1922 the Church acquired Hopuhopu from the *Crown*. ... *Cabinet* [has now] decided the *Crown* should acquire the property for return to Tainui.'²⁸ Whereas in other cases the distinction between *Cabinet* (or government) and the *Crown* was insignificant, here government and *Crown* were notably separate. Graham went on to say, '[j]ust over six weeks ago the *government* returned Hopuhopu military camp to Tainui as a gesture of goodwill on

²⁶ Jeffries, 'Tainui Settlement on Negotiations unexpected', Press Statement, on 13 June 1990.

²⁷ Graham, 'Government and Maori Congress historic agreement', Press Statement, 10 September 1991, p. 1.

²⁸ Graham, 'Hopuhopu Camp to be returned to Tainui', Press Statement, 31 August 1991.

the *Crown's* part.'²⁹ Once again, the use of the two terms here implies some difference between Crown and government. On another occasion Graham said, 'the *Crown* has been exploring innovative and bold ways of resolving Treaty grievances in line with this *government's* desire to resolve all major Treaty issues by the end of the century.'³⁰ Graham implied by this that the National Government was acting on the recommendations of the Crown, as something other than government. Later he commented, '*Cabinet* has provided resources to reimburse Tainui for past expenditure and to enable Tainui to continue to negotiate with the *Crown*.'³¹ Once again the Minister has managed to distance the government per se from the role of treaty negotiations by creating the impression that the Crown was something other than Cabinet. While it was earlier noted that Graham was conscious of the need to use Crown instead of government at times, these examples of his language indicate that this device gives the public the impression that a Crown identity, as something other than government, acts in relation to the Treaty. This was also well illustrated by Bill Jeffries comment that 'Cabinet had authorised the making of an offer to the Tainui Maori Trust Board. ... It was expected that representatives of Government and Tainui would discuss the Crown's offer.'³²

National's former Environment Minister, Simon Upton, similarly implied that Crown and government were two separate identities when he said, '[t]he [National] *Government* felt that the reference to the special relationship between the *Crown* and te iwi Maori might not be clearly enough expressed.'³³ He went on say, '[l]ocal authorities and the *Crown* must consider whether the purpose could best be met

²⁹ Graham, 'Launch of "Claims to the Waitangi Tribunal" by Prof. Bill Oliver', Speech Notes, 15 October 1991, pp. 2-4.

³⁰ Graham, 'Government to negotiate with Tainui', Press Statement, 27 October 1991.

³¹ Graham, 'Government to negotiate with Tainui', Press Statement, 27 October 1991.

³² Jeffries, 'Tainui Offer', Press Statement, 9 August 1990.

³³ Simon Upton, Minister for the Environment, National, 'Address to the New Zealand Planning Council', 22 May 1991, p. 5.

through the use of economic instruments.’³⁴ As Graham had done also, Upton managed to distance the National Government from the Treaty by naming both government and Crown in such a way as to distinguish them one from the other. Prime Minister Bolger even more explicitly distinguished between Crown and government when he said, ‘[treaty] grievances are matters between Maoridom and the *Crown*, and settlements must be reached between the appropriate representatives of Maoridom and the *Government*, which acts for the *Crown* and all citizens of the Nation.’³⁵ In noting his language on this occasion it will be recalled from earlier discussion that Bolger seldom referred to the Crown and when he did, he did so in such a way as to present it as difference from the National Government.

On other occasions, a third variation in the use of the Crown was identified. In this case, the Crown was left largely unqualified, and did not appear in reference to other institutions. For example, Jeffries stated that an agreement had been reached ‘between the *Crown* and the hapu of ... the Ngati Maniapoto’ but the Minister provided no explanation of what he meant by the Crown. According to Jeffries, representatives of the *Crown* and the tangata whenua were to attend a ceremony to acknowledge the agreement.³⁶ Not only did the Minister not clarify the Crown but he also kept some distance between the government and the negotiations which were to be conducted with ‘the Crown’. Later the Minister was able to deflect criticism that the *government* lacked commitment to the claims process by responding that ‘claims of tardiness on the part of the *Crown* were totally unjustified.’³⁷

In another example of the Crown’s identity being left unsubstantiated, former Labour Prime Minister, David Lange, announced at a press conference that it was time to

³⁴ Upton, ‘Address to the New Zealand Planning Council’, p. 8.

³⁵ James Bolger, Prime Minister, National, ‘Waitangi Day Celebrations’, Speech Notes, 6 February 1991, p. 4.

³⁶ Jeffries, ‘Waitomo settlement reached’, Press Statement, 1 June 1990.

³⁷ Jeffries, ‘Tainui criticism rejected’ Press Statement, 3 August 1990.

define how the *Crown* would approach the resolution of treaty issues. He said, 'it is quite wrong for *Crown* or Maori interests to be done on an ad hoc issue by issue basis. It's perfectly plain that Maori have a clear view of where they're headed. The *Crown* must have a clear view of where the *Crown* is headed.'³⁸ Palmer similarly said, 'I believe that what the government is doing in its legislation and before the Tribunal will provide us with a fair and equitable arrangement between the *Crown* and Maori.'³⁹ In both cases, this elusive Crown identity allowed the Ministers to theoretically discuss the Treaty without immediately implicating the government in the execution of those policies. In this case, the Crown fulfils, we assume from the context, its traditional role as an authority which sits above government and protects the public interest and in this case, carries out its obligations to Māori under the Treaty of Waitangi.

The function of the Crown in ministers' treaty discourse has been challenged in the past. For example, Graham's references to 'the Crown' in a speech attracted the attention of one critic who noted, 'the use of the term 'the Crown' emphasises the extent of Pakeha responsibility without threatening the actual individuals who did the dirty work.'⁴⁰ This observation supports the earlier suggestion that vague symbolic outlines such as the Crown are used by government to distance themselves from certain actions and events. While Graham has denied that he uses 'Crown' with this intention,⁴¹ his and other ministers' use of the Crown did simplify complex issues, therefore making them more accessible to the public. In doing so, the ministers further complicated the Crown's identity.

³⁸ Lange, Press Conference, (Post Cabinet), 3 August 1989, p. 4.

³⁹ Palmer, Prime Minister, Labour, Press Statement announced 19 September 1989, p. 3.

⁴⁰ Tim McCreanor, 'Settling grievances to deny sovereignty: Trade goods for the Year 2000' in *Sites* No. 27, Summer 1993, 45-73, p. 55.

⁴¹ Interview, Rt Hon. Douglas Graham, Minister in Charge of Treaty Negotiations and Minister of Justice, The Beehive, 9 August 1995.

In addition to these uses for the Crown in ministers' statements, the symbol also identified non-governmental representatives, which again can be seen to lend legitimacy to those representatives' actions and authority. Palmer has acknowledged how important it was that only those individuals with the appropriate authority act on treaty issues. He said, '[w]e want to move along in this [Treaty] process. So do most people. However, they also want to have the confidence that people with the appropriate political responsibility are making the decisions.'⁴² The 'correct authority' is easily demonstrated, it is argued here, by giving the individual or institution the 'Crown' title. For example, Palmer announced at one time that, 'Maori fishing negotiators, fishing industry representatives and *Crown* representatives met today to discuss a joint submission to the Parliamentary select committee which is considering the Maori Fisheries Bill ...'⁴³ These 'Crown' representatives were in fact the Chairman of the Human Rights Commission, the Executive Chairman of New Zealand Rail Corp, the Deputy Chairman of the Fishing Industry Board and the Associate Secretary to Treasury. While not the sovereign, the Governor-General or members of the Executive (as the traditional interpretation of the Crown), these representatives appeared to have legitimate authority to make decisions and take action on treaty matters because of their 'Crown' title. Palmer said that the process constituted the 'bringing together the of the Treaty partners to resolve a common problem to ensure the interests of both are given weight.'⁴⁴ In reality, the Crown had been reduced to four individuals from government agencies. This was, in this instance, the Crown treaty partner for Māori. If the public had been actively scrutinising the facts of the issue people might ask who these Crown representatives were. However, as a symbol used in its appropriate context, the Crown title would presumably escape people's attention, leaving only the impression that the appropriate authorities were acting.

⁴² Geoffrey Palmer, Prime Minister, Labour, 'Address to the Wellington District Law Society, "The Treaty of Waitangi, Constitutional and Procedural Issues", 14 December 1989, p. 10.

⁴³ Geoffrey Palmer, Deputy Prime Minister, 'Maori Fishing', Press Statement, 27 February 1989.

⁴⁴ Geoffrey Palmer, Deputy Prime Minister, Labour, Press Statement, 21 December 1987.

A final identity for the Crown according to ministerial use of the symbol was where the Crown was used to identify the actions, authority or opinions of one minister, as opposed to the Ministers of the Crown or the Executive collectively. For example, in a statement on Māori fisheries, Palmer said that Bill Jeffries, Minister of Justice, would 'assume the responsibility for conducting discussions with Maori where Maori and the *Crown* ... enter negotiations.' Palmer also stated that, 'Mr Jeffries will speak for the *Crown* on any outstanding issues related to the implementation of the Maori Fisheries Act.' He concluded, 'I have always said that the *Crown* prefers to negotiate rather than litigate.'⁴⁵ Similarly, Graham, announced in a press statement that he was to meet with Ngāi Tahu. Speaking 'for the Crown', Mr Graham announced that the two parties (Crown and Māori) have agreed to negotiate. This 'Crown' negotiating team was to comprise of the Minister of Justice, and the Chief Executives of the Departments of Justice and Conservation, the Treasury and Manatū Māori officials.⁴⁶ Once again, Mr Graham spoke for the Crown indicating, in this instance that Māori are negotiating with the Minister personally as their treaty partner.

This discussion of the Crown and the problem of consistency has demonstrated that because the concept of the Crown is a powerful and useful tool in legitimating authority in terms of the Treaty, it has been used in relation to a wide range of individuals, including ministers and non-government actors and institutions, including working parties, government, Cabinet and the Executive. In recalling the suggestion from the previous chapter that symbols can create their own reality for those publics which engage in them, the findings of this chapter suggest that the inconsistency in the Crown identity might create obstacles for the Māori in trying to negotiate with their Crown treaty partner. This and other implications arising from this discussion will be further considered.

⁴⁵ Geoffrey Palmer, Prime Minister, Labour, 'Maori Fisheries' Press Statement announced 28 February 1990, pp. 1-2.

⁴⁶ Graham, 'Ngai Tahu and the Crown to meet', Press Statement, 17 September 1991, pp. 1-2.

The Crown Symbol and Implications for Māori

This discussion has demonstrated that the Crown symbol appeals to diverse groups. It represents an omnipresent reassurance which attempts to appease public concerns while emotionally engaging the public in the issues and distancing government from the responsibilities and obligations of the Treaty. Furthermore, the Crown (as a result of the aforementioned qualities) can enhance the legitimacy of action and authority under the Treaty (when applied to a range of individuals and institutions) because it creates the impression that the entity with the appropriate authority under the Treaty (the Crown) is acting. It was also explained, in relation to legitimacy under the Treaty, that legitimacy was particularly critical in treaty negotiations because the government lacked popular mandate for its actions. As a result of both the popularity and wide application of the Crown symbol, the problem for Māori of finding a consistent identity for the Crown is magnified.

On the basis of this investigation and its findings some of the implications of symbolic communication by government identified in the previous chapter must be reemphasised. Theorists suggest that a symbol such as the Crown, when used often enough, will be accepted as a political reality for the publics who engage in its use. It is possible therefore, that the New Zealand public is failing to engage in active scrutiny and debate about the identity of the Crown and instead is passively accepting its appearance in the context of treaty discourse. Also, there is concern that the Crown, as a prevalent political symbol, has created obstacles to, or perhaps determined the nature of, future events. With these possibilities in mind, the second section of this thesis addresses the relationship between Māori and the Crown in New Zealand. Specifically, it focuses on the following themes. First, in contrast to the popular conception of the Crown how have Māori interpreted the Crown through time? Second, the effects upon Māori as the other treaty partner of the flexibility and ambiguity of the Crown symbol will be analysed. Third, it is considered whether the

popular interpretation of the Crown has created obstacles to the development of treaty debate from a Māori perspective. The investigation of these and other issues in the next section of the discussion reveals that the Crown poses not only problems of inconsistency for Māori, but also a problem of evolution.

SECTION TWO

The Problem of the Evolution of the Crown:

Māori and the Crown

*COLONISATION IN AOTEAROA: THE ARRIVAL AND SUBSEQUENT
'DISAPPEARANCE' OF THE CROWN*

The purpose of this second section of the thesis is to investigate the relationship between Māori and 'the Crown' since the signing of the Treaty of Waitangi in 1840. It is argued that, in addition to posing problems of consistency in a contemporary setting, the identity of the Crown has encountered problems of 'evolution' since 1840 which again have had serious implications for Māori. This historical investigation of the evolution of the Crown begins with the events surrounding the signing of the Treaty of Waitangi.

The symbol of the Crown has a long and interesting history in Aotearoa/New Zealand. Most notable is its ambiguity in the nineteenth century and its declining use in political discourse until the 1970s. The concept of 'the Crown' (as was established in Chapter One) was first officially introduced to Aotearoa on 6 February 1840 when the Treaty of Waitangi was signed by representatives of the British Crown and some Māori rangatira. In this chapter it is observed that the Crown had two possible interpretations in 1840. Māori interpreted 'the Crown' as the personal authority and mana¹ of Queen Victoria, while the British settlers understood 'the Crown' to be a symbol for the authority of the British state or more precisely the government. From 1840, the British interpretation of the Crown dominated New Zealand's constitutional development. Furthermore, from the turn of the century, and following the transfer of authority from the British Crown to responsible government in New Zealand, the Crown symbol practically 'disappeared' from political discourse. By the late 1960s, despite the fact

¹ Loosely translated the word 'mana' equates with the English concept of prestige. See the glossary at the back of this thesis for further elaboration.

that it had always been a part of New Zealand public law, 'the Crown' was seldom heard of in New Zealand's political discourse.

The Treaty of Waitangi: The Crown in 1840.

The Treaty of Waitangi is a significant and controversial document in New Zealand history. While acknowledging the depth and breadth of the issues surrounding the Treaty, discussion in this chapter is restricted to a description of its terms and a more detailed account of the role and identity of 'the Crown' in relation to the Treaty of Waitangi.²

Prior to 1840, Britain had made no official moves for territory or authority in Aotearoa.³ In fact, it has been noted that Britain seemed less than willing to be 'drawn too deeply into New Zealand's affairs.'⁴ However, some seventy years of contact between British and Māori in Aotearoa⁵ prior to the Treaty created responsibilities for the British Government in New Zealand with regard to the British migrants there.⁶ Also, there is evidence of several direct appeals to the British Crown from Māori leaders requesting 'the King's protection' from hostile forces before the Treaty had been drafted. For example on 3 October, 1831 a French naval vessel visited the shores of New Zealand and it was rumoured that it intended to annex the islands. Prior to the incident, several Māori rangatira had discussed the possibility of sending

² While focusing on the role of the Crown in the treaty process, it should be acknowledged that the identity 'Māori' came into use after the 1840s. Prior to the Treaty the Māori iwi did not attribute themselves with a national identity and Europeans called Māori New Zealanders. Claudia Orange, *An Illustrated History of the Treaty of Waitangi*, Allen and Unwin, Port Nicholson Press, Wellington 1990, p. 1.

³ Claudia Orange, *The Treaty of Waitangi*, Allen and Unwin, Port Nicholson Press, Wellington, 1987, p. 32. Also, J.B. Ringer, *An Introduction to New Zealand Government*, Hazard Press, Christchurch, 1991, p. 17.

⁴ Orange, *The Treaty of Waitangi*, p. 14

⁵ The name 'Aotearoa' as opposed to New Zealand is used here to indicate relations between British and Māori prior to the cession of governance to the British, whereby New Zealand became a British colony. For the rest of the thesis, the country is identified as 'New Zealand' while still recognising the significance of the names Aotearoa and Te Wai Pounamu (north and south islands respectively) in contemporary New Zealand society.

⁶ Orange, *The Treaty of Waitangi*, p. 8.

an appeal to the British King for protection for the Māori people. Even when the threat of French invasion appeared inconsequential, thirteen rangatira signed a petition to the King of England which acknowledged a special relationship between Māori and British in New Zealand and requested that the King become a 'friend and guardian of these islands' and preserve the Māori people from foreign threat.⁷

As foreign settlement increased in Aotearoa, the British acknowledged that Māori independence was diminishing.⁸ Apart from British immigrants, other nations were also represented in the settlers arriving in Aotearoa. For example, French settlement in Akaroa and the arrival of French Catholic Missionaries aroused further interest in New Zealand by the French. The United States also indicated an interest in New Zealand and its resources, and convicts escaping from Australia (at that time a penal colony) were finding a safe haven in New Zealand. The result of this mixed settlement was an increasing sense of 'lawlessness' in Aotearoa which lacked the control of a national government.⁹ However, despite competition from other nations, the British dominated the settlement process and British colonisation soon appeared inevitable. In recognising this fact themselves, the British considered it imperative that British and Māori interests in Aotearoa be reconciled.¹⁰ In March 1839, British officials declared that any action in Aotearoa should allow for the '[p]rotection of the Maori people and the introduction of self-government for the settlers.'¹¹ In August 1839, the British consul, Captain William Hobson, arrived in Aotearoa and became a critical figure in drafting a treaty apparently intended to secure British authority in Aotearoa and protect the needs and rights of the Māori people.

⁷ Orange, *The Treaty of Waitangi*, p. 11. The kings referred to here are King George IV (1820-1830) and King William IV (1830-1837).

⁸ Ringer, *New Zealand Government*, p. 18.

⁹ Waitangi Tribunal, *Kaituna River Report*, Department of Justice, Wellington, 1984, p. 12.

¹⁰ Orange, *The Treaty of Waitangi*, p. 27.

¹¹ Orange, *The Treaty of Waitangi*, p. 28.

Claudia Orange observes, the treaty Hobson drafted identified 'the Crown' as the appropriate authority in Britain to treat with the indigenous people of Aotearoa. In fact, the Treaty itself identified 'the Queen' as the appropriate authority with no reference to the Crown as such. However, the Treaty was presented to Māori in a manner which emphasised 'the Crown' as Queen Victoria (the newly crowned monarch). According to Orange, this was intended to diminish the impersonal nature of Crown authority in New Zealand.¹² As Lindsay Cox explains, Māori understood from the letter of the Treaty itself that the British Queen was a central, active figure in British politics. In addition, Cox contends, Māori were more familiar with the concept of the 'all-powerful sovereign' than with democratically elected parliament. It was certainly unlikely, he argues, that Māori appreciated that the actual 'law making and unmaking powers' which were to shape the colony's development rested with a group of elected representatives in Britain.¹³

The actual role of the British monarch in 1840 was in stark contrast to the myth created by the rhetoric which surrounded the Treaty and the Treaty text itself. It will be recalled from Chapter One that while the Crown was still a popular and prevalent symbol in post-seventeenth century Britain, politics itself was centred on parliament and the notion of a representative system rather than the sovereign.¹⁴ The Crown was, in short, an 'undeveloped and lifeless abstraction' at this time.¹⁵ It was also explained in Chapter One that during the nineteenth and twentieth centuries the monarchy survived because it became compatible with democratic government. It relinquished a great deal of its real authority to government and the monarch retained a largely symbolic role in Britain and the Commonwealth which was above party politics, as a

¹² Orange, *The Treaty of Waitangi*, p. 46.

¹³ Lindsay Cox, *Kotahitanga: The Search for Māori Political Unity*, Oxford University Press, Auckland, 1993, p. 4.

¹⁴ K. Dyson, *The State Tradition in Western Europe*, Martin Robertson Publications, Oxford, 1980, p. 39.

¹⁵ Dyson, *The State Tradition in Western Europe*, p. 43.

figure to unite all British citizens in common loyalty to their country.¹⁶ From 1830, the Crown retained the prerogative power to conduct the foreign affairs of the realm, to acquire new territory by way of conquest, usurpation, treaty or other means as an 'act of state' and to erect the institutions of government for newly acquired territory.¹⁷ Therefore, while the Treaty was written and New Zealand was colonised in the name of Her Majesty the Queen of England, in reality, the British Cabinet ruled Britain and the colonies.¹⁸

While Queen Victoria did much to restore the 'symbolic lustre' of the monarchy during her reign which began in 1837, the political function and constitutional role of the Crown had irrevocably changed by the time she gained the throne.¹⁹ In addition to this, while the British officials presenting the Treaty to Māori in 1840 may have been genuine in their symbolic reference to the love and protection of the Queen of England, they understood that the Crown's authority would, in all practical terms, be exercised by the British Government. While there is little evidence that this complication in the Crown's identity was conveyed to Māori, this chapter discusses some of the attempts by British officials to associate the Queen with the Treaty (see discussion later in the chapter). As a result, Māori accepted the British at their word and chose to treat with the noble Queen.

Had Māori been aware of the involvement of government in the Treaty, there seems every likelihood that they would have insisted that their agreement be made with the Queen instead. The reason for this is that the Queen has certain qualities which appealed to Māori rangatira which other possible treaty partners, such as government, did not exhibit. The first of these is the similarity between the British monarchy and

¹⁶ Andre Mathiot, *The British Political System*, The Hogarth Press, London, 1958, pp. 262-263.

¹⁷ Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Oxford University Press, Auckland, 1991, p. 22.

¹⁸ Eugene C Black (ed.), *British Politics in the Nineteenth Century*, Macmillan, London, 1970, p. 31.

¹⁹ Black, *British Politics in the Nineteenth Century*, p. 32.

patterns of Māori leadership at the time of the Treaty. As Api Mahuika explains, traditional Māori leadership was similar to the royal succession in Britain in that it was often determined by primogeniture (leadership passed on to the first born male in each generation or to the first born female as a 'male-substitute').²⁰ For Māori however, chieftainship was also a birthright expressed through the function of active leadership. Even for hapū which demonstrated variations on male centred leadership, the concepts of chieftainship and leadership were inseparable. Māori would naturally have assumed similar conditions for the rule of the British monarchy. Unfortunately, as we have seen, this was not an accurate assumption because the British Queen, while a 'chief' in many respects, was not an active authority in British politics.

In assuming active leadership, Māori also anticipated that the Queen would rule in order to increase her personal prestige. Again, this expectation may be linked to the fact that Māori rangatira were 'imbued with the qualities of mana and tapu [personal sanctity] by reason of their exalted birth.'²¹ While Māori believed that a person's mana was largely inherited, it could also be increased by personal achievements in leadership²² and presumably reduced by dishonourable conduct. Also, leadership for Māori was a lifelong commitment based on personal integrity.²³ Therefore, in signing the Treaty with the Queen of England, Māori may have been confident that Her Majesty would honour the Treaty in order to maintain and increase her 'mana' in the eyes of her people. As Anne Salmond notes, '[g]iven that the Treaty was presented to the Chiefs as a personal transaction between themselves and the Queen of England, it must have been difficult for them to imagine that she would allow her mana to be compromised.'²⁴

²⁰ Api Mahuika, 'Leadership: Inherited and Achieved', in M. King (ed.), *Te Ao Hurihuri: The World Moves On*, Hicks Smith and Sons, Wellington, 1975, p. 86.

²¹ Mahuika, 'Leadership: Inherited and Achieved', pp. 88-89.

²² Mahuika, 'Leadership: Inherited and Achieved', p. 90.

²³ Raj Vasil, *What Do Māori Want? New Māori Political Perspectives*, Random Century Press, Auckland, 1990, p. 77.

²⁴ Anne Salmond, 'Treaty Meanings', *Wai* 45, Doc. F19, p. 9.

Second, the Queen might also have appealed to Māori as a treaty partner because of certain political principles. As Professor James Ritchie explains, these include face-to-face [kanohi ki te kanohi] discussion or confrontation, structured direct speaking, (whai kōrero) and the opportunity for negotiation between equals until a matter is resolved.²⁵ A treaty with 'the Queen' would have appealed to Māori rangatira because they believed they were establishing a personal relationship with a leader of equal status who had the mana to uphold and protect the sacred nature of the agreement being created. Furthermore, the Queen could be personally identified and approached in times of crisis and met with face to face, on an equal footing, until the matter could be resolved. Had Māori known that the Queen was not a rangatira as Māori understood the concept, and that in practical terms the Treaty would be dependent on the rule of representatives in Britain and eventually in New Zealand, the Treaty might not have been agreed to on any terms.

At the meeting of Māori and British at Waitangi on 6 February 1840, Captain Hobson explained that the purpose of the meeting was to inform rangatira of the 'Queen's' intentions in New Zealand and to establish a treaty agreement between Māori and the Queen. He described the proposed treaty as an 'act of love towards [Māori] on the part of the Queen.'²⁶ Hobson emphasised that the Queen was motivated by her concern for Māori and British welfare in New Zealand, and that the Treaty was an acknowledgment of Māori requests for her protection. The Treaty of Waitangi was signed on that day by the Queen's representatives and a significant number of rangatira from iwi and hapū across New Zealand. It was then taken around the country in an attempt to secure the signatures of those rangatira not present at

²⁵ Interview, Professor James Ritchie, Waikato University, 4 June 1993.

²⁶ Orange, *The Treaty of Waitangi*, p. 45.

Waitangi. During this process, according to Orange, the image of the 'personalised caring Queen' was again predominant.²⁷

The Treaty of Waitangi itself is a short and deceptively simple document.²⁸ For the purpose of later discussion it is important to consider the rights and obligations conferred to Māori and Her Majesty, the Queen of England, under the Treaty. There are also critical differences between the Māori and English texts of the Treaty which ought to be recognised.

The preamble to the Treaty in the English text explains that Her Majesty Queen Victoria wishes to establish a settled form of Civil Government in order to protect Māori 'Rights and Property.' The Māori text also spoke of 'government' (kāwanatanga) under Queen Victoria which would preserve Māori 'chieftainship and their land.' This notion of protection was to become crucial for Māori throughout New Zealand history as Māori sought redress from the Queen for alleged grievances by government. Even today, Māori speak of the need for protection from government as a treaty right.

In the first Article of the Treaty (in English), Māori cede 'absolutely and without reservation all the rights and powers of sovereignty' to Her Majesty the Queen of England. In the Māori version, this concept of 'sovereignty' is reduced to Māori ceding only 'kāwanatanga' or 'governance' to Her Majesty. The second Article of the Treaty states in English, that Māori will retain 'full, exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties', while the Queen retains the exclusive right of pre-emption over these possessions. In Māori, this notion of 'possession' was extended to one of chieftainship or 'tino rangatiratanga', indicating the essential elements of sovereignty and autonomy. It is

²⁷ Orange, *The Treaty of Waitangi*, p. 56.

²⁸ See Appendix A. The versions of the Treaty supplied in this Appendix and referred to here are those found in: Orange, *The Treaty of Waitangi*, pp. 257-259.

the relationship between these two articles of the Treaty which has been the basis of the injustice suffered by Māori as subsequent governments failed to protect Māori sovereignty and assumed control of Māori resources such as land. More detail is provided on this process in the final section of this chapter.

The significance of the third Article of the Treaty is often overlooked. In the English version, 'Her Majesty extends to the Native of New Zealand Her Royal protection' and the rights and privileges of British citizens.' A similar idea is conveyed in the Māori text.²⁹ From the third Article it is understood that Māori and Pākehā settlers would live as equal citizens under the Queen. However, many Māori rangatira (as later discussion demonstrates) saw themselves not under monarchical rule but equal to it in a partnership of trust and goodwill with the Queen. However, such a relationship between Māori and the Queen, as will shortly be revealed, was problematic for Māori from the outset.

Before moving on from discussion of the treaty text it should be recognised that, through the passage of time, many aspects of the Treaty have proved highly contentious. The questions of British intent in drafting the Treaty and Māori understanding of the Treaty are still debated today. So too are appropriate interpretations for the words 'tino rangatiratanga' and 'kāwanatanga' in the Māori texts which provide the basis for contemporary claims for Māori sovereignty in New Zealand. However, despite these and so many other disputes, one tentative conclusion can be made from which this discussion: that Māori and Pākehā representatives who signed the Treaty in 1840 agreed that with the Treaty of Waitangi, Her Majesty the Queen of England could govern New Zealand and extend her protection to the Māori

²⁹ E.T. Durie explains that the Māori text guaranteed Māori their own tikanga (roughly translated as 'rules') as the English were guaranteed theirs. This can be seen as the legitimate basis for a separate legal system for Māori. See, Chief Judge E.T. Durie, 'Justice, Biculturalism and the Politics of Law', in Wilson et al. (eds.) *Justice and Identity. Antipodean Practices*, Bridget Williams Books, Wellington, 1995, p. 34.

people. In this respect the Treaty marks the beginning of 'Crown' government in Aotearoa.

Almost immediately following the signing of the Treaty it became apparent from a Māori perspective that the relationship between their people and the Crown was not developing in accordance with Māori expectations. In particular, the relationship between Māori and the Queen of England was proving problematic. In hindsight it is evident that the British intention in drafting the Treaty was that the authority of the British Crown in New Zealand would be transferred to the settler government as soon as was practicable. Therefore, soon after the Treaty was signed, a gradual transition away from rule by the British Crown towards responsible settler government in New Zealand began. This transition was based on an entirely different interpretation of the meaning of the Crown to that held by Māori and was to have serious implications for Māori in trying to maintain and encourage relations with the Queen as their treaty partner. On a practical level the qualities of the Queen most attractive to Māori could not easily be translated on to the institution of government as it developed in New Zealand. Also, it was problematic and offensive for Māori to have to deal with an institution in a constant state of flux when dealing with its treaty partner. On a more philosophical level, the transition from Queen to settler government represented a fundamental change in the treaty partner not agreed to by Māori. Further compounding this fact was the problem that increasingly powerful settler governments (who were not treaty signatories) emphasised their right to govern in Aotearoa under Article I without upholding the Queen's duty to protect Māori tino rangatiratanga under Article II of the Treaty. In short, this process demonstrates the first 'evolution' in the identity of the Crown.

The Evolving Crown: The Development of Responsible Government

The development of responsible government in New Zealand after 1840, which marked this transition from 'Queen' to settler government, happened in three stages.

The first stage was direct British rule in Aotearoa through British representatives from 1840 to 1852. Second, from 1852, partly representative settler government was established which was still accountable to British authority. Finally, after 1856 'responsible' settler government was established which was independent from British influence and, after 1863, settler government was accountable to voters in New Zealand on all matters including Māori affairs. At the same time as the independence of the settler government was increasing, the authority of the British Crown (as either Queen or government) in New Zealand was being reduced. This was a time of great confusion and anxiety for Māori who were forced to adjust to a change in the identity of their treaty partner. Most distressing for them with this transition, was the apparent lack of interest and dishonour of settler governments with regard to the Queen's Article II obligations.

In May 1840, following the signing of the Treaty, New Zealand became a dependency of the Crown Colony of New South Wales under its Lieutenant-Governor. On 24 May, 1840 the first session of the legislative council in New Zealand was held and British law was temporarily brought into operation while laws suitable to New Zealand were prepared.³⁰ On 16 November, 1840 New Zealand became a separate Crown Colony from New South Wales by charter with a governor and a legislative council nominated from Britain.³¹ At around the same time Captain William Hobson framed 'The Constitution of 1840', a lengthy document of sixty-three clauses relating to the establishment of the colony which provided guidance for the legislative council.³² As J.B. Ringer says, 'Hobson and his successors administered the new colony in the name of Queen Victoria, but in practice were responsible to the Colonial Office in London.'³³ Up until 1852, the Crown Colony of New Zealand was

³⁰ J. Hight, *The Constitutional History and Law of New Zealand*, Whitcomb and Tombs, Christchurch, 1914, p. 158.

³¹ Hight, *The Constitutional History and Law of New Zealand*, p. 381.

³² Hight, *The Constitutional History and Law of New Zealand*, p. 150.

³³ Ringer, *An Introduction to New Zealand Government*, p. 19.

governed by Hobson's Constitution of 1840. During this time there was an increasing desire amongst the 12,000 colonists for representative government in New Zealand.³⁴ There was a strong feeling that the 'irksome constitution of the Crown Colony should be replaced.'³⁵

This desire for independent government was apparently not shared by Māori, many of whom insisted that they would have no dealings with either the governor or the government and who would not acknowledge their authority, as these representatives had not signed the Treaty.³⁶ In 1845, the newly appointed Governor, George Grey, managed in part to resolve this challenge to British authority in New Zealand, by reiterating the promises of the Treaty in meetings with prominent rangatira. Despite this, one Māori leader from the north, Hone Heke, held fast to his conviction that the British settlers intended to take Māori land despite the honour of the 'Queen's Treaty'.³⁷ In 1849, just before he died, Heke wrote directly to Queen Victoria recalling the 'conversation' of the Treaty and appealing to her to leave New Zealand in Māori ownership. At around the same time another prominent leader, Te Wherowhero from the Waikato, presented Grey with a letter for the Queen which requested reassurance from Her Majesty that the actions and authority of the Governor were legitimate.³⁸

As these incidents indicate, this was a time of unrest for Māori, who saw the authority of government in Aotearoa as a threat to the status of the Treaty and the rights of the Māori people. There are numerous accounts of British officials reassuring Māori that the Treaty was a compact between the Queen and the Māori people, which created a

³⁴ Hight, *The Constitutional History and Law of New Zealand*, p. 157.

³⁵ Hight, *The Constitutional History and Law of New Zealand*, p. 195.

³⁶ Orange, *The Treaty of Waitangi*, p. 110.

³⁷ Orange, *The Treaty of Waitangi*, p. 125.

³⁸ Orange, *The Treaty of Waitangi*, p. 128.

special relationship with governors as 'paternal figures'.³⁹ As Claudia Orange notes, this 'special relationship' and the unrealistic notion of benevolent government presented to Māori, effectively left them 'ill-equipped to cope with the impersonal and rigorous nature of executive and legislative branches of government.'⁴⁰

Despite Māori resistance to the loss of British (essentially monarchical) authority in Aotearoa, the Crown Colony was granted a representative constitution by the British Government under the 'New Zealand Constitution Act 1852'.⁴¹ This was a critical step in New Zealand's emancipation from the British colonial office. One writer has recently gone so far as to argue that the 1852 Act 'declared that Treaty rights disappeared legislatively, because the Treaty was signed between Britain and the chiefs and was not now binding on the new settler government.'⁴² The British Crown, however, retained substantial prerogative rights under the 1852 Act. For example, the governor (a British Official) could assent to or refuse Acts for consideration by Her Majesty and 'the Crown' (in Britain) retained the right of pre-emption over native lands.⁴³ Despite increasing concessions to the settler colony, the British still considered it 'the duty of the Crown to uphold those vague but powerful rights and privileges of the Maori people as against the aspirations of the colonisers.'⁴⁴

Under the Act of 1852, a two-tier parliament was created with a supreme legislature and a series of six subordinate provincial councils.⁴⁵ In 1853, elections were held for the provincial councils and in 1854, the first national elections took place with the first

³⁹ Mark Francis, *Governors and Settlers: Images of Authority in the British Colonies, 1820-60*, Canterbury University Press, New Zealand, 1992, pp. 189-213.

⁴⁰ Orange, *The Treaty of Waitangi*, p. 132.

⁴¹ For detail on the structures established by the Act see: Cox, *Kotahitanga*, pp. 34-37.

⁴² Hiwi Tauroa, *Healing the Breach. A Māori Perspective on the Treaty of Waitangi*, Collins, Auckland, 1989, p. 40.

⁴³ Orange, *The Treaty of Waitangi*, pp. 262-264.

⁴⁴ A.H. McLintock, *Crown Colony Government in New Zealand*, Government Printer, Wellington, 1958, p. 53.

⁴⁵ Cox, *Kotahitanga*, p. 35.

New Zealand parliament formally opening on 27 May, 1854.⁴⁶ As B.C Gustafson explains, in a representative (as opposed to responsible) government the legislature is elected but has no control over the executive branch which actually governs the country. According to Gustafson, '[Executive] Ministers are appointed by and answerable only to the Crown [as the Queen] or, in the case of early New Zealand, the Crown's representative, the Governor.'⁴⁷ As a result there was often conflict between the legislature, elected by the people⁴⁸ and the executive, which was chosen by the Crown and responsible only to it.⁴⁹ For example under Henry Sewell in 1856, Māori policy was considered an 'imperial matter' outside the competence of the colonial legislature. According to Margaret Wilson, the colonists continued to push Britain for domestic control over native affairs in order to get hold of Māori land.⁵⁰ Despite their efforts, the governor continued to decide Māori policies according to ministerial advice from British representatives, a practice strongly resented by elected representatives in New Zealand.⁵¹

When Governor Grey ended his first governorship in 1853, the Treaty was still being promoted as a special link between Māori and the Queen.⁵² However, it was becoming increasingly difficult for Māori themselves to reconcile government actions with the Queen's obligations. Settler government seemed to be representing interests which were opposed to those of the Māori people and which could not be easily

⁴⁶ Ringer, *An Introduction to New Zealand Government*, p. 20.

⁴⁷ B.S. Gustafson, *Constitutional Changes Since 1870*, Heinemann Educational Books, Auckland, 1969, p. 1.

⁴⁸ In 1854, voting was restricted to all European males who could read and write with property valuing over £30, or Māori with property valuing over £200. Report of the Royal Commission on the Electoral System. *Towards a Better Democracy*. December 1986, Appendix A-10. Māori were effectively disenfranchised by these requirements. Their land was communally owned so they could neither vote nor stand for election. See Tauroa, *Healing the Breach*, p. 40.

⁴⁹ Hight, *Constitutional History and Law of New Zealand*, p. 274.

⁵⁰ Margaret Wilson, 'Constitutional Recognition of the Treaty of Waitangi: Myth or Reality?' in Wilson and Yeatman (eds.), *Justice and Identity. Antipodean Practices*, Bridget Williams Books, Wellington, 1995, p. 8.

⁵¹ B. Bowden, *Parliament and the People; The New Zealand Constitution and How it Developed*, Government Printer, Wellington, 1984, p. 32.

⁵² Orange, *The Treaty of Waitangi*, p. 136.

reconciled with the terms of the Treaty. Consequently, throughout the 1850s, there was 'an occasional Maori appeal to the Queen for redress of grievances - the first trickle of what would later become a steady flow of Maori protest based on treaty rights.'⁵³ Māori also moved to organise politically to protect themselves from this change in the identity of their treaty partner. For example, through the Māori King Movement, founded in 1858, northern Māori tribes selected a common king and banded together to protect Māori independence and slow the loss of Māori land.⁵⁴ Peter Cleave suggests that the movement developed partly as a rejection of the way the term 'the Crown' was being used by the British in the 1850s, although he does not elaborate on this statement.⁵⁵

In 1856, the Constitution Act was amended to allow for the establishment of responsible government in New Zealand, again qualified by the continued right of the British government to control native affairs, amongst other things.⁵⁶ According to Gustafson, 'responsible government' meant the king and/or governor became a figurehead without any real political power who will conventionally act on the advice of New Zealand ministers.⁵⁷ The implications of the monarchy being a symbolic figurehead were particularly serious for Māori when coupled with the settler governments' ongoing failure to uphold and protect Māori rights under Article II of the Treaty.

From 1856 to 1876 there was vigorous expansion and growth of material prosperity in New Zealand. By 1858 Māori were numerically dominated by the increasing Pākehā

⁵³ Orange, *The Treaty of Waitangi*, p. 141.

⁵⁴ Belich, 'The Governors and the Māori', pp. 87-88.

⁵⁵ Peter Cleave, *The Sovereignty Game: Power, Knowledge and Reading the Treaty*, Institute of Policy Studies, Wellington, 1989, p. 51.

⁵⁶ Leicester Webb, *Government in New Zealand*, Department of Internal Affairs, Wellington, 1940, p. 7.

⁵⁷ Gustafson, *Constitutional Changes Since 1870*, p. 2.

population.⁵⁸ While 'the Queen's' sovereignty prevailed, there was still support from the majority Pākehā population for further separation of the colony from British authority.⁵⁹ Once again, due to their own interpretations of the appropriate identity of the Crown, many Māori were expressing disapproval and confusion over the shift in power which was taking place. In 1863, apparently due to the cost of the Land Wars,⁶⁰ the independent New Zealand legislature was granted responsibility for Māori affairs.⁶¹ Māori protests against government action and control of Māori affairs increased. For example, in 1865 and 1866, Wiremu Tamihana Tarapipipi of the Waikato petitioned the New Zealand parliament and the Queen appealing that the 'Queen's mana' be reasserted and that Māori land, mana and chieftainship be consequently restored.⁶² This and other similar appeals were to no avail. By 1870 the British Crown had withdrawn completely from native affairs and land management in New Zealand.⁶³

From 1891 to 1912, described as the 'Liberal Era', the identity of the ruling authority in New Zealand was further complicated by the introduction of party politics. In 1891 the Liberals became the first party government under Premier John Ballance.⁶⁴ For Māori, the possibility that power could be handed back and forth over the years between competing political parties was completely contrary to the concept of the constant authority and protection of the Queen initially envisaged and agreed to by them under the terms of the Treaty. It was small compensation for Māori that Richard

⁵⁸ M.P.K. Sorrenson, 'Modern Māori: The Young Māori Party to Mana Motuhake', in Keith Sinclair (ed.) *The Oxford Illustrated History of New Zealand*, Oxford University Press, Oxford, 1993, p. 323.

⁵⁹ Orange, *The Treaty of Waitangi*, p. 286.

⁶⁰ The Land Wars were fought between northern Māori and the British. For further discussion see: Ringer, *New Zealand Government*, p. 31, and James Belich, 'The Governors and the Māori', in Sinclair (ed.) *New Zealand History*, pp. 89-93.

⁶¹ Gustafson, *Constitutional Changes Since 1870*, p. 3.

⁶² Orange, *The Treaty of Waitangi*, p. 180.

⁶³ Bowden, *Parliament and the People*, p. 32.

⁶⁴ David Hamer, 'Centralization and Nationalism (1891-1912)', in Sinclair (ed.), *History of New Zealand*, p. 125.

Seddon, Premier from 1893 to 1906, encouraged a dominant role for central government (as opposed to regional government) which was at least compatible with the concept of central 'Crown' authority.⁶⁵

According to Claudia Orange, it was some time before Māori fully comprehended the implications of the transfer of power from the British Crown to the New Zealand government. She comments that '[i]t was inconceivable to them [Māori] that both the Queen and her parliament had washed their hands of the Waitangi covenant. But they had.'⁶⁶ Despite the impossibility of the situation and ignoring the increasing authority of the settler government, Māori turned their energies in the 1880s towards appealing directly to the Queen in England in order to test 'the Crown's' long-held promise of protection and to secure Māori autonomy and future interests.⁶⁷ Two Māori deputations, one from Ngāpuhi and another which included Tawhiao, the Māori King from the Waikato, made their way to England in the 1880s seeking audience with the Monarch as their true treaty partner.⁶⁸ It appeared that some forty years after the Treaty had been signed, Maori had maintained an image of the Queen as the Crown treaty partner.

