

The Chinese in a Bicultural New Zealand.

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THE CHINESE IN A BICULTURAL NEW ZEALAND

The way forward

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PART 1: HISTORICAL PERSPECTIVE

Following World War II and the establishment of the United Nations, many countries began (or continued) a process of de-colonisation. In countries with a predominantly indigenous population, independence devolved to governments comprising indigenous people and the colonists withdrew. Even where independence devolved to dominant expatriate colonists, there was increasing recognition of the rights of indigenous people who, in general, at that time were badly treated.

In New Zealand, an increasing recognition of the rights of the Maori people culminated in the passing of the Treaty of Waitangi Act in 1975. This Act provides for the observance and confirmation of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.

We shall discuss the Treaty principles later; however, suffice to say that over the past 20 years or so since the passing of the Act, as these Treaty principles have become incorporated in the laws and constitution, New Zealand has become "bicultural". (Note this DOES NOT mean that the Government of New Zealand officially supports and promotes only European and Maori culture and cultural activities. See Appendices.)

The Chinese originally came to New Zealand in the 1860s at the invitation of the Otago Provincial Government to re-work the gold fields, but subsequently in many ways their fortunes paralleled those of others who participated in the Chinese Diaspora during the 1800s.

Following their success (or lack of success) in the gold fields, they stayed on, becoming mainly labourers, shopkeepers or market gardeners, all the while being privately and personally discriminated against by the European population and officially by the Government. It was only during World War II that the Chinese in New Zealand were recognised as allies supporting the war effort by contributing money to the war against the Japanese and growing food to feed the troops. It was only after the war that the Chinese were accorded the full rights of citizens.

The post-war generation, by dint of effort, managed to raise themselves into the professions. In the period up to 1987 immigration was only commonly possible through marriage and chain migration. Through cultural isolation this group has become politically and socially passive. At the same time these people became very thoroughly westernised, developing a fine appreciation of rule of law and the concepts of social responsibility and human rights.

Since 1987, there has been a dramatic increase in Chinese migration to New Zealand, from Taiwan, China, Hong Kong and Malaysia, made possible by a change in Government policy and driven in source countries by political, social and environmental considerations. There has been an unprecedented influx of Chinese - not only professionals, but also business tycoons, entrepreneurs, share market and property investors and artists, academics and intellectuals. These new immigrants grew up in an environment in which their culture was dominant and accordingly in New Zealand they have been much more willing to participate in the political process. Many also profess a love freedom and the rule of law.

The presence of these "new immigrants" has leavened the political, social and cultural mix of the Chinese population of New Zealand.

PART 2: UNDERSTANDING THE CONFLICTS WITHIN A BICULTURAL NEW ZEALAND

The Chinese population in New Zealand, comprising these two main groups, both fired up by (until recently) burgeoning Asian economies, and a resurgent China, seek to build a "multi-cultural" society in order to be able to assert their cultural identity to an extent consistent with their numbers, resources, energy etc. Within a democratic society they expect equality before the law and at least decreasing racial discrimination.

Lacking a proper understanding of "bicultural" principles, they observe with interest the apparently endless Treaty claims for vast tracts of "government" lands, rivers and fisheries.

They are more uneasy when it appears that Maori groups can make claims on, or object to the use of sites for passive recreation or sporting and cultural facilities proposed by municipal authorities. They are also uneasy when they see national resources being allocated to Maori language maintenance, Maori radio and television and Maori educational support.

They are positively alarmed when the Minister of Justice (naively) explains that there is one law for everyone, but the Maoris have additional rights under the Treaty of Waitangi.

Worst is the notion (implied by Europeans and voiced by Maori radicals) that the Chinese in New Zealand, as tau iwi (foreigners) have no standing to participate in the constitutional debate regarding the Treaty. This, despite the fact that many Chinese are fourth generation New Zealanders, whose forebears helped build the country, some even dying in its defence.

The "old" Chinese are as confused as other New Zealanders about the changes being wrought in society by the application of the Treaty principles to their everyday life. It seems that the Treaty of Waitangi is being used like soy sauce: we add a little to everything to improve its flavour.

