THE TREATY AND THE SEATS

ANTHONY WICKS*

Introduction

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The overall desirability of the seats is a complex debate involving the question of the relationship of the Treaty to the seats and the question whether separate representation is consistent with the nature of the New Zealand state.4 In this article I will examine the first of these two questions. Specifically, I will consider whether the abolition of the seats in the face of substantial Māori opposition, by ordinary legislation...

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A. Background to the current legal position of the seats and the Treaty principles

The Māori seats are a form of “dedicated” or “reserved” representation. They guarantee that a certain number of seats in Parliament will be filled by Māori directly elected by Māori. The legal authority for the existence of the Māori seats is contained in the Electoral Act 1993. Sections 76 to 79 of the Act give all Māori the option of enrolling either on the general electoral roll, which is open to all voters, or the Māori roll, which only Māori voters can enrol on.

“Māori” are defined in section 3(1) of the Electoral Act as “a person of the Maori race of New Zealand; and includes any descendant of such a

1 Under the New Zealand MMP system voters get two votes: an “electorate vote” and a “party vote”. Electorate Members of Parliament (MPs) are elected to represent 69 “electoral districts”. Within each electoral district the constituency candidate who wins the most votes wins that electoral district’s seat in Parliament. Once the electorate seats have been filled an additional 51 MPs enter Parliament from party lists. List seats are distributed so that the overall share of seats in Parliament a party gains is close to the proportion of the party vote the party won at the election. A party becomes eligible to receive list seats if it gains over 5% of the party vote or wins a constituency seat. Thus, if a party gains 20% of the Party vote it will have at least 24 seats in Parliament. These will consist of however many electorate seats the party won plus the necessary amount of list seats to ensure proportionality. Usually, this results in a 120 member Parliament. However, if a party wins more constituency seats than its proportion of the party vote then extra list seats are distributed to the House of Representatives. This ensures all parties still receive a share of representation proportionate to the party vote, resulting in a Parliamentary “overhang”: See A. Geddis, *Electoral Law in New Zealand* (2007, Wellington LexisNexis) at 31-32. For further explanation of MMP see the New Zealand’s Electoral Commission’s discussion in ‘MMP: How it Works, Quiz & Calculator’, (Wellington, New Zealand Electoral Commission) http://www.elections.org.nz/voting/mmp/, accessed 30/7/08.

2 Supra n4, at 357.

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2 Supra n4, at 357.
person”. Therefore, any person with any degree of Māori descent may choose to enrol on the Māori roll. However, the choice of which roll to enrol on may only be made the first time a person enrols to vote or during the Māori electoral option.7 Voters are prohibited from changing rolls outside the Māori electoral option period.8 The Māori electoral option is held for a four month period every five years in conjunction with the New Zealand census (unless Parliament is due to expire that year in which case it must be held the following year).9

Section 45 of the Electoral Act then provides that the Representation Commission must divide New Zealand geographically into Māori electoral districts. A formula for the creation of the districts is provided in subsection 3. It ties the number of districts to the number of people on the Māori electoral roll and ensures that the population of each Māori electoral district is derived using the same procedure as for the population of general electoral districts. Each Māori electoral district then forms a constituency that corresponds to a seat in Parliament. Then on election day, voters on the Māori roll vote for a candidate in their Māori electoral district.

As enrolment on the Māori roll is voluntary, and the number of Māori seats is directly tied to the number of electors on the Māori roll, the Māori electoral option acts as a “de facto referendum” of all Māori electors on the question of whether the Māori seats should be retained.10 If Māori no longer wanted the seats they could simply choose to enrol on the general roll.

Over the past decade the numbers of Māori enrolling on the Māori roll has increased in both absolute and relative terms.11 In 2006, nearly twice as many Māori transferred to, or enrolled on, the Māori roll than on the general roll.12 In 2001 and 1997, nearly three times as many Māori transferred to, or enrolled on, the Māori roll than on the general roll.13

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1. The Electoral Act 1993, s 76(2).
2. Ibid, s 78.
3. Ibid, s 77.
5. Supra n4, at 356.
7. The Electoral Act 1993, s 76(2).
8. Ibid, s 79.
9. Ibid, s 77.
11. Supra n4, at 356.
Despite strong support from Māori, the Māori seats are still vulnerable to repeal by a simple majority in Parliament. Unlike the provisions of the Electoral Act that set out the formula for creating general electoral districts, the Māori seats are not entrenched. Accordingly, it would be entirely possible for the Māori seats to be repealed by a simple Parliamentary majority in the face of strong Māori opposition. Before turning to whether such a move would be consistent with Treaty principles it is convenient to give some background to the principles. Signed in 1840, the Treaty of Waitangi is the founding document of New Zealand. However, its exact effect is a matter of significant debate. The English and Māori versions of the Treaty are not exact translations of each other and the passage of time since the signing of the Treaty compounds difficulties in its interpretation.