While neither claim was successful, they both attracted a great deal of public attention. The first petition maintained that the sole authority under with the Treaty of Waitangi was vested in the Queen of England. The deputation requested that Her Majesty appoint a 'Royal English Commission' to investigate and rectify the laws created by the settler government which contravened the Treaty. The issue of land confiscations

⁶⁵ David Hamer, 'Centralization and Nationalism (1891-1912)', pp. 126-128. The Crown identity was to be redefined to incorporate local government after the late 1980s with the Local Government Reforms and the Resource Management 1991. See Chapter Seven.

⁶⁶ Orange, *The Treaty of Waitangi*, p. 184.

⁶⁷ Orange, *The Treaty of Waitangi*, p. 204.

⁶⁸ Orange, *The Treaty of Waitangi*, p. 205; also see Chapter 10 'The struggle for Autonomy' pp. 205-225.

and Māori representation were also raised.⁶⁹ However, the British official hearing the deputation denied any responsibility on the part of the British Crown and pointed out that the British Crown no longer had a right to interfere in New Zealand's internal affairs.⁷⁰

The second deputation led by the Māori King asked the Queen to consider a separate Māori parliament under section 71 of the Constitution Act 1852⁷¹ (which allowed Māori districts to govern themselves). According to Cox, the Māori King assumed that Queen Victoria, his treaty partner would meet with him 'kanohi ki te kanohi'. '[I]t was seen as appropriate that the two monarchs should meet face to face, to resolve the difficulties between their peoples.'⁷² However, the Māori delegates were refused audience with Her Majesty. The deputation was instead interviewed by the Secretary of State for the Colonies who informed them that Britain could play no part in colonial affairs which were now the responsibility of the colonial government.⁷³

Appeals to 'the Crown' in England by Māori leaders continued after the turn of the century, but seemed to lack the support they had earlier enjoyed. In 1909, a petition was drafted to be forwarded to England by the Governor, but a new generation of younger Māori leaders seemed unwilling to back the appeal.⁷⁴ Evidence of appeals to the British Crown is increasingly scarce from this time on, while government action contravening the terms of the Treaty is increasingly apparent.

⁶⁹ Orange, *The Treaty of Waitangi*, p. 206.

⁷⁰ Orange, *The Treaty of Waitangi*, p. 207.

⁷¹ Cox, *Kotahitanga*, p. 57.

⁷² Cox, *Kotahitanga*, p. 58.

⁷³ Cox, *Kotahitanga*, p. 58.

⁷⁴ Orange, *The Treaty of Waitangi*, pp. 227-228.

On 25 September, 1907 New Zealand became a self-governing Dominion,⁷⁵ as a climax to growing colonial nationalism evident in New Zealand, as in other British colonies. According to Gustafson, at this point New Zealand was still a long way from being a sovereign state. Indeed, in 1914, when Britain declared war, the Dominions were automatically implicated.⁷⁶ However, following the end of the first world war, New Zealand enjoyed further diplomatic independence from Britain by signing the peace treaty on its own behalf.⁷⁷ Later, the Statute of Westminster Act 1931 was passed by the British Parliament and gave those Dominion parliaments which chose to adopt the Act independent control of their entire legislative process. New Zealand was initially unwilling to adopt the Act due to defence and economic ties with the 'mother' country. However, when it eventually did so in 1947, the New Zealand government gained *full* legislative power from Britain. From this point, the New Zealand Parliament was supreme.⁷⁸ Much later, the Constitution Act 1986, severed a last tie with Britain when it replaced the New Zealand Constitution Act 1852 of the Parliament of the United Kingdom.⁷⁹

It has been argued in this discussion that Māori were encouraged to believe that the Queen was a British rangatira who would personally protect the taonga (treasures) and tino rangatiratanga of the Māori people. In reality, the Queen's authority was exercised by British and subsequently New Zealand governments. The symbol of the Crown played a critical role in linking the transition of power between the Queen, the British government and New Zealand governments. As it had earlier done in Britain when authority was transferred from monarch to representative, the Crown created an impression of an undisturbed exercise of power in New Zealand and a natural and

⁷⁵ Hight, *Constitutional History and Law of New Zealand*, p. 381.

⁷⁶ Gustafson, *Constitutional Changes Since 1870*, p. 4.

⁷⁷ Gustafson, *Constitutional Changes Since 1870*, p. 5.

⁷⁸ Gustafson, *Constitutional Changes Since 1870*, p. 7.

⁷⁹ Paul Harris and Stephen Levine (eds.), *The New Zealand Politics Source Book*, 2nd Edn., Dunmore Press, Palmerston North, 1994, p. 38.

legitimate transfer of authority from Queen, to British government to settler government. While this may be true from the perspective of the British constitution, for Māori, the shift from Queen to government created tremendous disruption by forcing them to adjust to a change in the identity of their treaty partner which was neither explained in the Treaty or subsequently agreed to by Māori.

In recounting the events following the signing of the Treaty, this discussion has demonstrated also that the Crown symbol flourished in New Zealand (again as it had done in Britain) during a time of constitutional instability and transition. However, as settler government in New Zealand became established the Treaty was further marginalised, and the Crown symbol shifted into a state of 'hibernation' and remained in this dormant state for around forty-five years. The next section provides evidence of this 'disappearance' of the Crown and considers the reasons for this.

The 'Dormant Crown': The Political Agenda Pre-1975.

The purpose of the final section of this chapter, is to demonstrate that the Crown symbol was not frequently used in political discourse prior to a renaissance of the Treaty in the mid 1970s (discussed in Chapter Six). This is also an interesting argument in relation to the frequent use of the symbol by the 1980s, demonstrated in Chapter Two of this thesis. The investigation of the use of the Crown in the mass media prior to 1975 which is summarised below, was not required to be as comprehensive as the investigation of the mass media in the 1980s, because its purpose was to discover whether the Crown was absent or present in media texts, rather than to analyse the symbol's use. The source was the newspaper collection at Auckland University; more specifically the Māori Affairs files from 1965, 1969 and 1975.⁸⁰ As was previously the case with Index New Zealand, the content of

⁸⁰ The clippings kept in the newspaper archives were predominantly from two Auckland newspapers *The Herald* and the *Auckland Star*. Ideally, the kind of investigation carried out through the Index New Zealand database would have provided a better source for longitudinal analysis, however, INNZ does not extend back prior to 1985. Therefore, in the interests of time, certain years were selected for

Auckland's files was subject to the discretion of the individuals selecting the material over the years. However, the data available was certainly substantial enough for the purposes of this inquiry.

The investigation demonstrated two things. First, the mass media reports indicate that the political agenda was at this time dominated by assimilationist policies which rejected the Treaty and second, such policies correlate with a noticeable absence of references to 'the Crown'. In the mid sixties and early seventies, 'the Crown' was a dormant political symbol. Before discussing this, some understanding of events leading up to the changes in the 1970s is required.

Restrictions of time and space do not allow for detailed discussion of the process from 1840 to 1975 which undermined the place of the Treaty in New Zealand's developing society. There are, however, some events which are often identified as significant points in this process. Professor Gordon Orr, for example, describes a combination of events which included a ruling in 1845 to allow the governor the power to extinguish Māori claims to land, coupled with the fact that Māori were numerically outnumbered by the 1850s when massive land confiscations occurred. He explains that a shift in the judicial attitude towards the Treaty also undermined its significance, epitomised by the 1877 ruling by Judge Prendergast that the Treaty was a 'simple nullity'.⁸¹ Lacking both political and judicial support, treaty issues were further marginalised by attention to more urgent matters raised during the two World Wars. Emerging from the 1930s depression, New Zealand society was ushered into the era of the 'Welfare State' led by the first Labour Government (1935-1949) which promoted meritocracy, equal opportunity and the national interest, creating an atmosphere in which Māori were to be considered as equal citizens which at the same time denied their unique position

closer examination at around five year intervals prior to 1975 (the year of the Treaty of Waitangi Act, identified as a turning point in the next chapter).

⁸¹ Gordon S. Orr, 'The Treaty of Waitangi 1840: The New Zealand Experience', in *Legislative Studies*, Vol. 9, no. 2, Autumn, 1995, pp. 15-17.

under the Treaty of Waitangi. The political agenda both reflected and promoted these ideals, while the media and education reinforced the universality of 'the conformist white, middle-class, two parent, consumption-oriented unit.'⁸² Assimilationist policies which developed out of the 'welfare mentality' forced Māori to urbanise. As one commentator explains:

[a]ctive assimilation demanded the Maori adopt the psyche and behaviour of the Pakeha, whilst the same society continued to discriminate against them for being Maori. Monocultural state education sanitised the history, suppressed the language and rationalised Maori failure.⁸³

From the mid-1940s, New Zealand's political agenda was dominated by assimilationist attitudes and policies. Now commonly referred to as the 'melting pot ideology' (originating in the USA), assimilation strove to reduce ethnic differences to promote equality as 'sameness' between the races. In the 1950s and 1960s it was generally accepted that Māori would be assimilated by the dominant European culture, despite an increasing Māori population. *The Hunn Report* of 1961, adopted and implemented by the National Government, reinforced the opinion that assimilation (and integration) was not only inevitable, but also an appropriate means of preventing racial tension in New Zealand.⁸⁴ The Treaty of Waitangi was completely disregarded by government at this time because it encouraged the acknowledgment of 'difference' between Māori and Pākehā and appeared to complicate the simple principle of a monocultural society. According to James Ritchie, 'until 1975, government policy and public attitude [in New Zealand] fuelled the fires under the melting pot.'⁸⁵

⁸² Jane Kelsey, *A Question of Honour? Labour and the Treaty 1984-1989*, Allen and Unwin, Wellington, 1990, p. 17.

⁸³ Kelsey, *A Question of Honour?*, p. 18.

⁸⁴ Barry Gustafson, 'The National governments and Social Change (1949-1972)', in Sinclair, *History of New Zealand*, pp. 288-289. Gustafson points out that in the 1960s Māori began to question these policies and organised themselves to express their concerns; p. 290. Also see Chapter Six (this thesis), for further discussion of Māori reaction to government policy in the 1960s and 1970s.

⁸⁵ James Ritchie, *Becoming Bicultural*, Huia Publishers, Wellington, 1992, p. 9.

At a time when the Treaty was not a matter for public debate, the symbol of the Crown as the treaty partner served little purpose or function in public or political discourse. The language of mass communication at the time substantiates this argument and demonstrates that the symbolic structure surrounding Māori issues was quite distinct from that revealed in Chapter Two. For example, a report in 1965 clearly indicated no sense of responsibility for Māori land under the Treaty with the comment the '[Maori] Land Court should be ended' because, 'The [Whakatane County] Council feels the present day Maori is capable of holding his own, so far as dealings with land is concerned.'⁸⁶ In place of the notions of 'Crown' and 'resources' identified in mass communication, the discourse of Māori affairs in 1965 was preoccupied with the issue of Māori education. Without reference to either the Treaty of Waitangi or 'the Crown', several reports acknowledged the 'government's' responsibility to provide equal opportunity for Māori students. Land issues were only occasionally discussed. However, when they were mentioned 'Crown land' was a salient phrase (in keeping with the earlier argument that this was a traditional 'Crown' title). Very occasionally, 'the Crown' was mentioned in a more active role. For example, in a discussion of the Māori Land Court, it was required to 'remedy the invidious position of the *Crown* in handling disputes over lands.'⁸⁷

By 1969, the prevailing symbols still supported and promoted assimilationist policies and perspectives. For example, one report stated that '[a]t the time of the Treaty of Waitangi the Maori did not regard land as an asset to be developed in value and productivity much beyond its usefulness in providing the essentials of life. Such ingrained viewpoints could scarcely be eradicated overnight.'⁸⁸ Notions of equality

⁸⁶ 'Land Court should be ended', *New Zealand Herald*, 10 May 1965, p. 14.

⁸⁷ 'Hundred Years of Maori Land Court', *Auckland Star*, 8 March 1965, p. 6.

⁸⁸ 'Development of Maori Fishing', *New Zealand Herald*, Editorial, 24 March, 1969, p. 6. Other issues debated included the rejection of a Māori Parliament, the phasing out of Māori Affairs and the abolition of Māori seats and the Māori roll which are all indicative of an overarching and prevailing assimilationist attitude. See 'Needed: Proof of Integration', *The Auckland Star*, 10 November 1969, p. 7, and *New Zealand Herald*, 3 December 1969, p. 6.

between the races also dominated discourse, as indicated by a statement that the aim of the Māori Affairs Department was to make itself unnecessary and redundant, because the department only exists to 'overcome the obstacles which hinder the Maori people from achieving complete equality.'⁸⁹ Land issues were sometimes discussed, but were largely preoccupied with issues about forestry, land lease and subdivision, although several references were made to Māori land demands. The Crown symbol appeared very occasionally in this context. For example, under a new lease policy 'the Crown' was reported to have reclaimed an area of land in order to manage the forests and control the land use.⁹⁰ Similarly, another report noted that Māori land owners had rejected a 'Crown' proposal on land ownership. However, these references to the Crown were much more the exception than the norm.

By 1975, assimilationist policies and attitudes continued to dominate the mass media's interpretation of Māori Affairs. However, a significant increase in the discussion of land management and ownership in New Zealand in relation to Māori demands for control of their resources was also evident. So too were references to the Crown in relation to natural resources (although still relatively few and far between when compared with discussion of the same in Chapter Two). One report, for example, made reference to the Crown by stating, 'it would not be proper for the *Crown* to nominate who might be given the land.'⁹¹ Despite some exceptions, generally the Crown was still not a popular symbol and the Treaty was not a matter for public debate. This is perhaps best evidenced by the fact that neither the Labour nor the National Party showed serious recognition of Māori policy or the Treaty of Waitangi in their 1975 election manifestoes. National's policy issues included the economy, superannuation, women's rights, industrial relations, agriculture, and a combined policy for freedoms, sports and human rights, which stated that National would 'repeal

⁸⁹ 'Maori Affairs Department: Aim is to become redundant', *New Zealand Herald*, 18 September 1969, p. 10.

⁹⁰ 'Maoris to share in profits', *New Zealand Herald*, 7 August, 1969, p. 3.

⁹¹ 'Ten Shilling site goes back to Maoris', *New Zealand Herald*, 23 July 27 1975. p. 1.

the legislation that makes it possible for the *state* to literally steal productive land for no better purpose than it wants more control. This applies to Māori land, coastal land and farmland alike.⁹² The choice of the term 'state' is interesting here, particularly when compared to the Labour Party election promise to 'ensure the return to the Māori people where possible, lands which were doubtfully acquired by the *Crown*.'⁹³ This was an early indication of a significant difference between Labour and National party use of the Crown symbol detected and explained earlier in Chapter Four.

The purpose of demonstrating the dominance of assimilationist attitudes and the noticeable absence of 'the Crown' in newspaper reports in the 1960s and 1970s has been to emphasise the difference between the attitudes and language used at this time, as opposed to the prolific use of 'the Crown' symbol from 1986 to 1993 as discussed in Chapters Two and Four. The piece in this puzzle which remains unexplored is the events which were responsible for the 'revival' of both the Treaty of Waitangi and the Crown symbol in public discourse. This is the subject of the next chapter which addresses the next stage in the evolution of the Crown in New Zealand.

⁹² *The National Party Manifesto*, 1975.

⁹³ *Labour Party Manifesto*, 1975, p. 34.

THE TREATY RENAISSANCE: REVIVING THE CROWN

The previous chapter argued that the Crown was an important symbolic identity during and after the signing of the Treaty in 1840, but that by the 1960s it only infrequently appeared in mass communication. This pattern was closely related to the Treaty's notable absence from New Zealand's political agenda during most of the twentieth century. A causal relationship between the currency of the Crown symbol and the profile of the Treaty is further developed in this chapter where it is argued that a renaissance of Treaty issues which began in the 1970s simultaneously revived the use of the Crown symbol in public treaty discourse. In looking to explain how and why this occurred and to understand more about the relationship between the Treaty and the symbol of the Crown, this chapter begins with a discussion of another aspect of the theory of political symbols, this time regarding the circumstances under which new political symbols emerge. In then applying these theories to the events under which the Crown re-emerged in New Zealand after the 1970s, it is argued that the theory helps to explain both why the government was in need of a reassuring symbol such as the Crown, after the 1970s, as well as explaining how the Crown symbol naturally emerged from the political events of the late 1970s and 1980s. Again, even in its revived form, the popular conceptions of the Crown treaty partner proved problematic for Māori.

The Creation of New Political Symbols

The creation of new political symbols is one aspect of the general theory about symbols in politics which was not discussed earlier in the thesis (Chapter Three) but which is highly relevant here. A new political symbol, according to theorists, is a word or object which is promoted, through political developments and frequent usage,

to the status of a 'key word' in political communication. In other words, it is a political concept which gains popularity amongst the public through frequent use by government and other public commentators (such as the mass media, for example).

This discussion of some of the key ideas in the theory of new symbols builds upon the general theory discussed in Chapter Three. In particular it enlarges upon ideas about the role of symbols in providing public reassurance from perceived threats and legitimacy for government actions and authority. Theorists suggest three features of new political symbols which will later be tested against the nature and circumstances of the Crown's revival in treaty discourse. First and foremost, theorists suggest that social and political changes, especially those which are forced upon the public by government, create the greatest need for symbols which are able to reassure the public and therefore enhance the government's legitimacy in the eyes of the citizens. While symbols which fulfil this function may be generated by government, theorists secondly argue that the most effective symbols are those which arise spontaneously or develop naturally from the facts and context of the situation (such as the 'wine box' symbol in Chapter Two). Finally, theorists explain that the most effective reassuring symbols will not only develop naturally but will also represent or indicate the emergence of a new order intended to resolve the problems of the old order and at the same time represent those things most valuable in the old order.¹

First, theorists suggest that a change in the frequency of a key sign or symbol's use in political language indicates a social or political development.² More specifically, new political symbols arise as a result of dramatic events or major changes within a society or changes outside the society which impact on it in some way. In addition, it is suggested that a government which forces unwelcome change upon its citizens or

¹In particular, see: Murray Edelman, *The Symbolic Uses of Politics*, University of Illinois Press, Urbana, 1964; and C.D. Elder and R.W. Cobb, *The Political Uses of Symbols*, Longman Press, New York, 1983;

²Edelman, *The Symbolic Uses of Politics*, p. 122.

somehow outrages its public has the greatest need for reassuring symbols.³ This point in particular is most important for understanding the revival of the Crown in public discourse in New Zealand and will be discussed later. In the meantime, it will be recalled from Chapter Three that symbols can provide reassurance sought by the public, particularly when the symbol provides the public with something they want to believe about themselves or their environment. Particularly in a time of social or political turmoil, symbols can affirm social identities and provide reassurance.⁴ As was also explained in Chapter Three, it is the public perceptions of threat and tension levels which are critical to their acceptance of any symbols, but particularly new ones.⁵ For example, citizens will react to a controversial political issue with either divided opinions or multiple views. The public's reaction has a significant bearing on the public's collective perception of threat and therefore its reaction to symbolic assurances from government also. When a society's reaction is 'bimodal' (split into two factions) perceptions of threat and security are maximised because the issue becomes a question of right and wrong or good and bad. In this case, the public is most likely to look for and accept symbolic reassurances from appropriate authorities which appease anxieties and offer security by, presumably, offering a solution to the problem.⁶ The nature of this 'solution' is discussed later.

The suggestion that bimodal opinion enhances threat perception and the acceptance of symbols by publics is interesting in light of the New Zealand public's reaction to Māori protests and government action regarding the Treaty of Waitangi in the mid 1970s. In earlier discussion it was noted that the New Zealand public has generally been divided on its opinion of treaty issues; polarised between supporters and opponents of the Treaty. Furthermore, as is soon revealed, the government did not enjoy general public support in taking action on the Treaty. In this respect, the New

³ Edelman, *The Symbolic Uses of Politics*, p. 9.

⁴ Elder and Cobb, *The Political Uses of Symbols*, pp. 31-32.

⁵ Edelman, *The Symbolic Uses of Politics*, p. 177.

⁶ Edelman, *The Symbolic Uses of Politics*, pp. 175-178

Zealand government was forcing unwelcomed change on a divided New Zealand public. According to theorists, both the public's perception of threat and its need for symbolic reassurances were maximised by these conditions. This possibility is given more detailed examination later in the chapter.

Second, in considering the question of how new symbols emerge, theorists argue that symbols are most likely to be generated when an advantaged group in society finds itself or its status threatened.⁷ The symbols generated by that group will serve to preserve the group's authority and status and protect it from any perceived threat. An example of this was earlier demonstrated with the 'Principles for Crown Action' which protected the government's authority to govern against increasing pressure for an acknowledgment of Māori treaty rights. However, the question as to how effectively even the most advantaged or powerful groups can generate symbols on the basis of their own needs must be raised. It has been suggested that rather than being planned or manufactured, effective and lasting political symbols emerge more or less spontaneously from the facts of the situation.⁸ In other words, as was revealed in discussing the development of the Crown symbol in British history, popular symbols arise naturally from their context or environment. A second purpose for later discussion will therefore also be to determine whether the Crown symbol was generated by an advantaged group in an attempt to protect its interests, or whether it emerged more or less spontaneously from the context of the events after 1975.

The final theoretical suggestion considered in this chapter is that symbols which effectively resolve social and/or political tensions do so by indicating altered possibilities for a new political/social order.⁹ Here we are discussing the 'solution' mentioned in the first theoretical suggestion which was thought to appease public

⁷ Elder and Cobb, *The Political Uses of Symbols*, p. 32.

⁸ Elder and Cobb, *The Political Uses of Symbols*, p. 30.

⁹ Edelman, *The Symbolic Uses of Politics*, p. 174.

tension and anxiety. Once again, looking in particular at governments who are implementing unpopular change, it is suggested that they justify and maintain public support by using symbols which lend credibility, stability and direction to an emerging political order. New symbols will also under these circumstances attempt to establish new identities or meaning for an emerging political order.¹⁰ As one theorist notes, '[n]ew words and concepts are created if changes in the environment come about which require new symbolic interpretations.'¹¹ Alternatively, a new symbolic structure for government creates the impression that significant changes have taken place in the structure of government.¹² For example, by creating a new agent in government administration, such as the Crown health enterprises and Crown research institutes discussed in Chapter Two, a change in the relationship between the government and other groups is indicated, whether or not that change is real. The possibility, to be later examined, is that the Crown symbol implied that significant change had taken place in the management of treaty issues by suggesting that a new 'Crown' body had been introduced to the political structure to fulfil the role of treaty partner.

With these three theoretical arguments in mind, discussion now turns to the chain of events which led to the revival of the Crown symbol in treaty debate. These events began with a challenge to the political agenda in the early 1970s.

*Challenging the Political Agenda*¹³

The sort of social or political change which theorists suggest will trigger the creation of a new political symbol, occurred in New Zealand in the mid 1970s when both the National and Labour Governments faced a potential constitutional crisis in the form of Māori rights and the Treaty of Waitangi. Prior to the 1970s, the dominant discourse of

¹⁰ Elder and Cobb, *The Political Uses of Symbols*, p. 32.

¹¹ Claus Mueller, *The Politics of Communication*, Oxford University Press, New York, 1973, p. 15.

¹² Edelman, *The Symbolic Uses of Politics*, p. 57.

¹³ In this discussion 'political agenda' means the political issues which dominate not only the government's energies but also which attract public attention and are discussed by the media.

mass communication largely reflected the prevalent attitude that the Treaty of Waitangi was irrelevant to New Zealand's social and political development. This attitude was briefly demonstrated through examples of news reports in the previous chapter but has been established more conclusively by other writers.¹⁴ Equally well documented is the fact that, despite these attitudes within mainstream Pākehā society and government prior to the 1970s, Māori maintained and nurtured demands that the Treaty of Waitangi be recognised and honoured at all levels of society. However, it was not until the mid 1970s that Māori protest action received the sort of publicity and recognition required to make the Treaty a matter of national debate and concern.

The success of Māori protests in forcing action from first the Labour Government (1972-1975) and then National Government (1975-1984), despite the lack of public support for the Treaty, has been attributed in part to the national and international environment at that time which was increasingly conscious of indigenous peoples' rights. As New Zealand historian, P.K. Sorrenson explains, changes in national attitudes (particularly within government) towards the Treaty were encouraged by the work of historians and lawyers who, from around 1970, 'resuscitated' the Treaty of Waitangi and paved the way for new radical interpretations of the Treaty and its role in New Zealand history.¹⁵ Raj Vasil adds that the election of the conservative National Government in 1975 (which replaced Labour) created great anxiety for Māori, prompting unprecedented protest action.¹⁶ In exploring the broader international scene, James Ritchie describes an atmosphere in which other nations had already set

¹⁴ For example: see; Barry Gustafson, 'The National Governments and Social Change (1949-1972)', in Keith Sinclair (ed.), *The Oxford Illustrated History of New Zealand*, Oxford University Press, Auckland, 1993, pp. 267-294, and Andrew Sharp, 'The Problem of Maori Affairs 1984-1989' in M Holland and J. Boston (eds.), *The Fourth Labour Government: Politics and Policy in New Zealand*, 2nd edn., Oxford University Press, Auckland, p. 251, for discussion of issues which dominated the political agenda. Also see: Ranganui Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, Penguin Books, Auckland, 1990, for discussion of the Māori struggle to have their rights acknowledged during this time.

¹⁵ M.P.K. Sorrenson, 'Towards a Radical Interpretation of New Zealand History', in I.H. Kawharu (ed), *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi*, Oxford University Press, Auckland, 1989, pp. 159-160.

¹⁶ Raj Vasil, *What do Maori Want?, New Political Perspectives*, Random Century Press, Auckland, 1990, p. 28.

about dealing with their 'colonial past' and the dispossession of their native people in different ways.¹⁷ This international trend towards the recognition of native and indigenous peoples' rights, fuelled nations' condemnation of conditions within South Africa and placed pressure on other countries, such as New Zealand, to consider the state of their own indigenous peoples.

However, while national and international circumstances were more favourable than ever before for Māori, the most immediate challenge to New Zealand's political agenda came from Māori protest action which gathered force in the 1970s drawing attention to issues of land ownership and to the Treaty itself.¹⁸ According to Sorrenson, 'new Maori organisations emerged to deal with ... specific grievances, especially in relation to land.'¹⁹ Amongst the protests identified as 'the most significant milestones'²⁰ in these critical years were the Land March in the summer of 1974/75, the Bastion Point land occupation of 1977 which lasted for 506 days²¹ and the Raglan land dispute. However, of all of these, the Land March perhaps best demonstrated that Māori protests were about finding a treaty partner who would address and resolve Māori grievances and reinstate the Treaty of Waitangi to its rightful place in New Zealand's social and political structure. The motivation for the Land March had occurred many years before with the 1967 Māori Affairs Amendment Act (consequently dubbed 'the

¹⁷ James Ritchie, *Becoming Bicultural*, Huia Publishers, Wellington, 1992, p. 10.

¹⁸ Ritchie, *Becoming Bicultural*, p. 9. Ranginui Walker looks further back to the Waitangi Day Act 1960 when the government 'dusted off' the long neglected Treaty and declared 6 February a national day of thanksgiving to commemorate the signing of the Treaty. According to Walker, the National Government was considerably embarrassed by a Māori group which called Waitangi Day a day of mourning for the loss of Māori land. The Government sought advice from the Māori Council over the issue, and was presented with a list of fourteen statutes which contravened Article II of the Treaty. As a result, 'monocultural land law' was modified for the first time when the Town and Country Planning Act 1974 was changed to take account of the 'culture of the colonised.' See; Ranginui Walker, *Ka Whawhai Tonu Matou*, pp. 211-212.

¹⁹ M.P.K. Sorrenson, 'Modern Maori: The Young Maori Party to Mana Motuhake', in Keith Sinclair (ed.), *The Oxford Illustrated History of New Zealand*, Oxford University Press, Oxford, 1993, p. 348.

²⁰ Raj Vasil, *What do Maori Want?*, p. 27.

²¹ Sorrenson, 'Modern Maori', p. 349.

last land grab') which Māori considered a breach of their treaty rights.²² The late Dame Whina Cooper, leader of the March, described the protest as a call for Māori unity over land and 'a protest that might be heard where others had failed.' She said, 'Take no more land from us. That is our cry.'²³ The March was widely reported by the media, as the marchers walked from Cape Reinga, at the top of the North Island, to Parliament Buildings in Wellington, where they established a 'tent assembly' and refused to move until their concerns were registered and action was taken by government.²⁴

Widely publicised Māori protests such as the Land March generated considerable tension and anxiety within the greater New Zealand public and brought the previously latent issue of race relations in New Zealand to the fore. With little knowledge and even less of an understanding of the Treaty and its implications for New Zealand, public opinion was both polarised and passionate. Under such circumstances, according to theorists, the government's legitimacy was under considerable strain and the public's perception of threat was maximised. In responding to the crisis in 1975 the newly elected National Government inherited policies developed by Labour which would force unwelcomed change on the majority of New Zealanders who did not support the Treaty or sympathise with Māori grievances. This policy focused on the Treaty of Waitangi Act 1975, a provision which had been introduced by the Labour Government.

The Crown and the Treaty of Waitangi Act 1975

Amidst a background of Māori insistence that the Treaty should be honoured and grievances resolved, the Treaty of Waitangi Bill had been introduced to Parliament by

²² Walker, *Ka Whawhai Tonu Matou*, p. 212.

²³ 'Unity Call on Maori Land', *New Zealand Herald*, 23 April 1975, p. 3.

²⁴ 'Rowling Greets Maoris outside Parliament', *New Zealand Herald*, 14 October 1975, p. 1.

Labour's Minister of Maori Affairs, Matiu Rata, on 8 November 1974.²⁵ The debate of the readings of the Bill in the House of Representatives demonstrates both the centrality of 'the Crown' in the Bill and the complexities of this identity as a representation of one of the two contemporary treaty partners.

At the first reading of the Bill, Rata explained to the House that its purpose was to 'provide for the observation and confirmation of the principles of the Treaty of Waitangi and to determine claims about certain matters which are inconsistent with those principles.'²⁶ He also explained that the Bill was an integral part of Labour's objective to find a practical means of legally acknowledging the principles set out in the Treaty. Rata advised that the Bill would provide for the establishment of the Waitangi Tribunal which would 'consider claims by persons prejudicially affected by any Act, regulation, Order in Council, or policy or practice of the *Crown* which is considered inconsistent with the principles of the Treaty of Waitangi.' He said the Waitangi Tribunal would also have the authority to make recommendations to the *Crown* based on the Tribunal's findings on each claim.²⁷ The Bill and the 1975 Act were cautious in that they only applied to the future and did not allow for inquiry into the actions or policy of the Crown in the past (although the subsequent amendment in 1985 did as discussed later in the chapter).

The various possible interpretations for the Crown within the legislation were also demonstrated at the readings of the Bill. For example Robert Muldoon, the Leader of the Opposition, offered one possible interpretation for the Crown when he stated, 'the tribunal simply has the power to recommend. That means that the final decision is in the hands of the *government of the day*.' In denouncing the Bill's usefulness, he

²⁵ *New Zealand Parliamentary Debates*, [NZPD] Vol. 395, 11 Oct-8 Nov 1974, pp. 5725-5729.

²⁶ *NZPD*, Vol. 395, p. 5725.

²⁷ *NZPD*, Vol. 395, p. 5726. Note that the italics in this quote were added for emphasis as in all other quotations from *NZPD* unless otherwise specified.

advised that the Opposition would not delay the Bill's introduction.²⁸ On the other hand, at the third reading of the Bill, Rata indicated a significantly different interpretation for 'the Crown' when he clarified that the Tribunal would 'inquire and make recommendations to the *government* and of course to *Parliament* itself.'²⁹ The Crown, it appeared, could be interpreted as both government and parliament, which are significantly different entities. Despite these differences in interpretation, the meaning of the Crown was not resolved or even discussed during the Bill's readings.

The Treaty of Waitangi Act was passed on 10 October 1975. In the preamble to the Act it was stated that the Treaty had been entered into by 'her Late Majesty Queen Victoria and the Maori people of New Zealand' and that it was now desirable to establish a Tribunal to make recommendations on claims relating to the practical application of the Treaty's principles. While acknowledging that the Treaty was originally with the Queen, the Act identified 'the Crown' as the appropriate contemporary partner for Māori under the Treaty. Most importantly, while interpretations were offered for 'Maori', 'Treaty' and 'Tribunal' within the Act, none was offered for the equally significant (and arguably more complex) concept of 'the Crown.'

In questioning the identity of the Crown in legislation in contemporary New Zealand society, it is prudent to note that the Crown had undergone significant change the previous year in the amendment to the Royal Titles Act 1974. According to Rata, the 1974 Act was a critical precursor to the 1975 legislation because it established the identity of the Crown in New Zealand by shifting the emphasis away from the Queen in England in the Royal Titles while at the same time emphasising the role of the Queen as Queen of New Zealand.³⁰ The circumstances surrounding the reading of the

²⁸ NZPD, Vol. 395, pp. 5726-5727.

²⁹ NZPD, Vol. 402, 30 Sep - 10 Oct, 1975, p. 5406.

³⁰ Pers. comm., Matiu Rata, 28 July 1995.

Bill were fairly unique. All three readings of that Royal Titles Amendment Bill were done at once in the presence of Her Majesty the Queen of England who was on tour in New Zealand at the time. In addressing the purpose of the Bill, the Prime Minister, Right Honourable N.E. Kirk, stated that '[t]he [Royal Titles Amendment] Bill now before Parliament lays a primary emphasis on Her Majesty's designation as Queen of New Zealand rather than on her status as Queen of the United Kingdom.'³¹ He said, 'I hope and believe that the Bill does reflect more accurately the constitutional position of the Sovereign in relationship to New Zealand.'³² Another writer was more conservative in his view of the significance of this legislation with regard to the identity of the Crown in New Zealand, and commented:

[t]he Royal Titles Act 1974 has emphasised the position of the Crown in the sovereignty of New Zealand as being distinct from the UK. ... The Crown in New Zealand should not be seen as autochthonous [meaning indigenous]. This new status necessitates an examination of the position of the Crown in the United Kingdom of New Zealand and of the role of the Queen and Her Governor-General in the contemporary government of the country.³³

The centrality of the Crown in the 1975 legislation, in conjunction with its ambiguity in the legislation (despite the Royal Titles Amendment Act 1974) leads us to question the wisdom of the decision to use the term 'the Crown' in the 1975 Act. In wondering why this phrase was chosen to identify the treaty partner (a point which becomes critical in the next chapter) two points should be kept in mind. First, it will be remembered from Chapter One that 'the Crown' is an identity known to the law, while a term such as 'government' is not. Secondly, the Crown was an appropriate choice in

³¹ NZPD, Vol. 389, 4 February-March 4 1974, p. 2.

³² NZPD, Vol 389, p. 2. It is also interesting to note that the Queen, present in New Zealand for the passage of the Bill, stated in her response to the Bill's reading that 'it was on the sixth day of February 134 years ago that the link was established between the British Crown and my Māori people and the first step in New Zealand's nationhood was taken ...' (See, NZPD, Vol. 389, p. 4) The Queen's use of the word 'my' in this context is an indication of her awareness of a special relationship between her and the Māori people which reciprocates the feelings conveyed by Māori after the signing of the Treaty in 1840.

³³ D.L. Stevens, *The Crown, the Governor-General and the Constitution*, Thesis for Masters in Law, Victoria University of Wellington, 1974, p. xix.

as much as it encapsulates the Queen, as the original partner, and the government as the institution which now governs on her behalf. However, despite these appealing qualities, the Crown is a complex symbol which poses problems of consistency and evolution in its identity. Moreover, no obvious attempt was made to resolve these complexities in the 1975 legislation (in fact there was no indication that the House was aware of these complexities). Consequently, when the Waitangi Tribunal (established under the Act) went on to attract public and government attention to the Treaty in the 1980s, the Crown symbol was used with increasing frequency and the problem of the Crown increased, particularly for some Māori in negotiation with 'the Crown'. In short, after 1975, a new chapter in the history of 'the Crown' in New Zealand had begun which would lead to further evolution of this most complex identity.

The Waitangi Tribunal: A Call for Crown Action

It was noted earlier that there is some degree of tension between theorists as to whether new political symbols are consciously generated by government, or whether popular and enduring symbols arise naturally and spontaneously from the facts of a situation. In this section of the chapter, it is argued that the Waitangi Tribunal, as a direct result of its purpose set out in the 1975 Act, couched its findings and recommendations in terms of 'the Crown'. This, in combination with the media's attention to the Tribunal's early recommendations which were also presented to the public in terms of 'the Crown', meant that by and large the Crown symbol naturally emerged in the 1980s.

Since its inception, and particularly after the early 1980s, the Waitangi Tribunal has played an essential and pivotal role in the interpretation of the Treaty and in the promotion of Māori rights. Whether attracting commendation or criticism from government, political parties, pressure groups or public, the Tribunal has been responsible, through its findings and recommendations, for raising the nation's awareness on treaty issues. Also, where possible, the Tribunal has re-educated New

Zealand society about the country's history and the options for its future development. In doing so, the Tribunal has methodically introduced new concepts and words into the language of government policy and public debate relating to the Treaty of Waitangi. In particular, the Tribunal has recognised and promoted a Treaty partnership between Māori and 'the Crown'.

Before discussing specific claims, some attention should be paid to the Tribunal's development which partly explains its unpredicted success. Under the 1975 Act, the Tribunal was given exclusive authority to determine the meaning and effect of the Treaty according to the English and Māori texts and to resolve issues arising from the differences between these texts.³⁴ The Tribunal was restricted to hearing claims relating to events which occurred after 10 October 1975, when the Act was passed.³⁵ The first Waitangi Tribunal was established in 1977 and consisted of three members; the Chief Judge of the Māori Land Court, a representative for the Ministry of Māori Affairs and an Auckland lawyer.³⁶ While the Tribunal was limited in its success at this time (because of its limited jurisdiction and poor resources), three new members in 1980 introduced new enthusiasm for the Tribunal's role. Much of this enthusiasm and the Tribunal's subsequent success has been credited to the appointment of Judge E.T. Durie who is said to have transformed the procedure and philosophy of the Tribunal and consequently raised the credibility and legitimacy of the Tribunal, most importantly in the eyes of its Māori claimants.³⁷

The Tribunal's impact on New Zealand society increased dramatically in the 1980s. Central to this development was a decision by the Labour Government in 1985 to have

³⁴ Sorrenson, 'Towards a Radical Interpretation of New Zealand History', p. 160.

³⁵ Sorrenson, 'Towards a Radical Interpretation of New Zealand History', p. 160. Sorrenson argues that in reality there was no way of avoiding historical analysis when hearing claims despite this limitation of the Act.

³⁶ Paul Temm, *Waitangi Tribunal; The Conscience of the Nation*, Random Century Press, Auckland, 1990, p. 5

³⁷ Sorrenson, 'Towards a Radical Interpretation of New Zealand History', p. 161.

the Tribunal's jurisdiction extended to include Crown actions and policies claimed to be inconsistent with the Treaty since the signing of the Treaty in 1840. Under the same amendment the number of members on the Tribunal was increased to seven with a provision for seven more members to be appointed as deputies.³⁸ In 1988, the Tribunal was further increased to sixteen members.³⁹ In 1988, the National Government amended the Act in order to restrict the Tribunal from investigating claims to private land. Despite these increases and setbacks and the continued success of the Tribunal in fulfilling its statutory function, the Tribunal was described as recently as 1990 as 'essentially a part-time body doing a full time job.'⁴⁰

The Tribunal's ability to increase its credibility and prestige despite the range of impediments before it has been largely attributed to four early decisions by the Tribunal which added to the institution's mana and gave the Tribunal 'teeth'. Paul Temm, former member of the Tribunal, has described each of these decisions as 'a foundation block or cornerstone ... [which] came to be linked, to lay the ultimate foundation for the development of the Waitangi Tribunal.'⁴¹ In each of the reports, the concept of the Crown enjoyed a high profile. In addition, media coverage of two of the reports, also included in this discussion, demonstrates that the Tribunal's attachment to the Crown symbol was widely adopted by the mass media as the Tribunal's findings and recommendations were announced to the public.

The Tribunal released its first 'cornerstone decision', the *Motonui / Waitara Report*, in 1983.⁴² The report related to a claim by Te Atiawa people of Taranaki that they were prejudicially affected by the discharge of sewage and industrial waste onto or near

³⁸ Temm, *Waitangi Tribunal*, pp. 12-14.

³⁹ Temm, *Waitangi Tribunal*, p. 14.

⁴⁰ Temm, *Waitangi Tribunal*, p. 15.

⁴¹ Temm, *Waitangi Tribunal*, pp. 36-37. Also see Sorrenson, 'Towards a Radical Interpretation of New Zealand History', pp. 161-172.

⁴² Waitangi Tribunal, *Motonui-Waitara Report*, Department of Justice, Wellington, 1983.

traditional fishing grounds and reefs. Te Atiawa asserted that this action was inconsistent with the principles of the Treaty of Waitangi. After hearing evidence, the Tribunal found that the Treaty obliges the *Crown* (as opposed to government, parliament, the Executive or the state) to protect Māori people in the use of their fishing grounds and from the consequences of settlement and development. In response to the claim, the Tribunal cited section 6(3) of the Treaty of Waitangi Act 1975 which 'provides that we [the Tribunal] may recommend to the *Crown* that action be taken.'⁴³ Consequently, the Tribunal stated, '[w]e consider ... it would be helpful for the *Crown* to give further weight to the interests of the local community and the local Maori people.'⁴⁴ On the basis of the evidence provided, the Tribunal recommended that the outfall be discontinued and that 'the *Crown* seek an interim agreement' with the appropriate parties involved.⁴⁵

Temm comments that the Tribunal's findings on this claim received wide publicity which made people aware of the Tribunal, many for the first time.⁴⁶ As Temm explains, '[t]he importance of the finding was not so much in the recommendations that were made, ... but in the fact that the terms of the Treaty had been brought to life.'⁴⁷ The newspapers generally responded to the finding by conveying, almost verbatim, the Tribunal's findings and recommendations to the public. 'The Crown' was frequently referred to in the reports. For example, one article stated that, '[the Tribunal] recommends that the *Crown* should forego the outfall', while also noting the Tribunal's finding that '[t]he Treaty of Waitangi obliges the *Crown* to protect Maori ... fishing grounds.'⁴⁸ However, while the reports discussed the Tribunal's references to 'Crown promises' and 'Crown obligations', the government (as opposed

⁴³ *Motonui-Waitara Report*, p. 33. The emphasis has been added to this and all other quotations taken from reports in this chapter unless otherwise specified.

⁴⁴ *Motonui-Waitara Report*, p. 56.

⁴⁵ *Motonui-Waitara Report*, p. 58.

⁴⁶ Temm, *Waitangi Tribunal*, p. 37.

⁴⁷ Temm, *Waitangi Tribunal*, p. 40.

⁴⁸ 'Outfall proposal fishery threat', *The Evening Post*, 19 March 1983, p. 5.

to the Crown) was identified when considering the government's response to the Tribunal's findings.⁴⁹ It appeared that, while the Crown would later be used as a metonym for government (as indicated in Chapter Two) at this point the symbol was more limited in its application.