The "new" Chinese, often from countries where the rule of law is not strictly applied, are confused by the seemingly endless Treaty settlement process which apparently grants additional rights to the Maori people and by implication reduces what they imagine are their rights - making them second class citizens.

In fact, the changes being wrought on New Zealand society by the Treaty are, for the most part, firmly founded on the principles of the rule of law. Once it is accepted that the British Crown and the Maori Chiefs of New Zealand entered into an agreement documented in the Treaty, then other rights and obligations flow in both directions.

However, the development of law is not only a legal process, it is also a dynamic political process: laws often move in the direction in which they are driven by people. At the present time, the laws may be moving in a certain direction because of the activism of Maori people and others sympathetic to their cause. Perhaps things have gone far enough or even too far. The way to change that it is political activism by other groups.

If Chinese New Zealanders are troubled by the apparent limitations on their political and social freedoms, they have essentially three choices:

They can pretend that it is not happening; ignore the Maori people and their legitimate aspirations as indigenous people, ignore the need to work towards an integrated society in New Zealand. Their minds will then be free to get better academic grades and earn more money.

They can run; but other destinations are not without their social and political problems, but many lack the social and environmental advantages of New Zealand.

They can fight; which means continuing political activism, because continuing participation in the political process is the price of recognition.

PART 3: THE WAY FORWARD

If Chinese New Zealanders are to have a meaningful political existence and not be politically marginalised they must fully understand and embrace the "bicultural" status quo then bend it to their liking through legitimate democratic political processes.

(As a starting point in understanding what is meant by a Bicultural New Zealand, a few notes on the Constitution of New Zealand, Customary Maori Rights, the Treaty of Waitangi, Treaty Principles, the enforceability of the Treaty of Waitangi, Maori and the Resource Management Act are included in the Appendix.)

The first requirement in trying to participate in the political process is to get a voice that can be heard. The most powerful voice today is that of New Zealand's first Chinese Member of Parliament. Pansy Wong has been able to make the voice of the Chinese heard in Parliament and other places where it has never been before. She has been instrumental in making Ministers sit through meetings with community groups to hear their concerns. She has heightened the awareness of other MPs to the concerns of the Chinese community. However, the community must remember she is a List MP. She is in Parliament because the National Party placed her high enough up their list that she gained a seat under MMP (Mixed member proportional representation). MMP may not survive unchanged in the next Parliament; Pansy Wong or another Chinese person may not be high enough up the National Party list to keep her seat (because she is moved down by the party or the party does not gain enough votes in the next election to include her in the group of list members.) Traditionally the Chinese have done nothing about these sorts of possibilities: they have not lobbied individually or as a group for someone such as Pansy Wong to be moved up the list, nor have they helped to increase the party vote under MMP. However, inaction of this sort can be fatal to their aspiration for a continued voice in Parliament.

However, it is not sufficient to look after ones own interests; rather it is necessary to seek active engagement with other New Zealanders. To a greater or lesser extent the Chinese New Zealanders do interact with other New Zealanders, participating in the workplace and the activities of churches, schools, sports clubs, and other community groups. However, they do not have much to do with the Maori population, perhaps because they feel them to be one removed from the dominant (European) culture. This is rather strange when, in many ways the Chinese and the Maoris have much in common: community and family values, a reverence for ancestors, a history of oppression by colonial powers and so on. If the DNA evidence is to be believed, they even share a common ancestry. The Maoris have a great love of the land and the environment - something the Chinese could learn from; the Chinese are wise in the ways of the commercial world, have an almost single-minded

obsession with academic attainment; these skills could help the Maori people. Also Maori people in general would appreciate the efforts of the Chinese community in learning about the Treaty and its implications. Clearly, it is necessary to find the right forum for this interaction since a touchy-feely approach would wear thin and soon be abandoned. However, given the will, a solution would soon be found.

Finally the way forward must include retaining and enhancing Chinese culture. It is beyond the scope of this paper to discuss the ways and means of doing this and there are people far better qualified to implement it. However, it is pertinent to point out that the way forward in a bicultural New Zealand is not to be assimilated into the dominant European/American/ersatz Maori culture but to take the best of Chinese culture and to adapt it to local conditions.