In brief then, the English version of the first article of the Treaty cedes sovereignty over New Zealand to the British Crown. However, the Māori version of the first article cedes kawanatanga, which translates to...
In following sections of this essay I will examine whether the guarantee of equality in Article 3, and the guarantee of rangatiratanga in the Māori version of Article 2 of the Treaty, support the provision of reserved seats for Māori.

Due to the difficulty involved in interpreting the Treaty’s text, the courts and the Waitangi Tribunal have developed a set of Treaty principles to determine the obligations of the Treaty partners. The Privy Council has stated that the principles have become more important than the precise terms of the Treaty. According to the Privy Council, the Treaty principles are the “underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole.” Importantly, the use of these principles to determine the obligations of the Treaty partners is not immediately relevant to the provision of separate seats for Māori.

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20 I. H. Kawharu, ‘Translation of Māori text by LH Kawharu’ in Kawharu (ed), Waitangi: Māori and Pakeha Perspectives on the Treaty of Waitangi (1989, Auckland, Oxford University Press) at 319-321. Accordingly, there is much debate over whether the Treaty does in fact cede sovereignty to the Crown as the British version of the first article states. However, this debate over sovereignty is not immediately relevant to the provision of separate seats for Māori in the New Zealand legislature. For a collection of differing perspectives on the debate see supra n17 (Belgrave, Kawharu and Williams). As will be seen, arguments for a Treaty right of separate representation have been based on articles two and three of the Treaty.

21 Supra n19.

22 Ibid.

23 Supra n20.

24 Supra n 20. The Māori version of Article 3 is substantively similar to the English version. Kawharu translates it as a guarantee that the Crown will “give [Māori] the same rights and duties of citizenship as the people of England”. See supra n20.

25 The Waitangi Tribunal is charged with hearing Māori claims for breaches of the Treaty. Its jurisdiction, which is set out in s 6 of the Treaty of Waitangi Act 1975, is to inquire into any official act “that was or is inconsistent with the principles of the Treaty of Waitangi”.

26 New Zealand Maori Council v Attorney-General [1994] 1 NZLR 513 (the Broadcasting Acquisi case) at 517 per Lord Woolf.

27 Ibid at 516 per Lord Woolf.
of Treaty principles is not merely a judicial approach. The adoption of the phrase “the principles of the Treaty” in legislation creates a parliamentary mandate for their application.

The most significant statement of the Treaty principles was in the landmark case New Zealand Māori Council v Attorney-General (the Lands case).28 Here, the Court of Appeal recognised that the Treaty creates a relationship of partnership between Māori and the Crown.29 This requires the Treaty partners to act towards each other reasonably, and with good faith.30 Justice Cooke, the then President of the Court of Appeal, held that the Treaty “creates responsibilities analogous to fiduciary duties”.31

In the years since the Court of Appeal’s decision a considerable body of Treaty jurisprudence has been developed by the Waitangi Tribunal and the courts.32 The effect of these developments will be considered in more detail in discussing the obligations under Articles Two and Three of the Treaty. For the moment though it is enough to note that the Treaty continues to be interpreted according to its principles and that Lands case is still recognised as the founding case on Treaty principles.33

Although the Treaty creates obligations “binding on the honour of the Crown”, it is not automatically incorporated into New Zealand law.34 The provisions of the Electoral Act that set up the Māori seats do not make any reference to the Treaty. Therefore, regardless of the relation of the Treaty to the seats, the question of their overall desirability is dependent on the wider debate over the constitutional status of the Treaty and the status of Māori as the indigenous people of New Zealand. However, interpretation of the Treaty is, and will continue to be, fundamental to this debate. As will be seen, those who seek the retention of the seats frequently justify their position by reference to