The second cornerstone claim was lodged on 30 January, 1978 by Sir Charles Bennett and others on behalf of the Ngāti Pīkiao people. The claimants requested the Tribunal use its powers under the 1975 Act to consider the *Crown's* policy to build a nutrient pipeline to the Kaituna River. The claimants considered this policy to be inconsistent with the principles of the Treaty of Waitangi, and requested the proposed pipeline to the Kaituna River be discontinued.⁵⁰ In 1984, having heard a great deal of technical and historical evidence from numerous claimants, the Tribunal ruled that 'the policy of the *Crown* by which a pipeline is to be constructed ... is contrary to the principles of the Treaty of Waitangi.'⁵¹ Accordingly, the Tribunal recommended to the *Crown* that the scheme be abandoned.⁵²

On 19 July, 1985 the Tribunal released its third major finding, the Manukau Harbour report. The Manukau claimants had argued that their tribal kaimoana (seafood) had been devastated by pollution. They also directed the Tribunal's attention to the issue of land ownership through evidence of unjust land loss and confiscation of Māori land during the 1860s.⁵³ The Tribunal's written recommendations were directed at specific ministers, but were often made in relation to the Crown. For example, to the Minister of Lands, the Tribunal recommended that the *Crown* negotiate ... for the acquisition of

⁴⁹ For example see: 'Waitangi decision significant', (Editorial) *The Evening Post*, 21 March 1983, p. 3; 'Motonui timing tied to effluent disposal', *The Evening Post*, 23 March 1983; 'Tribunal upholds Maoris' claim', *The Dominion*, 19 March 1983, p. 3, and 'Fishing Ground fears backed', *The New Zealand Herald*, 19 March 1983, p. 3.

⁵⁰ Waitangi Tribunal, *Kaituna River Report*, Department of Justice, Wellington, 1984, p. 1.

⁵¹ *Kaituna River Report*, p. 33.

⁵² *Kaituna River Report*, p. 5.

⁵³ See: Sorrenson, 'Towards a Radical Interpretation of New Zealand History', p. 166 for further discussion.

sites referred to.' Also it was recommended that 'the *Crown* should gazette areas as wāhi tapu' (sacred sites).⁵⁴ The Tribunal frequently made reference to 'the other party to the Treaty, the *Crown* in right of New Zealand.'⁵⁵

While the Tribunal's recommendations on the Manukau Harbour claim have been described as 'not particularly far reaching',⁵⁶ the report has been likened to a bombshell in its impact on the media. The contents of the Tribunal's report were widely relayed to, in Temm's words, 'a profoundly shocked and amazed New Zealand public'.⁵⁷ The impact of the report was perhaps further heightened by a comment by the Minister of Māori Affairs for the recently elected Labour Government, Koro Wētere, that the Government would seriously consider the Tribunal's recommendations. One report in the Wellington newspaper was typical of the media's response to the Tribunal's report. It advised the public that the Tribunal had recommended a review of the laws relating to the ownership and control of rivers, harbours, coastal and foreshore areas, in what was described as the most comprehensive claim yet for the Tribunal and Māori. The report made frequent use of the Crown symbol, as the Tribunal had done, in advising readers that 'the intention would be to restore the ownership of the *Crown* expressing the *Crown's* fiduciary responsibilities to local tribes in terms of the Treaty of Waitangi.'⁵⁸ It was also noted that '[t]he omission of the *Crown* to provide a protection against [treaty breaches] is contrary to the Treaty of Waitangi.'⁵⁹ Once again however, the government was rarely identified as the Crown when discussing its responses to the Tribunal's findings.

⁵⁴ Waitangi Tribunal, *Manukau Report*, Department of Justice, Wellington, 1985, p. 98.

⁵⁵ *Manukau Report*, p. 99.

⁵⁶ Temm, *Waitangi Tribunal*, p. 50.

⁵⁷ Temm, *Waitangi Tribunal*, p. 47.

⁵⁸ 'Manukau Maori wronged - tribunal', *The Evening Post*, 31 July 1985, p. 10.

⁵⁹ 'Manukau Maori wronged - tribunal', *The Evening Post*, 31 July 1985, p. 10.

The last of the four cornerstone decisions, which is not considered in any detail here, was the Te Reo Māori claim which was regarded by the Tribunal as potentially the most difficult issue to resolve due to its political, social and financial ramifications. Lodged on behalf of Ngā Kaiwhakapumau i te Reo Inc (the Wellington Board of Māori Language) the claim asked that Māori be made an official language in New Zealand.⁶⁰ Recommendations by the Tribunal were again made to individual ministers rather than 'the Crown', although the Tribunal made frequent reference to 'the Crown' in its report as in the statement, 'the Treaty of Waitangi obliges the *Crown* to recognise and protect the Maori language.'⁶¹

This brief review of the Waitangi Tribunal and its four cornerstone decisions provides some evidence of the development of the Crown symbol (as opposed to it being consciously generated by government) from the context of the Tribunal's legislative responsibility to investigate and make recommendations to 'the Crown', and the media's part in relaying the Tribunal's findings to the wider public also using the Crown symbol. However, it would not be accurate to say that the Crown's revived popularity in the 1980s was the result of these influences alone. As the next section of the discussion demonstrates, there is also some evidence of a conscious effort by the Fourth Labour Government to respond to the Tribunal's call for Crown action and, in doing so, to identify government as the contemporary Crown treaty partner.

The Fourth Labour Government (1984-89): The New Crown in Action

By the time the Labour Government came to power in 1984, the ground swell of debate and publicity for Māori rights which had begun publicly in 1975, showed little sign of abating. Labour had to act on Treaty matters if further antagonism and possible conflict over race relations in New Zealand were to be avoided. Labour's efforts to address the Treaty of Waitangi in New Zealand have been acknowledged and

⁶⁰ Sorrenson, 'Towards a Radical Interpretation of NZ History', p. 169.

⁶¹ Waitangi Tribunal, *Te Reo Maori Report*, Department of Justice, Wellington, 1986, p. 51.

debated by many writers, one of whom commented that, '[o]n the surface, the Labour Government did take unprecedented steps to redress the injustices of the past, and the principles of the Treaty of Waitangi ...'⁶² Another acknowledged that, 'Labour dealt with the Māori 'problem' with imagination, courage and finesse and it did not make them popular in doing so.'⁶³

Labour's policy on the Treaty of Waitangi had three objectives, which were announced prior to Labour's election victory in July 1984. These were to incorporate the Treaty of Waitangi into a new Bill of Rights in New Zealand, to review Waitangi Day commemorations and to amend the Treaty of Waitangi Act 1975 (as mentioned previously). Geoffrey Palmer, Minister of Justice, Deputy Prime Minister and later Prime Minister, was central to the Government's treaty policy. As earlier research indicated, Palmer displayed a characteristic propensity to use the symbol of the Crown in treaty debate. Palmer's announcement and discussion of Labour's treaty policy were loaded with 'Crown' symbolism. For example, in discussing the first policy objective (as the Leader of the Opposition) Palmer explained that, '[t]he Treaty of Waitangi was an agreement between tangata whenua [indigenous people (of the land)] and the *Crown*. Promises were made and the *Crown* gave certain undertakings. The intentions were honourable, but some of the subsequent history was not.'⁶⁴ Similarly, with regard to the review of the Waitangi Day commemoration, Palmer explained, '[i]t is important for New Zealand to have a national day. Labour believes that Waitangi Day can be an important reminder of the agreement between the Māori people and the *Crown*. It can be a symbol of the beginning of our nationhood.'⁶⁵ Finally, on the matter of an amendment to the Treaty of Waitangi Act 1975 (discussed earlier in the chapter), Palmer stated, '[t]he *Crown* clearly accepted the obligations of the Treaty at

⁶² Jane Kelsey, *A Question of Honour? Labour and the Treaty: 1984 -1989*, 1990, Allen and Unwin, Wellington, p. 2.

⁶³ Andrew Sharp, 'The Problem Of Maori Affairs 1984-1989', p. 255.

⁶⁴ Geoffrey Palmer, Deputy Leader of the Opposition, 'Labour and the Treaty of Waitangi: Policy Announcement', 2 February 1984.

⁶⁵ Palmer, 'Labour and the Treaty of Waitangi', 2 February 1984.

the time and its representatives have reasserted that acceptance regularly ever since. It is the duty of the New Zealand Government to ensure that the obligations have been met.’⁶⁶

Palmer’s use of the Crown symbol in this new manner, it is argued here, indicated the emergence of a new political order, one which would deal with treaty issues. In particular, it indicated the presence of the ‘Crown’ identity in New Zealand politics which had both the authority and the obligation to resolve treaty grievances with Māori. From around 1984, the Crown treaty partner, which had previously only infrequently been identified in mass communication, was to arise in treaty discourse with increasing regularity (as demonstrated by the language of the mass media in Chapter Two of this thesis). However, in addition to being a new symbol in treaty discourse, ‘the Crown’ also represented the old order (pre-1975) in such a way as to offer further reassurance to the New Zealand public. In this respect, the Crown bridged the gap between the old and emerging political orders. However, despite the impression given by the appearance of the Crown in the 1980s that significant change had taken place in the process of addressing treaty grievances, ministers such as Geoffrey Palmer and Douglas Graham have themselves acknowledged that the difference between Crown and government is largely semantic - ‘the Crown’ is simply the government (or some manifestation of the government) by another name. We are left to wonder, therefore, whether the ‘Crown’ symbol is not merely ‘the fruits of symbolic bedazzlement’⁶⁷ intended to save the government from a crisis of legitimacy.

Therefore, during Labour’s first term in office (1984-1987), the Crown became a metonym for government as the unifying central decision maker in politics in New Zealand, responsible not only for the rights of Māori people under the Treaty, but also the rights of all New Zealanders. Political theorist, Andrew Sharp, has criticised

⁶⁶ Palmer, ‘Labour and the Treaty of Waitangi’.

⁶⁷ John H. Schaar, ‘Legitimacy and the Modern State’ in W. Connolly (ed.), *Legitimacy and the State*, Basil Blackwell Publisher Ltd., Oxford, 1984, p. 110.

politicians and government departments under Labour which, he believes, co-opted Māori concepts and phrases such as 'the principles of the Treaty' for their own purposes in the 1980s in order to make them work in favour of Government rather than Māori objectives.⁶⁸ In applying Sharp's criticism to the way Labour used the 'Crown' identity, it seems that, having spent many decades and much energy searching for a Crown treaty partner, Māori were presented with a Labour government which not only adopted the identity of the Crown, but in doing so, took care to emphasise that the contemporary Crown symbolises majoritarian, liberal-democratic government. As a result, the new Crown was not only partner to Māori (as explained in the Treaty of Waitangi), but was responsible and accountable to the rest of New Zealand as well. As earlier argued in Chapter Four (which investigated ministers' use of the Crown symbol), from Labour's second term in office (from 1987) and beyond, the Crown symbol allowed ministers to appease Māori concerns for demands for a responsible treaty partner, while simultaneously reassuring Pākehā that the Crown would protect the interests of all New Zealanders and that ultimate sovereignty in New Zealand remained in the hands of the government. As was also demonstrated in Chapter Four, after the Labour Government was replaced by a National Government in 1990, these patterns of use and meanings of the Crown were largely maintained.

However, while the Labour Government, and its successor governments, were to co-opt the Crown as a metonym for government in their discourse, the problem of both inconsistency and evolution of the concept and scope of the Crown meant that other groups in New Zealand were continuing to identify with the Crown as something other than government. As a review of the Muriwhenua claim demonstrates, in the 1980s, Māori in particular harboured an alternative interpretation of the Crown which was brewing beneath the surface of the claims process.

⁶⁸ Sharp, 'The Problem Of Maori Affairs 1984-1989', p. 255.

The Muriwhenua Land Claim: The Crown 'Problem' Resurfaces

The evolution of the Crown from Queen to settler government meant that by the 1980s the Crown was being identified as more than just government by groups within the negotiation process. Evidence presented at the Muriwhenua land claim, a substantial North Island claim to the Tribunal still in progress at the time of writing, clearly demonstrates that there was substantial confusion and contradiction in the Crown's identity which had neither subdued with the passing of time, nor been resolved by the Treaty of Waitangi Act 1975.

Research into the Muriwhenua land claim began in the mid 1980s. The claim was originally divided into matters arising before and after 1865 (although subsequently it has been decided by the Tribunal that the two aspects of the claim should be heard together). In 1995, the claim was still in progress and the Tribunal was yet to hear all evidence and make recommendations and findings. As one of the longest running and most comprehensive claims in New Zealand to date, the evidence presented at Muriwhenua hearings by 1995 provides valuable insights into the ways the Crown is interpreted and used by Tribunal researchers, Muriwhenua claimants and the Crown itself.

To briefly outline the nature of the Muriwhenua land claim, claimants have argued that land transactions must be seen in terms of the Māori laws which governed them, meaning that Muriwhenua land was not 'sold' to the Crown in the European sense and thus is still Muriwhenua land. Also, the claimants contend that the Crown kept surplus land for itself, which is contrary to the Treaty's terms of sale. Finally, the claimants have challenged the validity of Crown purchases of Muriwhenua land from 1841 to 1865. The Crown contends in return that the Muriwhenua Māori clearly understood the land transactions to be purchases and that the Crown was entitled to the surplus land, having awarded only part to the settlers.

The methodological problem of selecting evidence to use in analysing the language of such a substantial claim in order to study the uses of the Crown was simplified by the publication of a list of research and evidence relating to the Muriwhenua land claim (before 1865) produced by the Waitangi Tribunal.⁶⁹ These twenty-two research reports came from the Waitangi Tribunal, the claimants and the Crown. The objective, as earlier stated, was to review this evidence in order to determine the use and meaning of the Crown as demonstrated by these three groups. The results of this investigation shows that concerns that, despite a common use of the Crown as a metonym for government by the mass media and ministers in the 1980s, the Tribunal and Māori claimants in particular, perceived of the Crown as something which could be distinctly different from the government.

In looking at the meanings and uses of the Crown by Tribunal, Crown and claimants, it was first observed that, as it had done in mass communication, the Crown symbol often appeared in evidence without clarification. References were made, for example, to 'the main lines of *Crown* policy towards Muriwhenua during the 19th century...' ⁷⁰ as well as the comment that, 'the *Crown* blundered ... the *Crown* chose to deal with the two claimants separately. Not only did the *Crown* fail to define their [Muriwhenua Māori] respective interests, it created a great deal of suspicion all around.'⁷¹ However, the report offered no explanation as to who the Crown was in these cases. In other instances the Crown was personified and capable of action, as in comments which noted '[t]he *Crown* failed to fulfil a basic public responsibility'; 'the *Crown's* obligation to honour ... agreements' and 'the role of the *Crown*'. Also 'the Crown admitted' and 'the Crown was engaged in' as if the Crown were a single person or entity capable of action, but again, the detail about the identity of the Crown was not

⁶⁹ Waitangi Tribunal Division, *Te Manutukutuku*, Newsletter Number 24/25, October to December 1993, pp. 3-4.

⁷⁰ Barry Rigby and John Koning, 'Historical Evidence Relating to the Muriwhenua Claim', *Wai 45*, Doc. A1, p. 6.

⁷¹ Barry Rigby, 'Oruru Report', *Wai 45*, Doc. C1, pp. 25-26.

forthcoming.⁷² It will be recalled from Chapter Two that symbols such as the Crown when used in this manner, can fulfil the public's understanding of issues despite the fact that they lack sufficient detail. It will also be recalled that Tim McCreanor had suggested that Doug Graham's use of the Crown in this manner allowed him to avoid actually naming the individuals who did the 'dirty work'.⁷³ These are both possible explanations for the lack of detail regarding the Crown here.

On other occasions, the Crown was identified as one of the trinity of the Queen, a governor-general (or other political official) or 'government' generally. For example, the Crown was identified as the Queen in the statement that, 'Crown pre-emption' meant that 'the Queen would not interfere with native [Māori] lands'.⁷⁴ Indeed, the Queen was most often identified as the Crown by Muriwhenua claimants themselves in recalling the words of their ancestors, as in this statement following the signing of the Treaty by one Māori rangatira, 'I say yes, I say yes, for the Queen.'⁷⁵ Similarly, the famous words of another rangatira were recalled in evidence for the Muriwhenua claim: '[o]nly the shadow of the Land goes to the Queen but the substance remains with us.'⁷⁶ Other examples include the statement by Nopera Panakarea as he signed a land deed, 'to make over to the Queen of England ... this piece of land and everything thereinto belonging is accordingly made over to Her Majesty Victoria to the Queen of England to the Kings or Queens after Her - for ever and ever.'⁷⁷

⁷² Barry Rigby, 'Muriwhenua North Report', *Wai 45*, Doc. B15, pp. 5-38.

⁷³ See Chapter Four for further discussion.

⁷⁴ Rigby and Koning, 'Historical Evidence Relating to the Muriwhenua Claim', p. 55.

⁷⁵ Rigby and Koning, 'Historical Evidence Relating to the Muriwhenua Claim', p. 54.

⁷⁶ Rima Edwards, Submission, *Wai 45*, Doc. B2, The Chief later reversed his words (just before his death) saying 'The Queen has taken the substance of the land and only the shadow remains with us.' Also quoted in Rev. D. Urquhart, 'Summary of Kaitaia Treaty signing', *Wai 45*, Doc B12.

⁷⁷ 'Mangonui District Deeds', *Wai 45*, Doc. A26, p. 33. Again, there were also exceptions to the way the Crown was presented to Māori. For example a letter written to Hemi Paera by a British official, it was stated that, 'This land is in the hands of the Government, the lands that the Parliament agreed that you were to have, have been settled, the balance belongs to the Government.' *Wai 45*, Doc. A52.

While Muriwhenua Māori recalled their ancestors' interpretations of the Queen as the Crown (and previous chapters in this thesis also provided evidence of this interpretation) the significance of the Queen as the Crown was also emphasised by the Tribunal reports. For example, Anne Salmond recognised that the Māori preamble to the Treaty said that Queen Victoria herself had a personal care for the Chiefs, and that throughout the Treaty it was implied that the agreement was a personal transaction between themselves and the Queen.⁷⁸ Also, other Tribunal reports provided evidence that British officials were aware that Māori interpreted the Crown as the Queen and used this symbolism to simplify their explanations of transactions to Māori rangatira. For example, one report noted that one British official, 'went to great lengths to explain the intent of *Crown* pre-emption. He told the assembled chiefs, 'the *Queen* would not interfere with their native laws ... that *Her Majesty* was ready to purchase such as they did not require for their own use.'⁷⁹ In another Tribunal report it was similarly noted that, '[o]n the day the [land] deeds were signed in Kaitaia, the *Crown* notified Pakeha residents of Mangonui that 'the Lands of Mangonui have been purchased for *Her Majesty*.'⁸⁰

In addition to identifying the Queen, the Crown was also seen to represent British or government officials in evidence presented in the Muriwhenua claim. For example it was observed that, 'Colonel Edward Godfrey, the Crown Land Claims Commissioner investigating [a] claim during 1843, provided the *Crown's* definition of the nature of [the land holders] property rights in Muriwhenua North.'⁸¹ It was also noted that:

to form an alliance with the *Crown* ... [one private land buyer] befriended the most powerful Crown agent in the ... area, Donald McLean. ... [The land buyer] cooperated

⁷⁸ Anne Salmond, 'Treaty Meanings', *Wai 45*, Doc. F19, pp. 5-6.

⁷⁹ Rigby and Koning, 'Historical Evidence Relating to the Muriwhenua Claim', p. 55.

⁸⁰ Barry Rigby, 'Mangonui Area and the Taemaro Claim', *Wai 45*, Doc. A21, p. 13.

⁸¹ Rigby, 'Muriwhenua North Report', p. 24.

actively with McLean and [Governor] Grey in negotiating *Crown* land purchases in the Wanganui area.⁸²

This brief review of some evidence presented in the Muriwhenua land hearings has demonstrated that the problem of inconsistency and evolution in identity of the Crown was once again resurfacing in the contemporary claims process.

In conclusion to this chapter, three arguments are restated. First, 'the Crown' symbol was revived by the 1975 Act and the work by the Waitangi Tribunal. In popular use (as previous chapters have indicated) the Crown was being interpreted and used, admittedly with some inconsistency, as a metonym for government. It was suggested that the symbol was used both consciously and unconsciously to make rapid policy change more acceptable. Second, within the claims process, as the Muriwhenua evidence indicated, the Crown had a much broader range of uses. In particular, the Queen was still an important representation of the treaty partner for Māori. Finally, despite the ambiguity and confusion generated by the Crown in a contemporary context, the problem of the identity of the Crown was neither publicly acknowledged nor reconciled in the Treaty of Waitangi Act 1975. The next two chapters indicate that as the process of resolving treaty grievances continued to unfold in the late 1980s and early 1990s, the problem of the evolution of the Crown was to become even more extensive and result in further serious implications for Māori.

⁸² Rigby, 'Muriwhenua North Report', pp. 28-29.

SEVEN

THE CONTRACTING PROBLEM OF THE CROWN: A CASE STUDY OF THE MORIORI CLAIM

In the previous chapter the question was raised as to whether the identity of 'the Crown' in the Treaty of Waitangi Act 1975 adequately acknowledged and reconciled the ambiguities and complexities inherent in the symbol of the Crown revealed and discussed in Chapter Five and also demonstrated in evidence presented in the Muriwhenua claim in the previous chapter. It is now argued that the problem of the identity of the Crown in the 1975 legislation was not clarified and, as a result, has created difficulties for Māori in the negotiation of some treaty disputes. The case study used to demonstrate this is the Moriori claim before the Waitangi Tribunal relating to the Chatham Islands. In particular, the case study investigates a claim by a third party that the Tribunal does not have the jurisdiction to examine the actions of the *Native Land Court* (NLC) as required by Moriori claimants because the Tribunal is only allowed to consider actions or omissions by the *Crown*, or *Crown agents*. This question forced the Tribunal to consider the meaning and identity of the Crown under the 1975 Act. Its findings, as well as the arguments of Moriori claimants and Crown Counsel, are reviewed.

The issue of Crown agency becomes something of a focus in this chapter and requires some explanation. The Crown has, on occasion, been recognised as a 'complex and highly organised corporation aggregate of which the King is the head.'¹ Philip Joseph, constitutional lawyer, argues that this corporate identity conveys to the Crown an alter ego of the Crown's ministers or their departments as its servants or agents

¹ Philip Joseph, *Constitutional and Administrative Law*, The Law Book Co., Sydney, 1993, p. 496.

through which the Crown may act. Also, through the concept of 'persona designata' a person or group of people chosen or designated by the Crown can act on behalf of the Crown for a particular purpose. In such cases, certain Crown rights and privileges can be extended to 'persona designata'. However, this relationship between Crown and agent has proven problematic with regard to the law. 'The Crown' can be identified in such a manner as to separate it suddenly from the actions of an 'agent'. For example Joseph comments, '[w]hy the Crown should benignly lose its alter ego at the courthouse door makes it a mysterious creature, a sometimes corporate institution acting through its Ministers or servants and sometimes not.'² Joseph cites several examples which indicate that the Crown may be anything (or anyone) that Parliament chooses.³ In the Education Act 1964, every education board and teachers' college was said to be an agent of the Crown. Joseph concludes that 'the ... Crown is a multifarious creature, with sometimes chameleon qualities.'⁴

The problem of agency with regard to the Treaty of Waitangi and the claim of the Moriori iwi to the Waitangi Tribunal, raises the significant question as to whether the Native Land Court was acting 'by or on behalf of the Crown', which in turn determines the Tribunal's authority to examine the actions and policies of the Native Land Court. The ruling is one based on a broader principle of the identity of the Crown in the 1975 Act, an issue which has also been investigated in cases other than the Moriori claim (for example, the Waitangi Fisheries Commission case discussed at the end of this chapter).

² Joseph, *Constitutional and Administrative Law*, p. 499.

³ Joseph, *Constitutional and Administrative Law*, p. 502.

⁴ Joseph, *Constitutional and Administrative Law*, p. 505. Sir Kenneth Keith, Head of the Law Commission in New Zealand, addressed other matters in relation to the issue of Crown agents in a report on the 'Crown Agencies Issue' which arose from the Public Finance Act 1989. In the Act, the Crown is defined as 'in essence Ministers and Departments.' Keith identifies a difficulty with the phrase 'Crown agencies', asking whether the expression was apt for the bodies which are concerned. He asks '[c]an it really be said that they 'represent' and 'act on behalf of the Crown' (that being the standard relevant definition of 'agent')? And that the Crown is their principal with all that implies for control and responsibility?' See: K.J. Keith, 'Crown Agencies', a paper presented at the Institute of Policy Studies Meeting, *Constitutional Restraints*, 5 July 1990, pp. 3-4.

The History of the Moriori Claim

Before examining the facts of the claim brought to the Waitangi Tribunal by Moriori, it is essential to understand the history and some of the detail of the claim in order to appreciate the significance of the ruling on whether the Native Land Court can be considered agent to the Crown for the purposes of the Treaty of Waitangi Act 1975.

Michael King, an authority on the Moriori people, contends that Moriori history has long been shrouded in myths and lies.⁵ According to King, Moriori are of Polynesian origin and share their ancestry with New Zealand Māori, evidenced by the languages and development of the two peoples.⁶ Moriori arrived in the Chatham Islands through accidental or deliberate migration from New Zealand around the fourteenth century.⁷ They traditionally called the islands 'Rekohu' meaning 'misty sky' or 'misty sun'. The name Moriori itself comes from the Moriori phrase 'tchakat moriori' meaning 'ordinary' or 'normal'.

Rekohu provided Moriori with abundant natural resources including fish, mutton birds and fertile soils. Moriori cultural and social development was finely tuned by this productive but insular environment.⁸ One important consequence of the isolated conditions on Rekohu was the development of the Moriori philosophy of 'nunuku'. 'Nunuku-whenua' was a famous Moriori ancestor who grew tired of bloodshed and ordered the warring parties on Rekohu to retire. Moriori consequently developed the unusual tradition of abolishing lethal contact between tribal and kin groups and ostracising those who resorted to warfare or violence. In practical terms the

⁵ Michael King, *Moriori. A People Rediscovered*, Viking Press, Auckland, 1989. King's book is the source for all information relating to the history of the Moriori people in this thesis, and was used as evidence in the Waitangi Tribunal claim. See *Wai 64*, 'Record of Documents', C13(L). Also, for further discussion of the myths which have historically surrounded the Moriori people, see 'Whence of the Moriori', *Wai 64*, Doc. A5 and 'The Myth of the Moriori', *Wai 64*, Doc. A6.

⁶ King, *Moriori*. p. 26.

⁷ King, *Moriori*, p. 22.

⁸ King, *Moriori*, pp. 25-26.

philosophy provided a valuable means of ensuring the survival of a viable population on the islands.⁹ As King says, 'Moriore had found a way of living in a state of equilibrium with ... available resources.'¹⁰ Like other Polynesian cultures, Moriore developed an elaborate system of spiritual beliefs and practices and a strong sense of place, evidenced in myths and ancestral knowledge. King describes Moriore as 'a very tapu people'.¹¹

The Moriore lived unaware of other peoples and the wider world until the British vessel 'Chatham' came across Rekohu by mistake in 1791.¹² With the passing of this incident, King observes:

[t]he membrane of distance which had protected the Chatham Islanders from contact with peoples who thought and behaved differently from themselves, which had allowed the uninterrupted evolution of their culture and the successful observance of Nunuku's law, was about to be perforated; the Moriore were to discover they were not alone in the world.¹³

Moriore established a tenuously amicable relationship with early European arrivals. Māori also came to the islands (which they called 'Wharekauri') on European vessels and lived fairly harmoniously in predominantly Moriore settlements.¹⁴ While the exchange of some goods with these immigrants was beneficial to Moriore, Europeans introduced disease and exploited Rekohu's natural resources in ways which were

⁹ King, *Moriore*, pp. 26-28.

¹⁰ King, *Moriore*, p. 28. Also, King comments that Moriore endured a high population density; about 2 000 people on 108 000 hectares which would endanger resources unless conservation was observed, p. 33.

¹¹ King, *Moriore*, pp. 35-36. 'Tapu' meaning sacred. King notes that Moriore culture was not studied until it had been shattered by trauma. Consequently, the Moriore are often misunderstood as a simple and backward society; p. 38.

¹² King, *Moriore*, p. 39.

¹³ King, *Moriore*, p. 40.

¹⁴ Wharekauri – allegedly named after a house built by on the island Māori out of salvaged Kauri timber. Māori apparently found this easier to pronounce than 'Rekohu'; King, *Moriore*, p. 52.

devastating for the Moriori inhabitants.¹⁵ King recounts, '[b]y 1835, the Moriori at Rekohu ... had undergone some irreversible changes. ... [T]hey were now aware of ... British people with a King, who in some mysterious way was also their King as a result of [the European] visit.'¹⁶ Despite this upheaval, the Moriori remained essentially in control of their lives and customs and their traditional views on life were remarkably unchanged.¹⁷

However, this state of affairs was irrevocably altered in early 1835 by an invasion of around nine hundred Māori from Ngāti Mutunga and Ngāti Tama tribes (collectively known as Te Ati Awa) who had earlier been driven out of Taranaki in the 1830s and had travelled down to the Wellington/Port Nicholson area.¹⁸ In the traditional manner of supporting new land claims, the Māori invaders killed huge numbers of Moriori who, in supporting their own philosophy of *nunuku*, are said not to have killed a single Māori in defence of their land and their lives – to do so would compromise their *mana*. Europeans apparently offered no intervention in the invasion and ensuing massacre.¹⁹ The invading Māori asserted ownership over the lands they chose to settle on and those Moriori who survived the invasion were apparently forced into slavery. King explains that surviving Moriori 'faced a world in which everything in which they had believed spiritually and culturally was shown to be leached of fertility and value: their gods did not protect them from these horrors; their gods were dead.'²⁰

¹⁵ King, *Moriori*, p. 49. The impact of European hunting of seals and whales was devastating to the resource (pp. 48-49). Also, there is some debate over the drop in population of Moriori between 1828 and 1832, some commentators quoting up to fifty per cent reduction, while others more conservatively refer to a twenty per cent decline in the Moriori population, pp. 49-50.

¹⁶ King, *Moriori*, p. 56. Earlier, King had stated that despite provocation, there is no record of Moriori breaking the law of *nunuku* by killing European or Māori immigrants, p. 51.

¹⁷ King, *Moriori*, p. 57.

¹⁸ Later, King explains that Te Ati Awa had been displaced from their ancestral home and therefore forced to search for new land – though he does not identify the cause of displacement, p. 76.

¹⁹ King, *Moriori*, pp. 58-66.

²⁰ King, *Moriori*, p. 67.

After the signing of the Treaty of Waitangi in 1840, Māori on Rekohu claimed to embrace British laws, although conditions improved little for Moriori. Soon, the recent Māori arrivals grew restless and fought amongst themselves.²¹ When European surveyors arrived with plans to purchase the Chatham Islands they intervened in warfare between Ngāti Tama and Ngāti Mutunga in order to settle the question of ownership and complete the purchases. These purchases were overruled in 1842 when the Chatham Islands became part of New Zealand by proclamation, hence subject to British rule and a target for British settlement.²² In neither transaction was Moriori ownership considered.²³ As King explains:

[t]heir mana whenua ... had been ignored by the Maori, but had not been extinguished. They had not been defeated in fair contest because they had not engaged in a contest. They had been dealt with neither as owners of the land, nor as the partners they had been prepared to be. Their offer to share the resources of Rekohu with those who were, after all, distant Polynesian kin, had been hurled back in their faces. They had been ignored, insulted, slaughtered and enslaved - brought to their knees physically, culturally and spiritually. But because they had neither broken Nunuku's injunction or vacated their island, their own mana was in tact.²⁴

As the British struggled to maintain law and order on the islands, the Moriori began to hold meetings to petition the Governor.²⁵ The earliest surviving example of such a petition was a letter sent in April 1859 to Governor Grey. It contained historical and genealogical information about the Moriori intended to distinguish Tchakat Moriori from Chatham Island Māori in order to demonstrate Moriori rights of ownership to land on Rekohu. Again in 1861, Moriori met with and sent letters to the Governor

²¹ This 'restlessness' is later cited as the reason for 'The Maungahuka Experiment' – the temporary settlement of the Auckland Islands by Māori and Moriori slaves - which will not be discussed in this thesis, but which is the basis for a Moriori claim to the Tribunal (Wai 64, #1.7, 3.0 - 3.1). See: King, *Moriori*, pp. 77-88.

²² King, *Moriori*, p. 89.

²³ King, *Moriori*, p. 73.

²⁴ King, *Moriori*, pp. 75-76. 'Mana whenua' can be explained as the sense of self the Moriori drew from their lands on Rekohu, after at least half a millennium of occupation.

²⁵ King, *Moriori*, p. 98, and p. 118.

attempting to convince him to address the issue of land ownership and acknowledge Moriori rights. Moriori petitions to the government increased after the abolition of slavery in 1863. King says that no response from Governor Grey to any of these communications has survived.²⁶

In 1868, great numbers of Ngāti Mutunga and Ngāti Tama, restless and disheartened by dwindling prosperity on Wharekauri, were attracted back to life in Taranaki where Native Land Court sittings required their presence to ensure their claims to land would be heard. With the resulting mass exodus, the Moriori population exceeded that of the Māori for the first time in almost thirty years, although the number of Europeans now exceeded them both.²⁷

In 1867 Henry Halse, Under-secretary for Native Affairs, was instructed to gather the opinions of the Chatham Islanders on the possibility of extending the Native Land Court to the Chatham Islands. The Native Land Court had been established in New Zealand in 1865 and charged with the task of establishing who 'owned' tribal Māori land (a concept foreign to Māori) in order to grant European title so land could be bought and sold without dispute.²⁸ In his instructions regarding the Native Land Court in the Chatham Islands, Halse was also instructed (less officially it would seem) to encourage the establishment of the Court and discourage the return of Te Ati Awa Māori to Taranaki. Halse, a humanitarian, believed justice would be served through the Court, but quickly discovered that the Native Land Court was facing a complex web of land ownership issues on the Chatham Islands. Moriori claimed ownership as the original land occupants while Māori claimed the land by right of conquest and were divided amongst themselves on ownership issues. Following extensive hui

²⁶ King, *Moriori*, pp. 114-120.

²⁷ King, *Moriori*, p. 109.

²⁸ J.B. Ringer, *An Introduction to New Zealand Government*, Hazard Press, Christchurch, 1991, pp. 33-34. The Land Court has been described as an 'effective mechanism of subtle conquest', see James Belich, 'The Governors and the Maori', in *The Oxford Illustrated History of New Zealand*, Keith Sinclair (ed.), Oxford University Press, Oxford, 1993, p. 94.

(meetings) and consultation with the people on the Islands, Halse announced the Court would be established and that the first pre-hearing meeting would take place on the Island in 1868. He also advised that Te Ati Awa people must remain on, or return to, the islands to secure their Chatham Island holdings.²⁹

By 1870, the Moriori population was scattered around settlements throughout Rekohu and numbered just under one hundred. Poorly organised and unaccustomed to judicial procedure, the Moriori claimants in the 1870 Chatham Island Native Land Court hearings were unable to compete with Māori who had returned from Taranaki with knowledge of the court procedure, to secure their own land title on Wharekauri.³⁰ King also argues that the judge had been encouraged by Native Affairs to award land to Taranaki Māori to discourage them from returning to Taranaki where strong anti-British sentiment was already developing. Consequently, following ten days of hearings, the judge ruled that:

The Court ... is of the opinion that [the Māori claimants] have clearly shown that the original inhabitants of these Islands were conquered by them and the lands were taken by force of arms and the Moriori people were made subject to their rule and also that they maintained their conquest by actual occupation ... [the Māori claimants] are the rightful owners of this block according to Native custom. But ... as the original inhabitants have had a permissive right hitherto of cultivating certain portions of their land for their maintenance, an order will be made in favour of ... the Moriori people ... without any restrictions being placed thereon.³¹

Accordingly, the first section under examination was divided by the Native Land Court – 15, 520 hectares were awarded to Māori claimants and 240 hectares to Moriori.³² The case set a dangerous precedent followed by later claims. In all, the

²⁹ King, *Moriori*, pp. 120-122.

³⁰ King, *Moriori*, p. 125. King provides transcripts of Moriori and Māori evidence presented at the first Land Court hearing, pp. 125-131.

³¹ King, *Moriori*, p. 56.

³² King, *Moriori*, pp. 131-132.

Court awarded 58,516 hectares to Māori, and 1,640 hectares, only 2.7 percent of the land to Moriori.³³ The initial judgment destroyed Moriori faith in the British system of justice and revealed to Moriori that they were horribly under-prepared and under-resourced for the legal procedure required of them by the NLC. To Moriori it appeared that Māori were not to be punished by the justice system for their treatment of the Moriori, but rather rewarded for it. Māori themselves were encouraged by the Native Land Court's findings and many more Taranaki Māori returned to the Chathams to endorse land claims or collect rents.³⁴

These actions by the Native Land Court in ruling on Chatham Islands land ownership in the 1870s have recently been explained and criticised as an application of the '1840 rule'. The '1840 rule' can be interpreted in a number of ways in different contexts. In the case of the Moriori claim, the '1840 rule' meant the courts would recognise land gained by violence or conquest up to 1840 (when British sovereignty was arguably introduced) but not after that time. As one judge has since explained, the 1840 rule allowed forcible conquest or *raupatu* to be regarded as a legitimate basis for a land claim provided it occurred before 1840.³⁵ The Court's application of the '1840 rule' seriously disadvantaged Moriori because it excused the Native Land Court from recognising the traditional ownership rights of the Moriori people who had been invaded by Taranaki Māori in 1835.³⁶

Consequently, in 1885 when Moriori took their grievances back to the Native Land Court claiming ownership of an island not considered in earlier claims, they were told by the presiding judge that 'the Chatham Islands were adjudged to the Maori in 1870, [in accordance with the 1840 rule] and the Court is of the opinion that the adjacent islands were included in that judgement.' This was, according to King, the last

³³ Brian Gilling, 'The Native Land Court in the Chatham Islands', *Wai 64*, Doc. A10, p. 91.

³⁴ King, *Moriori*, p. 132.

³⁵ 'Record of the High Court Proceedings on Jurisdiction', *Wai 64*, Doc. 2.42, p. 8.

³⁶ Gilling, 'The Native Land Court in the Chatham Islands', p. 29.

Moriori claim lodged with the Native Land Court, and certainly the last attempt to use the legal system to rectify grievances arising out of the Taranaki invasion.³⁷

The Native Land Court's findings were devastating for Moriori still living on Rekohu, whose population had dropped to just twelve by 1900. This rapid decline in population was paralleled by the speed with which traditional Moriori knowledge was evaporating.³⁸ By 1904, only six of those twelve Moriori were still alive. Problems of securing the limited land title allowed to Moriori were prolific.³⁹ With the death of the last known 'full blooded' Moriori, Tame Horomona Rehe, known later as Tommy Solomon, the Moriori people were believed to be extinct.⁴⁰ In reality, many hundred Moriori descendants living in New Zealand were too ashamed to acknowledge their Moriori ancestry because of pervasive myths that the Moriori were a distinct and inferior race of people who had been conquered by the New Zealand Māori and driven to the Chatham Islands. In 1980, a documentary was screened in New Zealand which dispelled many of these myths and lies about the Moriori and prompted the reunion of Tommy Solomon's family in 1983. This was a turning point in Moriori history because it meant that membership of the Moriori iwi looked set to become more of a matter of honour than a source of disgrace.⁴¹ A Rekohu claims committee was established to regain control of the resources of the islands, and get compensation for the Moriori losses of the nineteenth century. King states that, '[m]ore than money and land was at stake, however. The committee's general objective was recognition of the Moriori people as the indigenous owners and spiritual guardians of Rekohu.'⁴²

³⁷ King, *Moriori*, pp. 140-141.

³⁸ King, *Moriori*, pp. 136-137.

³⁹ King provides detailed accounts of the claims to several Moriori land holdings following the death of the owner; King, *Moriori*, pp. 150-154.

⁴⁰ 'And then there was one?'; an account of Tommy Solomon's life in King, *Moriori*, pp. 156-198.

⁴¹ King, *Moriori*, pp. 190-192.

⁴² King, *Moriori*, pp. 193-194.

The Claim Before the Waitangi Tribunal

The claim relating to Rekohu and outlying islands by Te Iwi Moriori and the Moriori Tchakat Henu Association was first brought before the Waitangi Tribunal in 1987. The Moriori claimants claimed first that they had been prejudicially affected by the omission of the Crown to act in such a manner as to protect Moriori customary rights to their lands following petitions by Moriori to Crown representatives in the 1850s and 1860s. Furthermore, the claimants believed this failing was inconsistent with the principles of the Treaty of Waitangi.⁴³ Secondly, the claimants argued that a number of acts or omissions of the Crown, *by or through its statutory agent the Native Land Court* had also prejudicially affected the rights of Moriori claimants. It was these claims in particular which were later challenged by a third party, Te Runanga o Wharekauri o Rekohu, on the basis that the Native Land Court was not a part of the Crown, and thus the claims were beyond the jurisdiction of the Tribunal. The claims made by Moriori which are relevant to this discussion were as follows:⁴⁴

- 1.2.1.1 The omission of the Crown to provide adequate legislative machinery to guide the work of the Native Land Court in its investigation of claims on Rekohu despite the Crown having prior knowledge of the unique circumstances pertaining to claims between Moriori and Taranaki Maori;
- 1.2.1.2 The application of the so-called "1840 rule" on Rekohu effectively depriving the claimants of 97% of their customary lands;
- 1.2.1.3 The intervention of the Crown and/or its agents in actively discouraging the return of Taranaki Maori to their home in Taranaki in the 1860s;

⁴³ The acts, policies and omissions of the Crown which the claimants believe to be contrary to the principles of the Treaty of Waitangi are listed in 'Te iwi Moriori Trust Board and Moriori Tchakat Henu Association, re: lands and fisheries', *Wai 64*, Doc. 1.7. Refer to sections 1.0-3.0 inclusive for discussion.

⁴⁴ These come from 'Te iwi Moriori Trust Board and Moriori Tchakat Henu Association, re: lands and fisheries', *Wai 64*, Doc. 1.7, and the paragraph numbers used here are those used in the original document.

- 1.2.1.4 The Crown and/or its agents intervening to encourage re-migration of Taranaki Maori back to Rekohu to lessen the potential conflict with the colonial militia and European settlers in Taranaki;
- 1.2.1.5 The active intervention of the Crown to keep Taranaki Māori on Rekohu and to encourage their return, together with circumstances surrounding the establishment of the Native Land Court on Rekohu, indicate a desire by the Crown to have land title's [sic] conferred on Taranaki Maori claimants, as against the ancestral claims of Moriori;
- 1.2.1.6 The failure of the Court to ensure that Moriori had available to them such persons with necessary skills to ensure that Moriori were not unduly disadvantaged during the Court hearings as a result of their lack of experience and to ensure that natural justice prevailed;
- 1.2.1.7 The failure of the Native Land Court to correctly apply the customary lore of Moriori in making their determinations both in respect of the main island of Rekohu and the outlying islands of the group;
- 1.2.1.8 The failure of the Crown to respond to or action direct requests from Moriori in or about 1879, seeking from the Crown redress for the injustices perpetrated by the Native Land Court in denying their lands [sic] rights to Rekohu and outlying islands;
- 1.2.1.10 The failure of the Crown to protect Moriori from enslavement between the years 1840 and 1963 in breach of Articles II and III of the Treaty of Waitangi.