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I am indebted to Nicola Young BA, LIB (1999) for her research into the legal definition of "a Bicultural New Zealand"; and particularly in unearthing the legal meaning of "Treaty Principles"; however I am solely responsible for the statements contained in this paper.

APPENDICES

In order to understand what is meant by "a Bicultural New Zealand" it is necessary to have a basic understanding of:

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The Constitution of New Zealand

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Customary Maori Rights

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The Treaty of Waitangi

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The Treaty Principles

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The enforceability of the Treaty of Waitangi

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Maori and the Resource Management Act

APPENDIX 1

THE CONSTITUTION

Although New Zealand has the Constitution Act 1986, a great deal of our constitutional arrangements are found in other non-statutory materials and doctrines.

New Zealand does not have a constitution in the sense that there is one set out in higher law to which all other law is subject, but it does have a number of statutes and other law with constitutional significance.

One of the basic doctrines which drives the Constitution is: "The rule of law".

The development of the rule of law has been of fundamental importance in limiting the power of government over the citizen and requiring certain procedures to be followed.

Another aspect of New Zealand's constitutional arrangements is the Treaty of Waitangi. The functioning of the Waitangi Tribunal and the place of the Treaty in New Zealand judicial decisions have played an increasingly important role in the last 20 years.

Constitution Act 1986

This Act brings together certain provisions of constitutional significance. Among other matters it defines:

The Sovereign

The Sovereign in right of New Zealand is the Head of State of New Zealand.

The Executive

Ministers of the Crown are to be members of Parliament.

The Legislature

There shall continue to be a House of Representatives for New Zealand.

There shall be a Parliament of New Zealand, which shall consist of the Sovereign in right of New Zealand and the House of Representatives. Parliament shall have full power to make laws.

The Judiciary

There is protection of judges against removal from office. (Independence of the judiciary)

APPENDIX 2

CUSTOMARY MAORI RIGHTS

Customary rights are rights of use and occupancy in lands and waters which continue as a recognised legal interest after conquest, discovery, or cession until they are extinguished by the colonizing power.

As customary rights are a rule of common law, they can be enforced in the courts without the need for statutory recognition.

Customary rights have been repeatedly recognised in United States law and are also a feature of Canadian and Australian law.

Not all customary rights have been extinguished in New Zealand.

APPENDIX 3

THE TREATY OF WAITANGI

There are three versions:

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English version

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Maori version

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Translation of Maori version

The Treaty of Waitangi Act 1975

This Act provides for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.

Major Waitangi Tribunal Claims

Sealord/fisheries (September 1992)

First and only pan-tribal settlement, assets still undistributed to date due to arguments over allocation method.
Value \$170 million.

Waikato-Tainui (May 1995)

Precedent settlement for confiscation of 1.2 million acres of land after New Zealand Wars, included apology signed by The Queen. Value \$170 million.

Ngai Tahu

Government's failure to set aside land for Ngai Tahu in eight deals between 1844 and 1864 involving almost the whole South Island - precedents established for conservation land management, access to traditional food sources and pounamu, Mt Cook returned and re-gifted to nation as Aoraki-Mt Cook. Value \$170 million.

APPENDIX 4

TREATY PRINCIPLES

The term "Treaty principles" originates from s. 6 of the Treaty of Waitangi Act 1975.

The Treaty principles are not static but are dynamic and should evolve with the time.

The Waitangi Tribunal, the Courts and the Crown, have considered and substantially defined the principles of the Treaty.

The main principles are drawn from the decisions of the Waitangi Tribunal and the Courts:

NB. The Court of Appeal is not bound by Waitangi Tribunal reports, but various judges have stated that such reports should be given considerable weight.

Sovereignty and Kawanatanga

Article I conferred on the Crown the exclusive right to make laws for the good governance of the country.

Principle One: The Essential Bargain

Court of Appeal: The cession by Maori of sovereignty rangitiratanga to the Crown was in exchange by the Crown of Maori

Waitangi Tribunal: The right of the Crown to make laws was exchanged for the obligation to protect Maori interests.

Exclusive Possession and Rangitiratanga

Article II guaranteed the continued right of hapu to manage and control their resources in accordance with their customs and having regard to their cultural preferences.