29 Ibid, at 664 per Cooke P, at 693 per Somers J and at 702 per Casey J.  
30 Ibid, at 664 per Cooke P and at 693 per Somers J.  
31 Ibid, at 664 per Cooke P.  
32 For a summary of the developments in the jurisprudence see the summary of Treaty principles provided by Heath J in Carter Holt Harvey Ltd v Te Rangatira O Toa Kaurua [2003] 2 NZLR 349 at para 27.  
34 Hoani Te Heu Heu Tukino v Aotea District Māori Land Board [1941] AC 308.  
35 New Zealand Māori Council v Attorney-General (the Lands case) [1987] 1 NZLR 641.  
36 Ibid, at 664 per Cooke P, at 693 per Somers J and at 702 per Casey J.  
37 Ibid, at 664 per Cooke P and at 693 per Somers J.  
38 Ibid, at 664 per Cooke P.  
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The Treaty and the Seats

B. The guarantee of equality in Article 3 and the Māori seats

As has been seen, both the English and Māori versions of Article 3 of the Treaty contemplate equality for Māori in terms of legal rights, privileges and duties. However, this raises the question of whether Article 3 is a guarantee of formal or substantive equality. Formal equality refers to treating people identically in order to treat them equally. Substantive equality refers to treating people differently in order to treat them equally. The meaning of these definitions is best explained by the example used by the New South Wales Law Reform Commission to distinguish the two forms of equality:

If there are two people stuck down two different wells, one of them is 5m deep and the other is 10m deep, throwing them both 5m of rope would only accord formal equality. Clearly, formal equality does not achieve fairness. The concept of substantive equality recognises that each person requires a different amount of rope to put them on a level playing field.

In the context of an electoral system, according formal equality means ensuring that all people have identical voting rights, that is, the same chance to participate in the electoral process. Accordingly, if Article 3 is a guarantee of formal equality, then under it Māori will be entitled only to voting rights identical to the rest of the population. Therefore, Article 3 will be unable to justify reserved seats for Māori.

On the other hand, if Article 3 is a guarantee of substantive equality, then something more than simply ensuring Māori have equal voting rights will be necessary. A guarantee of substantive equality must ensure that Māori achieve equality in representation, the outcome of the Treaty. The rest of this article aims to answer one part of the puzzle over the desirability of the Māori seats by clarifying their relationship to the Treaty.

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35 Supra n4, at 365.
37 Ibid.
In considering what substantive equality in the context of political representation of an indigenous minority meant, the Canadian Royal Commission on Electoral Reform and Party Financing turned to John Stuart Mill’s “Of True and False Democracy: Representation of All, and Representation of the Majority Only”. The Commission adopted Mill’s position that “in a really equal democracy every or any section would be represented, not disproportionately, but proportionately.” The Commission found that having numerical minorities represented in national legislatures in proportion to their number was “one of the fundamental tenets of liberal democracy.”

Similarly, the 1986 New Zealand Royal Commission on the Electoral System found that membership of the House should reflect significant characteristics of the electorate, such as ethnicity. The Commission stressed that in view of Māori’s particular historical, Treaty and socio-economic status, it was particularly important that they be fairly and effectively represented.

Accordingly, if Article 3 is a guarantee of substantive equality, then it will be met if the proportion of Māori in Parliament matches the proportion of Māori in the general population of New Zealand. Thus, if structural features of the electoral system mean that Māori fail to achieve equality in representation, then the provision of reserved seats may be justified as a way of achieving the necessary level of representation.

The history of the Māori seats shows that the distinction between substantive and formal equality does have very real consequences for Māori representation. Before 1867 the right to vote was determined by a freehold property franchise set out in the Constitution Act 1852.
Formally, this applied equally to Māori and the settlers. However, while Pākehā were guaranteed representation by virtue of their ownership of property, Māori were effectively excluded from representation as almost all Māori property was communally owned.44 Similarly, the 1986 Royal Commission noted that, under New Zealand’s former First Past the Post (FPP) electoral system, because Māori were a minority in all the general electorates, there was little chance of them gaining representation in general electorates.45 There was also little incentive for candidates or parties to promote Māori interests where these clashed with Pakeha interests.46 Thus, in the past, the provision of separate seats has allowed at least some level of political representation for Māori to be achieved despite the structural features of the electoral system that worked against it.