Other grievances levelled at the Crown included Crown denial of Moriori birding and sealing rights as well as harvesting rights, and a Crown failure to protect Moriori wāhi tapu (sacred sites) and other taonga. Remedies and redress sought by the claimants included an apology from the Crown and 'compensation for the unfair and unequal treatment of Moriori by the Crown and *its statutory agent, the Native Land Court*, in depriving Moriori of their rightful lands.'⁴⁵

⁴⁵ 'Te Iwi Moriori Trust Board and Moriori Tchakat Henu Association', *Wai 64*, Doc. 1.7, sections 4.0-4.10.

The Native Land Court: "By or on behalf of the Crown"?

Moriori were not the only group to present a claim to the Tribunal relating to the Chatham Islands. Te Runanga Wharekauri o Rekohu Inc, representing Taranaki Māori, also lodged a claim. When the first hearing for the Moriori claim had been set for 9 May 1994, Te Runanga requested interim relief and challenged the Tribunal's jurisdiction to inquire into the Native Land Court (NLC) hearings and rulings as required by the Moriori claimants.⁴⁶ The request was unsuccessful. The judge hearing the challenge ruled that 'the applicant does not succeed in its application for interim relief and the hearing should continue in the form contemplated by the Tribunal for the week of 9 May in the Chathams.'⁴⁷ Prior to the next hearing in August 1994, Te Runanga once again made application for the issue of the Tribunal's jurisdiction to be determined. In this instance the Tribunal agreed that submissions on the question of jurisdiction should be heard before the next substantive hearing which was scheduled for October 1994. The ruling would turn on the matter as to whether the Native Land Court was acting by or on behalf of the Crown in terms of section 6(1) Treaty of Waitangi Act 1975 (section 3 Treaty of Waitangi Act 1985). In two separate hearings, both the Tribunal and the High Court examined the matter of the jurisdiction of the Tribunal in relation to the Crown and the Native Land Court. For the purposes of this discussion the arguments presented in both will be discussed concurrently, although the findings will be discussed separately.⁴⁸

Section 6(1) of the Treaty of Waitangi Act 1975, states the Tribunal can consider claims –

⁴⁶ 'Runanga request for clarification', *Wai 64, Doc. 2.25*.

⁴⁷ 'Record of High Court Proceedings', p. 2.

⁴⁸ Only aspects of the hearings considered relevant to this thesis are discussed here. Readers looking for a more detailed discussion should go back to the original sources cited here.

(1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected⁴⁹ –

- (a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or
- (b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or
- (c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown: or
- (d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted by or on behalf of the Crown,

and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or other act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.

The challenge to the Moriori claim had raised the question as to whether the NLC could be identified as the Crown or acting by or on behalf of the Crown. More specifically, could the NLC's application of the '1840 rule' be considered within the jurisdiction of the Waitangi Tribunal. The 'rule' itself was judge-made, that is, it was not prescribed by the NLC Acts or other legislation which would make it the direct responsibility of the Crown. Therefore, was the adoption of the '1840 rule' by the NLC judges in any way a policy, practice or act adopted or done on behalf of the Crown as prescribed in the Treaty of Waitangi Act 1975?

For the sake of clarity, the groups involved in the hearing must be clearly identified. First, there were the Moriori claimants who brought the original claim before the

⁴⁹ Another matter of identity is the relationship between Moriori and Māori. For the purposes of this claim, and in a much broader sense Moriori contend that they are a Māori iwi, distinct from other iwi but inclusively Māori. See Heron J.'s ruling on this matter: 'Record of High Court Proceedings', pp. 4-5.

Tribunal who are referred to in this discussion as 'the claimants'. Second, there were the Māori claimants (referred to here as Te Rūnanga) who also brought a claim regarding the Chatham Islands, and requested the Tribunal's investigation of its jurisdiction regarding the Native Land Court and the Moriori claim. Finally, there was the Waitangi Tribunal, which conducted the investigation into the meaning of 'the Crown' in the 1975 Act, and the High Court which first considered the matter and decided it was appropriate that the Tribunal should resolve the question of jurisdiction before proceeding with the Moriori claim.

The arguments presented by each group also require clarification. While the claimants contended that the term 'the Crown' in the 1975 Act included the Native Land Court, council for the Crown and Te Rūnanga maintained that it did not.⁵⁰ The argument turned on two points in particular which revisit aspects of 'the Crown' discussed previously.⁵¹ First, there was some debate over the meaning of 'the Crown' as drawn from the context of the Treaty, reminiscent of the discussion in Chapter Five which identified two possible interpretations for the Crown after the Treaty was signed as either the Queen or British/settler government. The second point, investigated most rigorously by the Tribunal itself, was the evolution of the Crown identity and its relationship with other political institutions. These arguments are now examined in turn.

i. The Treaty Context

One of the claimants' arguments was that the meaning of 'the Crown' in the 1975 Act was best determined within the context of the Treaty of Waitangi in 1840. Similar to the argument raised in Chapter Five, the claimants recognised that Māori and Pākehā understood 'the Crown' to mean different things in 1840. They argued that, through

⁵⁰ 'Tribunal finding on jurisdiction re: Native Land Court', *Wai 64*, Doc. 2.67, p. 2.

⁵¹ The arguments presented here are not in the order they were presented to the High Court or the Tribunal, but have been reorganised to fit better the developments of my own earlier arguments. Consequently, the emphasis on the original arguments may differ from that conveyed here.

the Treaty, Māori transferred to the Crown as the Queen the very broad right to exercise 'kāwanatanga'⁵² in New Zealand. Through this action, the Crown or Queen became the embodiment of the right to make and maintain law and order in Aotearoa. At no point in the Treaty was there mention of the separation of powers between legislature, executive and judiciary.

In considering this argument, the Waitangi Tribunal agreed that there was nothing in the Treaty to suggest that Māori were aware of the legal separation of powers under 'kāwanatanga', or for that matter were they aware of the refined legal meaning of the Crown developed by the British. The Tribunal also acknowledged that the compact was 'sold' by the missionaries as a personal one between the Queen and the chiefs.⁵³ The comment was made that:

[t]he Treaty itself is silent as to the manner of exercise of the Crown's powers of sovereignty or kwanatanga. It is clear that the compact was sold by the missionaries as a personal one between the Queen and the Chiefs. There was no suggestion that the Queen was constitutionally unable to exercise the kwanatanga the Chiefs conferred upon her. Separation of powers is not mentioned.⁵⁴

The claimants also argued that Māori were encouraged to sign the Treaty by a European promise to settle the lawlessness resulting from European settlement (a fact also made explicit in the preamble to the Treaty). The claimants contended that circumstances such as these render the Crown's right to make laws an absolute priority in the scheme of the Treaty.⁵⁵ The point was made that it was only after 1852 that law-making authority was delegated to a representative assembly in the New

⁵² 'Tribunal finding on jurisdiction re: Native Land Court', p. 12-13. Also see Chapter Two for discussion of kāwanatanga and tino rangatiratanga in the Treaty of Waitangi, as interpreted by the Waitangi Tribunal.

⁵³ 'Tribunal finding on jurisdiction re: Native Land Court', p. 13. See also Chapter Three, 'The Arrival and Subsequent Disappearance of the Crown' (this thesis) for further discussion of the Queen as the Crown.

⁵⁴ 'Mori Counsel on jurisdiction re: Native Land Court', *Wai 64*, Doc E1, p. 3.

⁵⁵ 'Mori Counsel on jurisdiction re: Native Land Court', p. 3.

Zealand Constitution Act 1852.⁵⁶ It would therefore follow, the claimants reasoned, that any act of government or *kāwanatanga*, by any arm of government including the Native Land Court (as a creature of statute) would constitute an Act of the Queen, or the Crown, at least (and most importantly perhaps) in the eyes of Māori. In conclusion, the claimants submitted:

[w]hat the Crown stands for, for the purposes of section 6 of the Treaty of Waitangi Act 1975, falls to be determined in the context of the Treaty itself and what powers passed to the Crown by it which are now exercised by the Crown as incidents of *kāwanatanga*. It is the case for the claimants that policy or action adopted pursuant to the *kāwanatanga* ceded by the Treaty is adopted "by or on behalf of the Crown" within the meaning of the Treaty of Waitangi Act 1975.⁵⁷

According to this logic the subsequent separation of powers does not alter the fact that the power to do justice was appropriated by the Crown through *kāwanatanga* ceded by Māori in 1840. Consequently, all actions pertaining to law-making and justice must be weighed against the principles of the Treaty on the part of the Crown, including the actions of the Native Land Court.⁵⁸

In further defending their argument, the claimants cited a finding in Halsbury's Laws of England that judicial decisions were a source of government power which indicated that, despite a separation of powers, the source of all justice originally emanated from the Crown. It was stated that, 'all Judges and Magistrates are appointed by and derive their authority, either mediately or immediately, from the Crown' and; 'Courts are created by the authority of the Sovereign' and 'the Courts are the Queen's Courts administering justice in Her name.'⁵⁹ The source also stated that, 'the greater part of

⁵⁶ 'Moriore Counsel on jurisdiction re: Native Land Court', p. 3.

⁵⁷ 'Moriore Counsel on jurisdiction re: Native Land Court', p. 2.

⁵⁸ 'Moriore Counsel on jurisdiction re: Native Land Court', pp. 3-4.

⁵⁹ 'Moriore Counsel on jurisdiction re: Native Land Court', p. 47.

the machinery of central government may be regarded, historically and substantially, as an emanation from the Crown.'⁶⁰

In response to these arguments by the claimants, Crown counsel argued that when the Treaty was signed by chiefs in 1840, the courts in Britain had been independent of the sovereign for some one hundred and forty years. Therefore, the chiefs were not ceding their sovereignty to the British courts or legislature, but to the Queen herself. Counsel went on to argue:

[w]hile an independent court structure was soon set up by the Crown, and indeed was necessary in order for the Crown to fulfil its Treaty duties to provide Maori with the rights of British subjects, this was a distinct and separate development from the transfer of sovereignty itself. ... Therefore, whilst it can be said that the signing of the Treaty led to the establishment of courts in New Zealand styled on the British Model, this does not mean that the courts were part of the Crown, either in 1840 or subsequently ...⁶¹

In drawing its own conclusions on the place of the Treaty and 1840 conceptions of the Crown in the 1975 Act, the Tribunal acknowledged that Māori were not aware of the separation of powers between the Crown and the judiciary. However, it also suggested there was nothing in the preamble of the Treaty to suggest the Queen had a different constitutional relationship in mind for New Zealand than that which was already established in Britain, that is, with a judiciary independent from the Crown. Furthermore, the Tribunal stated that the meaning of 'the Crown' in the 1975 Act should not be determined by the possible understandings of the Treaty participants in 1840, but rather the meaning intended by the legislature in choosing to use the phrase in the 1975 Act.⁶² This point is discussed in more detail in the third section concerning interpretations of the Tribunal's jurisdiction.

⁶⁰ Halsbury's Laws of England, 4th ed., *Constitutional Law*, refer sections 806-807, quoted in 'Mori Council on jurisdiction re: Native Land Court', p. 4.

⁶¹ 'Crown submissions on jurisdiction', *Wai 64*, Doc. E2, pp. 4-5.

⁶² 'Tribunal finding on jurisdiction re: Native Land Court', p. 14.

ii. The Evolution of the Crown

While the Tribunal observed that 'the Crown' was not defined in the Treaty of Waitangi Act 1975, it suggested that in the sections of the Act 'the Crown' only refers to the executive or the government, not the judiciary or the Courts. However, before the Tribunal was willing to explore the meaning of the Crown in the Act, it first considered the evolution of the Crown, noting its development from a 'piece of jewelled headgear' to a collection of powers confirmed by statute on 'the Crown.'⁶³ Consideration was also given by the Tribunal to possible historic meanings of the Crown and its more recent range of identities and associations. For example, the Tribunal noted that when the House of Lords had occasion to wonder at the complexity of the Crown, one Lord had stated:

"the Crown" was no doubt a convenient way of denoting and distinguishing the monarch when doing acts of government in his political capacity from the monarch when doing private acts in his personal capacity, at a period when legislative and executive powers were exercised by him in accordance with his own will. But to continue nowadays to speak of "the Crown" as doing legislative or executive acts of government ... involves risk of confusion. ... [F]eatures of the debate ... could have been eliminated if instead of speaking of "the Crown" we were to speak of "the government".⁶⁴

In interpreting the Crown in New Zealand, the Tribunal also acknowledged Philip Joseph's argument that Parliament wrested sovereignty from the Crown at a relatively early stage in New Zealand, resulting in the 'somewhat fictional sense in which the term "the Crown" is now used' in New Zealand.⁶⁵

⁶³ 'Tribunal finding on jurisdiction re: Native Land Court', p. 4.

⁶⁴ 'Tribunal finding on jurisdiction re: Native Land Court', p. 4.

⁶⁵ Joseph, *Constitutional and Administrative Law in New Zealand*, pp. 507-508. Also see Chapter One (this thesis) for further discussion of the Crown in the law and Joseph's work in this area.

The Tribunal then considered the relationship of the Crown with other institutions in New Zealand in order to determine what the Crown was *not*. The Tribunal concluded that it was straining credibility to characterise the House of Representatives as the Crown. It stated, '[t]he term "the Crown" ... appears inapt to describe the New Zealand Parliament. No case or statute was cited to us which indicated that Parliament is included in "the Crown".'⁶⁶ Furthermore, in examining the relationship between the judiciary and the Crown, the Tribunal stated that, 'the relationship between the Sovereign and Ministers of the Crown is essentially different from that between the Sovereign and the judiciary who functions completely independently of the Sovereign and of the Ministers of the Crown and Parliament.'⁶⁷ With regard specifically to the NLC, the Tribunal asserted that the Court had been established through the Native Lands Act 1865 as a Court of Record and was a part of the judicial arm of government much the same as the Magistrates and Supreme Courts. The Tribunal further emphasised that the power of the Courts has been 'irrevocably delegated to judges and magistrates, so that the Sovereign may take no part in the proceedings of a court of justice.'⁶⁸

However, Grant Phillipson, researcher for the Tribunal, extensively investigated the relationship between Courts and the Crown and came to very different conclusions from those presented by the Tribunal. Phillipson argued that the relationship between the NLC and the government of the day was historically much closer than the theoretical separation of powers would indicate. Phillipson contended that the NLC, more perhaps than most courts, operated in an intensely political atmosphere and he demonstrated with an abundance of examples of instances where the Crown had actively intervened in both the general process and the individual decisions of the Māori Land Court (contemporary counterpart to the NLC). He said, '[a]s a result of

⁶⁶ 'Tribunal finding on jurisdiction re: Native Land Court', p. 5.

⁶⁷ 'Tribunal finding on jurisdiction re: Native Land Court', p. 9.

⁶⁸ 'Tribunal finding on jurisdiction re: Native Land Court', pp 8-9, quoting: Courts of Record 10 *Halsbury*, 4th ed., p. 535, para 812.

the court's semi-political nature, Parliament frequently altered the legislation governing the constitution of the court, and the laws which the court was supposed to administer, and frequently gave the government statutory powers to intervene in the process of court hearings.'⁶⁹

On consideration of the evidence presented, the Tribunal concluded that, had it been the intention of the Treaty of Waitangi Act to include all Courts in the term 'the Crown' it would have been so stated in clear and unambiguous language as was done in clarifying other aspects of the legislation.⁷⁰ Crown Counsel similarly argued that for the Courts to be implicated as 'agents of the Crown' 'it would be necessary for specific provision to have been made in the statute. The absence of any provision in relation to the Courts, and the insertion of a specific provision in relation to the Legislature in the 1975 Act weighs against an interpretation that actions of the courts can be equated with 'acts or omissions of the Crown.'⁷¹

The Tribunal concluded through this process of determining what the Crown was *not*, that the most accurate interpretation of the Crown in the 1975 Act would be 'the Executive'. It submitted that, 'a contemporary reference to the Crown will prima facie refer to the Executive or the Government or the administration.'⁷² In substantiating this ruling, the Tribunal gave many examples of legislation in which the Crown had been defined as the Executive, without including the courts in that definition.⁷³ The Tribunal concluded, on the strength of the evidence presented, that 'the Crown when used in contemporary statutes, in the absence of express provision or necessary

⁶⁹ Grant Phillipson, "Government awareness of Chatham's situation", *Wai 64*, Doc A16, p. 37.

⁷⁰ 'Tribunal finding on jurisdiction re: Native Land Court', p. 9.

⁷¹ 'Crown submissions of jurisdiction', p. 3.

⁷² 'Tribunal finding on jurisdiction re: Native Land Court', p. 10.

⁷³ Examples include: section 2 (1) of the *Public Finance Act* (as amended), section 2 of the *Crown Forest Assets Act 1989*, also, section 2 of the *State-Owned Enterprises Act 1986*.

intendment refers to the executive or government or their servants and agents and not to Parliament or the courts or judiciary.'⁷⁴

iii. The Jurisdiction of the Tribunal

A third argument presented by Moriori claimants to demonstrate that the NLC was indeed part of the Crown, focused specifically on an interpretation of the Tribunal's jurisdiction in the 1975 Act. The claimants called for a 'purposive interpretation' of the 1975 Act, arguing that the principle and practice of the Act had been to provide a forum for investigation of grievances under the Treaty, and that the Waitangi Tribunal had been established to hear such grievances. The claimants considered it highly irregular, given the scope of the Tribunal to investigate Acts of Parliament, that the Tribunal might not be allowed to examine judge-made law also thought to be inconsistent with the treaty principles.⁷⁵ The Tribunal, the claimants argued, would not be asked to judge the legality of court rulings, but rather their consistency with the principles of the Treaty. In other words, it was possible for the Tribunal to consider a ruling legal in the eyes of the court, but at the same time, find it to be inconsistent with the principles of the Treaty in the eyes of the Tribunal. In response, the Tribunal agreed that it has had occasion to examine court decisions with regard to the principles of the Treaty, but warned that it does not follow that such decisions can be understood to be made by, or on behalf of the Crown. That, according to the Tribunal, is quite another matter.⁷⁶ The claimants asserted that if the Tribunal lacks the jurisdiction to examine the actions of the Court, then the Treaty of Waitangi Act 1975 fails to provide a remedy for serious treaty breach which indicates a significant hiatus in the operation of the Tribunal.⁷⁷

⁷⁴ 'Tribunal finding on jurisdiction re: Native Land Court', p. 11.

⁷⁵ 'Tribunal finding on jurisdiction re: Native Land Court', p. 11.

⁷⁶ 'Tribunal finding on jurisdiction re: Native Land Court', p. 12.

⁷⁷ 'Moriori Counsel on jurisdiction re: Native Land Court', pp. 13-14.

In extending this argument further, the claimants secondly argued that a restricted interpretation of 'the Crown' as it appears in section 6 is fundamentally inconsistent with the Treaty of Waitangi Act 1975. The claimants identified other aspects of the legislation which indicated a broader interpretation of the Act would be more appropriate. These included the scope of section 6 (stated earlier in the chapter) and more specifically the width of the expression *by or on behalf of the Crown*. Also the long title to the Act allowed for the establishment of a Tribunal to observe and confirm the principles of the Treaty; and section 7 allows Tribunal discretion and does not suggest that judicial decisions are beyond the scrutiny of the Tribunal.⁷⁸ This reading of the Act, the claimants argued, indicates that the legislation was intended to be generally permissive and inclusive, and would not have intended to limit the meaning of the Crown to the point that some grievances could not be heard because of the questionable relationship between, in this case, the courts and the Crown.

An additional argument raised by the claimants was that the Tribunal's purpose is to inquire into acts or practices adopted *by or on behalf of the Crown*. Therefore, it is not necessary that the Court be characterised as an "agent" of the Crown, as "[a]gency is a term of art; whether an action is on behalf of the Crown is an inquiry of effect."⁷⁹ According to the claimants, the Native Land Court is wholly a creature of statute, used to convert native customary title into a form approximating English land tenure. There can be no doubt, the claimants concluded, that the Native Land Court was acting *on behalf of the Crown* in devising the tenure system.⁸⁰

In acknowledging that the Tribunal has jurisdiction to consider claims relating to any Act of Parliament, Counsel for the Crown accepted that the Native Land Court Act and successive Māori Land Court legislation are within the Tribunal's jurisdiction and a

⁷⁸ 'Moriore Counsel on jurisdiction re: Native Land Court', pp. 8-9.

⁷⁹ 'Moriore Counsel on jurisdiction re: Native Land Court', p. 12.

⁸⁰ 'Moriore Counsel on jurisdiction re: Native Land Court', pp. 12-13.

proper matter for inquiry. However, on the matter of the phrase 'by or on behalf of the Crown', Counsel for the Crown submitted that the policies and practices of the NLC are not those of the Crown 'as the Courts are an entity distinct and independent from the Crown'. Furthermore, the NLC was not acting 'on behalf of' or as 'an agent' of the Crown⁸¹ because 'it is clearly evident by statute, common law and general constitutional convention that the courts are an independent arm of Government and are neither part of the Crown, nor an agent or acting on behalf of it.'⁸²

In originally appealing to the High Court to investigate the matter of the Tribunal's jurisdiction with regard to the Moriori claim, Te Rūnanga had stated:

Presumably it will be argued on behalf of the Moriori interests that the Crown was at fault within the terms of s. 6(1) of the Treaty of Waitangi Act 1975 in failing to provide redress for the injustices perpetrated by the Native Land Court in the context of the chatham [sic] Islands hearing. ... Such an argument presupposes and requires an investigation into the conduct of the Native Land Court and alleged injustices on its part – which is not permitted because it was an independent superior Court of record and not an agent of the Crown in doing what is now complained of.⁸³

Te Rūnanga argued that the Crown should be regarded as the embodiment of executive government, and should not apply to the decisions of courts of record such as the NLC whose actions could not be considered 'by or on behalf of the Crown.'⁸⁴

In response to Te Rūnanga's original request, Heron J. of the High Court, accepted a 'strongly arguable case that [the Native Land] Court's decision could not be regarded as the actions of the Crown.' However, he warned that Te Rūnanga was not

⁸¹ 'Crown submissions of jurisdiction', p. 2.

⁸² 'Crown submissions of jurisdiction', p. 18.

⁸³ 'Tribunal finding on jurisdiction re: Native Land Court', pp. 19-20.

⁸⁴ 'Runanga submission on jurisdiction', *Wai 64*, Doc. 2.18, pp. 2-3.

necessarily correct in saying that the Tribunal had no jurisdiction to 'inquire into or make recommendations in connection with the hearings of the Native Land Court.' He explained that 'a proper investigation of the claims of Moriori here can not avoid a consideration of what the Court did.'⁸⁵

Also, Crown Counsel presented earlier Waitangi Tribunal reports which argued that the NLC is not the Crown, nor is it an agent of the Crown, demonstrating that the NLC has traditionally fallen outside the jurisdiction of the Tribunal. For example, the *Orakei Report 1987* stated that the Courts are not part of the executive arm of Government and are in fact required to 'function independently of it: [the courts] are not the Crown nor are they agents of the Crown.'⁸⁶ Similarly, in the *Ngai Tahu Report 1991*, the Tribunal observed, '[i]n any event it was the Native Land Court, not the Crown, which was conducting the proceedings to which the Crown was party. Any defects on the court proceedings were the responsibility not of the Crown, but of the court.'⁸⁷ Finally, in the *Mohaka River Report 1992* the Tribunal made a significant finding with regard to the Planning Tribunal, that, 'the Planning Tribunal is neither the Crown nor the agent of the Crown. Therefore, although we have the power to review the legislation under which the Planning Tribunal operates, we do not have the power to review its actions under that legislation.'⁸⁸ Counsel for the Crown cited these previous findings in submitting that the Tribunal was correct in its approach to the actions of the NLC.⁸⁹ However, Crown Counsel acknowledged one Tribunal report which treated the matter differently. In *Te Roroa Report 1992*, the Tribunal stated that for the purposes of Te Roroa claim the NLC would be regarded as an agent of the

⁸⁵ 'Tribunal finding on jurisdiction re: Native Land Court', p. 20.

⁸⁶ Waitangi Tribunal, *Orakei Report*, Department of Justice, Wellington, 1987, p. 136, section 11.7.2.

⁸⁷ Waitangi Tribunal, *Ngai Tahu Report*, Department of Justice, Wellington, 1991, p. 510, section 8.10.10.

⁸⁸ Waitangi Tribunal, *Mohaka River Report*, Department of Justice, Wellington, 1992.

⁸⁹ 'Crown submissions on jurisdiction', p. 10.

Crown by reason of the Court's powers and authority being conferred by statute.⁹⁰ Crown counsel explained that it was the particular facts of the case which induced the Tribunal's findings in respect of the NLC in this claim and in fact challenged the Tribunal's ruling saying the Tribunal's argument was insufficient on certain grounds.⁹¹

In the case of the NLC/Crown relationship in the Moriori claim, the Tribunal was consistent with its earlier findings regarding this relationship. The Tribunal considered it 'significant' that the 1975 Act explicitly included Acts of Parliament (which might normally not be considered acts by or on behalf of the Crown as part of 'the Crown'), but had excluded any reference to the Courts, whose decisions similarly are not normally considered to be acts by or on behalf of the Crown. The Tribunal considered this to be more than oversight or coincidence. Furthermore, the Tribunal pointed out that, for the term 'the Crown' to be consistently meaning the same thing throughout the 1975 Act, it could only be referring to the executive or government. While not an impossibility, the Tribunal considered it unlikely that Parliament intended 'the Crown' to mean two different things in the same Act.⁹² Crown counsel similarly submitted:

[t]o infer that the phrase "agents of the Crown" could impliedly include the Courts would be to ignore the clear intentions of the Parliament and the accepted tenets of statutory interpretation. ... The absence of any provision in relation to the Courts, and the insertion of a specific provision in relation to the Legislature weighs against an interpretation that actions of the courts can be equated with acts or omissions of the Crown.⁹³

⁹⁰ Waitangi Tribunal, *Te Roroa Report*, Department of Justice, Wellington, 1992, in: 'Crown submissions on jurisdiction', pp. 10-11

⁹¹ See: 'Crown submissions on jurisdiction', pp. 13-17 for an explanation of Crown Counsel's criticisms of the Tribunal's findings in *Te Roroa Report 1992*.

⁹² Tribunal findings of jurisdiction re: Native Land Court', pp. 14-15.

'Tribunal findings on jurisdiction re: Native Land Court', p. 15.

⁹³ 'Crown submissions on jurisdiction', p. 3.

In concluding its evidence, Crown Counsel similarly advised:

The Crown therefore submits that the Tribunal does not have the jurisdiction to consider the actions of the Native Land Court with a view to making recommendations based on its orders. It does however accept that the Tribunal may examine both the legislation which sets up the Court and the actions or omissions of the Crown once the results of the Native Land Court orders were brought to its attention.⁹⁴

Having heard the evidence during the request for interim relief, Heron J. noted that the claims brought to the Tribunal by Moriori largely circumvented the workings of the Court (see earlier list), except for clauses relating to the application of the so-called "1840 rule" on Rekohu which deprived the claimants of 97 per cent of their land (clause 1.2.1.2) and the failure of the NLC to correctly apply the customary lore of the Moriori (clause 1.2.1.7). Both these grievances would require the Tribunal to scrutinise the NLC sitting as a court rather than the actions or failings of the Crown. Heron J. explained that while the Tribunal may consider the actions of the Court in an historical narrative, it does not have the jurisdiction to consider whether the Court's actions were in breach of the treaty principles because such actions are not those of the Crown. However, the judge qualified the decisions by finding that the Crown's response to the actions of the NLC may be considered by the Tribunal.⁹⁵ Heron J. finally ruled that:

What is set out in the [Moriori] statement of claim is a series of complaints or grievances as to the treatment of an individual group who are entitled to bring if they can, a case which suggests that the principles of the Treaty have not been honoured. Simply because a court may have intervened does not in my view preclude the finding that overall injustices remain.⁹⁶

⁹⁴ 'Crown submissions on jurisdiction', p. 18.

⁹⁵ 'Crown submissions on jurisdiction', pp. 8-9.

⁹⁶ 'Record of High Courts Proceedings on jurisdiction', p. 6.

In subsequently considering the matter itself, the Tribunal found that there was not satisfactory evidence that the term 'the Crown', where it appears in sections 6(1) (c) and (d) of the Treaty of Waitangi Act 1975 includes the Native Land Court or any other court. It found on the basis of, amongst other things, the evolution of the independence of the judiciary and the manner of the identification of the Crown in that and other legislation, that the adoption of the '1840 rule' by judges of the Native Land Court was not a policy, practice or act adopted by or on behalf of the Crown.⁹⁷ However, the Tribunal qualified its finding with the ruling that it may:

properly give consideration to whether the Native Land Court has acted inconsistently with Treaty principles and, if it so finds, to determine whether the Crown omitted to take appropriate action to remedy the situation to the extent such action was practicable. In ascertaining what the court did does not involve the Tribunal in questioning or impugning the legality of the court's decision.⁹⁸

The Implications: Reduced Accountability for the Crown?

In considering the implications of the Tribunal's ruling on the identity of the Crown with respect to the Moriori claim before the Tribunal, it is important to note that this is not an isolated case. In 1995, a similar principle was tested when the Waitangi Tribunal was asked by urban Māori to investigate the policies of the Waitangi Tribunal Fisheries Commission which, urban Māori asserted, contravened the principles of the Treaty of Waitangi. The Commission itself stated that the Tribunal had no legal power of inquiry into the Commission's policies because the Commission was not part of the Crown, nor was it acting on behalf of the Crown. In explaining this position, the Commission's lawyer contested that 'the Waitangi Tribunal only has power to examine the policy or proposed policies of the *Crown*, but the Fisheries Commission is not a Crown body and as yet, it doesn't have a fixed policy about how the fisheries

⁹⁷ 'Tribunal findings on jurisdiction', p. 21.

⁹⁸ 'Tribunal findings on jurisdiction', p. 22.

benefits should be allocated.'⁹⁹ The Commission's lawyer also argued that the commissioners themselves are not subject to government control and that for tax purposes the Commission was treated as a Māori authority, which also clearly demonstrated that it was not 'the Crown.'¹⁰⁰ The Commission requested that the High Court conduct a judicial review of the Tribunal's plans. While restrictions in time and space in this thesis do not allow for a detailed review of the hearing, the principal relevant rulings should be noted. In ruling on the matter of the Waitangi Tribunal Fisheries Commission and the Crown, the High Court advised that:

the Tribunal is empowered to enquire into a claim by any Maori that he or she is likely to be prejudicially affected by any policy or practice adopted by or on behalf of the Crown. ... I think it is beyond doubt that the Commission in its functions acts on behalf of Maori and on behalf of the Crown.¹⁰¹

One can assume that the Native Land Court and Fisheries Commission rulings will not be the last of such cases. They demonstrate that significantly different interpretations of the meaning and identity of the Crown co-exist in contemporary New Zealand society and that these were not reconciled by the 1975 legislation or subsequent amendments.

In respect of which institutions and entities such as the Native Land Court and Waitangi Fisheries Commission are or are not the Crown, Maui Solomon, Wellington Barrister, advises that he would 'throw the cloak over the whole lot'. He describes what he calls 'the legal fictions which the Crown has created to compartmentalise itself' and states that while it had the authority to do so, 'by the same token, Maori

⁹⁹ 'Waitangi Tribunal Challenged by Treaty of Waitangi', Radio New Zealand, *Midday Report*, 12:17 pm, 24 July 1995.

¹⁰⁰ 'Battle in Court over Crown Identity', Radio New Zealand, *Mana News*, 6:17 pm, 24 July 1995.

¹⁰¹ *Treaty of Waitangi Fisheries Commission v Waitangi Tribunal*, Judgement of Ellis J. 31 July, 1995.

have the right to protect themselves and not be affected by the differences the Crown has created.’¹⁰² According to this logic, the judiciary, the Fisheries Commission and any other body with authority under the Treaty of Waitangi is implicated in the identity of the Crown. Solomon’s comment highlights a certain degree of tension between two possible interpretations of the Crown. One of those is the historical interpretation of the Crown largely supported by Māori, that all authority in New Zealand is ‘Crown’ authority as the source from which it originally emanated. It is argued that, in evolving, the Crown can recreate itself, but it cannot divest itself of its original treaty obligations and its responsibility to hand those obligations on to the authorities it creates. The other interpretation is the more constitutional, legal perspective which identifies the Crown as the Queen and the executive, and then grapples with problems of Crown agency in relation to this. While both approaches are arguably problematic in themselves, in composite they are not easily reconciled. The issue comes down to a matter of which interpretation will prevail.

On the matter of whether Māori will be prejudicially affected by interpretations of the Crown which are contrary to their own in these, or other court rulings, the evidence is inconclusive. In the case of the Moriori claim in particular, the findings had not been made on the claim before this research was completed. However, every indication was that, while the ruling might have been unfavourable to Moriori, in practical terms the Tribunal had retained the authority to investigate the Native Land Court.

However, at the same time the Crown identity is able to contract in order to exclude entities which it is *not*, the Crown is also actively expanding in other ways. The next chapter moves on to discuss the process which extends Crown authority under the Treaty to local and regional government in New Zealand and once again considers the implications of this for the Māori treaty partner.

¹⁰² Interview, Maui Solomon, Molesworth Chambers, Wellington, 29 August 1995.

EIGHT

THE EXPANDING PROBLEM OF THE CROWN: LOCAL GOVERNMENT REFORM AND THE RESOURCE MANAGEMENT ACT

In Chapter Five it was demonstrated that the Crown was identified in the Treaty of Waitangi as Her Majesty the Queen of England. Subsequent to the signing of the Treaty the Queen's authority was transferred to settler government despite resistance from Māori on the grounds that this was an inappropriate interpretation of the treaty partnership. In Chapter Six, the Treaty of Waitangi Act was shown to revive the symbol of the Crown although the symbol was still to be interpreted in different ways by various groups in contemporary society. Chapter Seven subsequently demonstrated that the contemporary identity of the Crown was able to contract and exclude the Native Land Court when its identity in the 1975 Act was brought into question. In this chapter it is argued that the Crown identity was also expanding to include local and regional authorities, despite protest by Māori that this was an inappropriate expression of the original treaty partnership.

This discussion focuses on two of the Labour Government's policies and subsequent legislation in the late 1980s: the reform of local government and the Local Government Amendment Act(s); and resource management law reform and the Resource Management Act 1991. It demonstrates that in both cases the changes these policies brought to the identity of the Crown treaty partner were resisted by Māori. The discussion concludes with a case study of the Moutoa Gardens occupation by Māori in March 1995. This protest and the public debate which surrounded it illustrate the implications of the Government's policies and legislation for Māori by demonstrating that as a result of reforms, accountability for the Treaty within the negotiation process fell between central and local government to the disadvantage of Māori.

One important point which requires clarification before discussion begins is that both the local government reforms and the Resource Management Act 1991 transferred, amongst other things, aspects of central government's (or the Crown's) treaty obligations and authority regarding resource management to local and regional authorities.¹ This shift was part of a general trend at the time to minimise central government authority and increase public responsibility and participation in decision making processes. Also, some of the sources discussed later in this chapter provide evidence that the Labour Government was under considerable pressure from some sections of the public to increase local participation by devolving functions away from central agencies.

It is equally important to realise, however, that this transfer of authority was met with strong resistance from representatives from both Māori and local authorities. Those Māori who rejected a relationship with local authorities on treaty matters asserted that the Treaty was signed by the Crown (which later became central government) not local government.² Many local authorities have also protested at their involvement in treaty management matters which they regarded as an issue for central government to resolve. This chapter follows the progress of this debate through local government and resource management law reform by reviewing submissions made by Māori and local authorities at various stages in the reform process. It demonstrates first, that while both groups expressed concern over the role of local government in treaty issues, this matter was barely acknowledged in either reform and was certainly not resolved. Second, it argues that the reforms redefined the Crown treaty partner in a way which had serious implications for the Māori treaty partner similar to those

¹ For the purposes of this discussion, the term 'local authorities' is a generic term for all types of sub-national bodies: local government, territorial and regional authorities and special provider boards both before and after the reforms.

² Both local government reforms and the resource management law reform process have been criticised with regard to the lack of Māori opinion attracted by the submission process. More is said on this later in the chapter.

suffered by Māori following earlier evolution of the Crown after the signing of the Treaty of Waitangi in 1840.

Māori, Local Government and the Crown: Local Government Reform

The history of Māori and local government relations in New Zealand through the 1970s and 1980s provides a vital context for analysis of the local government reform process from the perspective of the Treaty of Waitangi. It also helps to explain the traditional mistrust of local government by Māori as well as their preference for dealing directly with the central government as 'Crown' authority. Finally, it highlights a tension between central and local government. As J.B. Ringer explains, '[t]he history of local government in New Zealand is one of fierce parochialism and suspicion of central government.'³ When seen within this context the implications for Māori of central government further empowering local government may be better understood.

Prior to colonisation, Māori organised themselves as hapū (extended family groupings) and tribal or iwi groupings. The Europeans who drafted and promoted the Treaty acknowledged this fundamental social structure by travelling the length of the country to secure the signatures of well over five hundred chiefs from almost all iwi in Aotearoa. While Māori authority was decentralised and tribally based at this time, European authority in the settler colony, at least according to the terms of the Treaty, was focused on the centralised rule of 'the Crown'. As shown earlier, Māori saw this Crown treaty partner as the Queen, who subsequently became a focus for their grievances. However, the Māori conception of a single governing 'Crown' was first disrupted by the New Zealand Constitution Act 1852 which established a General Assembly in New Zealand and electoral districts for the election of members of the House. Section 71 of the Act allowed for the, '[s]etting apart of districts in which the

³ J. B. Ringer, *An Introduction to New Zealand Government*, Hazard Press, Christchurch, 1991, p. 237.

laws, customs and usages of the Aboriginal or Maori inhabitants of New Zealand should for the present be maintained for the government of themselves, in all their relations to and dealings with each other' which provided the potential for local authorities to encourage Māori development under the Treaty. However, this potential was not borne out as the provisions of this section of the Act were never implemented. Writing on the matter of Māori and local government in 1989, Hirini Matunga argued that all local government legislation since the 1852 Act has subordinated the place of Māori in local government.⁴ Other writers have supported Matunga's contention by providing examples of 'constant and frequently deliberate, violations of the Treaty' by provincial and later regional / local government, including the seizure of Māori land for public works, the granting of mining licenses on Māori land and the levying of taxes on Māori land.⁵ When questioned on this matter, Matunga explained that local government has historically violated Māori rights, not only in its neglect of the Treaty, but in failing to accept its responsibilities under the Treaty. Through time, Māori have developed an aversion to local authorities and have come to view the Crown as a necessary 'backstop' for local government authority.⁶

Despite this history of poor relations between Māori and local government, some progress in the area of local government and the Treaty began in the 1970s. In keeping with general developments in treaty issues at this time (discussed in Chapter Six), relations between Māori and local government moved into a new phase with the Town and Country Planning Act 1977 which required local government to recognise Māori interests and values (although the Act made no direct reference to the Treaty of Waitangi). By the time of the Labour Party's victory in 1984, local government constituted three distinct strands of regional and territorial authorities and special

⁴ Hirini Matunga, *Local Government: A Maori Perspective*, A Report for the Maori Consultative Group on Local Government Reform, January 1989, p. 2.

⁵ Jane Kelsey, 'The Treaty of Waitangi, Local Government and Resource Management Law Reform', Paper presented at the *New Zealand Institute of Planning Conference*, Waikato University, 1989, p. 2.

⁶ Pers. comm., Hirini Matunga, 13 February, 1995.

purpose boards with varying size, capacity and calibre between the units and between regions. It was a system which Graham Bush described as having 'multiple fragmentation.'⁷ Following amendments to the Town and Country Planning Act by Labour in 1987 local government was further compelled to acknowledge Māori values in resource management decision making by allowing provision for Māori traditional and cultural uses, including fishing grounds (section 33 2A) though still without reference to the Treaty. It was considered more appropriate that treaty issues be addressed at the level of central government within the context of Māori and Crown relations as the treaty partners (as later discussion demonstrates). Subsequently, and soon after regaining office in 1987, Labour announced radical reform to the structure and function of local and regional government based on the principles of greater autonomy and improved accountability.⁸ These reforms would produce a regional tier of government for natural resource management and environmental planning (absorbing most special purpose bodies); a reduced number of territorial local bodies; corporatised local government trading activities; and new instruments of accountability.⁹ 'Fewer, leaner and meaner' is the description of the reformed local bodies offered by Bush.¹⁰

As the reform process progressed the concept of devolution was starting to 'punctuate ministers' speeches'¹¹ and the idea was met with mixed responses. 'Devolution' has been widely debated by writers and commentators of both local government and resource management law reform. There continues to be considerable disagreement over not only the merits of devolution, but also what constitutes 'real' devolution. In

⁷ Graham Bush, 'The Historic Reorganisation of Local Government', in *The Fourth Labour Government. Politics and Policy in New Zealand*, 2nd Edn., M. Holland and J Boston (eds.), Oxford University Press, Auckland, 1990, p. 232.

⁸ Bush, 'The Historic Reorganisation of Local Government', p. 233.

⁹ E.M. McLeay, 'Two Steps Forward, Two Steps Back: Maori Devolution, Maori Advisory Committees and Maori Representation', *Political Science*, Vol. 43 No.1, July 1991, p. 32.

¹⁰ Bush, 'The Historic Reorganisation of Local Government', p. 238.

¹¹ Bush, 'The Historic Reorganisation of Local Government', p. 236.

this context of this chapter, the debate about real devolution is important because it addressed the question of whether ultimate authority for the Treaty remained with the Crown (as central government) or was wholly transferred to other authorities such as local government as a result of the reforms. To summarise this debate, on the one hand devolution is said to be the complete transfer of power, authority and responsibility from a national to sub-national level, while on the other hand it was said to be more like the decentralisation or delegation of these things while ultimate responsibility remained at the national level.¹² In addition to debate about the nature of devolution, there has also been disagreement over the merits of devolving authority from central government to sub-national bodies. The merits of devolution are said to include greater public participation, greater focus on the needs of local communities and more efficient and cost effective management and organisation, while the disadvantages include a loss of central administration and national perspective, a marginalising of community needs and the fragmentation of issues which are best understood and co-ordinated from a national office.¹³ Having acknowledged both these debates it should be noted that, from the perspective of the Treaty of Waitangi, the devolution of Crown authority from central government to local authorities can be seen as being inconsistent with the Crown/Māori partnership established by the Treaty and contrary to the treaty obligation for central government to protect Māori interests.

In addition to these concerns, the speed of the local government reforms has been criticised. When the reforms were first introduced in early 1988 the process was intended to be completed in time for local authorities to be elected in 1989.¹⁴ This rigid time frame cast some doubts over the impact of public participation and submissions on the reform process. As one writer commented, '[e]ven though several

¹² John Martin, 'Devolution and Decentralisation' in *Reshaping the State: New Zealand's Bureaucratic Revolution*, J. Boston et al. (eds.), Oxford University Press, Auckland, 1991, p. 268.