Principle Two: Tribal Self-Regulation

Court of Appeal: Maori were to retain chieftainship rangitiratanga over their resources and taonga and to have all the rights and privileges of citizenship.

Waitangi Tribunal: The Crown has an obligation to legally recognize tribal rangitiratanga.

Partnership

Principle Three: The Treaty Relationship

Court of Appeal: The Treaty requires a partnership and the duty to act reasonably and in good faith. The responsibilities of the parties are analogous to fiduciary duties. The Treaty does not authorize unreasonable restrictions on the Crown's right to govern.

Waitangi Tribunal: The Treaty implies a partnership, exercised with utmost good faith. The Treaty is an agreement that can be adapted to meet new circumstances. The courtesy of early consultation is a partnership responsibility. The needs of both Maori and the wider community must be met, which will require compromises on both sides.

The concept of a partnership is fundamental to the compact or accord embodied in the Treaty of Waitangi. Inherent in it is the notion of reciprocity – the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands and all other valued possessions.

Active protection

Principle Four: Active Protection

Court of Appeal: The duty is not merely passive, but extends to active protection of Maori people in the use of their resources and other guaranteed taonga to the fullest extent possible. The obligation to grant at least some form of redress for grievances where these are established.

Waitangi Tribunal: The Maori interest should be actively protected by the Crown. The Crown right of pre-emption imposed reciprocal duties to ensure that the tangata whenua retained sufficient for their needs. The Crown cannot evade its Treaty obligations by conferring an inconsistent jurisdiction on others.

The duty of active protection extends to those interests which are guaranteed to Maori by the Treaty, primarily the continued authority to exercise rangitiratanga over natural and cultural resources.

APPENDIX 5

ENFORCEABILITY OF THE TREATY OF WAITANGI IN THE COURTS

The treatment of the Treaty of Waitangi in the courts has waxed and waned over time.

The greatest difficulty in enforcing the Treaty of Waitangi, however, remain the rule of statutory incorporation established by the Privy Council in Hoani Te Heu Heu. That rule, established in 1941, states that the Treaty is only enforceable to the extent that it is incorporated into statute.

Within the confines of this rule, the courts can still decide whether or not to take a generous interpretation of statutory incorporations of the Treaty of Waitangi, and it is arguable that the broad approach of the Court of Appeal in New Zealand Maori Council in 1987 has been significantly narrowed in the case concerning broadcasting assets in 1992.

The exact status of the Treaty of Waitangi in international law has yet to be determined.

Statutory incorporations of the Treaty of Waitangi and of Maori concerns

The following Acts, enacted since 1975, make particular reference to the Treaty of Waitangi, to the Maori perspective or to Maori interests.

Resolution of claims under the Treaty of Waitangi

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Treaty of Waitangi Act 1975

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Treaty of Waitangi (State Enterprises) Act 1988

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Crown Forest Assets act 1989

Legislation to secure rights protected by the Treaty of Waitangi

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Fisheries Act 1983

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Maori Language Act 1987

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Maori Fisheries Act 1989

Provisions requiring that regard be had to the principles of the Treaty of Waitangi

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State-Owned Enterprises Act 1986

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Conservation Act 1987

-

Resource Management Act 1991

APPENDIX 6

MAORI AND THE RESOURCE MANAGEMENT ACT ("Learning from the Maoris")

Maori have a special relationship with the land and its natural resources, through whakapapa.

This special relationship Maori have with the environment places strong obligations on them to protect the land and its natural resources.

Maori were extensively consulted during the resource management law reform process.

Many of the issues and concerns raised by Maori in consultation were incorporated into the RMA.

Other reforms happening at the same time as the resource management law reform were slow to develop or failed to eventuate. As a result the RMA's effectiveness for Maori was impeded by its inability to link to complementary legislative provisions.

What was achieved however, was an environmental regime that provided for Maori participation in resource management to a greater extent than ever before.

The RMA recognizes that Maori are not just another interest group but have special status as the tangata whenua of this country.

APPENDIX 7

THE TREATY OF WAITANGI 1840 [English text of the Treaty]

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized 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 authorize "me William Hobson a Captain" in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

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

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[Signed] W Hobson Lieutenant Governor

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.