The ambiguity over what Article 3 of the Treaty means by its guarantee of equality has led to differing interpretations of the article in the High Court and Waitangi Tribunal. In Taiaroa v Minister of Justice,47 the High Court heard a judicial review application of the exercise of the Māori Electoral Option. During the course of his judgment Justice McGechan considered the meaning of Article 3 of the Treaty.48 The Crown had argued that Article 3 was a guarantee of formal equality only, submitting that: “Article 3 conferred the right of franchise upon Māori but not the right to separate representation in Parliament”.49 Justice McGechan did not accept this submission in such bald terms but seems to have gone a long way towards doing so. His Honour accepted that: “Article 3 conferred on Māori equivalent rights to vote for, and rights to stand for election to, any future Parliament”.50 However, he went on to state: “I do not accept that vision extended precisely at the time to a

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44 Supra n4, at 352.
45 Under FFP, New Zealand was divided into a number of geographic constituencies, each of which corresponded to a seat in Parliament. At a general election individual candidates would run for election in each constituency. Voters in each constituency voted directly for their preferred candidate. The person who gained the most votes in each constituency would then represent that constituency in Parliament. See supra n6 (Geddis), at 26.
46 Supra n42, at 90-93.
47 (No 1) (High Court, Wellington CP 99/94, 4 October 1994, McGechan J).
48 Ibid, at 68-69.
49 Ibid, at 69.
50 Ibid.
right to separate Māori seats in such future Parliament.”

Just before the Taiaroa litigation, the Waitangi Tribunal too was called upon to consider the relationship of Article 3 to the Māori seats in order to determine whether the Māori Electoral option had been run in accordance with Treaty Principles. The Waitangi Tribunal found in the Maori Electoral Option Report that Article 3 guaranteed more than merely formal equality. The Tribunal stated: “The fact that [the form of Māori political representation] is, and has been since 1867, different from that of Pakeha representation does not mean that it is not embraced by [Article] 3 of the Treaty”. The Tribunal found that the right to representation is such an important and fundamental right that it was “clearly included in the protection extended by the Crown to Māori under [Article] 3”.

Neither the Waitangi Tribunal nor the High Court gives extensive discussion of their reasons for preferring their particular interpretation of Article 3. Justice McGechan argues that as the Treaty partners were “not clairvoyant” they would not have contemplated separate representation for Māori at the time of signing. He concludes that this means Article 3 cannot guarantee separate representation. Similarly, academics have argued that an historical analysis of the seats reveals that they were created more as a political expedient to foster cooperation with the Government than to give expression to Article 3.

However, with all due respect, a focus on the state of minds of the parties at the time of signing the Treaty seems to be misplaced. In his landmark judgment in the Lands case, Justice Cooke rejected approaching the Treaty with the “austerity of tabulated legalism”.

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51 Ibid.
53 Ibid at 12.
54 Ibid.
55 Supra n47, at 69.
56 Ibid.
58 Supra n28, at 665. Similarly, Bisson J rejected “a strict or literal interpretation of the Treaty” at 714 and Richardson J held that the Treaty required “a broad interpretation and
Rather, His Honour recognised that “The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas.”

Joseph provides an alternative approach to arguing that Article 3 is a guarantee of formal equality. He argues that as liberal democracies “rail against electoral privilege based on racial or ethnic distinction” Article 3 cannot be read to mandate separate representation for Māori. He asserts that partnership is a “substantively neutral concept” that cannot be used to justify electoral privilege. Joseph’s concern, that the Treaty is not used to create social division, echoes similar concerns held by Justice Baragwanath in Ngati Maru Ki Hauraki Inc v Kruithof. Here, Justice Baragwanath noted:

It is time to recognize that the Treaty did not contemplate a society divided on race lines between two groups of ordinary citizens – Maori and non-Maori, set against each other in opposing camps.

No doubt, Joseph is correct to point out that the Treaty principles do not condone social division through granting Māori unfair electoral advantage. However, Joseph is incorrect to assert that the provision of separate seats results in any such advantage for Māori voters. The legislation that provides for the seats is entirely consistent with the ideal of democratic equality.

As Māori and general electorates have the same population and the votes from them are counted in exactly the same way, votes cast in the Māori electorates are no more determinative of the election result than those cast in general electorates. The MPs from both rolls then sit in one legislature. Moreover, the party vote, which is the most important under MMP, is counted on a national basis. Accordingly, the
provision of separate seats for Māori does not create social division by giving Māori an unfair electoral advantage.