¹³ See discussion in, Martin, 'Devolution and Decentralisation', pp. 269-271.

¹⁴ Ton Buhrs and Robert Bartlett, *Environmental Politics in New Zealand: The Politics of Clean and Green?*, Oxford University Press, Auckland, 1993, p. 119.

rounds of submissions were solicited during the work of the Local Government Commission ... the tight timetable imposed by the government limited the extent and meaningfulness of the formalities of consultation.'¹⁵ The submissions presented at various stages of the reform process support the claim that fundamental issues were raised which could not have been addressed or resolved in such a restricted timetable. In particular, there were criticisms from Māori and local authorities that sub-national bodies were not legitimate 'Crown' authorities under the Treaty of Waitangi, discussed in this chapter.

The reform of local government officially began with the release of the first report by the Officials Co-ordinating Committee on Local Government (OCCLG) in February 1988 which invited public submissions on the government's policies. It emphasised that reforms were '[t]aking place in the context of increased awareness of, and emphasis on the place of the Treaty of Waitangi in Government.'¹⁶ However, the report did not address the question of local Government and Māoridom until the final chapter, 'Constitutional Issues', which offered the 'vague and unsubstantial musing'¹⁷ that Māori had not historically enjoyed any special place in local government as tangata whenua. The report acknowledged that such a place for Māori should exist and suggestions were made for Māori representation in local authorities.¹⁸ The discussion document prompted a reply of nearly 500 submissions from many sources including local authorities (61%) and Māori (2%).¹⁹ Many of these submissions raised fundamental issues and serious criticisms. Also, as Bush noted, '[t]he notion that the Treaty of Waitangi might give Māori aspirations a special and privileged status in local

¹⁵ Burhs and Bartlett, *Environmental Politics in New Zealand*, p. 122.

¹⁶ The Officials Co-ordinating Committee on Local Government (OCCLG), *Reform of Local and Regional Government. Discussion Document*, Department of Internal Affairs, Wellington, February 1988, pp. 2-3.

¹⁷ Robert Mahuta, 'Reform of Local and Regional Government. A Tainui Perspective', *New Zealand Geographer*, Vol. 44, No. 1, 1989, p. 84.

¹⁸ OCCLG, *Reform of Local and Regional Government*, pp. 59-60.

¹⁹ Bush, 'The Historic Reorganisation of Local Government', p. 239.

government drew little support.²⁰ Indeed, local authorities expressed the general view that '[the Treaty] has no place in local government'.²¹ Māori similarly expressed concern that a relationship with local government was not an appropriate expression of the treaty partnership.²²

Despite the serious nature of these and other issues raised in the submissions, Labour introduced the Local Government Amendment (No.3) Act to Parliament before the submissions on the Discussion Document had closed.²³ The Act directed the Local Government Commission to prepare final schemes for regional and local units of government in one year. Once again the Commission solicited several rounds of submissions and then published indicative reorganisational schemes. The final proposals on new regional and local authorities were issued early in 1989. Soon after, further measures implementing local government restructuring were passed in the Local Government (No.2) Act 1989.²⁴ By November, 1989 the new system was in full operation and new units of local government were established.²⁵

The Local Government (No.2) Act was heavily criticised for its 'indefensible silence on treaty matters'.²⁶ In particular, despite the Government's promises and the concerns raised in submissions, the Act was criticised because it neither legislated on how Māori were to be involved in the consultation process nor said how Māori could be incorporated into the process of decision making at the local government level. This sort of criticism, which came largely from Māori, prompted further government action.

²⁰ Bush, 'The Historic Reorganisation of Local Government', p. 239.

²¹ The Bridgeport Group, *Synopsis of Submissions on Reform of Local and Regional Government*, Report to The Officials Committee on Local Government, Dept of Internal Affairs, June 1988, p. 43.

²² The Bridgeport Group, *Synopsis of Submissions*, p. 45.

²³ Bush, 'The Historic Reorganisation of Local Government', p. 239.

²⁴ Burhs and Bartlett, *Environmental Politics in New Zealand*, p. 120.

²⁵ For detail of these events see: Bush, 'The Historic Reorganisation of Local Government', pp. 240-243.

²⁶ Sir Graham Latimer, Chair of the New Zealand Maori Council, quoted in Jane Kelsey, *A Question Of Honour? Labour and the Treaty 1984 - 1989*, Allen and Unwin, Wellington, 1990, p. 181.

Māori participation in local government was already being considered by three different groups during the reform process. The work of the OCCLG has already been discussed. A second group, the Māori Local Government Reform Consultative Group (MCG), was established by the Minister of Local Government in May 1988 to work in association with the OCCLG to ensure that Māori issues affected by the reforms would be considered. In reviewing the work of the MCG there is evidence of concern by some members of the group about the relationship between Māori and local government with regard to the Crown's responsibilities under the Treaty. The minutes of one meeting record a comment by Caren Wickliffe (Māori Legal Services, Wellington) that 'all the functions undertaken by local authorities ... impinge on the rights of the Māori people under the Treaty of Waitangi.'²⁷ At the same meeting, the Deputy Secretary of the Department of Māori Affairs said, 'the Treaty of Waitangi must be honoured and that there needs to be commitment from the Crown and from local government, by way of statutory provisions and direction, as you can't rely on goodwill alone.'²⁸ In keeping with this sentiment, the MCG recommended that the principles of the Treaty of Waitangi be incorporated into amended local government legislation. However, having heard these recommendations the amendment prepared by the OCCLG stated a limited obligation to 'consult such persons and organisations, including Maori tribal authorities and other Maori authorities as it thinks fit.'²⁹

In addition to this work by the group, Hirini Matunga wrote an independent report for the MCG which reiterated the essential principle established by the Court of Appeal and the Waitangi Tribunal, also raised in the previous chapter. That principle was that, '[t]he Crown can't divest itself of Treaty obligations or confer an inconsistent jurisdiction on others. The Crown should provide for its treaty promises when vesting

²⁷ Maori Local Government Reform Consultative Group (MCG), 'Minutes of the Second Meeting of the MCG', State Insurance Building, Wellington, June 9 1988, p. 4.

²⁸ MCG, 'Minutes of the Second Meeting of the MCG', June 9 1988, p. 4.

²⁹ Ngā Kaiwhakamarama in Ngā Ture (Māori Legal Services, Wellington), *Paper on Local Government Reform for Maori / Iwi Authorities*, 1988, p.5.

responsibilities in local authorities.’³⁰ As Matunga explained, ‘simply stated [the principle means that] local and regional government need clear statutory guidelines outlining their treaty obligations, and how these obligations are to be met when making decisions about land and resources.’³¹ He emphasised:

While there may be moral, and certainly cultural imperatives which compel local government to recognise the significance of the Treaty, there is currently no legislative imperative. Some local authorities have attempted to address their obligations under the treaty but usually failed. Most have left the issue for central government to deal with.³²

A third group addressing the issue of Māori participation in local government, the Cabinet Committee on Reform of Local Government and Resource Management Statutes, responded to Māori concerns about local government reforms by asking the Minister of Local Government to prepare a draft Bill and discussion paper recognising the Treaty of Waitangi and to provide an appropriate consultative means to ensure Māori input into local government decision making. The result was the Local Government Amendment (No.8) Bill to establish Māori Advisory Committees (MACs) to facilitate consultation and discussion between tangata whenua and regional councils/territorial authorities. These proposals were recognised as ‘very much addenda to the extensive changes made to the local government system by the Labour government’, and were not passed before Labour was voted out of office in 1990.³³ However, the discussion which surrounded the proposed Bill again illustrates a point of tension over the relationship between Māori and local government. The ‘Explanatory Statement’ which was released with the Bill and which called for submissions also asked whether the Treaty applied to local government. A synopsis of the submissions indicated that the point was repeatedly made across the range of

³⁰ Matunga, *Local Government: A Maori Perspective*, p. 6.

³¹ Matunga, *Local Government: A Maori Perspective*, p. 9.

³² Matunga, *Local Government: A Maori Perspective*, p. 13.

³³ McLeay, ‘Two Steps Forward, Two Steps Back’, p. 32.

submissions that 'the Treaty is an agreement between the Crown and Maori. Many of its undertakings are outside the jurisdiction of local government.' Furthermore it stated that 'the application of the Treaty to local government is open to question.'³⁴ Many of the submissions from Māori expressed the viewpoint that local government was not the Crown and would be an inappropriate partner for Māori in consultation or negotiation of treaty issues. For example, a Māori Youth Advisory Committee commented:

[the restructuring of local and regional government] is a dilution of the ability of the Crown to act in accordance with the Treaty of Waitangi toward iwi Māori. The obligations put upon both partners of the Treaty cannot be complied with if in effect iwi Māori have to consult with a series of local governing regimes rather than with their singular Treaty partner – the Crown. [With this draft Bill] the distance between Crown and iwi will be increased.³⁵

Another submission insisted that the Bill include the proviso that regional councils and territorial authorities may not act in a manner which is inconsistent with the Treaty of Waitangi or any other special arrangement that iwi may have with the Crown. 'To provide less is to delegate Crown responsibility without Crown treaty obligations.'³⁶ Another Māori council encapsulated the focus of Māori concern about local government reform by emphasising the historic relationship between iwi and Crown in its submission on the Bill. According to this council, the Government's proposals to restructure local government would:

result in a fragmentation of power from the Crown to its sub-national bodies and away from iwi, consequently weakening the status and position of the Māori as one of the

³⁴ The Bridgeport Group, *Reform of Local and Regional Government, Synopsis of Submissions on Bill for the Establishment of Maori Advisory Committees in Local Government and Explanatory Statement*, Report to the Officials Co-ordinating Committee on Local Government, April 1990, p. 16.

³⁵ Youth Advisory Committee Maniapoto Trust Board in The Bridgeport Group, *Reform of Local and Regional Government*, p. 17.

³⁶ *Bill for the Establishment of Maori Advisory Committees in Local Government and Explanatory Statement*, R. J. Te Heu Heu, Submission No. 48, p. 2.

Treaty partners, who are, in fact, the iwi Māori and the Crown (represented by central government) not the iwi Māori and the local government authorities. We find this situation [of the Bill and proposed local government reforms] unacceptable and contrary to both the spirit and mana of the Treaty provisions and their principles.³⁷

The council also claimed that it spoke for all Māori in stating that the Crown - iwi relationship must be preserved.³⁸ Concern over the proposed role for local government was evident in other sources also. For example, Robert Mahuta of the Tainui Trust Board wrote, 'the Trust Board recognises that local government draws its authority from the Crown and is therefore an agent to it. In terms of the Treaty it will do no good to confuse which party is who.'³⁹

However, Māori were not the only group to reject or question the role of local government involvement in treaty issues. While many local authorities and other individuals accepted the need for effective consultation with Māori, they also demonstrated clear reservations about the Treaty's application to local government.⁴⁰ One individual advising on the appropriate phrasing for the Bill, commented that:

[a]ny strengthening of the words ['have regard to the Treaty of Waitangi'] would not be appropriate in terms of local government responsibilities under the Treaty - the Treaty is a contract between the Crown and Maori, not between local government and Māori.⁴¹

Another individual submission stated, 'Maori claims under the Treaty of Waitangi are with the Crown and Ministers of the Crown, not with government (or local

³⁷ *Bill for the Establishment of Maori Advisory Committees*, Te Runanga o Turanganui a Kiwa, Submission No. 153, p. 3.

³⁸ *Bill for the Establishment of Maori Advisory Committees*, Te Runanga o Turanganui a Kiwa, Submission No. 153, p. 3.

³⁹ Robert Mahuta, 'Reform of Local and Regional Government. A Tainui Perspective', p. 84.

⁴⁰ The Bridgeport Group, *Reform of Local and Regional Government*, p. 61.

⁴¹ *Bill for the Establishment of Maori Advisory Committees*, Pieter Burghout, Legal Adviser, Submission No. 57, p. 2.

government) agencies.⁴² Yet another more strongly asserted that '[t]he Treaty should have no bearing whatsoever on present day local body affairs.' The respondent went on to ask '[w]hat right has any member of any government to demand these conditions from any local council?'⁴³ Finally, another group condemned the Bill, saying that it was a 'simple denial of Rangatiratanga' and that it attempted to replace the 'constitutional relationship between Iwi and Crown provided for in the Treaty.'⁴⁴

Overall, the submissions in response to the Labour Government's policy for reform of regional and local government, which have been discussed here, illustrate resistance by both Māori and local authorities to a change in the identity of the Crown, similar to the kind of resistance identified amongst Māori with the shift in Crown identity following the signing of the Treaty of Waitangi. However, the devolution of Crown responsibilities to local authorities was to become all the more significant with resource management law reform and the passing of the Resource Management Act 1991.

Māori, Local Government and the Crown: Resource Management Law Reform

During the reform of local government, a parallel review of resource management law relating to town planning, water and soil, mining, clean air, energy, noise control and the environment was proceeding. The reports and submissions made during the Resource Management Law Reform (RMLR) process (the most extensive in New Zealand's history) indicate that the debate over the appropriate role of local government in treaty matters was again of considerable concern. Through RMLR, the Labour

⁴² *Bill for the Establishment of Maori Advisory Committees*, Ian Andrews, Submission No. 20.

⁴³ *Bill for the Establishment of Maori Advisory Committees*, Mrs J M Revill, Submission No. 14, p. 2.

⁴⁴ Iwi Transition Agency, *Report of the Iwi Transition Agency Working Group on the Runanga Iwi Bill, Local Government Amendment (No.8) Bill and the Resource Management Bill*, Iwi Transition Agency, January 30, 1990. The central debate over the Bill was the issue of representation, whether Māori have a constitutional right to guaranteed representation in local government, or whether it was anti-democratic for government to use anything other than the one-person, one-vote philosophy. The government's failure to implement the recommendations of the MCG in the Bill would indicate that the government favoured the latter argument. See McLeay, 'Two Steps Forward, Two Steps Back', pp. 31-37 for further discussion of Māori representation and local government.

Government proposed to empower local government further with critical authority in resource management and regional planning. Once again there was some disagreement as to whether RMLR constituted 'real devolution' of central government's authority. For example, Martin argued that the government was willing to devolve functions in resource management through mechanisms established in the local government reforms.⁴⁵ However, Buhrs and Bartlett disagreed, stating that front-line responsibility for environmental policy would be largely delegated and decentralised, not devolved, and that ultimate responsibility would remain with central government.⁴⁶ In either case, concern was expressed about primary responsibilities being assigned to local and regional government. For example, Martin said:

[i]t can simply be noted that the opportunities for confused accountability are considerable. There must also be an element of concern about the capacity of local government to assume responsibilities ... where central government agencies are the repositories of technical expertise and 'case-law'.⁴⁷

A further concern, according to other sources, was the appropriateness of local government dealing with treaty issues, given the poor history of local government/Māori relations in New Zealand, and the nature of the original Crown/Māori partnership.⁴⁸

As with the local government reform process, members of the public were invited to make submissions on the RMLR policy proposals. In August 1988, 'Directions for Change. A Discussion Paper' introduced the public to the Government's proposed reform of resource management laws and structures. The paper posed the fundamental question; '[i]n what circumstances should government play a role in resource

⁴⁵ Martin comments that there is some disagreement as to whether this is 'real' devolution. See: Martin, 'Devolution and Decentralisation', p. 277.

⁴⁶ Buhrs and Bartlett, *Environmental Policy in New Zealand*, p. 121.

⁴⁷ Martin, 'Devolution and Decentralisation', p. 277.

⁴⁸ This opinion was repeatedly expressed in the submissions made on the Resource Management Bill, discussed later.

management, and in what circumstances can it leave choices about resource use and preservation to individuals?’⁴⁹ The Treaty of Waitangi was afforded only token recognition in the discussion document which provided the framework for the RMLR debate. The document stated that the Treaty of Waitangi was of special significance to the review and acknowledged that ‘[t]he Crown has particular responsibilities to the Maori people under the Treaty of Waitangi.’ It said that ‘Maori could expect the Crown not to establish new tiers of government or resource management procedures in a way that is inconsistent with the principles of the Treaty.’⁵⁰ Despite the Government’s reassurances, treaty considerations looked set to once again come head-to-head with the decentralisation of central government (as it represents Crown) authority.

In December 1988 the Government published its proposals for resource management law reform. These made no mention of Crown responsibilities to Māori under the Treaty of Waitangi. They did, however, discuss the ‘indivisibility of the Crown’ which was causing complications in the reform process. The proposal stated that under the new resource management system ‘the Crown would have to speak with one voice in terms of the outcome sought. However, the range of views or information held by the Crown could be revealed in the course of the proceedings.’⁵¹ The problem of the ‘divisibility’ of the Crown (similar, it will be recalled from Chapter One, to the problem which once plagued the Commonwealth) arose from the reform of resource management because it was envisaged that under the new system, two government departments – the Ministry for the Environment and the Department of Conservation – would be involved in the new decision making process and might present two incompatible ‘Crown’ views on resource issues. This was not a new concern in the

⁴⁹ *Directions for Change. A Discussion Paper*, Ministry for the Environment, Wellington, August 1988, p. 13.

⁵⁰ *Directions for Change. A Discussion Paper*, p. 23.

⁵¹ *People, Environment and Decision Making: The Government’s Proposals for Resource Management Law Reform*, Ministry for the Environment, Wellington, December 1988, p. 23.

area of resource management. In 1987 the divisible Crown had also concerned A. Hearn Q.C., in *The Review of the Town and Country Planning Act 1977* (which the Resource Management Act replaced). Hearn advised that, under the Town and Country Planning Act 1977, a minister speaks for the Crown. However, he asked, 'is it reasonable that different officers of different Departments of State, at different levels in different districts are entitled to participate in the planning process as the Crown?'⁵² Hearn evidently feared a loss of central control and consequently suggested that the Crown should remain 'indivisible in respect of resource management statutes.'⁵³ He was concerned that 'a lowly conservation officer in a remote part of the country could not purport to speak for the Crown'.⁵⁴ Hearn was clearly expressing concern that the divisibility of the Crown would lead to a dispersion of Crown or central authority which would result in a breakdown in the hierarchy of decision making. In later acknowledging this dilemma, the authors of the management law reform proposal emphasised that RMLR must remedy this situation by making it clear that individual departments are not 'the Crown'.⁵⁵ However, the authors of one RMLR working paper challenged the real significance of the 'indivisibility of the Crown', suggesting that departments should be able to operate individually as long as only one minister speaks authoritatively for the Crown on a matter such as the national interest. Experience shows, the report stated, that the 'fiction of the Crown speaking with one voice was difficult to maintain.'⁵⁶ Consequently, it concluded that, '[i]t is not possible to maintain the fiction that the Crown speaks with one voice. Why try?'⁵⁷

⁵² A Hearn. *Review of the Town and Country Planning Act 1977*, Report commissioned by the New Zealand Government, Department of Trade and Industry, August 1987, p. 108.

⁵³ Hearn, *Review of the Town and Country Planning Act 1977*, p. 109.

⁵⁴ K. Edmonds et al., *Resource Management Law Reform. The Various Roles of the Crown: As Resource Developer and as a Participant in Resource Management*, Working Paper No. 16, December 1988, p. 18.

⁵⁵ Edmond's et al., *RMLR. The Various Roles of the Crown*, p. 18

⁵⁶ Edmond's et al., *RMLR. The Various Roles of the Crown*, p. 19.

⁵⁷ Edmond's et al., *RMLR. The Various Roles of the Crown*, p. 20.

Quite apart from demonstrating further complications in the Crown's identity, the indivisibility of the Crown has serious implications for the role of the Crown as the treaty partner. For example, if departments and officers are able to operate independently as the Crown, Māori and other groups in negotiation or consultation with the Crown face potentially serious difficulties in isolating and identifying a single, reliable and constant source of Crown authority under the Treaty.⁵⁸

While the Government's policy proposals initially demonstrated considerable neglect of the Treaty in the reform of resource management procedures and institutions, a number of working papers produced in 1988 were more insightful and forthcoming in their discussion of RMLR from a treaty perspective. For example, Working Paper No. 3 reviewed the submissions of the future role of local and regional government in response to local government reform proposals (discussed earlier). The paper observed that:

[m]any authorities take a different view [on the relationship between the Treaty and local government]. They feel that the whole area of the relationship of the Treaty to resource management and planning rests with central government and that local authorities should have no responsibility in this area.⁵⁹

In fact, a review of the submissions from local authorities indicates that in 1988 a majority of local bodies rejected responsibilities under the Treaty. They did so in three ways. Some, while commenting extensively on all other aspects of the reform proposal, simply failed to address constitutional matters which dealt directly with local government and Māoridom. For example the Waimate Plains District Council gave no response to questions regarding the principles of the Treaty and responded to all other

⁵⁸ It is important to recognise at this point that criticism against local government is levelled at its role in replacing the Crown as the treaty partner. Local government and Māori must reasonably find a productive relationship but, it is argued here, that relationship would most appropriately be expressed under the authority of the Crown as the formal treaty partner with Māori.

⁵⁹ The Bridgeport Group, *Resource Management Law Reform. Review of the Submissions of the Future Role of Local and Regional Government*, Working Paper No. 3, Ministry for the Environment, Wellington, July 1988, p. 19.

questions with 'non-applicable' or 'rejected'.⁶⁰ Other authorities addressed the issues but rejected the idea of 'special treatment' for Māori by the Council. Taupō City Council stated, '[w]e see no room in local government for any different treatment between individuals and groups.'⁶¹ Similarly, the Tuapeka County Council stated that only matters of council land control were effected by the Treaty of Waitangi and no special constitutional arrangements were necessary in local government under the Treaty because New Zealand was an equal society.⁶² The third level of comment was a fundamental rejection of local government as a treaty partner. The Ashburton Borough Council demonstrated this when it said, '[t]he Treaty of Waitangi issue is one of equity between the Crown and the Maori people and not an issue for resolution at the local government level.'⁶³ Similarly, the Queenstown-Lakes District Council agreed that '[t]his issue [the Treaty of Waitangi and Māori] needs to be addressed by Central Government.'⁶⁴

Working Paper No. 8, a report by the Centre for Resource Management at Lincoln University, did not address the issue of the Crown and local government, but argued more directly that matters of identity must be resolved before treaty issues could be dealt with in any meaningful way. The paper stated, '[a]ccording the Treaty constitutional status will require that clear specification be given to the identity of the treaty partners. The terms Maori and Crown need to be better defined.'⁶⁵ The paper's recommendation was based largely on the findings of a hui at Taumutu (in May 1988)

⁶⁰ *Reform of Local and Regional Government*, Submission by Waimate Plains District Council, No. 414, refer section 8.5.

⁶¹ *Reform of Local and Regional Government*; Submission by Taupō City Council, No. 365, p. 6.

⁶² The Bridgeport Group, *Reform of Local and Regional Government*; Submission by Tuapeka County Council, No. 345, p. 13.

⁶³ *Reform of Local and Regional Government*; Submission by Ashburton Borough Council, No. 391, p. 15.

⁶⁴ *Reform of Local and Regional Government*; Submission by Queenstown-Lakes District Council, No. 406.

⁶⁵ Centre for Resource Management in Association with the Centre for Māori Studies and Research, Waikato, *Resource Management Law Reform. The Treaty of Waitangi and its Significance for the Resource Management Laws*, Working Paper No. 8, Ministry for the Environment, August 1988, p. 22.

where much debate had surrounded the appropriate definition for 'the Crown' treaty partner. The sentiment was expressed in the paper that the Crown's identity was problematic because current institutional and constitutional arrangements had obscured the definition of the Crown.⁶⁶

Finally, Working Paper No. 27 investigated a Treaty-based model for RMLR and stated that the policy of devolution to local authorities reduces the role and accountability of the Crown while increasing the role and power of the private sector. It said, '[t]he vital role of the state in protecting national interests and its ability to perform government duties is severely eroded.' The report later stated:

The reduced power of the Crown, and the fragmentation of decision making amongst local and regional bodies, will seriously hinder delivery and enforcement of tangata whenua rights. This will become even worse if separate iwi are required to negotiate at the regional level, with regional government bodies acting as organs of central government.⁶⁷

It went on to argue that '[a]ny system of resource management which treats this structure of local and regional government as pivotal will therefore also breach the Crown's duty of active protection of Maori rights and deny the right to te tino rangatiratanga.'⁶⁸

From these working papers it is evident that RMLR proposals for a more strategic role for local government in resource management ran counter to a vision of the treaty partnership in much the same manner as the reform of local government had. Once the Resource Management Bill had been introduced to Parliament, however, it became

⁶⁶ Assessment of proceedings at Hui Taumutu, 27-29 May 1988, in Appendix 2 of; *Resource Management Law Reform. The Treaty of Waitangi and its Significance for the Resource Management Laws*, p. 47.

⁶⁷ Mike Barns, *RMLR. A Treaty Based Model - The Principle of Active Protection*, Working Paper No 27, Ministry for the Environment, Wellington, October 1988, section 3.310.

⁶⁸ Barns, *RMLR. A Treaty Based Model*, section 3.320.

increasingly evident that the treaty relationship was particularly critical in the area of resource management, which lies at the heart of treaty negotiations.

In December 1989 the Resource Management Draft Bill was introduced to the House. Public consultation on the Bill was extensive, with over 1300 written submissions received. A review of written submissions by Māori groups and local authorities reveals a level of concern about Māori/local government relations similar to that expressed in the RMLR Working Papers. For example, Te Rūnanga a iwi o Ngāpuhi stated that the Resource Management Bill 'limits the ability of the Runanga to have "te tino rangatiratanga" over resources claimed by Ngapuhi and it will determine the relationship the iwi will have with government at a local, regional and national level in terms of resource management planning.'⁶⁹ Te Rūnanga emphasised that the most important clauses in the Bill were the ones which outlined the proposed relationship between iwi, local and regional government. They felt the wording had to be changed to make iwi management plans an integral part of district planning.⁷⁰ Also, the Department of Māori Studies at Victoria University declared, '[w]e do not support the Resource Management Bill because the Bill does not acknowledge the Treaty of Waitangi as establishing the constitutional relationship existing between the Crown and Māori of New Zealand'.⁷¹ In a similar vein, Te Whānau-A-Haunui argued that, '[t]he Bill transfers management powers to Local Government without adequately ensuring that the Crown's obligations under the Treaty of Waitangi are able to be fulfilled'.⁷² Te Whānau also stated, '[u]nder the Bill, many of the resource management responsibilities have been delegated to local authorities. It is arguable whether local government is an 'agent' of the Crown and therefore subject to the Treaty. However,

⁶⁹ *Resource Management Bill*, Submission by Te Runanga a Iwi o Ngapuhi, No. 12w, p. 1.

⁷⁰ *Resource Management Bill*, Submission by Te Runanga a iwi o Ngapuhi, No. 12w, p. 4.

⁷¹ *Resource Management Bill*, Submission by Department of Māori Studies, Victoria University, No. 424w.

⁷² *Resource Management Bill*, Submission by Te Whanau-A-Haunui of the Hauraki Gulf, No. 426w, p. 2.

that point is incidental to the issue of the *Crown's* responsibilities under the Treaty.⁷³

Te Whānau went on to say:

The Crown has demonstrably failed to ensure that its Treaty obligations can be met in transferring responsibilities to Local Government and therefore it has conferred an inconsistent jurisdiction in a manner which the tribunal said not to. It has done this by not giving a clear direction to Local Government as to what effect the Treaty has on their functions and by not affording Māori interests an appropriate place under the Bill.⁷⁴

The Whakatāne Association for Racial Understanding similarly expressed concern that '[t]here is no obligation on local bodies to ensure the Treaty is honoured, nor on any other government personnel.'⁷⁵ And the Moana District Māori Council in Tauranga warned the select committee that,

[i]t would be advisable for a Treaty reference to affirm the importance of the Crown's continuing obligations to Māori. In the transfer of decision making powers to sub-national units of government, it is important that the Crown protect the Treaty interests of Māori.⁷⁶

When the Resource Management Act 1991 was passed it contained a number of sections relating to Māori and the Treaty (as compared to its original version) including the following sections relating to the Treaty of Waitangi: section 6 (e) referring to the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga as a matter of national importance; section 7 (a) which requires particular regard to Kaitiakitanga [guardianship]; and section 8 which

⁷³ *Resource Management Bill*, Submission by Te Whanau-A-Haunui, No. 426w, p. 3.

⁷⁴ *Resource Management Bill*, Submission by Te Whanau-A-Haunui, No. 426w, p. 4.

⁷⁵ *Resource Management Bill*, Submission by Whakatāne Association for Racial Understanding, No. 752w, p. 1.

⁷⁶ *Resource Management Bill*, Submission by Moana District Maori Council, Tauranga, No. 655w, p. 1.

states a requirement to take into account the principles of the Treaty of Waitangi. Section 8 states that, '[i]n achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural resources shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).'⁷⁷ Despite the concerns expressed in submissions and the recommendations made in the working papers for the Government to address the question of Crown responsibilities, the Act did not deal with the question of partnership under the Treaty of Waitangi. Some years after the passing of the Act, the relationship between Crown and local government with regard to the extent of local government responsibility and authority under the Treaty of Waitangi is still largely an unresolved issue. In 1993, Diane Crengle, discussing Section 8 of the Act, asked, '[s]hould local authorities be regarded as agents of the Crown?' She remarked that 'the precise legal situation is uncertain and the present debate may not be resolved for some time.'⁷⁸

While it is beyond the scope of this inquiry to provide a detailed account of iwi/local government relations in New Zealand since the passing of the Local Government (No 2) Act 1989 and the Resource Management Act 1991 the principle behind the criticisms of the reforms discussed here deserved to be reiterated. As Jane Kelsey explains, despite the often repeated warning that 'the Crown cannot divest itself of its Treaty obligations', the reform of local government and resource management has done precisely that.⁷⁹ She argues that with the local government and resource management reforms 'significant powers exercised by the Crown are transferred to

⁷⁷ Consultation with Māori was another requirement of the Act under Section 8. Subsequent to the passing of the Act, the Ministry for the Environment published reports advising Māori and Local government of the importance of consultation on Treaty issues, and suggesting ways for both groups to consult widely and appropriately. See: *The Resource Management Act. Kia Matiratia. A Guide for Maori*, Ministry for the Environment, June, 1992 and *Proposed Guidelines for Local Authority Consultation with Tangata Whenua*, Ministry for the Environment, June, 1992.

⁷⁸ Diane Crengle, *Taking Into Account the Principles of the Treaty of Waitangi. Ideas for the Implementation of Section 8 Resource Management Act 1991*, Ministry for the Environment, Wellington, January 1993, p. 10.

⁷⁹ Kelsey, 'The Treaty of Waitangi, Local Government Reform and Resource Management Law Reform, p. 1.

Pakeha interests who dominate local bodies The Crown is effectively divesting itself of its treaty obligations'⁸⁰ and furthermore has 'distanced itself further from its ability to perform its treaty obligations.'⁸¹

The Government's actions in divesting treaty responsibility to local authorities and, more importantly, the implications of this for Māori were well demonstrated by the Māori occupation of Moutoa Gardens in Wanganui in 1995. This case study, which is the focus of the final section of this chapter, demonstrates the implications of the expanding identity of the Crown for Māori seeking negotiation with their treaty partner. The case study shows interesting parallels to Māori attempts to seek audience with the Queen treaty partner following the signing of the Treaty in 1840.

Moutoa Gardens/Pakaitore Marae: A Case Study of Crown, Māori and Local Government Relations

The aims in reviewing the protest action at Moutoa Gardens in 1995 and the events and debate which surrounded it are threefold. First, the purpose is to demonstrate that further evolution in the identity of the Crown (whereby the Crown has been expanded to incorporate local authorities) proved detrimental to Māori protesters seeking audience with 'the Crown' as central government in an attempt to negotiate and resolve treaty and land related grievances. Secondly, this discussion also draws attention to a certain parallel between the evolution of the Crown in the 1840s and subsequent evolution in the 1980s – an evolution which in both cases was not agreed to by Māori and furthermore, created significant complications for Māori in trying to identify and address an appropriate and responsive treaty partner. Finally it demonstrates that, through breakdowns in the communication process between 'Crown' (who or whatever that might be) and Māori, treaty grievances are resolved through the court

⁸⁰ Kelsey, 'The Treaty of Waitangi, Local Government Reform and Resource Management Law Reform, p. 9.

⁸¹ Kelsey, *A Question of Honour?*, p. 209.

system – a result which, in the case of the Moutoa Gardens protest, was not entirely satisfactory for Māori.

To briefly summarise the events at Moutoa Gardens, on the first of March, Wanganui River Māori began a peaceful celebration of their 'Wanganuitanga' (sovereignty as the indigenous people of Wanganui) in Moutoa Gardens. The Gardens, which had often been used in recent times as a marae (meeting house) for official occasions and which were the traditional site of a Māori marae, were 'renamed' 'Pakaitore Marae' by local Māori occupying the Gardens. Within the next two days it became clear that those gathered at the Gardens had no intention of dispersing and were in fact setting a 'makeshift' marae. Reports began to emerge that the occupation was a protest by Māori, who claimed the land belonged to them and not the Wanganui District Council. The Council's response to this allegation was to begin researching the ownership of the land. By 9 March, as the issue continued unresolved, pressure within the Wanganui community had begun to mount. On 17 March, the Council presented a five-point plan⁸² to Māori and called for an immediate response from the protesters. When no response appeared forthcoming, the Council ordered an eviction notice, allowing the protesters seven days to vacate the gardens.

As the eviction date loomed, Māori and the District Council still appeared unable to resolve the question of land ownership. Māori insisted they were moved from their land in 1845 by the army who used it as a parade ground. They claimed that in 1848, the Crown purchased 82,000 acres of land from local Māori at about threepence per acre. The Gardens themselves were said to be part of a fishing village which had not been intended for sale.⁸³ The District Council, on the other hand, argued that the land

⁸² 'Maori protesters demand 'supreme authority' over land,' *The Dominion*, 17 March, 1995, p. 1. The five-point plan proposed the establishment of a trust to manage the Gardens, to research the historical evidence of the Gardens' ownership, identify other contentious land in Wanganui, re-site monuments offensive to Māori, oversee the sharing of the Gardens by Māori and Pākehā, and resolve the issue in the Wanganui community.

⁸³ 'The taking of Moutoa,' *The Dominion*, 18 March 1995, p. 15.

had been legally purchased from Māori and was now the property of the Wanganui District Council, to be enjoyed by the whole community.

The wider debate about how the issue might be peacefully resolved was argued from two perspectives deriving from contrary perceptions of the Treaty as a matter of either local or national concern. Prior to the devolution or transfer of authority to local authorities, responsibility for treaty related matters may have rested more firmly on the shoulders of central government. However, with local authorities implicated in the treaty partnership, the issue appeared more complicated. On the one hand, the Moutoa Gardens' protest can be seen as a local issue, to be resolved by the Council and Māori, while the other hand, the protest is an expression of Māori rights under Article Two of the Treaty, which is an issue most appropriately addressed and resolved at the national level by central government acting on behalf of the Crown. The question which was repeatedly raised during the 'reoccupation' of the Gardens was; who is responsible for resolving the protest, the District Council or central government? In rephrasing the question for the purposes of this thesis; who or what was the Crown treaty partner under these circumstances? Finding an answer to this question requires consideration of the relationship between the various parties and the wider debate about where responsibility from this issue lay.

According to the *Wanganui Chronicle*, relations between the iwi and Council in Wanganui prior to the protest appear to have been uneasy. The paper advised that the Council had established an iwi liaison working party prior to the protest action called 'Te Roopu Whakakotahi.'⁸⁴ Despite this formal relationship, the Councillors' were surprised by the depth of the protesters feeling and by their actions.⁸⁵ Cr John Medlicott said, 'I am disturbed though that I never knew Maori had any concerns over the site and I am on the iwi liaison working party and would have liked to have

⁸⁴ 'Moutoa Gardens occupied by river Maori,' *Wanganui Chronicle*, 1 March 1995, p. 1.

⁸⁵ 'Mayor backed down over handling of iwi occupation,' *Wanganui Chronicle*, 7 March 1995, p. 7.

known.' Similarly, Cr Pam Erni said, 'I have never been aware prior to this event that ownership of Moutoa Gardens was an issue, nor as I understand it, did the Council.' A spokesperson for the Wanganui Māori, asserted that some Wanganui kaumatua (elders) had discussed the issues with the local council in the past but had been ignored. Wanganui Mayor, Charles (Chas) Poynter, challenged this statement arguing that there was a good relationship established in Wanganui between iwi and Council.⁸⁶ However, a few weeks into the protest, a press release was issued from the marae which stated that 'the alleged relationship with iwi that Mayor Poynter continually refers to is a myth.'⁸⁷

Regardless of criticisms of the Council's relations with Wanganui Māori, Poynter maintained a determination early in the event to resolve the dispute through iwi/Council dialogue 'in a manner which could be a model for the rest of New Zealand.'⁸⁸ On 9 March, Poynter said that the Council had not been told earlier of the strength of feeling about the gardens, but he emphasised, 'I'm sure the kaumatua and ourselves can work it out. I believe it's better to have direct contact.'⁸⁹ On 13 March, the first signs of the Mayor's doubts about the Council's involvement in the affair were beginning to show. He advised that the Council had confirmed its ownership of the gardens and that that fact would be conveyed to the Prime Minister, the Minister of Māori Affairs and the Minister of Treaty Negotiations. He said, 'I believe if there is no compliance by Maori occupying Moutoa Gardens the situation becomes a Government issue.'⁹⁰ The District Council made it clear also that it had no mandate to negotiate the issue of Māori sovereignty over land in Wanganui. According to the

⁸⁶ 'PM shies off direct involvement', *Wanganui Chronicle*, 14 March 1995, p. 1.

⁸⁷ 'PM calls on Maori protesters to oppose protesters', *Wanganui Chronicle*, 15 March 1995, p. 1.

⁸⁸ 'Moutoa Gardens occupied by river Maori', *Wanganui Chronicle*, 1 March 1995, p. 1.

⁸⁹ 'City determined to avoid another Bastion point', *Wanganui Chronicle*, 9 March 1995, p. 3.

⁹⁰ 'City's people have Moutoa ownership, Council told', *Wanganui Chronicle*, 13 March 1995, p. 1.

Council, '[t]hat must be negotiated between the partners of the Treaty of Waitangi, iwi and the Crown.'⁹¹

District Councillors themselves had earlier expressed concern over the role the Crown should play in the matter. For example, Cr Randhir Dahya said that government should have more to do with educating the public on the Treaty. Cr Mike Green stated, 'I also think the *Crown* has created this problem and that the *Crown* must recompense the Council somehow, sometime, for all the council has put into the area - maintenance, planting and so on.'⁹² The Mayor himself expressed his concern when he stated:

This is getting into a much wider area now and it's something that I believe the Government won't be able to back away from. ... [T]hey've got people in the Justice Department ... that are quite conversant with all this sort of problem and maybe they could help with some sort of personnel in that area. ... The Prime Minister's Department said that they're keeping a close watching brief on the matter and that's the sort of response I would have expected.⁹³

On 23 March, the Mayor met with ministers and advised them that the Māori at Moutoa had stated that the issue of sovereignty was to be the basis for negotiations with the Council. However, the Mayor was emphatic that sovereignty was not an issue that could be dealt with by local authorities.⁹⁴ He repeated this viewpoint on National Radio, saying that local government had the authority and responsibility to deal with the structures erected in the Gardens, but central government must be responsible for issues of sovereignty in Wanganui. According to Poynter, the fact that

⁹¹ 'Meter ticks on Maori occupiers', New Zealand Press Association, 23 March, 1995.

⁹² 'Mayor backed over handling of iwi occupation', *Wanganui Chronicle*, 7 March 1995, p. 7.

⁹³ Mayor Chas Poynter on *Morning Report*, National Radio, 14 March, 1995.

⁹⁴ 'Maoris rally to fight eviction from gardens', *The Dominion*, 23 March 1995, p. 1.

those issues had been raised by Māori meant that the issue had wider ramifications which must be dealt with by central government.⁹⁵

Calls for government intervention also came from outside the District Council. Both Helen Clark, Leader of the Opposition, and the Labour MP for Wanganui, Jill Pettis, urged the Government to facilitate negotiations with the protesters at Moutoa Gardens. Pettis urged, '[p]lease will you intervene as the governing party in this country so constructive and meaningful dialogue can take place?'⁹⁶ Koro Wētere, Labour MP for Western Māori, also sent a letter to the Minister of Māori Affairs, John Luxton, urging him to take action. The Alliance Leader, Sandra Lee, supported Wētere's actions and called for National Prime Minister, Jim Bolger, to provide informed leadership. Lee said:

[i]t is not good enough for the Prime Minister to wash his hands of this issue and turn his back on both the local city council and the local Maori. ... The Crown has the responsibility in this matter as it was the original benefactor of this public reserve, now vested in the local council.⁹⁷

Lee also pointed out that because local government was not the ministers, the Waitangi Tribunal or the Crown, it could not provide solutions required to resolve the issue satisfactorily. She explained that the Government had the legislative provisions to find an easy and immediate solution to the problem. Consequently, she insisted on 'Crown' involvement to allow Māori meaningful dialogue with their treaty partner.⁹⁸

The call for government intervention also came from angry Wanganui citizens who believed the Government had abandoned the town and left Mayor Chas Poynter in the

⁹⁵ Mayor Chas Poynter on *Morning Report*, National Radio, 23 March, 1995.

⁹⁶ 'PM to Maori leaders: rein in protesters', *The New Zealand Herald*, 15 March 1995, p. 1.

⁹⁷ 'Protester study peace plan', *The Dominion*, 16 March 1995, p. 1.

⁹⁸ Sandra Lee on *Morning Report*, National Radio, 24 March 1995. According to Lee, the Reserves Act and Te Ture Whenua Act would allow joint management of the land. See: 'Protester study peace plan', *The Dominion*, March 16, 1995, p. 1.

lurch.⁹⁹ Criticism over the Government's inaction flowed from media sources also. One *Evening Post* editorial commented, '[i]n fact [the government] had a clear obligation to act, since the Moutoa Gardens occupation carries implications for the whole of the country.'¹⁰⁰

Despite such criticism and the encouragement for government intervention in the protest, the Government maintained that it would not get involved in what it insisted was a local issue. Following the Mayor's insistence for government involvement, the Prime Minister apparently 'shied off direct involvement' repeating that the issue 'should be resolved at the local government level.'¹⁰¹ However, it was later reported that, '[t]he government is becoming increasingly worried about the Māori occupation of Moutoa Gardens in Wanganui, although ministers are reluctant to get involved as the tension mounts in the city.'¹⁰² On 15 March, the Government issued a statement urging Māori leaders to rein in protesters, but would not be drawn any further on the matter.¹⁰³ When challenged by Opposition MPs to resolve the crisis with mediation, the Minister of Māori Affairs commented that it was not the government's responsibility to appoint mediators.¹⁰⁴ However, the Prime Minister conceded on 20 March, '[c]learly if there were to be a rash of sit-ins the government would have a different response.'¹⁰⁵ When pressed for further comment, he stated, '[w]e [the Government] just simply are not involved. It is not our land, it is not our park.'¹⁰⁶ Political sources speculated that the Government was loath to get involved because of a

⁹⁹ Editorial, *Sunday Star Times*, 19 March 1995, p. A2.

¹⁰⁰ Editorial, *The Evening Post*, 27 March 1995, p. 4.

¹⁰¹ 'PM shies off direct involvement', *Wanganui Chronicle*, 14 March 1995, p. 1.

¹⁰² 'Plea for help as Wanganui tension rises', *The New Zealand Herald*, 14 March 1995, p. 1.

¹⁰³ 'PM to Maori leaders: rein in protesters', *The New Zealand Herald*, 15 March 1995, p. 1.

¹⁰⁴ 'Protesters study peace plan', *The Dominion*, 16 March 1995, p. 1.

¹⁰⁵ New Zealand Press Association (NZPA), Press Announcement, 20 March 1995.

¹⁰⁶ 'Pressure on as activists head for Moutoa Gardens', NZPA, 24 March, 1995.

fear that it would give protesters 'a national stage on which to debate issues such as Maori sovereignty rather than just ownership of the gardens.'¹⁰⁷

Māori opinion on the appropriate role of government in the matter proved difficult to gauge through media reports. According to Koro Wētere, Māori had stated that the government should be involved.¹⁰⁸ Indeed, protesters had asked that communication channels with the Wanganui District Council and the Government remain open.¹⁰⁹ Furthermore, regulations drafted by Wanganui Māori apparently outlined a framework for discussing the sovereignty issue with the Government. Niko Tongariro, a spokesperson for the Māori protesters, emphasised that the Crown had to become involved in the discussions over the gardens because of the sovereignty issue. He said, '[w]hat's happened is that the Crown has sidestepped the issue and left the Mayor on his own. We are talking about ... sovereignty [supreme authority for the Wanganui iwi over their resources and taonga], the Crown has to be involved.'¹¹⁰

One final comment also demonstrates the confusion over the identities involved in the protest – this time with regard to the question of the relationship between the Crown and government which was a backdrop to the more immediate question of the relationship between local and central authorities, and Māori. The comment was made by an individual who threatened a law suit against the Council that both the Crown *and* the Government were in breach of the Treaty of Waitangi and international law.¹¹¹

At 5pm on Thursday 30 March, the deadline for eviction expired and the threat for police intervention in the protest appeared inevitable. However, the eviction deadline

¹⁰⁷ 'Pressure on as activists head for Moutoa Gardens', NZPA, 24 March, 1995.

¹⁰⁸ *Morning Report*, National Radio, 23 March 1995.

¹⁰⁹ 'Whanganui tribe puts its case on land claims', *The New Zealand Herald*, 2 March 1995, p. 1:3.

¹¹⁰ 'Maori respond with own rules', *Evening Post*, 21 March 1995, p. 3.

¹¹¹ This comment came from the President of the Confederation of United Tribes, and was reported in 'Confederation of tribes says it plans to sue Wanganui Council', NZPA, 25 March, 1995.

passed without incident or confrontation between the police and the protesters. The District Council advised the following morning that it would take the protesters' claim to the High Court to resolve the question of land ownership. The Government was silent on the matter, maintaining a policy of non-involvement.

Finally, following seventy-seven days of occupation, the High Court ruled (despite the absence of the protesters for the hearing) that the land was Council land, gifted previously by the Crown, and should be vacated by the protesters. Having been gifted by the Crown, the land should be regarded as private land. The Judge considered it 'a matter of regret' that as such, it would be excluded from the recommendatory function of the Waitangi Tribunal (which is not allowed to consider claims brought against private land following the 1993 amendment.)¹¹² Following the High Court's ruling and once again faced with prospect of eviction, the protesters left before the police were required to intervene. With the issue resolved and the question of land ownership determined the Government announced that it would meet with the Māori protesters.¹¹³

The final point to note in this chain of events is the ruling Judge's observations regarding the role of the courts in resolving treaty based matters. The Judge acknowledged that the High Court (indeed any court) was restricted in what it may do to protect the Treaty while dispensing justice. He explained that the Treaty of Waitangi was not able to be fully considered (because it is not a legally binding agreement) where it fell outside the parameters of the law. As McGechan J advised in his opening statements in another High Court ruling:

[t]his case falls for decision under the cold legalism of administrative law, which looks at process rather than result. For the benefit of non-lawyers, I emphasise I have no

¹¹² Judgment of Heron J, High Court of New Zealand, Wanganui Registry, 11 & 12 May, 1995, p. 13

¹¹³ 'Government to meet Moutoa protesters', *The Dominion*, 19 May, 1995, p. 1 and p. 3.

power simply to determine what the "right" decision would have been, and to order that now be put into effect. ... The limitation is constitutional, and is not to be brushed aside, however aggrieved Māori may feel.¹¹⁴

In summary, the process of increasing the responsibilities of local authorities has, with regard to the Treaty and in the instance of protest action at Moutoa Gardens, created considerable confusion as to the appropriate dialogue partners in attempting to resolve the dispute. Furthermore, it brings into question the appropriateness of local government involvement in treaty matters, given the limited authority of local government to address and resolve the sorts of issues likely to be raised by Māori, such as resource ownership and sovereignty. Finally, the Moutoa Gardens protest demonstrates that, in creating a situation in which grievances cannot be resolved by local authorities and will not be addressed by government, the issues are forced through the courts which are limited in their ability to address and resolve issues of justice under the Treaty. In light of this case study and its findings, the general implications for Māori of the further evolved Crown identity can be considered.

The Implications of the Evolving Crown for Māori

In Chapter Five, it was argued that, following the signing of the Treaty in 1840, the Crown evolved from meaning the Queen, to identifying British and then settler government in New Zealand. This evolution was seen to have serious implications for Māori because the settler government was both distanced from and ambivalent about the terms of the Treaty. This created significant distress and confusion for Māori in identifying and addressing the treaty partner. As the theorists of political symbolism have suggested, prevailing interpretations of symbols have helped determine the nature

¹¹⁴ Reserved Judgment of McGechan J., High Court of New Zealand, Wellington Register, 29-31 August and 31 September, p. 3. The limitations of the courts in acknowledging the Treaty were similarly noted by Bill Oliver, who said: [w]hile many arguments brought before the Waitangi Tribunal are concerned with illegal actions on the part of Crown agents - in effect, the Crown breaking its own rules - many others relate to essential justice ... of their perfectly legal actions ... Here, too, the conjunction of legality and injustice is characteristic.' See: Bill Oliver, 'Pandora's Envelope: it's all about power', in *New Zealand Books*, March 1995, p. 19.

of future events. In New Zealand, the interpretation and evolution of the Crown has created serious obstacles for Māori. This chapter has demonstrated that the pattern of evolution was largely repeated in the 1980s whereby the Crown came to incorporate local authorities also. The Moutoa Gardens protest indicated that the implications of this evolution were as significant and distressing for Māori as they had been some one hundred and fifty years earlier in that they could not identify and approach an appropriate partner with which to discuss and resolve their grievances. This problem of the evolving Crown was well summarised in 1987 by the Royal Commission of Social Policy which expressed concern that, 'the solemn pact made with the British (the Queen in fact) could be delegated without consultation, to a new body motivated by different interests and priorities.'¹¹⁵ It has been demonstrated in this section of the thesis that this is precisely what has occurred twice: in the transfer of authority from the Queen to settler government; and, similarly, from central to sub-national government.

The evolution of the Crown does not end here. In 1995, New Zealand finds itself on the threshold of significant constitutional changes which will further involve and evolve the nature, function and identity of 'the Crown' in New Zealand. As constitutional issues are addressed Māori must be consulted if further inappropriate redefinition of the treaty partner is to be avoided. The purpose of the final two chapters of this thesis is to address the question of the Crown and the constitution in New Zealand in order to better understand the future of the Crown in New Zealand from the perspective of the Treaty of Waitangi.

¹¹⁵ Report of the Royal Commission on Social Policy, *The April Report*, Vol. II 'Future Directions', April, 1988. p. 51.

SECTION THREE

The Crown and the Constitution

A COMPARATIVE APPROACH: THE CROWN IN CANADA

In investigating the Crown in New Zealand, this thesis has demonstrated the problems of consistency with and evolution of the Crown identity, both of which have had implications for the Māori treaty partner. It has also argued that the Crown symbol is frequently used and widely applied in treaty discourse because of its ability to lend authority and legitimacy to the actions and policies of individuals and institutions involved in treaty negotiations. This chapter, which introduces the third section of the thesis, adds additional evidence to the arguments presented in the previous two sections by means of a comparative study. It observes that the Crown in Canada, while equally significant in relation to Canadian treaties and the Canadian constitution, is neither used as frequently in political debate in Canada as it is in New Zealand, nor is used to identify central government as it is in New Zealand. Factors and influences peculiar to Canada have actively deterred the development of the Crown symbol as witnessed in New Zealand. This chapter, then, re-emphasises the unique relationship between Māori and the Crown and the unique function of the Crown symbol in New Zealand. The future of the Crown with regard to New Zealand's developing constitution will be examined in the following chapter.

This chapter is divided into three parts. The introductory section briefly establishes the fact that the Crown does not enjoy the sort of currency in Canadian treaty discourse as it has done in New Zealand. The question is subsequently raised, what might the reasons be for this difference? The following two sections present a number of possible explanations. The first of these relates to the relationship between Indian people and their treaty partner in Canada. It is demonstrated that, while the Crown is historically an important symbolic identity for many Indian tribes, Native spokespeople tend to refer to the 'federal government' as their contemporary partner,

not 'the Crown'. This is the result, it is argued, of the wording and timing of treaties in Canada when compared to the Treaty of Waitangi in New Zealand. The second section points out that the Crown is a significant constitutional construct in Canada today, and argues that certain factors have complicated and influenced the meaning of 'the Crown' in Canada's history resulting in the fact that the Crown does not provide symbolic reassurances for the Canadian public (or provincial governments) as it does in New Zealand. Also, unlike New Zealand where the Crown became central to treaty debate because of the Treaty of Waitangi Act 1975, the symbol did not have the same opportunity to develop in Canadian treaty discourse because it was not a prominent identity in either the language of the Canadian treaties or subsequent statutes relating to Native rights in Canada.

Before beginning this discussion, it is important to understand how this comparative investigation can result in a better understanding of the New Zealand experience. The advantages of comparative analysis have been widely acknowledged. New Zealand specialists in public law have suggested that other nations' constitutions can tell us a lot about our own constitutional arrangements because they can lead us to ask 'why does New Zealand do one thing and other countries something else?'¹ Also, comparative theorists Mattei Dogan and Domonique Pelassy have suggested that it is natural for people to think comparatively, and that we do so in order to 'evaluate more objectively our situation as individuals, a community or a nation.'² A comparative study of the Crown can show what might have happened in New Zealand if circumstances had been different, and can also emphasise the unique blend of factors and influences present in New Zealand which has resulted in the popularity of the Crown symbol and the problem of its identity.

¹ Geoffrey Palmer and Mai Chen, *Public Law in New Zealand: Cases, Materials, Commentary and Questions*, Oxford University Press, Auckland, 1993, p. 268.

² Mattei Dogan and Domonique Pelassy, *How to Compare Nations. Strategies in Comparative Politics*, Chatham House Publishers Inc., New Jersey, 1984, p. 3.

However, while promoting the benefits of comparative thought, Dogan and Pelassy warn also of the disadvantages and limitations of this approach. Students of comparative politics are warned to recognise the influence of factors other than those included in the study which may alter their results and findings.³ They are also advised to make allowance for their limited familiarity with other countries relative to their more comprehensive understanding of their own. Finally, Dogan and Pelassy warn against a strictly theoretical approach to comparative study because of the risk of distorting information or creating false perceptions. Instead, they encourage the (often slow) development of generalisations, elaborations and even the induction of laws from comparative material.⁴ Noting these cautionary words, this chapter limits its use of Canadian material to providing general observations about the Canadian experience which, when seen in conjunction with evidence presented earlier in the thesis, serves to substantiate observations about the Crown in New Zealand. This discussion about the Crown in Canada will naturally be less comprehensive than the New Zealand study undertaken in the first two sections of this thesis.⁵

In addition to asking why we use comparative study, it is important to consider when it is appropriate to think comparatively. Generally speaking, in order for comparative analysis to be fruitful, some basic similarities, or 'functional equivalences', are required between the things compared.⁶ For the purposes of this study, the functional equivalences for Canada and New Zealand are the fact that both countries have: a British colonial history (and therefore a relationship with the British Crown); a constitutional monarchy (and therefore an on-going relationship with the British Crown); a history of relations with indigenous peoples based to some extent on treaties (signed with the British Crown); and finally a current national focus, to

³ Dogan and Pelassy, *How to Compare Nations*, p. 14.

⁴ Dogan and Pelassy, *How to Compare Nations*, p. 14.

⁵ The sources for the Canadian material used in this discussion include books, journal articles and newspaper reports. Where appropriate, indications are given to other points of comparison not investigated in this chapter which might be explored in future comparative research.

⁶ Dogan and Pelassy, *How to Compare Nations*, p. 32.

varying degrees, on the rights of indigenous peoples. The differences between the countries include: the geographical size of the countries; federal versus unitary systems of government; and the influence of French settlement on the relationship between British and Native Canadians. In noting these equivalences and differences, the question examined in this chapter is why the Crown symbol has enjoyed noticeably higher currency in New Zealand's treaty discourse than it appears to have done in similar debate in Canada.

Canadian Treaty Discourse: Noting the Absence of 'the Crown'

The first step in this comparative exercise is to briefly demonstrate the absence of the Crown symbol in Canadian treaty debate with reference to newspaper reports and the treaty discourse of Indian commentators. First, in briefly examining the language of treaty discourse in the mass media, one particular protest reported in the *Vancouver Sun* newspaper provides an interesting case study of the language of Canadian treaty debate, especially when compared with the newspaper (and broader media) coverage of the Moutoa Gardens protest discussed in the previous chapter. While the issues and language of the Indian protest shows some remarkable similarities to the Māori occupation at Wanganui, the Crown is not used by the mass media to identify central government in Canada as it was in New Zealand.

On 2 June 1995, the *Vancouver Sun* reported that a road block had been set up outside the town of Merritt in British Columbia, as a protest by a local Indian band against their loss of traditional hunting and fishing rights guaranteed in treaties signed with the British Crown. In the same way as Māori protesters at Moutoa Gardens sought audience with central government to address their grievances, the Indian band insisted that the protest, and the issues it drew attention to, should be resolved by federal government rather than provincial government. However, while Wanganui Māori often identified their treaty partner as 'the Crown', the Indian protesters identified 'federal government' as the partner with whom they sought negotiations. They said

that while the dispute was causing local concern it was 'really about a much bigger issue [of] Indian claims to private land in treaty talks with the [federal] government.' In the words of the protester, '[t]he real issues are that the *government* of this country and the people who run this province have not to this point listened to us.'⁷

In response to the crisis the provincial government appointed a mediator who advised that, 'we could really use the help of the *federal government* being present.'⁸ It will be recalled from the Moutoa Gardens incident that Wanganui's Mayor had similarly expressed concern that central government, whom he often identified as 'the Crown' should address the protesters' demands for Māori sovereignty. The Canadian newspaper also reported that the Indians were disappointed by the *federal government's* lack of involvement, which again echoed the sentiment of protesters at Moutoa Gardens. The provincial government in British Columbia advised that it would not negotiate until the protesters' blockades had come down, just as the Wanganui District Council had stated it would only negotiate once the protesters had left the gardens. As the events unfolded, reports continued to identify the 'federal government' in contexts where 'Crown' was used in the Moutoa Gardens articles. In fact, no references to 'the Crown' could be found in a dozen reports on this particular protest in Canada. Instead, reports mentioned, 'the *government's* chief negotiator', *government* officials, *government* obligations to Indians, and *government* demands, all of which might be acceptably alternatively presented as *Crown* obligations, *Crown* demands and *Crown* officials or representatives in New Zealand.⁹

A tension similar to that in the relationship between Māori and District Council in Wanganui could be detected between the provincial government and the Indian protesters in British Columbia. Indeed, many years before the protest at Merritt the

⁷ 'Blockade: Repeat of Oka is worst fear', *The Vancouver Sun*, 2 June 1995. Italics added for emphasis in all quotations in this chapter unless otherwise specified.

⁸ 'Ranch has seen blockades before', *The Vancouver Sun*, 2 June 1995.

⁹ 'Legal action threatened as Indians disrupt traffic', *The Vancouver Sun*, 28 July 1995.

'Statement of the Government of Canada on Indian Policy, 1969', better known as the White Paper, raised protest from Indian groups very similar to Māori protests against local government reforms and the resource management law reform process (discussed in Chapter Eight). The 'White Paper' was intended to transfer the responsibility of Indian administration from the federal government to the provinces.¹⁰ However, Indian groups protested against the move, arguing that the White Paper was not developed in good faith and was a denial of their special rights.¹¹ Specifically, Indians argued that the federal government should not turn responsibility for Indian affairs over to the provincial government because 'provincial governments have no obligations to fulfil our treaties. They never signed treaties with the Indians'.¹² Evidently, despite the Crown/federal government difference, the principle of keeping the responsibility for treaty rights at the level of central government has been emphasised in Canada and New Zealand.

The absence of the Crown in the language of the mass media in Canada, which can only be briefly demonstrated here, was emphasised by a passing comment in a Canadian newspaper report about the Queen's visit to New Zealand in 1995. The report discussed the Queen's role in signing an agreement with a Māori tribe which had recently been negotiated with the New Zealand Government. In order to clarify the identities involved in the treaty negotiation process in New Zealand (particularly with regard to the Queen and the government) the newspaper told its Canadian readers that in New Zealand, 'the Crown' denotes the government, not the monarchy.¹³ This statement clearly demonstrated a lack of familiarity within the Canadian public with 'Crown' being used to identify central government.

¹⁰ Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970*, University of Toronto Press, Toronto, 1981, p. 4.

¹¹ Weaver, *Making Canadian Indian Policy*, p. 173.

¹² Harrold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians*, Hurtig Publishers, Edmonton, 1969, pp. 30-31. A similar sentiment was expressed about the involvement of local government in treaty affairs in New Zealand. See Chapter Eight for details.

¹³ 'Queen will approve Maori land deal, but not apologise', *Vancouver Sun*, 2 November, 1995.

The language of Indian commentators on treaty rights also demonstrates much less frequent use of the Crown in Canadian discourse when compared to New Zealand's, in addition to the difference that 'the Crown' does not denote central government in Canada. Two sources are used here once again to briefly demonstrate that, while concerns raised by Indians generally correspond to those of the Māori people, the Crown does not fulfil the same symbolic function in Canadian treaty discourse as it has done in New Zealand. The first of these sources is the discourse of Harrold Cardinal, long-standing vocal advocate of Indian rights in Canada.

Writing in the late 1960s, Cardinal provides further evidence of the many similarities in the language and issues pervading indigenous rights debate in Canada and New Zealand. His discourse also demonstrates the absence of the Crown in treaty debate in Canada. As an example of the similarities evident in Cardinal's writing when compared to New Zealand commentators, he spoke of treaties which gave Indians the right to hunt and fish and which guaranteed Indian access to traditional land.¹⁴ He talked about *government* policy which he described as 'a thinly disguised program of extermination through assimilation'¹⁵ similar to the assimilationist policies identified in New Zealand in the early 1970s. He also referred to patterns of cultural renaissance and renewed pride within Indian communities in the later 1960s, such as those witnessed with the treaty renaissance in New Zealand since the 1970s. On a more abstract level, Cardinal spoke of the 'spirit of the treaties'¹⁶ saying that a, '[s]imple, literal reading of the treaties does not reflect the spirit in which they were signed.'¹⁷ Furthermore, in recalling the signing of the treaties, Cardinal noted that Indians were

¹⁴ Cardinal, *The Unjust Society*, p. 19. This can be compared with the wording of the English version of the Treaty of Waitangi provided in Appendix A of this thesis.

¹⁵ wCardinal, *The Unjust Society*, p. 1. Government attempts to encourage the assimilation of the Maori people into European society in New Zealand were discussed in Chapter Six of this thesis.

¹⁶ Cardinal, *The Unjust Society*, p. 101.

¹⁷ Cardinal, *The Unjust Society*, p. 153. In a High Court ruling in New Zealand, Bisson J. delivered a ruling which similarly acknowledged that 'the spirit of the Treaty transcends the sum total of its component parts and puts narrow or literal interpretations out of place.' See, *New Zealand Maori Council v Attorney-General*, [1987] 1 NZLR 641 (CA), p. 663.

impressed by the pomp and ceremony of the treaty process. He explained that a 'father image' was advanced by the authorities to explain the relationship of the white man to the Indian. The Indians, according to Cardinal, did not fully understand the meaning or implications of the treaties they signed. He said promises were made, which were subsequently broken.¹⁸ 'To the Indians of Canada, the treaties represent an Indian Magna Carta. The treaties are important to us because we entered into these negotiations with faith, with hope for a better life with honour.'¹⁹ All of these ideas, arguments and sentiments have been expressed in very similar ways in New Zealand.

However, despite these similarities, New Zealand has distinguished itself from Canadian discourse such as Cardinal's with its use of the Crown symbol in treaty debate. While Māori and non-Māori alike in New Zealand frequently spoke of the Crown when referring to a great variety of institutions and individuals in New Zealand (both historically and in contemporary society as was demonstrated in the evidence presented by Māori at the Muriwhenua claim in Chapter Six), Cardinal directly identified the contemporary treaty partner for Indians as the 'federal government'. For example, he said that, a 'major problem arises from the refusal of our present *Canadian government* ... and of *Canadian governments* in the past, to honour commitments for treaties signed with the Indians.'²⁰ He stated most emphatically, '[a]s far as we are concerned, our treaty rights represent a sacred, honourable agreement between ourselves and the *Canadian government*...' '²¹ He warned that Indians will eventually refuse to deal with the government if 'the *government* does not intend to honour its earliest and most sacred obligations to the Indian people.'²² He also spoke of 'hundreds of years of the Indian-*government* relationship.'²³ While

¹⁸ Cardinal, *The Unjust Society*, p. 36.

¹⁹ Cardinal, *The Unjust Society*, p. 28. Also see: Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Oxford university Press, Auckland, 1991.

²⁰ Cardinal, *The Unjust Society*, pp. 16-17.

²¹ Cardinal, *The Unjust Society*, p. 30.

²² Cardinal, *The Unjust Society*, p. 122.

²³ Cardinal, *The Unjust Society*, p. 6.

notions such as honour and obligation have often been used in relation to the Treaty of Waitangi in New Zealand, they have been generally associated with the symbol of the Crown, rather than government as was the case in Canada.

However, while the federal government dominated Cardinal's conception of the contemporary treaty partner, he also often referred to 'the Queen' and Her representatives in recalling treaty promises made in the past. It would appear, therefore, that while the Crown has not been a popular symbol in contemporary treaty discourse in Canada, the Queen was an important historical identity, at least for Cardinal. For example, he talked about the Queen and her government when he said, '[f]ulfilment of Indian rights by the *queen's* government must come before there can be any further cooperation between the Indians and the *government*.'²⁴ He also wrote that:

The Indians entered into the treaty negotiations as honourable men who came to deal as equals with the *queen's* representatives. Our leaders of that time thought they were dealing with an equally honourable people ... who would do no less than the Indians were doing – bind themselves, bind their people and bind their heirs to honourable contracts.²⁵

Other Indian commentators also demonstrated patterns of use similar to Cardinal's. For example, in 1989, a representative of the Innu people of Ungava discussed his tribe's contemporary treaty claim. His language demonstrated that the tribe's claim or grievance was with the *Canadian government* and military institutions in Canada, and he made no mention of 'the Crown'.²⁶ Similarly, a spokesperson for the Mi'kmaq

²⁴ Cardinal, *The Unjust Society*, p. 28.

²⁵ Cardinal, *The Unjust Society*, p. 29. Claudia Orange and Anne Salmond have observed similar expectations in New Zealand and have expressed the sentiment in similar ways. See Chapters Five and Six of this thesis for details.

²⁶ Daniel Ashini, 'David confronts Goliath: The Innu of Ungava versus the NATO Alliance', in Boyce Richardson (ed.), *Drumbeat: Anger and Renewal in Indian Country*, Summerhill Press, Toronto, 1989, p. 59.

people argued that his tribe had a valid treaty with the 'British Crown', but in discussing the claim in a contemporary context he differentiated between the Imperial Crown and the colonial and federal governments in Canada. Reference to the Crown in this narrative could be literally interpreted as meaning the Crown in England, as opposed to the government in Canada. For example, the comment was made that, '[r]epeated representations to the *Crown* [in Britain] regarding these ongoing breaches of the terms of our treaties were either stalled or ignored.'²⁷ Most importantly perhaps, the distinction between British Crown and federal government in Canada, as opposed to the ambiguity of the Crown in New Zealand treaty debate, provided greater certainty in the identities in Canadian history than is possible in treaty debate in New Zealand which uses the vague and often unsubstantiated Crown to identify a range of entities.

An Arkwesasne-Mohawk commentator also made a number of references to 'the Crown' specifically in reference to the British Crown as the original treaty partner. He spoke of the 'sacredness of the *Crown's* commitments', 'the *Crown's* obligations' and the *Crown's* promises. However, in a contemporary context, and again in contrast to New Zealand treaty discourse, the commentator replaced the Crown identity with the federal government. The comment was made, for example, that 'in petitions to the *government* [in 1898 the Mowhawk people] recalled ancient obligations undertaken by the *British Crown* ...'²⁸

These examples of the language of treaty discourse in Canada in the language of the mass media and Indian commentators, demonstrates that the Crown symbol is not used to identify central government in Canada, even in the context of treaty debate. In considering what might account for this difference, it will be recalled that theorists of

²⁷ Grand Chief Donald Marshall Sr., et al., 'The Mi'kmaq: The Covenant Chain', in *Drumbeat*, p. 86.

²⁸ Grand Chief Michael Mitchell, 'Akwesasne. An Unbroken Assertion of Sovereignty', in *Drumbeat*, p. 116.

symbols in political language suggest that a symbol will enjoy frequent use for one of three reasons (or as a result of a combination of these reasons.) A symbol may become popular: because the public accepts the symbol as a reassurance for collective fears or as a part of their collective identity especially in times of political or social tension; because a government finds it is able to use the symbol to its own advantage in legitimating its authority; or finally, a symbol may naturally develop from the political environment and the events which impact upon it (such as the passing of the Treaty of Waitangi Act and the subsequent work of the Tribunal in New Zealand). In New Zealand, all three of these factors were earlier argued to have had some influence in encouraging the revival of the Crown symbol in the 1980s. In Canada on the other hand, as the next two sections of this discussion argue, the federal government does not identify itself as the Crown. The symbol does not provide reassurances, rather it raises tensions between groups in Canada. Also, even if this antagonism did not exist, the Crown would have been unlikely to develop naturally as a symbol in Canada because of its omission from key legislation relating to Indian rights in Canada.

The Crown and Māori vs Federal Government and Indian

The language of Harrold Cardinal and other Indian commentators indicated that the Queen is an important historical identity for Indians. Earlier it was argued that Māori also traditionally related strongly with the identity of the Queen in envisaging their partner under the Treaty of Waitangi. It was suggested that this was a result of the wording of the Treaty, the language of the British officials who presented the Treaty to Māori and certain political principles which were central to traditional Māori society. It was also later demonstrated through the case study of the language of the evidence presented in the Muriwhenua claim, that the Queen continues to be an important identity in contemporary Māori discourse about the Treaty and treaty rights. In Canada, on the other hand, while the Crown as the Queen appears to be significant for some Indian tribes who signed treaties with the British Crown, the Crown symbol has been very rarely used in reference to the contemporary treaty partner who was instead

identified as the federal government. The question is why, given the similarity of Indian and Māori relations with the Crown, and the similarity in the transfer of authority from Queen to colonial government in the development of both countries' constitutions, did this difference occur? Here it is argued that the timing and wording of the Canadian treaties influenced Indian conceptions of the relationship they established under the treaties and, subsequently, their language in later treaty debate.

However, it is first important to more substantially acknowledge the significance of the Crown for Indians with regard to Canada's treaties. Even as recently as the 1980s, a national debate in Canada about the country's constitution forced the question of whether the First Nation Treaties would be included in the amended Constitution Act. First Nation representatives lobbied the Canadian government to protect their rights, stating, '[i]n particular, we did not want our link to the *Crown* to be affected.' In addition, and much to the surprise of the Canadian public and government, the lobby aimed its campaign at the British Parliament and sovereign, once again demonstrating that the relationship with Britain was still of significance to Indian communities. A gathering of more than 500 chiefs descended onto London as an expression of their historic relationship with Britain through treaties in Canada.²⁹ As a result of the campaign, the First Nations became a widely debated constitutional issue from which resulted a 'remarkable statement of the responsibilities that the *Canadian government* has undertaken by repatriating the constitution, and a ringing declaration of the continuing validity of all the ancient undertakings given to [First Nations] by the *British Crown*.'³⁰

Looking further back, many Indians tribes historically attempted to maintain links with the Queen, as Māori did also. As in New Zealand, there are many accounts of Indian deputations to the Queen to express a treaty partnership between Indian and Queen.

²⁹ Richardson, *Drumbeat*, p. 21.

³⁰ Richardson, *Drumbeat*, p. 22.

One writer explains that Indians traditionally felt it was important to maintain the ceremonial renewal of their alliances with great Britain each year and did so through the distribution of gifts. As it became increasingly difficult for Indians to maintain these ceremonial links with the British, the Indian people became increasingly distressed.³¹ An attachment by some Indians to the Queen through what they perceived as a 'personal relationship', similar to the relationship many Māori understood growing from the Treaty of Waitangi, has also been well documented.³² In New Zealand also, as will be recalled from earlier discussion, attempts were made to seek audience with the Queen or the British government, in search of protection for treaty rights, and with very little result. Similarly in Canada, the Metis³³ people took a petition to England in 1847 to demand recognition of their special status as Indian/whites which led to 'spirited exchanges in the British Parliament' but with no results.³⁴

Furthermore, in a report on Indian self-government, published in 1983, the 'trust relationship' between Her Majesty the Queen and the Indians was identified. The report said:

It was, and continues to be of fundamental importance to the Indian Nations that they treated with the *Royal Majesty*. The elders understood they were entering into a sacred relationship of trust with another sovereign which would endure the passage of time and governments.³⁵

³¹ Olive P. Dickason, *Canada's First Nations: A History of Founding Peoples from the Earliest Times*, University of Oklahoma Press, Norman, 1992, p. 249.

³² For example, interviews with elders from of Treaty 6 and 7 reveal something of this nature of this relationship through their oral traditions. See: Richard Price (ed.), *The Spirit of the Alberta Indian Treaties*, Pica Pica Press, Edmonton, 1987.

³³ Metis are people of mixed French and Indian descent.

³⁴ Dickason, *Canada's First Nations*, p. 264.

³⁵ *Indian Self-Government in Canada. The Report of the Special Committee*, Second Report to the House, House of Commons, Issue no. 40, 1983, p. 119.

According to this report, the Royal Proclamation of 1863 in Canada established a special relationship between Indian and Crown, with the Crown as the protector of the smaller nations within its bounds.³⁶ However, when the report spoke of contemporary relations, the term 'Crown' almost completely disappeared. For example, it was asserted that, 'the special relationship between the *federal government* and Indian First Nations must be renewed and enhanced'.³⁷

Despite the symbolic and even practical significance of the Queen for Indian people in relation to their treaty rights, the Crown was not used to identify the contemporary treaty partner, in particular central government, as it has done in New Zealand. The wording and timing of many of the treaties signed in Canada, when compared to the Treaty of Waitangi in New Zealand, may have been partly responsible for this distinction.

First, it is important to note that not all Canadian Indians have a relationship with the British Crown through a treaty. While not all Māori in New Zealand signed the Treaty either, Canada, unlike New Zealand, draws a distinction between treaty and non-treaty Indians. A 'treaty' Indian in Canada is one whose ancestors signed a treaty with the representatives of the Queen and ceded some land rights to the Crown in return for specified rights. Examples of such treaties exist in Ontario, Manitoba, Saskatchewan, Alberta and some North Western territories. A registered Indian on the other hand, is one whose ancestors did not sign a treaty but who wants to be regarded (under the Indian Act which is discussed later) as a legal or registered Indian. Examples of this arrangement are found in the Maritimes, Quebec, some parts of the North-Western territories and British Colombia.³⁸ In practical terms this means not all Canadian Indians would relate to the 'Crown' as a treaty partner as all Māori in New Zealand

³⁶ *Indian Self-Government in Canada*, p. 120.

³⁷ *Indian Self-Government in Canada*, p. 147.

³⁸ Cardinal, *The Unjust Society*, p. 21.

might. It would therefore be less appropriate for the federal government to represent 'the Crown' on treaty matters in Canada than it is in New Zealand.

A second point to note in comparing the Treaty of Waitangi with treaties in Canada is that the timing of the signing of treaties within the colonisation process in Canada and New Zealand is significantly different. In New Zealand, it will be recalled from earlier discussion, the Treaty of Waitangi created a foundation for European/Māori relations prior to the establishment of settler government in the country. As a result, while there was reference to 'Civil Government' in the Treaty (to be established in the future) the Queen was the primary treaty identity. In Canada, between 1763 and 1867 the early treaties which were signed in the areas of Southern Ontario, Quebec and the Maritime Provinces were similarly negotiated by the British government in the name of the monarchy.³⁹ These treaties focused primarily on land and gave secondary consideration to issues of peace and friendship.⁴⁰ However, following the passing of the British North America Act 1867, the federal government in Canada was granted responsibility for Indians and lands reserved for Indians. As a result, treaties with the Indians which were negotiated after 1867 made reference to the Queen but were negotiated by the already established federal government which was also identified in the treaties. Between 1871 and 1921, the 'numbered treaties' (one to eleven) which were essentially land transfer agreements⁴¹ were signed, once again between the federal government (on behalf of the Queen) and Indian nations. Just over half of Canada's Indians were involved in these treaty agreements with the settler government.⁴² In addition, the language of the numbered treaties demonstrates a very different relationship in Canada than that implied within the Treaty of Waitangi in New

³⁹ Some treaties were signed prior to the Royal Proclamation between the Indians and the British (although not often with the French). One of the first treaties signed in 1713 included the provision that Indians were not to be 'molested in the territories where they lived.' See: Dickason, *Canada's First Nations*, p. 178. Also see: Richard Price, *Legacy: Indian Treaty Relationships*, Plains Publishing Inc., Alberta, 1991, p. 8.

⁴⁰ Dickason, *Canada's First Nations*, p. 189.

⁴¹ Dickason, *Canada's First Nations*, p. 189.

⁴² Dickason, *Canada's First Nations*, p. 273.

Zealand. For example, while Treaty Six stated that, 'Her Majesty the Queen, hereby agrees...' it went on to say that the treaty would be 'administered and dealt with for them by Her Majesty's *Government of the Dominion of Canada*'.⁴³ Also, Treaty 8 declared that, 'her Majesty the Queen hereby agrees ... subject to such regulations as may from time to time be made by *the government* of the country, acting under the authority of Her Majesty...' and subsequently outlines the terms of the agreement.⁴⁴ Therefore, it can be suggested that the relationship between Indian and federal government was, in many cases, more clearly established and understood by the Canadian Indian than the relationship between Māori and settler government had been understood by Māori in New Zealand.

It can also be argued that independence from Britain, which was more important to colonial Canada than it was in New Zealand, was another factor behind the different use of 'the Crown' in Canada as opposed to New Zealand. For example, in the early 1920s Canadian leaders insisted on further autonomy from British imperialism.⁴⁵ Almost immediately following the Westminster conference in 1930 (which proposed that the dominions be known as 'autonomous communities within the British Empire, equal in status.'⁴⁶), Canada, unlike New Zealand, took the opportunity to realise independence from Britain. Through the Statute of Westminster 1931, Canada became 'united mainly by allegiance to a single ceremonial monarch.' As a result of this history of independence Canadian commentators, unlike their New Zealand counterparts, make a point of stressing the transfer of power from the British Crown to federal government while New Zealand has traditionally down-played this transfer of power by referring to both the Queen and the settler government as the Crown.⁴⁷ For example, one commentator on Indian claims stated that '[Indians] assert

⁴³ Cardinal, *The Unjust Society*, p. 32

⁴⁴ Cardinal, *The Unjust Society*, pp. 40-41.

⁴⁵ McNaught, *The Penguin History of Canada*, pp. 249-250.

⁴⁶ McNaught, *The Penguin History of Canada*, p. 251.

⁴⁷ The process by which British authority was transferred to the colony followed much the same pattern in Canada as New Zealand. For example, until around 1860, the Lieutenant-Governor of

... that their inherent and historical right to self government was explicitly recognised by the *Crown* in the treaty agreements with Indians.⁴⁸ He goes on to explain that this right was 'usurped surreptitiously by successive *British and Canadian governments*, in contravention of international law.'⁴⁹ Similarly, a Canadian political scientist explained that:

The Aboriginal peoples thus understand the political identity of Canada to be a federation of Aboriginal nations and the *federal government* based on Treaty relations negotiated from time to time in accordance with the conventions of recognition, continuity and consent.⁵⁰

A final distinction between the treaties in Canada and New Zealand which may be worth exploring with the advantage of more time and resources is the difference between Māori and Indian conceptions of leadership and authority in traditional society. Earlier in the thesis (Chapter Five) it was demonstrated that the image of the Queen was important in securing Māori agreement to the Treaty because she represented the personal and constant leadership and authority which was familiar to pre-European Māori society. In Canada, on the other hand, many writers have noted quite a different conception of authority and leadership amongst Indian communities which might suggest that the nature and function of representative government was more familiar to Canadian Indians than it had been to Māori in colonial New Zealand.

Upper Canada (now Ontario) administered British North America from London while also holding the position of Superintendent of Indian Affairs. See: Dickason, *Canada's First Nations*, p. 225. This caused internal tensions because the Lieutenant-Governor was expected to act both for the Crown and the Indians, and the interests of the two were not entirely compatible. In 1860, the civil arm of government was turned over to the colonies which resolved tension to some degree, although not to the advantage of the Indian people. Again, see Dickason, *Canada's First Nations*, p. 247.

⁴⁸ Leroy Little Bear et al., (eds.), *Pathways to Self-determination: Canadian Indians and the Canadian State*, University of Toronto Press, Toronto, p. xiv.

⁴⁹ Little Bear et al., (eds.), *Pathways to Self-determination*, p. xv.

⁵⁰ James Tully, 'The Crisis of Identification: the Case of Canada', *Political Studies*, Volume 42, Special Issue, 1994, p. 87.

For example, while the traditional structure of Māori leadership was a primogeniture arrangement similar to the succession to the throne in monarchical society in England, leadership amongst the plains Indians was based on merit. As one writer explains, 'qualified people were able to rise to influence through the family and clan, eventually becoming members of a tribal council.'⁵¹ He explains that, since no institutionalised office of leadership existed in traditional Indian society, leaders had to work hard to keep their positions.⁵² According to Long, any one tribe could have a multitude of leaders, elected because of the skills they possessed which were in need at the time. For example, in times of hostility, distinguished warriors would be promoted to chieftainship, and would be reverted to the status of ordinary clan member when the time of warring had passed.⁵³ As Long explains, '[l]eadership was a temporary affair, a service to the clan or tribe.'⁵⁴ Temporary leadership was not so common amongst Māori tribes, which might have enhanced their sense of confusion when the Queen later rejected her role as treaty partner.⁵⁵

An anthropologist who studied Canada's Indians and Inuit for over thirty years (until 1947) offered a more comprehensive discussion of Indian political organisation. Jenness commented that in migratory tribes each family group or band had a nominal leader, 'some man who through courage, force of character or skill in hunting, had won for himself temporary pre-eminence.'⁵⁶ Jenness emphasised that Indian leaders varied from one season to another, depending on the needs of the clan or tribe. The

⁵¹ J. Anthony Long, 'Political Revitalisation in Native Indian Societies', *Canadian Journal of Political Science*, Vol 23, 1990, p. 759.

⁵² Long, 'Political Revitalisation in Native Indian Societies', p. 759.

⁵³ Long, 'Political Revitalisation in Native Indian Societies', p. 760.

⁵⁴ Long, 'Political Revitalisation in Native Indian Societies', p. 760.

⁵⁵ While Long's broad brush discussion of the Canadian Indian suits the purposes of analysis at this level of generalisation, a more detailed investigation of Indian conceptions of authority would have to differentiate between the tribes and their traditions. For example, see, G. Friesen, *The Canadian Prairies: A History*, University of Nebraska Press, Lincoln, 1984.

⁵⁶ Diamond Jenness, *Indians of Canada*, 7th Edn., University of Toronto Press, Toronto, 1977, p. 120.

leader would hold his position only as long as he could win popular support.⁵⁷ According to him, the typical plains chief was 'all too aware that his rank [hung] by a frail thread, which may quite easily be broken.'⁵⁸

While inconclusive, this observation draws attention to the unique situation in New Zealand whereby Māori perceptions of leadership, in combination with the emphasis placed on the person of the Queen by those drafting and promoting the Treaty, encouraged Māori to resist the transfer of power from Queen to settler government in New Zealand.

To revise the points made in this section of the discussion, it was demonstrated that the Queen, who continues to be an important figure in treaty discourse in Canada, is identified as the Crown while the contemporary treaty partner is identified as the federal government, unlike New Zealand where central government can be similarly identified as 'the Crown'. It was argued that the timing and language of the treaties in Canada has meant that the federal government was involved in the treaty process to a much greater extent than the government in New Zealand was in the Treaty of Waitangi. Canada did not, therefore face the same difficulty in legitimating a transfer of power from monarch to government as occurred in New Zealand and, as it has been earlier argued, this encouraged the conception of the government as an extension of the Crown. Also, it was pointed out that not all Indians signed treaties with the British Crown (and thus are not involved in a relationship with 'the Crown' as such) therefore making the Crown a symbol which cannot speak to all Canadian Indians as it does for Māori in New Zealand. Finally, it was also suggested that Indian conceptions of authority were notably different from those of the Māori people, a point which may reveal other more interesting possibilities with the benefit of more detailed research.

⁵⁷ Jenness, *Indians of Canada*, p. 120.

⁵⁸ Jenness, *Indians of Canada*, p. 128.

The next section of the discussion argues that certain events and characteristics in the Canadian constitution would actively deter government and other speakers from identifying the federal government as the Crown in treaty debate.

Explaining the Crown's Absence: The Problem(s) of the Crown(s) in Canada

As in New Zealand, the Crown is a fundamental concept in the Canadian constitution. However, unlike New Zealand, the Crown is not a frequently used metonym for government. There are two possible reasons for this difference. First, Canadian history is based on a struggle between several 'Crowns' (in particular the French and English Crowns). Therefore, the Crown in Canada is both ambiguous (unlike New Zealand where it can only refer to the British Crown) and, furthermore, it carries associations of oppression for the French population in Canada (whom the British Crown conquered in the later 1700s). In New Zealand on the other hand, the Crown symbol was seen to unite groups otherwise divided by the treaty debate. Second, it is argued that Canada has a 'hybrid' political culture which consists of central government and an equally strong provincial government which may resent federal government calling itself 'the Crown' because of the image of dominant central authority this creates.