In fact, the overall nature of the Treaty relationship strongly supports viewing Article 3 as a guarantee of substantive equality. Although the Court of Appeal has recently confirmed that the Treaty does not create directly enforceable fiduciary duties, the Court did accept that the relationship envisaged under the Treaty is analogous to a fiduciary duty.68 The Court also accepted that the law of fiduciaries informs key characteristics of the obligations under the Treaty.69 Specifically, the Court noted that the relationship was one of “good faith, reasonableness, trust, openness and consultation”.70 This accords with the foundational statements in the Lands case that the Treaty created an obligation of the “utmost good faith”.71

Nowhere would the obligations outlined by the Court of Appeal seem to be more important than within the national legislature. If the Treaty is to truly signify a “partnership between races” it must ensure that both Treaty partners have a fair say in the most powerful political and law-making institution in the country.72 If Article 3 is a guarantee only of formal equality, then it would be possible for the obligations under it to be fulfilled while Māori had little or no representation in the national legislature. This cannot be consistent with an obligation of partnership. A partnership cannot sensibly be said to occur within the New Zealand legislature if one Treaty partner is not fairly represented.

Accordingly, Article 3 should be interpreted as a guarantee that Māori will be represented in the legislature in proportion to the national Māori population. I will now turn to considering whether the advent of MMP means that there is no longer any need for the Māori seats in order for the Crown to fulfill its obligations under Article 3.

68 Supra n42, at paras 71, 81.
69 Ibid, at para 81.
70 Ibid.
71 Supra n28, at 664 per Cooke P.
72 Ibid, at 664 per Cooke P.
C. MMP and substantive equality in representation

It is clear that within some electoral systems separate Māori representation would be essential to give effect to a substantive right of political representation. However, it can be argued that MMP is not one of these systems. Indeed, the 1986 Royal Commission on Electoral Reform recommended the abolition of the Māori seats on this basis.73 The Commission reasoned that under a proportional system of representation it is in the interests of each party to gain as many votes as possible from all segments of society.74 Therefore, as a numerically significant minority, Māori were very likely to be strongly represented in Parliament.75

C. MMP and substantive equality in representation

Certainly, MMP has been successful in promoting Māori representation. Since MMP was adopted the number of Māori in Parliament has more than doubled compared with the number under FPP.76 At the last two elections the number of Māori MPs in Parliament has been in rough proportion to the national Māori population. After the 2002 election Māori MPs made up 15.8 per cent of Parliament’s seats. At the time Māori made up 14.0 per cent of the population.77 After the 2005 election the national Māori population remained at 14.0 per cent of the national population whilst Māori MPs made up 19.0 per cent of the seats in Parliament.78 Furthermore, the introduction of MMP has seen more Māori Members of Parliament in positions of power in parties and in government, including more gaining ministerial portfolios.79 Thus the status quo of the MMP system combined with separate seats for Māori ensures that Māori are represented roughly proportionately.

Joseph has recently argued that the increased number of Māori

73 Supra n42, at 101-103, 106.
74 Ibid, at 101-103.
75 Ibid.
77 Ibid.
78 Ibid.
79 Supra n2, at 11 and accompanying footnote.
represented in Parliament in list and general electorate seats in the last two elections means that there is no longer any need for the Māori seats. He points out that in 2002 Māori MPs in general electorate and list seats made up 10 per cent of Parliament’s membership. This was 4.0 per cent below the proportion of Māori in the general population.

He then notes in the 2005 election that Māori MPs in general electorate and list seats made up 12.4 per cent of Parliament. This was 1.6 per cent below the proportion of Māori in the general population. Joseph then concludes:

On those figures, the percentage of Maori members holding list or constituency seats in the next Parliament will exceed that of the relative national population.

He then argues that when this occurs Māori will have achieved equal representation, meaning that Article 3 can no longer justify the provision of separate seats.

However, it is extremely speculative to predict the outcome of this year’s election based simply on the number of Māori candidates in list and general electorate seats in the past two elections. Granted, Māori members of Parliament have increased their proportion of list and general electorate seats in the last two years. However, Joseph provides absolutely no reason to suggest this trend will continue. Analysing all four of the MMP elections rather than just the last two reveals little support for such a trend.