The first point to establish is the significance of the Crown in the Canadian constitution. This has been noted by many writers. For example, Frank Mackinnon says, '[t]he Crown is a fundamental source of power in the Canadian constitution. ... The Crown is an elusive phenomenon and a practical institution of government.'⁵⁹ He explains that the concept allows Canadians to 'put [executive power] outside the governmental structure, not in someone's hands, but in an abstraction', namely, 'the Crown'.⁶⁰ Using the analogy of an estate, Mackinnon explains further that the trustee (as the Crown) controls the estate (as political power) but does not possess it: while

⁵⁹ Frank Mackinnon, *The Crown in Canada*, McClelland and Stewart West, Calgary, 1976, p. 9.

⁶⁰ Mackinnon, *The Crown in Canada*, p. 15.

the children (as the government) possess it, but do not control it.⁶¹ Therefore, according to Mackinnon, an essential separation of powers is achieved if only in theory. A similar separation of powers can be identified in New Zealand's constitution with its important philosophical distinction between government and Crown, the first representing immediate authority while the latter represents the notion of perpetual succession (see Chapter Two). However, it was noted that this difference has largely been undermined by the use of the term 'Crown' as a metonym for government in New Zealand.

Jacques Monet also explains that 'the Crown' is the key to democratic government in Canada because it separates powers between the sovereign and the government; one with the formal power and the other with the tools to use it. He quotes John A. MacDonald, former Canadian premier, as saying:

By adhering to the monarchical principle, we avoid one defect inherent in the constitution of the United States ... we shall have a sovereign who is placed above the region of the party – to whom all parties look up – who is not elevated by the action of one party nor depressed by the action of another, who is the common head and sovereign of all.⁶²

According to Mackinnon, the fathers of the Canadian Confederation carefully examined the Crown in the late nineteenth century and decided that it would continue to work in Canada. He adds that the concept of the Crown was also valuable in strengthening the union of 1867 because it was the only symbol the separate provinces in Canada had in common.⁶³ Monet adds that while the position of Governor-General in Canada, as the Crown's representative, has had various titles and responsibilities through the ages, it has served as an 'uninterrupted link with the beginnings of

⁶¹ Mackinnon, *The Crown in Canada*, p. 17.

⁶² Jacques Monet, *The Canadian Crown*, Clarke, Irwin and Company Ltd., Toronto/Vancouver, 1979, p. 20.

⁶³ Mackinnon, *The Crown in Canada*, pp. 30-31.

Canada's recorded history'.⁶⁴ David E. Smith agrees that, 'the Crown's unbroken continuity is often cited as a fundamental ingredient of peaceful change' in Canada's constitutional development'.⁶⁵ The Crown has further been identified as a constitutional and psychological safeguard,⁶⁶ and a symbol of government which remains throughout any difficulty.⁶⁷ As one writer notes, the Crown is 'a symbol [which] speaks to the imagination and the emotions.'⁶⁸

In addition to these arguments, Smith advances the theory that Canada's 'imperial origins' were the root of Canada's modern distinctiveness from the United States and provide the basic explanation for the nature of modern federal and provincial governments.⁶⁹ He argues that the impact of monarchical government in Canada had been internalised in Canada's federal system and was perpetuated at both levels of the federal system.⁷⁰ Smith says:

But where once [the monarchy] was a symbol of allegiance external to Canada, today the loyalties it embodies are 'indigenous'. The function of the monarchy is far from apparent to many Canadians, because in the absence of an hereditary aristocracy or an established church, monarchy in Canada is essentially a political arrangement without social consequences. For this reason, the use of the term 'Crown' ... carries a less personal connotation. ... The organisational principle remains the same ... monarchy in Canada is mainly about politics.'⁷¹

⁶⁴ Monet, *The Canadian Crown*, pp. 24-25.

⁶⁵ David E. Smith, 'Empire, Crown and Canadian Federalism', *Canadian Journal of Political Science*, Vol 24, 1991, p. 459.

⁶⁶ Mackinnon, *The Crown in Canada*, p. 34.

⁶⁷ Mackinnon, *The Crown in Canada*, p. 51.

⁶⁸ Monet, *The Canadian Crown*, p. 76. Monet's comment echoes Bagehot's observations about the Crown as early as 1867. See Chapter One of this thesis.

⁶⁹ Smith, 'Empire, Crown and Canadian Federalism', p. 451.

⁷⁰ Smith, 'Empire, Crown and Canadian Federalism', pp. 451-452.

⁷¹ Smith, 'Empire, Crown and Canadian Federalism', p. 452.

Smith goes on to explain that proposals to abolish the Crown have never attracted popular support even when Canada was advancing from colony to nation primarily because the concept of the Crown is a central organising concept in politics, and because the Crown sets Canada apart from the United States.⁷²

In accepting the constitutional significance of the Crown, it is equally important to identify tensions and difficulties associated with the Crown in Canada. According to Mackinnon for example, Canadians generally perceive the symbol as demonstrating subservience to Britain. He also claims that the notion of 'the Crown' fuels federal-provincial antagonisms and leads to an 'over concentration on the symbolism of the Crown at the expense of an appreciation of its practical role in all governments of Canada, including that of Quebec.'⁷³ Smith similarly observes that in adopting the notion of the Crown in establishing its political structures, central government was trying to keep power away from the provinces, because 'the Crown' means centralising power in the hands of the political executive.'⁷⁴ He notes that at the time of confederation, the formerly colonial governments re-emerged as provincial governments with greatly reduced powers, subservient to the federal government, or 'the Crown'.⁷⁵ Therefore, the tension in the relationship between federal and provincial governments can be attributed for the most part to the altered relationship between the two levels of government after confederation in 1867.

⁷² Smith, 'Empire, Crown and Canadian Federalism', p. 468. Smith observes that there have been no studies, to his knowledge, substantiating British impact in Canada, which he considers unfortunate, commenting, 'it is impossible to know without study what lies behind the facade of British institution and practices that remain evident in Canadian life.' He specifically identifies legislatures, where 'traditions die hard but where symbols may have elusive meanings.' See, Smith, 'Empire, Crown and Canadian Federalism', p. 469. Also it is worth noting that in 1985, the Law Reform Commission of Canada released a working paper which proposed 'a new status for the federal administration which would be better suited to the contemporary legal and social circumstances of Canada.' It was suggested that the definition of the Crown privilege should be narrowed in order that the government is 'unable to not only say whether there's going to be a fight but [also] set the rules and have the last word on who gets the prize.' The commission recommended that the concept of 'administration' replace that of the 'Crown'. See: Philip A. Joseph, *Constitutional and Administrative Law in New Zealand*, The Law Book Co., Sydney, 1993, p. 516.

⁷³ Mackinnon, *The Crown in Canada*, p. 156.

⁷⁴ Smith, 'Empire, Crown and Canadian Federalism', p. 471.

⁷⁵ Smith, 'Empire, Crown and Canadian Federalism', p. 458.

Also, Mackinnon identifies the French influence in Canada in relation to the Crown, pointing out that for two hundred years French-Canadians have been trying to free themselves from the oppression of the British Crown. He explains that 'the Crown' is perceived by French Canadians as a symbol of foreign domination.⁷⁶ McDougall and Valentine similarly observe that modern Canadian society encapsulates a struggle between at least four Canadas for the realisation of their own vision of justice, freedom and self-realisation, two of those groups being the French and the English.⁷⁷ They explain that while French/English dialogue is well established, the First Nations/government dialogue is still developing.⁷⁸ This would suggest that the unpopularity of 'the Crown' in French/English negotiations has further dissuaded government from using 'the Crown' symbol in Indian/government discourse.

Evidently, the Crown is an important part of the Canadian constitution but one which, while allowing for continuity in Canadian politics, does not have the appropriate symbolic qualities to unite Canada as it does in New Zealand. A brief discussion of Canada's constitutional development substantiates the argument that the Crown poses problems in Canada which would deter the federal government from engaging in Crown symbolism.

Chapter Five noted that while other countries expressed an interest in New Zealand prior to British colonisation, the British Crown was the only 'Crown' to claim sovereignty over the country. In a sense, 'the Crown' in colonial New Zealand could only be the British Crown. Canada's political history, on the other hand, reveals that pre-confederation Canada was influenced by multiple 'Crowns'. Moreover, ongoing

⁷⁶ Mackinnon, *The Crown in Canada*, p. 157.

⁷⁷ A.K. McDougall and L.P. Valentine, 'Changing Players, Changing Times: Canada and the Negotiation of its Future', paper presented at the Conference on Ethnonational Conflict and Viable Constitutionalism, University of Hawaii, Hawaii, 5-8 January 1995, p. 1. The other ethnically defined group identified were the First Nations and the fourth was a group identified as culturally and economically distinct; the prairie provinces.

⁷⁸ McDougall and Pelassy, 'Canada and the Negotiation of its Future', p. 3.

tension between these 'Crowns' remains in contemporary Canada. The relationship of the Crowns in Canada with each other and with the native Indian people begins with the earliest contact between European and Britain arrivals and established settlements of Indian people.

Indians arrived in North America many thousands of years before the first Europeans. The two main settlement groups of Algonkin and Iroquoian Indians settled in the north eastern parts of North America.⁷⁹ The earliest recorded contact between Indian and European was in July 1543 by the Frenchman, Jacques Cartier, which began an extensive history of French-Indian relations motivated and maintained by French interest in fishing, fur trade, and exploration on the continent. For several centuries mutual cooperation between two groups was maintained by the compatibility of French and Indian interests.⁸⁰ Also, the French lacked the numbers and the motivation to interfere with or attack Indian society, while the Indians are said to have accepted French settlement because of the benefits the trade brought to many Indian tribes. The Indian customs of speech making and gift giving were said to have dominated relations, with the French traders learning and using various Indian dialects.⁸¹ However, along with the advantages of contact came more sinister consequences for Indian tribes, including disease, destructive warfare, and alcoholism.⁸² Eventually, despite some success in trading relations between Indians and the French (and for reasons due largely to political and religious affairs in Western Europe), the French Crown was distracted from further exploration in North America until the seventeenth century. During this time the English, who had also made their way to the shores of the continent, increased trade and fishing, although actual

⁷⁹ J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, revised edition, University of Toronto Press, Toronto, 1991, p. 4.

⁸⁰ Miller, *Skyscrapers Hide the Heavens*, pp. 40 and 268.

⁸¹ Miller, *Skyscrapers Hide the Heavens*, pp. 35-37 and p. 269.

⁸² Miller, *Skyscrapers Hide the Heavens*, p. 270.

settlement was discouraged by the British Crown.⁸³ With both the English and French presence in Canada, the stage was set for a history of warfare between the two nations for control of the Canada – a struggle into which the native Indian would also inevitably be drawn.

Indeed, eighteenth century pre-confederation Canada is characterised by a rivalry between the British and French Crowns. One writer notes, '[t]he Crown, be it English, French or Scottish - was the source of the charters and grants upon which early settlement was based.' Often, more than one grant was made for the same land by different countries. These differences were usually settled by force.⁸⁴ In particular, increasing hostility between the British and French affected their relations with the Indian peoples. Once trading partners for both nations, Indian tribes became allies in a time of war, choosing allegiance with English or French depending on their own interests.⁸⁵ Generally, the Indians are said to have perceived 'the Englishman as a farmer or town dweller' whose activities would inevitably drive the Indian people deeper into the hinterland, while the Frenchman was considered a trader or a soldier and much less of a threat to Indian land and cultural stability.⁸⁶

Canada remained a French colony from 1608 to 1759.⁸⁷ In 1663, New France, as it was called, became a royal province under a system of French provincial government and law.⁸⁸ However, by 1758 the British were clearly in the ascendant in North America and from 1759 to 1760, they gained control of the French province by

⁸³ Miller, *Skyscrapers Hide the Heavens*, pp. 29-30.

⁸⁴ J. M. Bumstead, *The Peoples of Canada: A Pre-Confederation History*, Oxford University Press, Toronto, 1992, p. 53. Bumstead's reference to the Scottish Crown's influence in pre-confederation Canada should be noted, although it is not discussed further here.

⁸⁵ Miller, *Skyscrapers Hide the Heavens*, p. 270.

⁸⁶ Miller, *Skyscrapers Hide the Heavens*, p. 271.

⁸⁷ Gordon T. Stewart, *The Origins of Canadian Politics: A Comparative Approach*, University of British Columbia Press, Vancouver, 1986. Information found in the chronology at the front of the edition.

⁸⁸ Kenneth McNaught, *The Penguin History of Canada*, Penguin, London, 1988, p. 27.

military conquest. In 1763, the Franco-American empire was ceded to the English in the Treaty of Paris.⁸⁹ In the Treaty, as an agreement between the two 'Crowns' it was stated that, 'his Most Christian Majesty cedes and guarantees ... all rights acquired by Treaty or otherwise, which the Most Christian King and the Crown of France have had until now...'⁹⁰

The territories acquired by the English in the Treaty of Paris were set down that same year in the Royal Proclamation of 1763. The proclamation also established certain guarantees for Indians, including an exclusive relationship between the British Crown and the Indian peoples for the negotiation and purchase of hunting grounds.⁹¹ The proclamation required that all lands not ceded or purchased by the British be considered 'reserved lands' for the indigenes while the *British Crown* retained the right to extinguish Indian title.⁹² Following the Proclamation, land could only be acquired from the Indians through treaty with the British Crown.

In addition to demonstrating antagonism between French and English Crowns, Canada's constitutional history is occupied with a tension between central and provincial governments. According to one writer, it was during the late eighteenth century that Canada's unique 'hybrid political culture' began to emerge. This consisted of a British Crown colony (with the emphasis on the executive) supplemented by the American model of strong provincial government.⁹³ This factor also needs to be considered in explaining the absence of the Crown symbol in Canada.

Prior to confederation in 1867, Canada had developed regionally with each region exhibiting distinctive institutional arrangements. In most provinces one council served

⁸⁹ McNaught, *The Penguin History of Canada*, p. 43.

⁹⁰ Price, *Legacy*, p. 6.

⁹¹ Price, *Legacy*, pp. 6-7.

⁹² Dickason, *Canada's First Nations*, p. 188.

⁹³ Stewart, *The Origins of Canadian Politics*, p. 3.

the purpose of the executive and the legislature, although in the colonies of Upper and Lower Canada a distinction between the two was maintained.⁹⁴ The colonies generally operated on a principle of mixed or balanced government in which the governor represented the monarchical element, the councils provided an historic element and the elected assembly provided the democratic element of government.⁹⁵ However, opposition to 'oligarchic government' was strong in Lower Canada (now Quebec) in the early 1800s because of the race and language differences between the French and English in the area.⁹⁶ Also there was general pressure from colonial political administrations for their representatives to be responsible to the provinces rather than Britain.⁹⁷

This desire was acknowledged by Britain and in 1839 Lord Durham was dispatched by the British Government to settle unrest in the colonies and instigate reform. His solution was to establish responsible government in the provinces and unite the two Canadas, with the further objective to assimilate the French into Anglo-Canadian culture.⁹⁸ As a result, between 1840 and 1841 Upper and Lower Canada became the Union of the Canadas and were renamed West and East Canada respectively.⁹⁹ With this move, the desire within the colonies to achieve independence from Britain was partly satisfied.¹⁰⁰

Despite earlier reservations about Canadian independence, London also eventually supported unification of the Canadian colonies in order to reduce British colonial

⁹⁴ Bumstead, *The Peoples of Canada*, p. 234.

⁹⁵ Those near the top of the social pyramid were most suitable for political service in the elected assemblies. Bumstead warns that popular election is not to be confused with democracy here. Bumstead, *The Peoples of Canada*, p. 235.

⁹⁶ Bumstead, *The Peoples of Canada*, p. 241.

⁹⁷ Bumstead, *The Peoples of Canada*, pp. 246-247.

⁹⁸ Bumstead, *The Peoples of Canada*, p. 256.

⁹⁹ Stewart, *The Origins of Canadian Politics*, see the chronology.

¹⁰⁰ Bumstead, *The Peoples of Canada*, p. 326.

responsibility and expense.¹⁰¹ At the same time, from 1841 to 1849, battles within the provinces for responsible government had begun. These were largely conceded from 1847 to 1854.¹⁰² For example, Nova Scotia was granted responsible government in August 1847 and Newfoundland later in 1855.¹⁰³ Despite Canada's increasing independence, the governorship remained a pivotal and enduring symbol of the British connection as well as a guarantor of the monarchical system of government in Canada.¹⁰⁴

In 1867, the Union of the Canadas was dissolved when the British North America Act created the Dominion of Canada, a confederation which included Quebec, Ontario, Nova Scotia, and New Brunswick. In 1870, Manitoba joined the Union followed by British Columbia in 1871 and Prince Edward Island in 1875. Under the 1867 Act and for the first time in history, an historic monarchy, a young parliamentary democracy and a new federal state were reconciled under one political system.¹⁰⁵ The unique blend of ingredients in Canada's history had come together to create an entirely new kind of political arrangement.

In reflecting on the tensions created by 'the Crown' in Canada it has been argued here that the French Canadian and provincial government associations with the Crown in Canada might deter federal government from identifying itself as the Crown, as central government has done in New Zealand. However, further to this, it is now argued that the Crown symbol would not have naturally developed in Canadian treaty discourse either (as it was seen to do in New Zealand) because of its absence from significant legislation relating to treaty rights in Canada (when compared with the Crown in the Treaty of Waitangi Act 1975 in New Zealand.)

¹⁰¹ Bumstead, *The Peoples of Canada*, p. 329.

¹⁰² Stewart, *The Origins of Canadian Politics*, see the chronology.

¹⁰³ Bumstead, *The Peoples of Canada*, p. 319.

¹⁰⁴ Stewart, *The Origins of Canadian Politics*, p. 57.

¹⁰⁵ Monet, *The Canadian Crown*, p. 35.

In New Zealand, the revival of the Crown symbol was thought to be partly due to the Treaty of Waitangi Act 1975 and the subsequent work of the Waitangi Tribunal which naturally drew heavily on the image of the Crown in its findings and recommendations. Canadian legislation relating to Indian rights and treaties, on the other hand, makes significantly fewer references to 'the Crown'. For example, the British North America Act 1867, 'federally united [Canada] into one Dominion under the Crown of the United Kingdom and Great Britain and Ireland ... with a Constitution similar in principle to that of the UK.' The legislation stated, '[t]he Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.' However, the responsibility for discharging the provisions of the Indian treaties fell entirely to the *dominion government* by subsection 24 of section 91. The Act gave the '*Parliament of Canada*' the exclusive power to deal with 'Indians and land reserved for Indians.'¹⁰⁶ Similarly, the Indian Act 1876, stated, '[t]his Act shall be administered by the Minister of Indian Affairs and Northern Development'. It did not refer to the Crown.¹⁰⁷ In other instances, an Indian Claims Commission allowed Indians to bring claims against the 'federal government' unlike the Waitangi Tribunal which inquires into the actions and policies of 'the Crown'.¹⁰⁸ Finally, in 1969 the Canadian Government proposed a mini-royal commission on Indian grievances to deal with breaches of Indian treaties. In the language of the Paper, the commission would then make recommendations to the '*government*'.¹⁰⁹

¹⁰⁶ Cardinal, *The Unjust Society*, p. 43.

¹⁰⁷ The Indian Act has been heavily criticised in that it never at any time reflected the spirit or the intent of the agreements between the Indians and the Canadian government. Rather, it 'subjugated to colonial rule the very people whose rights it was supposed to protect.' See: Cardinal, *The Unjust Society*, p. 44.

¹⁰⁸ Weaver, *Making Canadian Indian Policy*, p. 38. Indians protested against this policy, resenting the fact that provinces might not be included in the process of reviewing injustices.

¹⁰⁹ Weaver, *Making Canadian Indian Policy*, p. 154.

The Canadian Experience –Lessons for New Zealand

New Zealand political scientist Les Cleveland provides a theory about the differences in the symbolic language of various countries which summarises the distinction demonstrated in this chapter between Canada and New Zealand's use of the Crown symbol. Cleveland explained that:

[t]he symbols of the political culture are representations which express the customs, emotions, beliefs, attitudes, traditions and values that are embodied in the particular culture. ... They serve as representations which can evoke emotions of identity and acceptance on the part of large numbers of people, integrating them to the relevant political system.¹¹⁰

For reasons explained in this chapter, while it is appropriate for 'the Crown' to be a popular metonym for government and a frequently used symbol in treaty discourse in New Zealand, it is not appropriate for the Crown to be used in this way in Canada. While New Zealanders have traditionally identified strongly with the Crown symbol and while the Crown carries positive and uniting associations for most New Zealanders, in Canada, the Crown symbol was seen not to unite sections of Canadian political culture, but rather represent tension and potential division. While this discovery substantiates the argument in the first two sections of this thesis that the frequently use of the Crown symbol (especially as a metonym for government) in New Zealand is the result of the country's particular constitutional history, it serves another purpose also. That is, this comparison with Canada has drawn attention to the nature of the relationship between Māori and Crown within the broader context of constitutional evolution and reform. The next and final chapter of this thesis picks up on this aspect of the Crown, and considers the future of the Crown in New Zealand with regard to constitutional reforms facing the country in the mid 1990s. In particular, it considers how these reforms might address or resolve the problem of the

¹¹⁰ Les Cleveland, *The Politics of Utopia: New Zealand and its Government*, Methuen Publications Ltd., Wellington, 1979, p. 23.

Crown in New Zealand and how they might affect the popularity of the Crown symbol and impact on the Māori treaty partner.

***THE CROWN, THE CONSTITUTION AND MĀORI:
OPTIONS FOR NEW ZEALAND'S FUTURE***

Just as this thesis began with a discussion of the origins of the Crown within the British constitution (see Chapter One), it concludes in this chapter with a discussion of the place of the Crown in New Zealand's evolving constitution. As the final stage in this examination of 'who or what is the Crown treaty partner', the purpose of this chapter is to investigate constitutional reforms in New Zealand, both imminent and possible, which could impact on the role, function and even survival of 'the Crown' in New Zealand. In particular, and in keeping with the objectives throughout this thesis, the purpose is to consider how constitutional reform might impact on the identity of the Crown as the treaty partner and the possible implications of reform for the Māori treaty partner. The discussion is divided into two sections. The first section considers three constitutional developments which might reform the Crown, namely: the introduction of mixed member proportional representation; the possibility of a written constitution in New Zealand which incorporates the Treaty of Waitangi; and the possible abolition of the Judicial Committee of the Privy Council in New Zealand. The second section addresses the constitutional reform which would remove the Crown from the constitution completely: republicanism. Given the limited nature of the republican debate in New Zealand, this discussion considers the issues surrounding republicanism in Australia, a well advanced debate, although still unresolved, by the mid 1990s.

Reforming the Crown: Constitutional Developments in New Zealand

Three constitutional reforms which have the potential to impact on the Crown in New Zealand are at various stages in their development in the mid 1990s. The first of these,

Mixed Member Proportional (MMP) representation, might impact on the Crown in New Zealand as it represents both the Governor-General and the Executive. This could force a re-examination of the composition and identity of the Crown treaty partner in New Zealand. However, it has been suggested that the problem of the Crown (for Māori) could be avoided in the future if New Zealand were to legislate a written constitution which incorporated the Treaty of Waitangi. This would allow Māori to turn to the courts rather than 'the Crown' for the fulfilment and protection of their treaty rights. The third constitutional issue which implicates the Crown is the question of the future of the right of appeal to the Privy Council in New Zealand as a 'last link with the Crown'. It is argued that the debate surrounding the proposal to abolish the right of appeal further demonstrates the general trend towards cutting links with the Crown as it represents the Queen despite Māori insistence that the relationship be maintained.

i. Mixed Member Proportional Representation

In 1993, New Zealand voted in a national referendum to replace the First-Past-the-Post (FPP) voting system traditionally used in New Zealand with a Mixed Member Proportional (MMP) system for electing the country's Members of Parliament. Prior to the first MMP election, debate about the possible impacts this change would have on the function, composition and role of the New Zealand Parliament was widespread. Discussion here focuses specifically on the effect MMP was predicted as having on the Crown in New Zealand. In doing so, a distinction is drawn between the Crown as the Governor-General and the Crown as the Executive in relation to MMP and its implications for Māori.

In order to briefly explain why the head of state (as the Crown) is implicated in the change to MMP it is necessary to recognise the differences anticipated between government under FPP and MMP, and in particular the events thought possible following an MMP election with respect to the role of Governor-General. While FPP

most often produced a clear (although disproportionate) 'winner' as government, New Zealand is unlikely to get single party majority government because there will be multi-party Parliaments. Consequently, the increased possibility that the Governor-General will be required to exercise certain powers under MMP has also been recognised. In particular, the Governor-General may be required to exercise his or her independent discretion and judgement in order to establish government if the MMP election does not clear a clear winner, whereas in the past, the Governor-General has conventionally acted on the advice of his or her ministers. The Governor-General's discretionary or reserve powers which might be critical under MMP include the authority to appoint a prime minister and to dissolve Parliament.¹ While independent action of this nature by the Governor-General is unusual in a country of New Zealand's constitutional makeup, it was considered increasingly possible that the Governor-General would have act in this manner if, for example, the Prime Minister did not appear to have the full support of the party, if no party held a majority of the seats after a general election, or if an incumbent government lost the confidence of the House at any time.²

According to Harris and McLeay, under MMP the Governor-General will be required to be 'scrupulously non-partisan' in using his or her reserve powers, '[f]or it to be otherwise would deny the electorate's democratic right to choose its own government.'³ In other words, the neutrality of the Crown (as represented by the Governor-General) was predicted to be more significant under MMP than ever before. However, as Harris and McLeay also pointed out, the Crown's 'neutrality' is immediately called into question by the practice of the Queen appointing the Governor-General as her representative in New Zealand on the advice of the government of the

¹ Paul Harris and Elizabeth McLeay, 'The Legislature' in Gary Hawke (ed.), *Changing Politics? The Electoral Referendum 1993*, Institute of Policy Studies, Wellington, 1993, p. 108. For further information about the powers of the Governor-General see: *Working Under Proportional Representation: A Reference for the Public Service*, State Services Commission, Wellington, 1995 sections, 1.4, 1.5, 1.11, 8.2-8.4 and 8.8.

² Harris and McLeay, 'The Legislature', p. 109.

³ Harris and McLeay, 'The Legislature', p. 109. Also, for more discussion of the advice to the governor-general, see: *Working Under Proportional Representation*, sections, 1.8, 1.12, 1.15, 5.63, 7.1, 8.8 and 8.29-8.36.

day.⁴ Despite this concern, Harris and McLeay concluded that MMP may result in a more important role for the Governor-General who offers New Zealand a much needed flexibility to deal with a wide variety of political situations under MMP.⁵

While perhaps not directly affecting the relationship between the Crown and Māori, the introduction of MMP could increase the profile of the Governor-General as the Queen's representative in New Zealand because the authority to appoint and dismiss prime ministers and governments could find new application under this system of voting. In this respect, it is possible that the profile of the Crown's role as Governor-General would increase.

In addition to the changes predicted in the role of the Governor-General as the Crown, the role of the Executive as the Crown also displays some interesting characteristics with regard to the introduction of MMP. In assuming (as writers have done⁶) that through MMP the composition of the Executive has the potential to become more proportional to the composition of the nation as a whole, Māori may come to constitute a greater proportion of the Executive. When the Executive is identified as the Crown treaty partner (as it has been on many occasions throughout this thesis) Māori will therefore be in a partnership with themselves, to a certain extent. This argument demonstrates the irony of Maori Cabinet ministers representing the Crown (as the Executive) which existed in New Zealand prior to MMP also. Māori Ministers in Cabinet such as Koro Wētere, Matiu Rata and Winston Peters⁷ have ironically had membership to both parties identified in the Treaty. Even when Māori have not been represented in Cabinet, Cabinet constitutionally represents Māori through its accountability to Parliament and therefore also to the people. While this argument is

⁴ Harris and McLeay, 'The Legislature', pp. 109-110.

⁵ Harris and McLeay, 'The Legislature', p. 112.

⁶ Harris and McLeay, 'The Legislature', p. 103.

⁷ See Appendix B for ministerial portfolios.

not pursued here in any detail, it does emphasise the difficulties inherent in determining membership of identities such as 'Māori' and 'the Crown'. MMP, which may further exaggerate this problem of identity, could force a revision of the meaning of 'the Crown' as the contemporary treaty partner.

Also, in relation to the problem of identity, a suggestion may be recalled from Chapter One of this thesis that it would be appropriate to reconstitute the contemporary treaty partners as Māori and Pākehā. However, such a suggestion, it is argued here, makes assumptions about the nature of the treaty partners which fail to appreciate the essential component of the Crown identity which is that the Crown must have the ability to hold the government in New Zealand accountable under the Treaty of Waitangi and, in addition to this, must have both the authority and motivation to protect and promote Māori rights under the Treaty. It is highly questionable whether Pākehā in New Zealand, as 'the Crown', would have either the ability or the motivation to do so. In therefore rejecting the possibility that 'Pākehā' could perform these necessary Crown functions it is argued that while the meaning of the Crown might not be easily reconciled in contemporary New Zealand society, the problem of the Crown (at least for Māori) could be avoided if a better mechanism was put in place to fulfil the Crown's functions under the Treaty of Waitangi to uphold and protect Māori treaty rights. Such a mechanism could be a written constitution for New Zealand which incorporates the Treaty of Waitangi.

ii. A Written Constitution and the Treaty of Waitangi

If the Treaty of Waitangi were incorporated in a written constitution in New Zealand the courts would be awarded the authority to strike down government legislation and policy which was inconsistent with the terms of the Treaty. The question is whether this constitutional development would protect Māori from further evolution of the Crown.

Unlike many other nations such as Australia and Canada, New Zealand's constitution was not created at a given point in time, but rather evolved as the country developed. By the mid 1990s New Zealand did not have a fully written constitution. Instead, the rules which establish the major institutions of government, state their powers and broadly regulate the exercise of those powers in New Zealand were located within various pieces of legislation or operated by convention.⁸ However, the possibility of legislating a written constitution for New Zealand was an increasingly popular topic of debate in the early 1990s. In particular, it was suggested that the Treaty of Waitangi should be incorporated within a written constitution.

Opinion on this matter was divided. Arguments against incorporating the Treaty in an entrenched constitution pointed to a number of concerns, including a reluctance by Māori to incorporate the Treaty in a legal structure over which they have little control and the fear within Māoridom that the mana of the Treaty might be diminished once it was formally incorporated in New Zealand's judicial system.⁹ However, others stressed the absolute urgency of this constitutional reform. For example, Margaret Wilson pointed out that treaty jurisprudence in New Zealand is tenuous because it is reliant on the Treaty of Waitangi being recognised within New Zealand statutes. Wilson argued that 'the legal recognition of the constitutional status of the Treaty of Waitangi is necessary if Māori are to attain not only reparative justice, in the guise of appropriate compensation for past wrongs, but, just as important, social and political justice.'¹⁰ Wilson later argued that Māori struggles in the past to have the Treaty honoured demonstrated that legal recognition of the Treaty would first, provide Māori with a legitimacy which would be difficult to ignore and second, enable access to essential political power.¹¹ She explained that the undesirable aspect of New

⁸ Geoffrey Palmer, *New Zealand's Constitution in Crisis: Reforming our Political System*, John McIndoe, 1992, pp. 3-5.

⁹ Margaret Wilson, 'Constitutional Recognition of the Treaty of Waitangi', in M. Wilson and A. Yeatman (eds.), *Justice and Antipodean Practices*, Bridget Williams Books, Wellington, 1995, p. 6.

¹⁰ Wilson, 'Constitutional Recognition of the Treaty of Waitangi', p. 4.

¹¹ Wilson, 'Constitutional Recognition of the Treaty of Waitangi', p. 8.

Zealand's constitutional arrangements is that the government is currently able to control and dictate aspects of Māori policy so as to avoid adverse effects to the institution of government regardless of obligations under the Treaty. Accordingly, the courts should be the referee of the appropriateness or otherwise of the government's actions when held up against the original obligation of the Crown.¹²

Eddie Durie, Chief Judge of the Waitangi Tribunal and another supporter of the Treaty in a constitution, has argued that '[u]ltimate justice for indigenous peoples depends on political power-sharing through constitutional reform.¹³ He noted that in Canada, indigenous rights have been provided for in an entrenched constitution that can restrict the state's power, although it is left to the largely monocultural courts to determine 'aboriginal interest'. However, this possibility for New Zealand is restricted by the fundamental limitation that Parliament is supreme, and treaties are realised only to the point that Parliament has provided. Hence, in Durie's words, principle is subordinate to legislative will.¹⁴

The principal purpose therefore of including the Treaty in a written constitution would be to fulfil the original function of the Crown under the Treaty to uphold Maori rights and protect them from unconstitutional government. It will be recalled from Chapter Five that, in 1840, Māori understood that their relationship with the Queen would protect them against both colonists and government in New Zealand. In addition it should be noted that missionaries conveyed this idea to Māori by extolling the Queen as upholding a similar position to God, as the source of all justice and authority. This protective theme comes through very strongly in the preamble to the Treaty, which says that Her Majesty Queen Victoria was 'anxious to protect [Māori] just Rights and Property' (see appendix A). Chapter Five of this thesis evidenced this perception of

¹² Wilson, 'Constitutional Recognition of the Treaty of Waitangi', p. 15.

¹³ E.T. Durie, 'Justice, Biculturalism and the Politics of Law', in *Justice and Antipodean Practices*, p. 33.

¹⁴ Durie, 'Justice, Biculturalism and the Politics of Law', p. 42.

the Queen by Māori with discussion of the deputations to the Queen requesting her to assert her authority over colonial government and fulfil her original treaty obligations. In recognising how important it is to contemporary treaty negotiations also that the government be held accountable to the Treaty, it is argued here that including the Treaty in a written constitution would give the courts in New Zealand the authority to strike down legislation passed in the House which was inconsistent with the Treaty. This mechanism would also change the relationship between Māori and the Crown in that it would deflect the focus of treaty negotiations away from the Crown and even possibly protect Māori from future evolution of the Crown. However, such a proposition also introduces an increased possibility that it would be left to the courts to determine who is 'the Crown' treaty partner under the Treaty which may not always advantage Māori (as was the case with the Moriori claim before the Tribunal). The role of the courts generally under the new system will need to be considered. The future of the judicial system in New Zealand, in particular the right of appeal to the Privy Council, has already been the focus of another proposed constitutional reform which challenges Māori relations with the 'Crown' treaty partner.

iii The Judicial Committee of the Privy Council

In looking to identify an authority which would have the power to hold government accountable to the terms of the Treaty (and indeed determine the application of the Treaty in contemporary society), one possible candidate is the judicial system. While not enjoying the discretion of the Queen's role as identified within the Treaty of Waitangi and while being limited by the laws already in place, the courts in New Zealand have on occasion ruled in favour of the Treaty in such a way as to force a revision of government policy.¹⁵

¹⁵ In particular see: The judgement of Cooke J., *New Zealand Maori Council vs Attorney-General*, High Court, Wellington, April 1987.

However, the function of New Zealand's highest source of judicial authority, the Privy Council in England, has come under scrutiny in the 1990s. Its function is discussed here because it has historically held (and arguably holds) tremendous appeal for many Māori for the very reason that it demonstrates many of the qualities exhibited by the Queen which had appealed to Māori in the nineteenth century. Not only does the Privy Council have the authority to instruct government in its conduct (as the Māori assumed the Queen had, as revealed in Chapter Five) but it is also an off-shore independent judge and one which represents a link with the sovereign in England. Therefore, the Privy Council is a mechanism through which Māori symbolically recognise and express the original partnership with the Queen.

The future of the right of appeal in New Zealand to the Privy Council was under review in the mid 1990s. The debate surrounding the move demonstrated that New Zealand is still breaking its ties with the Crown (as it represents the Queen) in ways that could have significant implications for Māori.

First, it is important to explain how the Privy Council is a link with the Queen for Māori. The jurisdiction of the Judicial Committee of the Privy Council originally stemmed from a conception of the sovereign as the source of all justice. Traditionally, the Privy Council allowed for petition to the sovereign for redress.¹⁶ The Council was not formally established until 1833 by the United Kingdom Judicial Committee Act. Under the Statute of Westminster Act 1931, British colonies were allowed the option of abolishing the right of appeal to the Privy Council. Most countries have eventually done so on the grounds that appeal to the Privy Council was inconsistent with national independence and reflected adversely on their nation's confidence in its judiciary.¹⁷

¹⁶ Report of the Solicitor-General to the Cabinet Strategy Committee on issues of Termination and Court Structure, *Appeals to the Privy Council*, Crown Law Office, Wellington, 1995, p. 6.

¹⁷ *Appeals to the Privy Council*, pp. 4 and 7. The arguments for and against abolishing the right of appeal in New Zealand are not discussed in detail here but can be found in *Appeals to the Privy Council*, pp. 11-18.

In New Zealand, prominent people began publicly questioning the right of appeal to the Privy Council in the 1980s. Between 1989 and 1994, the Privy Council heard thirty-eight cases from New Zealand, of which twenty-one were dismissed and seventeen were upheld.¹⁸ The Committee is technically speaking not a court. It does not deliver judgements, but submits opinions to the sovereign, which are put into effect by Order-in Council.¹⁹ While Māori have not always been successful in the cases they have taken to the Privy Council, it is generally well supported by Māori because of those qualities discussed earlier which make it an appropriate forum for the discussion of treaty issues.²⁰

The debate in New Zealand about whether to retain the right of appeal to the Privy Council acknowledged the connection Māori appeared to have made with the Council, but equally clearly demonstrated that New Zealand is generally moving towards breaking its links with the Crown in England. For example, when the National Government took the first steps towards abolition of the right of appeal to the Privy Council in the early 1990s the Attorney-General, Paul East, emphasised that the Privy Council and the right of appeal were quite distinct from Treaty rights.²¹ Furthermore, in outlining the arguments for the retention and abolition of the Privy Council, the Office of the Attorney-General said, '[t]he Government recognises the value that in the past Māori have placed on the right of appeal from the Court of Appeal to the Privy Council. ... Some see these rights as a form of access to the Sovereign in her capacity as a party to the Treaty of Waitangi.' He concluded:

¹⁸ National Radio, *Morning Report*, 'Paul East and Austin Forbes - Privy Council', 7:15am, 5 May, 1995.

¹⁹ J. B. Ringer, *An Introduction to New Zealand Government*, Hazard Press, Christchurch, 1991, pp. 195-196.

²⁰ In 1991, for example, an application for appeal from the Māori Appellate Court was refused by the Privy Council. For more discussion of cases taken to the Privy Council by Māori, and their result, see, *Appeals to the Privy Council*.

²¹ Radio New Zealand, *Morning Report*, 'Paul East and Austin Forbes - Privy Council', 7:15am, 5 May, 1995.

it is clear that the retention or abolition of appeal rights to the Privy Council would neither improve nor diminish opportunities for Māori to pursue settlement of Treaty claims with the Crown. At the same time the ending of appeal rights to the Privy Council would not have any impact on the Crown's obligations as a party with Māori to the Treaty of Waitangi.²²

In his report to Cabinet, the Solicitor-General acknowledged that while he had not formally consulted with interests outside the law, such as those of the Māori people, he understood that the Ministers would later determine the scope of more extensive consultation.²³ However, he advised from 'the Māori perspective', as the Attorney General had done, that the right of appeal by Māori is seen by Māori as a 'form of access to the Sovereign in her capacity as a party to the Treaty'.²⁴ While acknowledging that Māori must be consulted on the decision, the Solicitor-General remarked:

there is nothing about the function or powers of the Privy Council, or its relationship with the Sovereign, that gives it any special legal status or role in relation to Treaty of Waitangi matters. ... Moreover ... there is no access to the Sovereign in right of New Zealand in any sense that might imply she has real powers of decision.²⁵

On the basis of his opinion and without the benefit of appropriate formal consultation with Māori, the Solicitor-General concluded:

Therefore, the retention or abolition of appeal rights to the Privy Council can neither enhance nor diminish opportunities for Māori to pursue settlement of Treaty claims with the *Crown* nor as a matter of law, would the ending of appeal rights to the Privy

²² *Appeals to the Privy Council*, p. 9.

²³ *Appeals to the Privy Council*, p. 4.

²⁴ *Appeals to the Privy Council*, p. 9.

²⁵ *Appeals to the Privy Council*, p. 9.

Council have any impact upon the *Crown's* obligations as a party with Māori to the Treaty of Waitangi.²⁶

The Solicitor-General was not alone in his sentiment. Sir Robin Cooke, High Court Judge, similarly stated that the position of the monarchy was quite distinct from the Privy Council and he identified Australia and Canada as examples where the right of appeal to the Privy Council had long since been abolished although the monarchy remained.²⁷

While the future of the right of appeal to the Privy Council in New Zealand had not been decided by the end of 1995 (the time of writing), the debate surrounding the possible abolition of the Privy Council demonstrates that New Zealand's constitution was still shifting its focus away from Britain in ways which would impact on the treaty negotiation process. The question this debate also raises is how far New Zealand will go in reviewing its relationship with Britain and in particular the Crown in Britain. In other words, would New Zealanders ever consider becoming a republic? This constitutional reform, which would remove the Crown from New Zealand society altogether, is the focus of the next section of the discussion.

Life Without the Crown? Republicanism from the Australian Perspective

The issue of republicanism had only very occasionally been raised in New Zealand by the mid 1990s, most often by National Prime Minister James Bolger who was known for his republican leanings, although the issue has so far found little support in the broader context of public debate. However by 1995, the question of the future of the

²⁶ *Appeals to the Privy Council*, p. 9. Emphasis added.

²⁷ R. Cooke, 'The Suggested Revolution Against the Crown' in P. A. Joseph (ed.), *Essays on the Constitution*, Brookers, Wellington, 1995, p. 39. If this discussion were to be carried further, it would be useful to consider alternatives to replace the Privy Council which would require consideration of an appropriate replacement for New Zealand's highest court of appeal. While it is not possible to pursue this line of thought here, it is suggested that an appropriate replacement would be one which would satisfy Maori misgivings about the present mechanisms available to protect and uphold their treaty rights. Key elements would be court's ability to demonstrate independence from and authority over government in New Zealand.

country as a constitutional monarchy had been under intense scrutiny and public debate in Australia for some years. The purpose here is to review the key issues in the Australian republic debate in order to better understand those issues which confront a Commonwealth nation considering the move to republicanism. In particular, this exercise demonstrates a need for New Zealand to determine the real significance of the Crown in New Zealand, consider the role of indigenous people under a republic, and finally, address republicanism within the context of other constitutional reforms. While there are many differences between New Zealand and Australia which must be considered when applying the Australian experience to New Zealand, there are some valuable lessons to be learned by New Zealand from the Australian debate.