After the 1996 election Māori held 9.5 per cent of the general electorate and list seats in Parliament. At the time Māori represented 15 per cent of the national population so the representational deficit in the general electorate and list seats was 5.8 per cent. However, after the 1999

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80 Supra n2, at 11.
81 Ibid.
82 Ibid.
83 Ibid.
84 Ibid, at 12.
85 Ibid.
87 Ibid.
88 Supra n2, at 11.
89 Ibid.
90 Ibid.
91 Ibid.
92 Ibid.
93 Ibid, at 12.
94 Ibid.
96 Ibid.
election Māori only held 8.3 per cent of the general electorate and list seats in Parliament. The national Māori population remained the same as in 1996 so the representational deficit increased to 6.67 per cent. Accordingly, although the representational deficit did decrease between 2002 and 2005, it increased between 1996 and 1999.

Therefore, the evidence that at the next election Māori will achieve representation in the list and general electorate seats proportional to their numbers in the population is equivocal at best. What we do know is that proportional representation of Māori has not yet been achieved without the use of reserved seats.

Joseph also argues that abolishing the Māori seats is justified because the nature of MMP means that it would have no adverse effect on Māori representation. He supports his claim by citing the finding of the 1986 Royal Commission. The Commission found that under an MMP system, with a common roll, parties would be encouraged to place Māori candidates high on party lists or in constituency seats in order to gain votes from those previously registered on the Māori roll.

However, the Royal Commission made its recommendation for the abolition of the seats alongside another recommendation. The Commission also recommended that parties representing primarily Māori interests should be exempt from the four per cent threshold for entry to Parliament. The Commission believed that if the threshold was waived for parties representing predominantly Māori interests then such parties would have a real chance of competing for list seats. This prospect would then encourage the major parties to compete for the Māori vote. Thus, the Commission argued that it was the combination of the waiver of the threshold, and the MMP electoral system, that would encourage parties to ensure fair representation of Māori, not the MMP system alone.

88 Ibid.
89 Ibid.
91 Supra n2, at 12.
92 Supra n2, at 12, citing supra n42, at 81.
93 Supra n42, at101.
94 Ibid.
Despite the recommendation of the Royal Commission, the Māori seats were not abolished when MMP was introduced and the threshold was not waived for parties primarily representing Māori interests. However, Claudia Geiringer has pointed out that the provision of the separate seats in the current system may serve a similar function to the waiver on the threshold envisaged by the Royal Commission. As entry into Parliament may be achieved by reaching the 5 per cent threshold, or winning a constituency seat, the Māori seats effectively provide a way for parties representing Māori interests to circumvent the threshold.

Moreover, on the Commission’s reasoning, the mere prospect of parties representing Māori interests circumventing the threshold would encourage major parties to compete more fiercely for votes from Māori. Thus, under the current electoral arrangement in New Zealand, it is the combination of the MMP system, and the provision of separate seats, that has allowed Māori to become represented in Parliament in rough proportion to their numbers in the general population.

Accordingly, abolishing the Māori seats would be to remove one of the two major incentives for parties to ensure fair representation of Māori, which may well result in a decrease in Māori representation. In these circumstances it is unlikely the abolition of the seats would be consistent with Treaty principles unless the seats were replaced with an alternative system that ensured proportional representation of Māori. One option would be to implement the Royal Commission’s suggestion of abolishing the Māori seats and instituting a waiver on the threshold for parties predominantly representing Māori interests. However, determining who should decide, and what standard should be applied to decide, whether a party represents predominantly Māori interests is an extremely difficult question. Under the status quo the difficulties of this question are avoided.

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95 See supra n15 and accompanying text for the reasons for the decision not to follow the recommendation of the Royal Commission.
96 Supra n10, at 241.
97 Ibid.
98 Ibid.
99 Ibid.
Accordingly, despite the advent of MMP, there does remain a case for the retention of the Māori seats based on Article 3 of the Treaty. It remains to be seen whether representation of Māori in general electorate and list seats will increase to a level that matches the proportion of Māori in the national population. Moreover, roughly proportional representation of Māori has been produced by the incentives produced by a combination of the MMP system and the separate seats, not by the MMP system alone. These two factors mean that it is premature to argue that the seats no longer fulfil Treaty obligations. Accordingly, the abolition of the seats without providing another mechanism to ensure proportional representation of Māori would be inconsistent with Treaty principles.

D. The relationship between Article 2 of the Treaty and the Māori seats

Like Article 3 of the Treaty, Article 2 presents an interpretative problem in determining its relation to the Māori seats. As has been seen, the English version of the Treaty guarantees to Māori title over their land and other customary property such as forestry and fisheries. However, the Māori version guarantees to Māori rangatiratanga, which has a considerably wider meaning than customary property. Although no exact definition of rangatiratanga can be given, and much controversy exists over its meaning, it is widely argued to encompass a right to self-determination. This is a right for Māori to participate in decision-making on the basis of their position as the indigenous people of New Zealand, rather than being treated the same as other minorities.