The question of republicanism focuses on the office of the Head of State (which in turn is very closely linked to the earlier MMP discussion). A republic is a state in which 'sovereignty is derived from the people and all public offices are filled by persons ultimately deriving their authority from the people.'²⁸ Republicanism in Australia or New Zealand, therefore, would be about replacing the monarch as head of state with an autochthonous representative. The debate surrounding this issue in Australia has been divided between those who believed republicanism would be an appropriate, inevitable and uncomplicated change to Australia's constitution and those who argued that the removal of 'the Crown' would have a significant and damaging effect on Australian society and government. In this brief review of the argument, the former viewpoint is considered first.

Australia, as many of its republicans point out, has a long history of republican sentiment which began with the arrival of the first settlers in Australia.²⁹ Following

²⁸ The Report of the Republic Advisory Committee, *An Australian Republic. The Options*, Vol. 1, Commonwealth Government Printer, Canberra, 1993, p. 39.

²⁹ Discussion of this nature is found in David Headon et al. (eds.), *Crown or Country. The Traditions of Australian Republicanism*, Allen and Unwin, New South Wales, 1994 and in John Arnold et al. (eds.), *Out of Empire: The British Dominion of Australia*, Mandarin Australia, Victoria, 1993. Also see: Tom Keneally, *Our Republic*, William Hienemann Australia, Victoria, 1993, pp. 155-182. Finally, Mark McKenna identified four phases in Australian republicanism.

the federation of the Australian Commonwealth in 1901, (a federation which itself has been credited to the unifying concept of 'the Crown'³⁰) the republican sentiment died down and Australian colonists appeared less antagonistic toward the presence of the British Monarchy in Australia.³¹ From 1901 to 1963 little was heard of the republicanism in Australia. Then, in 1963, the publication of an article by Australian writer and ardent republican, Geoffrey Dutton, triggered the revival of the debate.³² In 1975, a constitutional crisis involving the Governor-General encouraged further public criticism of the political system and in particular the role of the Crown's representative in Australia.³³ By 1995, republicanism was one of the leading debates on Australia's political agenda.

Advocates of an Australian republic have argued it to be a natural progression in the country's political development and they have claimed that Australia is already a republic in everything but name. Replacing the monarch, they stated, would be a final but inconsequential step in the nation's independence from Great Britain.³⁴ In substantiating these claims, republicans have argued that the language surrounding the

See: McKenna, 'Tracking the Republic', in D. Headon, et al. (eds.), *Crown or Country. The Tradition of Australian Republicanism*, Allen and Unwin, New South Wales, p. 87.

³⁰ John Hirst, 'The Conservative Case for an Australian Republic', in Arnold et al. (eds.), *Out of Empire*, p. 293. It will be recalled from Chapter Nine of this thesis that unification was credited in part to the bond between provinces symbolised in the Crown. Hirst argues that the same factor was present in Australian federation in 1901.

³¹ More ironically, once the colonists had achieved internal self-government, their attachment to Britain appeared to strengthen. See: Hirst, 'The Conservative Case for an Australian Republic', p. 293.

³² See the editors' comment, 'How Modern Australian Republicanism Began', in Donald Horne et al., *The Coming Republic*, Pan McMillan Publishers, Sydney, 1992, p. 5.

³³ The crisis in question concerned the Governor General's dismissal of the Prime Minister and the dissolution of his government in reaction to a supply crisis when the opposition-dominated Senate refused to pass the Government's Supply Bills. The opinions of both John Kerr, the Governor-General in 1975 and Gough Whitlam, the dismissed Prime Minister, can be found in Arnold et al. (eds.), *Out of Empire*, Chapters 20 and 21 respectively. Some commentators have argued that the crisis could not have been averted if Australia was a republic, arguing that the fault lay in the rules governing the Senate's right not to supply government rather than the function of the Governor-General. For example, see: Hirst, *A Republican Manifesto*, Oxford University Press, Melbourne, 1994, p. 67.

³⁴ The argument that it is simply offensive that Australia maintains a British head of state is very popular. See, Donald Horne, 'A New Common Sense for Australia', in *The Coming Republic*, pp. 26 and 28-29.

monarchy changed irrevocably in Australia in the space of the last few decades so that one no longer heard reference to 'Australian subjects' or 'Her Majesty's Kingdom of Australia'.³⁵ They argued further that the words and symbols associated with the Crown had lost their magic in Australia since the early 1980s.³⁶ As a result, the creation of an Australian republic would be no more significant than a change in the wording of the constitution while all other aspects of Australian government would remain unaltered. This type of argument has been identified generally as the 'minimalist' argument.³⁷ For example, George Winterton as a minimalist republican argued that 'an Australian republic could be implemented while leaving intact all essential features of Australian government except the monarchy.'³⁸ Similarly, Malcolm Turnbull, minimalist republican and Chair of the Australian Republican Movement in 1993, suggested that constitutional amendment was not especially difficult, adding that constitutional lawyers tend to make the process appear unnecessarily complicated for their own self-interested reasons.³⁹

One of the more significant pieces of minimalist writing to contribute to the republican debate in Australia was the *Report of the Republic Advisory Committee*. The Report did not debate the issue of republicanism, so much as provide pragmatic analysis of the minimal constitutional changes necessary to achieve an Australian republic. In typically minimalist fashion, the Committee advised that the only change required to create a republic would be to replace the monarch while other elements of government

³⁵ Peter Spearritt, 'Royal Progress: The Queen and Her Australian Subjects', in *Out of Empire*, p. 237.

³⁶ Geoffrey Dutton, 'Republican Australia?', in Arnold et al. (eds.), *Out of Empire*, pp. 241-243.

³⁷ For further discussion of the minimalist argument see: Hirst, *A Republican Manifesto*.

³⁸ George Winterton, 'A Republican Constitution', in George Winterton (ed.), *We, the People. Australian Republican Government*, Allen & Unwin, New South Wales, 1994, pp. 38-48.

³⁹ Malcolm Turnbull, *The Reluctant Republic*, William Heinemann Australia, Victoria, 1993, p. 161. In addition, Professor Brian Galligan argued that Australia was already a republic 'only barely disguised by monarchic symbols and forms'. He believed that republicanism meant regularising Australia's institutions, not creating them. See, Brian Galligan, 'Regularising the Australian Republic', *Australian Journal of Political Science*, Vol. 28, 1993 pp. 56-66.

would be unchanged.⁴⁰ However, the Committee expressed the view that the office of Head of State should not be dispensed with as 'there is much to be said for a national figure who can represent the nation as a whole, both to Australians and the rest of the world.' Also, in supporting the traditional role of the monarchy, the Committee advised that the new representative should be above politics and that the occupant should be seen to be impartial.⁴¹ The Committee appeared satisfied on the basis of its investigation that it would be both legally and practically possible to amend the Constitution to achieve a republic.⁴² The report concluded:

Fear that [republicanism] must involve substantial or unwelcome change to our political system is not well founded. The establishment of an Australian republic is essentially a symbolic change, with the main arguments, both for and against, turning on questions of national identity rather than questions of substantive change to our political system.⁴³

Aside from the formal constitutional changes such as those identified by the Republican Committee, outspoken republican, Donald Horne argued that 'the Crown' would be easily replaced in other aspects of Australian life also. He explained that the Crown logo, where it appears, could be replaced with the Australian Commonwealth or the individual state crests. Criminal offenders, according to Horne, could be charged by 'the people' instead of 'the Crown' for their offences. Similarly, the Queen's Counsel could be replaced by State or Senior Counsel, Crown Prosecutors could become State Prosecutors, and Royal Commissions could be called Special Commissions. Most interestingly, Horne observed that, '[t]he mystifying use of 'the Crown' as a metonym for 'the government' can be replaced simply by saying 'the government'.⁴⁴ Horne's argument, when viewed in relation to New Zealand,

⁴⁰ Republic Advisory Committee, *An Australian Republic*, p. 1.

⁴¹ Republic Advisory Committee, *An Australian Republic*, pp. 1-2.

⁴² Republic Advisory Committee, *An Australian Republic*, p. 10.

⁴³ Republic Advisory Committee, *An Australian Republic*, p. 151.

⁴⁴ Horne, 'Symbols of a Nation', in *The Coming Republic*, pp. 99-101.

emphasises the need to establish the practical and symbolic significance of the Crown in New Zealand before deciding the fate of the institution. In particular, the suggestion that the metonym of 'the Crown' for government could be easily replaced in Australia should be regarded with some scepticism for New Zealand, particularly in light of the evidence in this thesis of the prolific use of the Crown in treaty debate as well as its wider application with regard to Crown resources and, more recently, the trend of identifying government institutions as Crown entities. On the other hand, it has been suggested that younger generations of Māori and Pākehā in New Zealand do not harbour the attachments to the Queen of earlier generations.⁴⁵ This indicates that it could be possible to rename such entities as Crown health enterprises and Crown land, and remove the symbol. However, this does not solve the problem of what would replace the Crown symbol as the identity of the treaty partner which, as this thesis has also extensively demonstrated, is a complex and controversial issue. The way around this, as suggested earlier, would possibly be to reduce the significance of the Crown identity by focusing attention elsewhere, for example, on the Treaty in an entrenched constitution. But at this point the argument becomes circular because the courts would then at some point have to determine who was responsible under the Treaty in contemporary society, in other words, who or what the Crown would be.

Returning to the Australian debate, opposition to the republican movement is found in the argument that republicanism would be a much more radical departure from the status quo than the pragmatist minimalists have supposed.⁴⁶ For example Alan Atkinson, a strong supporter of Australia remaining a constitutional monarchy, believed the Crown is still an integral part of contemporary Australia's political and

⁴⁵ Ranginui Walker, *Marae*, Television New Zealand, 5 November 1995.

⁴⁶ This is one of the assertions made by Alan Atkinson in *The Muddle-Headed Republic*, Oxford University Press, Melbourne, 1993 repeated also in 'The Australian Monarchy: Imperfect But Important', *Australian Journal of Political Science*, Vol. 28, 1993, pp. 67-82. Similar sentiments are expressed by the Republic Advisory Committee, *An Australian Republic*, p. 41; and by Graham Maddox, 'The Possible Impact of Republicanism on Australian Government', in George Winterton (ed.), *We, the People. Australian Republican Government*, Allen and Unwin, New South Wales, 1994, pp. 125-139.

social fabric. He explained that 'the Australian monarch, however alien it might sometimes appear to Australian culture, is in fact central to our whole traditional approach to government.'⁴⁷ In his widely debated *The Muddle-Headed Republic*, Atkinson sought to re-energise the significance of the Crown by reminding readers of the Crown's influence in Australia's colonial history. He argued, for example, that 'the Crown' was the basis for universal health care not found in republics such as the United States. He also stated that the Crown played an extremely important part in early race relations in this country. He said that official dealings between the white settlers and the Aborigines were largely shaped by the Aborigines' perceived place under the Crown. For example, in 1770, when Captain Cook annexed Australia the land automatically became the property of the Crown. Unlike New Zealand, no treaty was signed between the British and the indigenous people although by the 1830s the Aborigines were regarded as British subjects. The Crown accordingly took responsibility for their protection and welfare.'⁴⁸ Atkinson also pointed out that the Crown symbol brought the separate states together through federation.

In identifying all these important roles for the Crown, Atkinson asserted that the nature of Australian society in the 1990s was due to the presence of the Crown and in spite of the absence of the monarchy (who did not reside in Australia). He argued that it would not be possible for Australia to rid itself of the Empire without destroying the 'essence of order and community in Australian life.'⁴⁹ Australia, according to Atkinson, 'is a monarchy at a more fundamental level than most people seem to imagine. Monarchy is more than merely royalty ... [it is] a living and active conscience at the centre of the state.'⁵⁰ What's more, as a representation of 'the moral purpose of government' and the 'perpetual and universal trustee for the people' the suggestion to

⁴⁷ Alan Atkinson, 'The Australian Monarchy: Imperfect but Important', *Australian Journal of Political Science*, p. 70.

⁴⁸ Atkinson, *The Muddle-Headed Republic*, p. 36.

⁴⁹ Atkinson, *The Muddle-Headed Republic*, pp. 43 and 46.

⁵⁰ Atkinson, *The Muddle-Headed Republic*, p. 29.

remove the monarchy, according to Atkinson, indicated governments' recent belief that it need not have any long-term or deep moral purpose. He warned that:

[t]he abolition of the Crown [would] drive home a fundamental shift of legitimacy which is already underway. In this sense the republican movement is part of the softening up of the state, its abdication of old responsibilities, its privatisation and its reshaping by market forces.⁵¹

Other writers have rejected the minimalist republican viewpoint (as opposed to republicanism per se) on the basis that the minimalists, more than misunderstanding the significance of the changes they were advocating, had failed to see that republicanism could not occur in a constitutional void. Republicanism, these proponents argued, could not be considered in the absence of other constitutional reforms because the Crown is so deeply and intricately worked into all aspects of the constitution. John Uhr, for example, argued that, 'as an analytical exercise, republican 'remodelling' [could] help define with greater clarity the political identity of our Parliamentary institutions, even in the absence of an immediate overhaul of Australian constitutionalism.'⁵² Uhr said that 'genuine republicanism requires at some stage a quite fundamental rethink of the institutions of government.'⁵³ Graham Maddox took a similar line in addressing a network of constitutional issues which he considered concomitant to republicanism, including the structure of federal government and amendments to the Constitution Act.⁵⁴ Australian political scientist, Elaine Thompson, used the republican debate as a platform for the constitutional issue of the place of indigenous peoples in Australia within the new republic in saying:

Australia could grasp the opportunity of the new millennium not only by becoming a republic but by opening up for discussion all aspects of our constitutional system. ...

⁵¹ Atkinson, *The Muddle-Headed Republic*, p. 64.

⁵² John Uhr, 'Instituting Republicanism: Parliamentary Vices, Republican Virtues?', *Australian Journal of Political Science*, Vol. 28, 1993, p. 27.

⁵³ Uhr, 'Instituting Republicanism: Parliamentary Vices, Republican Virtues?', p. 31.

⁵⁴ Maddox, 'The Possible Impact of Republicanism on Australian Government', pp. 125-138.

Finally we could do something about the stain of our treatment of the Aboriginal population, by embedding in the Constitution a formal treaty with the Aboriginal people, acknowledging the [sic] place as their [sic] first civilisers of Australia and recognising their claims to the land.⁵⁵

In addition to her reference to using a written constitution to protect indigenous rights, Thompson raised another issue relevant to the possibility of republicanism in New Zealand. Her criticism of the neglect of the Aboriginal and Torres Strait Islander peoples' relationship with the republic of the future should alert New Zealanders to the need to consider the implications of republicanism for Māori in New Zealand, particularly in view of the Treaty of Waitangi between Crown and Māori. In Australia, few writers addressed the implications of republicanism for Australia's indigenous people. Those who did, were highly critical of the republican movement, emphasising the significance of 'the Crown' to the indigenous peoples, and the immediate need for consultation with indigenous groups on the matter. For example, as Wendy Brady explained, Australia was an indigenous republic prior to British colonisation. Claims that republicanism in Australia is new and radical demonstrate that the history of struggle by Australia's native occupants to retain their independence within their own republic is not well understood in Australia.⁵⁶ Brady called contemporary republican movement 'second wave republicanism', and criticised it saying that, by and large, it did not include Aboriginal and Torres Strait Islander people as partners. Instead, the debate had assumed, according to Brady, that 'the Crown' incorporates these peoples and consequently is able to make decisions about the nation's future which have implications for the two indigenous groups without their consultation or consent.⁵⁷

⁵⁵ Elaine Thompson, 'Giving Ourselves Better Government', in *The Coming Republic*, p. 160.

⁵⁶ Wendy Brady, 'Republicanism: An Aboriginal View', in Wayne Hudson et al. (eds.), *The Republicanism Debate*, New South Wales University Press, Kensington, 1993, pp. 145-146.

⁵⁷ Brady, 'Republicanism: An Aboriginal View', p. 146.

Ironically perhaps, as Brady has pointed out, indigenous people best understand the consequences of British domination. As a result, their history of resistance to the British presence in Australia could be a model for the development of a republic in the future.⁵⁸ Questions of minority representation and legal and judicial systems must be addressed as a part of the debate, rather than addressing them once a republic has been established.⁵⁹ Brady asserted that republicanism provides an opportunity to address indigenous issues which should have been resolved long ago. She said, '[w]hen a republic does become a reality it would be a great advantage to start from a position which took account of the politics of indigenous peoples, rather than leaving the issue of indigenous rights and power to be settled afterwards.'⁶⁰ On this matter in respect of New Zealand, Justice Cooke, President of the Court of Appeal in New Zealand, has stated that 'the permanent significance of the Treaty as the principal source of the national partnership ... cannot be ignored in contemplating any major constitutional change.'⁶¹ In acknowledging the symbolic and philosophical significance of the Crown treaty partner, it is essential also to accept that the process of constitutional reform, republican or otherwise, must only happen with Māori consultation and concurrence. Chapters Five and Eight demonstrated that the Treaty partner has been unilaterally defined in the past without Māori agreement, and Māori treaty partner was seen to suffer in negotiations as a result. Other commentators have identified the need for consultation. For example, Sir Robin Cooke observed that the annexation of New Zealand by the British was subject to sufficient Māori concurrence. He stated that '[a]s a matter of elementary fairness, good faith and national honour, it is hard to see how we could cut our links to the Crown without similar concurrence.'⁶²

⁵⁸ Brady, 'Republicanism: An Aboriginal View', pp. 146-147.

⁵⁹ Brady, 'Republicanism: An Aboriginal View', pp. 147-148.

⁶⁰ Brady, 'Republicanism: An Aboriginal View', p. 148.

⁶¹ Cooke, 'The Suggested Revolution Against the Crown' pp. 39-40.

⁶² Cooke, 'The Suggested Revolution Against the Crown' p. 38.

In finally reviewing the constitutional reforms discussed in this chapter which relate to the Crown, it has been argued that MMP could increase the significance of the role of the Crown as the Governor-General and emphasise the difficulties in distinguishing between 'Māori' and 'the Crown' as the Crown is represented by the Executive. With regard to suggestions that the treaty partners should be renamed Māori and Pākehā in an attempt to avoid the confusion of the Crown, it was argued that this failed to appreciate the original and vital function of the Crown under the Treaty of Waitangi as the authority which could hold government accountable to the terms of the Treaty. It was considered questionable at best whether 'Pākehā' as an expression of the Crown could fulfil this function. Instead the possibility was explored that the problem of the Crown for Māori might be avoided altogether in the future if the Treaty of Waitangi were to be awarded legal recognition within a written constitution in New Zealand. While this strategy was seen to have both merits and disadvantages it drew attention to the role of the courts in New Zealand which introduced the significance of a third constitutional debate concerning the future of the right of appeal to the Privy Council. This debate demonstrated that New Zealand was still attempting, through constitutional reform, to break its traditional links with Britain and that this process was creating concern for Māori. The possibility that New Zealand might ultimately reject the monarchy altogether and establish a republican charter was considered through a comparative investigation of the republican debate in Australia in the mid 1990s. This revealed that New Zealand, if and when it considers republicanism, will have to established a firm understanding of the role of the Crown in New Zealand politics and society. It also warned of a need to see the Crown as a integral part of the constitution and furthermore, to consult widely with Māori, as the treaty partner, on the future of the monarchy in New Zealand.

CONCLUSION

On the fourth of November 1995 Queen Elizabeth II, while visiting New Zealand, signed the deed of settlement between the National Government and the Tainui iwi (a North Island tribe) for the return of almost 16,000 hectares of land and the payment of \$170 million to Tainui as redress for grievances suffered in the nineteenth century.¹ In addition to these terms of settlement, Tainui had requested a direct apology from 'the Crown' who, Tainui leaders had advised, was not to be a Crown agent such as the Government, but the original Crown partner, the person who wore the crown – Queen Elizabeth II.²

Tainui's interpretation of the Crown from the settlement deed and the Queen's function as a signatory to the deed, illustrate the two problems with respect to the identity of the Crown as the Treaty partner in New Zealand which have been the focus of this thesis. The irony of the Queen being reintroduced to the treaty process at this late stage in the negotiations, brings into focus both the shift in the Crown's identity through time and its many possible meanings in contemporary society. Analysis in this thesis has revealed that the Crown title, rather than consistently naming the same treaty partner has been applied to a range of institutions and individuals who are involved in the treaty negotiation process. In addition, it was argued that this wide application for the Crown was due to its capacity as a symbol to bring legitimacy to the authority and actions of those identities with which it is associated in treaty discourse. Furthermore, the Crown's characteristics as a key symbol in treaty discourse were seen to create obstacles to the resolution of treaty grievances from the perspective of the Māori treaty partner. In particular, inconsistency with regard to whether the Crown was the same as or different from the government of the day has forced Māori to negotiate with a treaty partner who is able to be both flexible and elusive; one

¹ 'Royal Apology to Tainui - Queen signs historic deal', in *The Evening Post*, 3 November, 1995, p. 1, and 'Queen puts signature to historic land deal' in *The Dominion*, 4 November, 1995, p. 1.

² 'Tainui wants apology from Queen', National Radio, *Mana News*, 24 February, 1995.

moment asserting its powers and authority as 'the Crown' and the next distancing itself from immediate responsibilities and obligations as 'the government'.

Closely related to the problem of inconsistency is the problem of the evolution of the Crown. This has meant that since 1840 the Crown has been identified as the Queen, the government of the day, and most recently, local and regional government as well as central government. The concern is that, through evolution, the responsibility and authority first given by Māori to the Queen has been handed on in part or in full to different bodies motivated by different priorities without consultation with Māori and that this process may continue in the future. The evolution of the Crown has been resisted by Māori, as submissions to the local government and resource law reforms analysed here have indicated. Also, the implications of the evolution of the Crown for Māori, as demonstrated by the Moutoa Gardens protest, have been that there is considerable disagreement as to exactly who holds responsibility for the Treaty and Māori rights in contemporary New Zealand society.

The consistency and endurance of the Crown symbol has distracted attention away from the reality of the turmoil, uncertainty and flexibility which has surrounded the Crown's identity as the treaty partner historically and in the present day. Despite signs that the Crown is increasingly coming under public scrutiny and attack from many quarters, the identity of the Crown must become a matter of public concern and debate in New Zealand. A brief study of the Crown in Canada emphasised that the Crown's position in New Zealand is a product of the country's particular constitutional development. The identity of the Crown (seen here with regard to the Treaty) must not be isolated from wider constitutional issues. Constitutional developments and reforms such as electoral reform (MMP), the future of the Privy Council and a written constitution which incorporates the Treaty of Waitangi, confront New Zealand at the end of the twentieth century. These reforms will inevitably have some impact on the identity and profile of Crown in New Zealand (its many forms) and will also have

implications for Māori in their continued negotiations with the Crown treaty partner. Perhaps most importantly, the question of New Zealand's future as a constitutional monarchy poses the greatest challenge to the Crown's future as well as the greatest opportunity for New Zealand to publicly consider and debate the Crown's contemporary identity and function in New Zealand. Most critical is the need to consult widely with Māori on any constitutional issues which will impact on the Crown, particularly the question of republicanism, in order to avoid the kinds of injustices illustrated in this paper from recurring in the future.

However, while a complex and significant matter, the identity of the Crown as the treaty partner is just one of the complexities surrounding the Treaty of Waitangi which presently challenge Māori and government negotiations. A great deal remains to be investigated and better understood by all participants in the treaty process and indeed the general public. Several important issues beyond the scope of this work, require attention. First, as acknowledged at the start of this thesis, there is a need to investigate the identity of 'Māori' as the treaty partner and the problems which surround it in a contemporary context. Also, questions need to be addressed from a Māori perspective regarding the acceptable evolution of the Crown and, moreover, an appropriate alternative to the Crown as the contemporary treaty partner.

The resolution of the problem of 'Who or What is the Crown' must begin with common recognition and consciousness of the problem of the Crown. As Maitland was seen to suggest in the first chapter of this thesis, this would mean that politicians, lawyers and the public alike would neither use nor accept 'the Crown' in treaty discourse without looking behind the symbol to reveal the important details which the symbol obscures.³ Treaty discourse, especially, deserves consideration and conscious redevelopment if we are to begin to resolve the problem of the Crown.

³ See Footnote 1, Chapter One of this thesis.

APPENDIX A ¹

Te Tiriti o Waitangi (Māori Text)

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

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata maori ki te Pakeha e noho ture kore ana.

Na kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane amua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te tuatahi

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu - te Kawanatanga katoa o o ratou wenua.

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu - ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua - ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini - Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

[signed] W. Hobson Consul & Lieutenant Governor

¹ This Appendix comes from Claudia Orange, *The Treaty of Waitangi*, Allen & Unwin, Wellington, 1987, pp. 255-266.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu. Ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Note: This treaty text was signed at Waitangi, 6 February 1840, and thereafter in the north and at Auckland. It is reproduced as it was written, except for the heading above the chiefs' names: ko nga Rangatira o te Wakaminenga.

***A Literal Translation into English, made in New Zealand,
of the Māori Version of the Treaty***

Victoria, the Queen of England, in her gracious remembrance of the Chiefs and Tribes of New Zealand, and through her desire to preserve to them their chieftainship and their land, and to preserve peace and quietness to them, has thought it right to send them a gentleman to be her representative to the natives of New Zealand. Let the native Chiefs in all parts of the land and in the islands consent to the Queen's Government. Now, because there are numbers of the people living in this land, and more will be coming, the Queen wishes to appoint a Government, that there may be no cause for strife between the Natives and the Pakeha, who are now without law: It has therefore pleased the Queen to appoint me, WILLIAM HOBSON, a Captain in the Royal Navy, Governor of all parts of New Zealand which shall be ceded now and at a future period to the Queen. She offers to the Chiefs of the Assembly of the Tribes of New Zealand and to the other Chiefs, the following laws:

- i. The Chiefs of (ie. constituting) the Assembly, and all the Chiefs who are absent from the Assembly, shall cede to the Queen of England for ever the government of all their lands.
- ii. The Queen of England acknowledges and guarantees to the Chiefs, the Tribes, and all the people of New Zealand, the entire supremacy of their lands, of their settlements, and of all their personal property. But the Chiefs of the Assembly, and all other Chiefs, make over to the Queen the purchasing of such lands, which the man who possesses the land is willing to sell, according to prices agreed upon by him, and the purchaser appointed by the Queen to purchase for her.

iii. In return for their acknowledging the Government of the Queen, the Queen of England will protect all the natives of New Zealand, and will allow them the same rights as the people of England

(Signed) WILLIAM HOBSON
Consul, and Lieutenant-Governor

We, the Chiefs of this Assembly of the tribes of New Zealand, now assembled at Waitangi, perceiving the meaning of these words, take and consent to them all. Therefore we sign our names and our marks.

This is done at Waitangi, on the sixth day of February, in the one thousand eight hundred and fortieth year of our Lord.

Note: Text from J. Noble Coleman, A Memoir of the Rev. Richard Davis, London, 1865, pp.455-56.

The Treaty of Waitangi (English text)

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the first

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights

and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

Article the second

Her Majesty the Queen of England confirms and guarantces to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or Individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them h that behalf.

Article the third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

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

Note: This English text was signed at Waikato Heads in March or April 1840 and at Manukau on 26 April by thirty-nine chiefs only. The text became the 'official' version.

APPENDIX B

Ministries in New Zealand¹

Date of General Election 15.8.1987

Labour Administration 24.8.1987 - 14.8.1989

Rt. Hon. David Lange	Prime Minister, Minister of Education, Minister in Charge of the Security Intelligence Service
Rt. Hon. G.W.R. Palmer	Deputy Prime Minister, Attorney General, Minister of Justice, Minister for the Environment.
Hon. Mike Moore	Minister of Overseas Trade and Marketing, Minister in Charge of Publicity
Hon. R.O. Douglas	Minister of Finance
Hon. Richard Prebble	Minister for State owned Enterprises, Postmaster-general, Minister of Works and Development, Minister of Broadcasting, Minister in Charge of Public Trust Office, Minister of Railways, Minister in Charge of Rural Banking and Finance Corporation.
Hon. K.T. Wetere	Minister of Maori Affairs
Hon. David Caygill	Minister of Health, Minister of Trade and Industry
Hon. Russell Marshall	Minister of Foreign Affairs, Minister for Disarmament and Arms Control.
Hon. Dr M.E.R. Bassett	Minister of Internal Affairs, Minister of Local Government, Minister of Civil Defence, Minister of Arts and Culture.
Hon. Jonathan Hunt	Minister of State, Leader of the House.
Rt. Hon. R.J. Tizard	Minister of Defence, Minister of Science and Technology.
Hon. Colin Moyle	Minister of Agriculture, Minister of Fisheries
Hon. Stan Rodger	Minister of Labour, Minister of Immigration, Minister of State Services.

¹ G.A. Wood, (ed.) *Supplement to Ministers and Members in the New Zealand Parliament, Ministers 1987 - 1991; Members of Parliament 1911 - 1990*, Tarkwode Press, Dunedin, 1992, pp. 1-13. *Note also:* The lists provided here do not include Ministers not in Cabinet or some changes which were not relevant to the research. The 1987 and 1990 administrations were chosen to coincide with the data researched in Chapter Two.

Hon. P.B Goff	Minister of Employment, Minister of Youth Affairs, Minister of Tourism, Associate Minister of Education.
Hon. Margaret Shields	Minister of Women's Affairs, Minister of Consumer Affairs, Minister of Statistics
Hon. Peter Tapsell	Minister of Police, Minister of Forestry, Minister of Lands, Minister of Recreation and Sport, Minister of Survey and Land Information, Minister in Charge of Valuation Department.
Hon. Helen Clark	Minister of Housing, Minister of Conservation.
Hon. Dr. M. Cullen	Minister of Social Welfare, Associate Minister of Finance, Minister in Charge of War Pensions.
Hon. W.P. Jeffries	Minister of Transport, Minister of Civil Aviation and Meteorological Services.
Hon. David Butcher	Minister of Energy, Minister of Regional Development, Associate Minister of Finance.

Labour Administration 14.8.1989 - 02.11.1990

Rt. Hon. Geoffrey Palmer	Prime Minister, Minister for the Environment, Minister in Charge of the New Zealand Security Intelligence Service and Minister of Education 08.08.89-14.08.89. (Appointed as Prime Minister on 08.8.89 until 04.09.1990 when he was replaced by Mike Moore.)
Hon. Helen Clarke	Deputy Prime Minister (appointed on 08.08.89), Minister of Health, Minister of Labour.
Hon. Mike Moore	Minister of Overseas Trade and Marketing, Minister of External Relations and Trade, Deputy Minister of Finance, Minister for the America's Cup, Member N.Z. Planning Council. Also, Prime Minister on 04.09.90)
Hon. David Caygill	Minister of Finance, Minister of Revenue, Minister in Charge of Earthquake and War Damages Commission.
Hon. Stan Rodger	Minister for State-owned Enterprises, Deputy Minister of Finance, Minister of State Services, Minister of Railways.
Hon. K.T Wetere	Minister of Maori Affairs, Minister in Charge of Iwi Transition Authority.

Hon. Dr M. Cullen	Minister of Social Welfare, Minister in Charge of War Pensions, Associate Minister of Health, Associate Minister of Labour.
Hon. Phil. Goff	Minister of Education (until 14.08.89), Minister in Charge of Education Review and Audit Agency.
Hon. Jonathan Hunt	Minister of Housing, Minister of Broadcasting, Leader of the House, Minister responsible for the New Zealand Symphony Orchestra.
Hon. Dr. Michael Bassett	Minister of Internal Affairs, Minister of Arts and Culture, Minister of Civil Defence, Minister of Local Government.
Hon. W.P. Jeffries	Minister of Justice, Minister of Transport, Minister of Civil Aviation and Meteorological Services.
Hon. R.O. Douglas	Minister of Police, Minister of Immigration, Minister responsible for the Audit Department, Minister responsible for Special Projects.
Hon. Margaret Shields	Minister of Consumer Affairs, Minister of Statistics, Minister of Women's Affairs, Associate Minister of Education.
Rt. Hon. R.J. Tizard	Minister of Defence, Minister of Research, Science, Technology.
Hon. Peter Tapsell	Minister of Science (DSIR), Minister of Forestry, Minister of Lands, Minister of Recreation and Sport, Minister of Survey and Land Information, Minister in Charge of the Valuation Department.
Hon. Russell Marshall	Minister of Foreign Affairs, Minister of Pacific Island Affairs.
Hon. Colin Moyle	Minister of Agriculture, Minister of Fisheries.
Hon. David Butcher	Minister of Commerce, Minister of Energy, Minister of Regional Development.
Hon. Annette King	Minister of Employment, Minister of Youth Affairs, Minister assisting the Prime Minister.

Bolger Administration 2.11.1990

Date of General Election

Hon. J.B. Bolger	Prime Minister, Minister in Charge of the New Zealand Security Intelligence Service.
Hon. Don. McKinnon	Deputy Prime Minister, Minister of External Relations and Trade, Minister of Foreign Affairs.
Hon. W.F. Birch	Minister of Labour, Minister of Immigration, Minister of State Services, Minister of Pacific Island Affairs, Minister responsible for Accident Compensation Corporation.
Hon. Ruth Richardson	Minister of Finance, Minister Responsible for Earthquake and War Damage Commission, National Provident Fund.
Hon. Paul East	Attorney General, Minister responsible for Serious Fraud Office, Leader of the House, Minister Responsible for Audit Department.
Hon. John Falloon	Minister of Agriculture, Minister of Forestry, Minister of Racing.
Hon. Doug Kidd	Minister for State-owned Enterprises, Minister of Fisheries, Minister of Railways, Minister of Works and Development, Associate Minister of Finance, and Minister Responsible for Airways Corporation of NZ Ltd., Coal Corporation of New Zealand Ltd., Government Property Services Ltd., Government

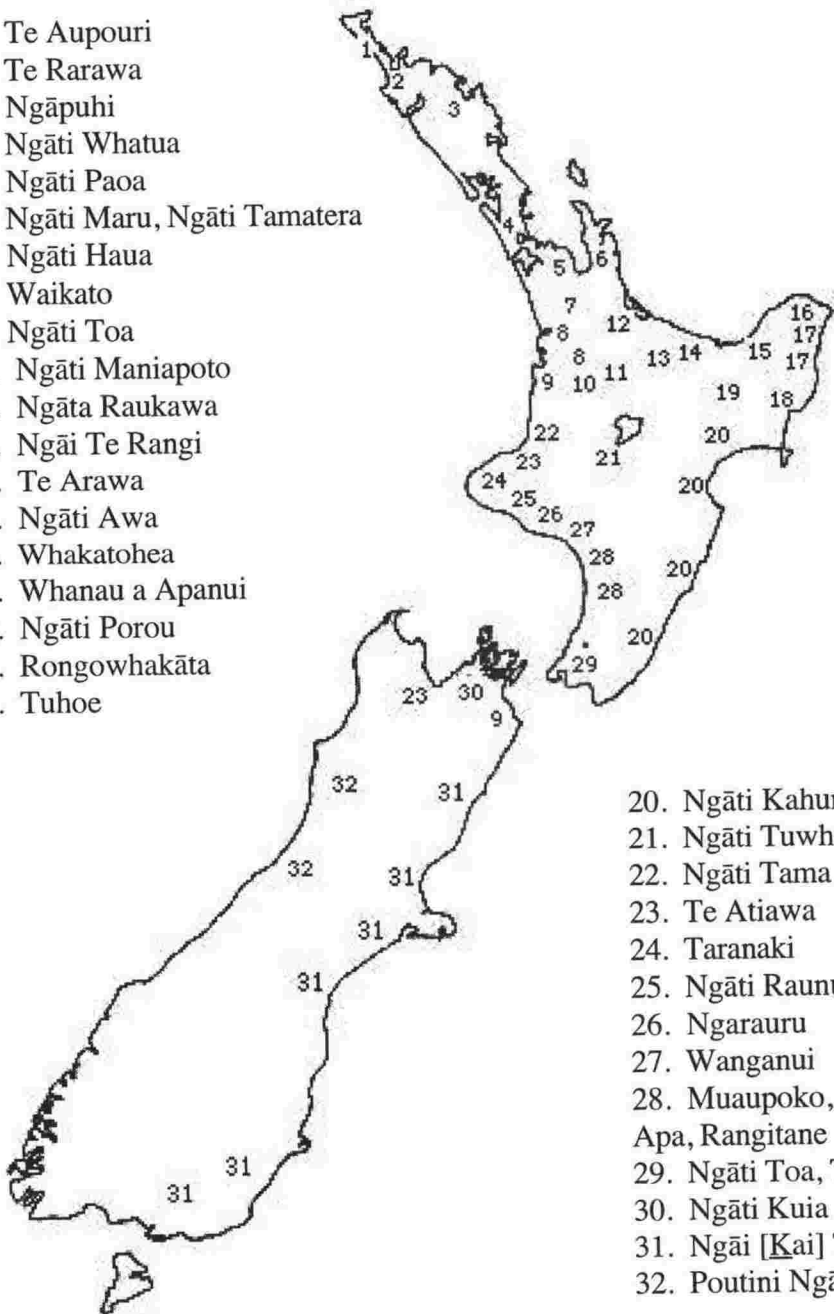
Hon. Doug Graham	Minister of Justice, Minister for Disarmament and Arms Control, Minister of Arts and Culture.
Hon. Dr. Lockwood Smith	Minister of Education, Minister responsible for Educational Review Office and National Library.
Hon. Maurice McTigue	Minister of Employment, Associate Minister of Finance.
Hon. Rob Storey	Minister of Transport, Minister of Statistics, Minister of Lands, Minister of Survey and Land Information, Minister in Charge of Valuation Department.
Hon. Winston Peters	Minister of Maori Affairs, Minister in Charge of the Iwi Transition Agency.
Hon. Denis Marshall	Minister of Conservation, Minister of Science (DSIR), Associate Minister of Agriculture.
Hon. John Luxton	Minister of Housing, Minister of Energy, Associate Minister of Education.
Hon. Wyatt Creech	Minister of Revenue, Minister of Customs, Government Superannuation Fund, Minister in Charge of the Public Trust Office.

APPENDIX C

Tribal Locations in New Zealand

Major tribes are indicated and some locations reflect movements which took place between 1800 and 1850. Original source is *Oxford History of New Zealand*, ed. W.H Oliver with B.R. Williams (OUP, 1981). The map is derived largely from AJHR, 1870, D-23.

1. Te Aupouri
2. Te Rarawa
3. Ngāpuhi
4. Ngāti Whatua
5. Ngāti Paoa
6. Ngāti Maru, Ngāti Tamatera
7. Ngāti Haua
8. Waikato
9. Ngāti Toa
10. Ngāti Maniapoto
11. Ngāta Raukawa
12. Ngāi Te Rangi
13. Te Arawa
14. Ngāti Awa
15. Whakatohea
16. Whanau a Apanui
17. Ngāti Porou
18. Rongowhākāta
19. Tuhoe



20. Ngāti Kahungunu
21. Ngāti Tuwharetoa
22. Ngāti Tama
23. Te Atiawa
24. Taranaki
25. Ngāti Raunui
26. Ngarauru
27. Wanganui
28. Muaupoko, Ngāti Raukawa, Ngāti Apa, Rangitane
29. Ngāti Toa, Te Atiawa, Ngāti Ira
30. Ngāti Kuia
31. Ngāi [Kai] Tahu, Ngāti Mamoe
32. Poutini Ngāi Tahu

APPENDIX D

List of Interviews

Mr David Bradshaw, State Services Commission, June 21 1993

Chief Judge E.T.J Durie, Waitangi Tribunal/Maori Land Court, 21 August 1995

Right Honourable Douglas Graham, Minister in Charge of Treaty Negotiations, 10 August 1995

Mrs Helen Hughes, Parliamentary Commissioner for the Environment, 6 July 1993

Mr Colin James, Journalist, 28 June 1993

Sir Kenneth Keith, President of the Law Commission, 1 July 1993

Judge Shonagh Kenderdine, 24 June 1993

Dr Claudia Orange, Historian, 1 July 1993

Mr Tipene O'Regan, Kai Tahu, 7 July 1993

Professor Sir Geoffrey Palmer, Former Prime Minister, 29 June 1993

Professor James Ritchie, Waikato University (Maaori Studies and Research), 4 June 1993

Professor Andrew Sharp, Political Theorist, 5 June 1993

Mr Maui Solomon, Barrister, 29 August 1995

Ms Mary-Anne Thompson, Treaty Unit, Treasury, 2 July 1993

Ms Kirsty Woods, Researching Officer, Parliamentary Commissioner for the Environment, 6 July 1993

My thanks also to Dr Grant Phillipson and Dr Barry Rigby from the Waitangi Tribunal, and Prof. Richard Price from Native Studies Department, Alberta University, Edmonton, Canada, for their ideas and input in less formal meetings.

GLOSSARY OF MĀORI TERMS¹

Hapū	Section of a large tribe, clan, secondary tribe
Hokonga	Exchanging, buying, selling
Hui	Congregate, come together
Iwi	Nation, people, [also <i>tribe</i> in some contexts]
Kaimoana	Seafood
Kaitiakitanga	Guardianship
Kanohi	Face
# Kāwanatanga	Governance, trusteeship
Kaumatua	Adult, old man or woman
Marae	Enclosed space in front of house, courtyard, village common
Mana	Authority, control, influence, prestige, power
*Nunuku	Moriori philosophy which supported and promoted a peaceful existence and outlawed bloodshed.
Rangatira	Chief (male or female), person of good breeding
Raupatu	Conquer, overcome
* Rekohu	Literally 'misty sky' or 'misty sun' - a name given to the Chathams Islands by the Moriori people.
Rūnanga	Assembly, council
Taonga	Property, anything highly prized
Tapu	Under religious or superstitious restriction
#Tangata whenua	Person or people of a given place
*Tchakat Moriori	Literally 'ordinary' or 'normal' - the name Moriori gave themselves after contact with Pākehā and Māori from New Zealand
Tikanga	Custom, habit
#Tino rangatiratanga	Unqualified exercise of (their) chieftainship, highest chieftainship
Tiriti	Treaty
Wāhi	Part, portion
#Whai kōrero	Speeches, oratory

¹ Most of these translations come from H.W. Williams, *Dictionary of the Maori Language*, (7th Edn.), GP Publications Ltd., Wellington, 1992.

This sign indicates translations taken from I.H. Kawharu (ed.), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, Oxford University Press, Auckland, 1989.

* This sign indicates translations taken from Michael King, *Moriori: A People Rediscovered*, Viking Press, Auckland, 1989.

Whānau	Family (although according to Williams it is questionable whether Māori had any real concept of the family unit.)
*Wharekauri	Literally 'House made of Kauri' - the name given to the Chatham Islands by Māori in the early 1800s
Whenua	Land, Country

LIST OF ABBREVIATIONS

CHE	Crown Health Enterprises
CRI	Crown Research Institutes
DSIR	Department of Scientific and Industrial Research
FPP	First-Past-the-Post
MAC	Maori Advisory Committees
MCG	Maori Local Government Reform Consultative Group
MMP	Mixed Member Proportional Representation
NLC	Native Land Court
NZPA	New Zealand Press Association
OCCLG	Officials Co-ordinating Committee on Local Government Reform
RMLR	Resource Management Law Reform
SOE	State Owned Enterprises

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Prime Minister

Minister for the Environment

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