Joseph seizes on the English version of Article 2 to argue that it guarantees “Māori customary property rights, not electoral rights” and therefore cannot guarantee the Māori seats. However, this focus on the English version of Article 2 is out of step with the approach of the courts and the Waitangi Tribunal. The courts have certainly not limited

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100 Supra n22 and accompanying text.
101 Supra n23-supra n24 and accompanying text.
102 See M. Durie, ‘Tino Rangatiratanga’ in supra n17 (Belgrave, Kawharu and Williams) at 3-19 for commentary on this debate.
104 Supra n2, at 11.
their interpretation of Article 2 to customary property rights. The Māori version of the article protects *taonga*. This term translates to "treasures", and the courts have recognised that it protects more than physical possessions. The Privy Council recognised in *New Zealand Māori Council v Attorney-General* (the Broadcasting Assets case) that the Māori language is protected under Article 2. In *Bleakley v Environmental Risk Management Authority* the High Court held that the article extended to the protection of intangible spiritual beliefs. In the *Ngai Tahu Sea Fisheries Report* the Waitangi Tribunal found that retention of *rangatiratanga* qualifies the cession of sovereignty under Article one of the Treaty. Accordingly, in determining the relationship of Article 2 of the Treaty to the Māori seats, it is necessary to consider whether the seats are encompassed by the guarantee of *rangatiratanga*.

The Māori seats are frequently argued to encompass an aspect of *rangatiratanga* through their ability to give direct representation to Māori. Whereas under MMP Māori form one of many interest groups that must be balanced against others in setting party lists and policy, separate representation allows for representatives that are accountable directly and solely to Māori. The importance of direct accountability to *rangatiratanga* was made clear in the *Te Whānau o Waipereira Report*, which described *rangatiratanga* as "a leadership acting not out of self-interest but in a caring and nurturing way with the people close at heart, fully accountable to them and enjoying their support."

This special form of representation provided by the Māori seats is then consistent with the special position of Māori under the Treaty as a

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105 Supra n19.
106 Supra n20.
107 Supra n26, at 513.
109 Ibid, at [76]-[83] per McGechan J.
111 Ibid, at 269-271.
112 Supra n86; supra n4, at 365-366.
113 Ibid.
115 Ibid, at xxv.
partner of the Crown. In this way the seats have come to be seen by many Māori as an important symbol of rangatiratanga. The 1986 Royal Commission pointed out that many Māori regarded the seats as “their last vestige of a lost autonomy”. Similarly, Justice McGechan in the Taiaroa litigation stated that the ability of the seats to give Māori a “voice in the running of the new nation” have led to them becoming a “[T]reaty icon” for Māori.

Despite recognising the symbolic importance of the seats, the 1986 Royal Commission raised doubts over their efficacy, questioning whether they really were an appropriate expression of rangatiratanga. The 1986 Royal Commission pointed out that separate representation under the FPP electoral system meant that each group was only responsible to those that elected it rather than the nation as a whole. This meant that the views of Māori MPs in the House were easily ignored and that there was little incentive for those in general electorates to seek the votes of Māori on the Māori roll. Rather than leading to self-determination, this led to the marginalisation of the Māori voice by the non-Māori majority.

Moreover, Catherine Iorns Magallanes has argued that the seats may be inappropriate as a form of rangatiratanga as they rely totally on the structures of Parliament, a non-Māori institution. She goes on to argue that it is difficult to justify the seats on the basis of Treaty principles when the process of selecting representatives does little to take a Māori view of societal organisation into account.

Finally, it may be argued that rangatiratanga need not extend to the provision of separate seats. The Crown in the Taiaroa litigation submitted that Article 2 did not confer upon Māori any authority in the

116 Supra n4, at 365-366.
117 Supra n42, at 93.
118 Supra n 47, at 69. When the Waitangi Tribunal held the hearing for the Electoral Option Report it heard only incomplete submissions on the relevance of rangatiratanga to the Māori seats so expressed no concluded view on the matter. Supra n52, at 14-15.
119 Supra n42, at 93.
120 Ibid, at 90-91.
121 Ibid.
122 Ibid.
123 Supra n79.
124 Ibid.

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119 Supra n42, at 93.
120 Ibid, at 90-91.
121 Ibid.
122 Ibid.
123 Supra n79.
124 Ibid.
organs of central government. Such an argument may be supported by placing emphasis on article one of the Treaty. This cedes to the Crown "Kawanatanga" according to the Māori version and sovereignty according to the English version. Both concepts are tied to ideas of central government.

Moreover, it could be argued that forms of separate Māori representation outside of Parliament make parliamentary representation unnecessary. In recent years there has been an effort by the government to tailor government services to Māori needs and increase iwi authority through social policies such as 'Tu Tangata' and 'Closing the gaps'.

However, the criticisms of rangatiratanga outlined above are overstated. Firstly, the criticism that separate representation may be harmful has much less force in an MMP environment. Because Parliament is much more fractured under MMP, and the party vote is the most important, parties can no longer afford to ignore the wishes both of Māori MPs and voters. The current MMP system gives Māori the best of both worlds. MMP provides Māori with much more effective representation in the general electorates and in Parliament as a whole while separate representation provides directly accountable Māori representatives.

Furthermore, given their reliance on Parliament and the electoral system, the Māori seats are open to criticism as a full realisation of rangatiratanga. However, they still form a very important part of self-determination for Māori. A key Treaty principle is the notion of a partnership between Māori and the Crown. This concept is very compatible with the idea that Māori should have dedicated seats in the most powerful political and lawmaking body in the nation. Although this does require reliance on some non-Māori governance concepts, it is

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simply unavoidable. Moreover, the overwhelming support for the retention of the seats amongst Māori suggests that despite their reliance on non-Māori concepts they are still viewed by Māori as an effective form of societal organisation for the purposes of achieving self-determination.129

Indeed reliance on the structures of Parliament in some ways strengthens the current system of separate seats as a form of self-determination. As has been discussed earlier, the Electoral Act provides for the seats in such a way that they are entirely consistent with the principle of democratic equality, provided one takes a substantive view of equality.130 This means that the seats can be seen as equally legitimate to the other seats in Parliament. This makes them equally worthy of being allowed full participation in the legislature.131 Of course, the corollary of the point is that it would be much harder to justify separate seats in the national legislative body if they had a different structure to those in the general electorates.

It follows that developments at the local level, while important, should not be over-emphasised either. ‘Tu Tangata’ and ‘Closing the Gaps’ were designed with the goal of improving social disparity between Māori and Pākehā by removing discrimination, rather than focussing on redefining the constitutional relationship between Māori and the Crown and securing rangatiratanga.132 Moreover, rangatiratanga is a right to both local and national authority.133 Therefore, even to the debatable extent that the programmes were successful in promoting local autonomy, they cannot compensate for the loss of separate representation at the national level.

The Māori seats provide Māori with an important symbolic and practical aspect of rangatiratanga. Their abolition would be clear breach of Article 2 of the Treaty. With this in mind the entrenchment of the

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129 Supra n4, at 361.
130 See supra n65-supra n67 and accompanying text.
131 Ibid, at 361-365. As Geddis shows, any equality concerns about the seats are based not on a violation of the principle of democratic equality but on a concern that giving an ethnic group special status through Parliament is inconsistent with the concept of the neutral state.
132 Supra n122, at 137-140.
133 Supra n111. at 4-6.
current provisions of the Electoral Act relating to the Māori roll is desirable. The provisions are particularly important to a minority and vulnerable to repeal by a majority. In the Broadcasting Assets case the Privy Council held that if a taonga is in a vulnerable state the Crown is required to take “especially vigorous action for its protection.”134 Entrenching the Māori seats would be consistent with this obligation.

Moreover, entrenchment of the current provisions would be consistent with the principle of options. This principle was explained in the Ngāi Tahu Sea Fisheries Report.135 The Tribunal stated that the Treaty envisaged Māori having the option of retaining iwi authority and self-management of resources under Article 2 or taking up the privileges of British subjects as contemplated in Article 3. The Tribunal added that Māori should also be free to pursue a combination of these options in appropriate circumstances.136

As discussed earlier, because subscription to the Māori roll is voluntary its exercise each year represents a referendum of Māori on whether the Māori seats are still desirable.137 In this way Māori have a choice over whether they retain the seats. If Māori became dissatisfied with the seats they could effectively repeal them by switching to the general roll. However, entrenchment would stop repeal by a majority that opposed the interests of the Māori minority.

Conclusion

The abolition of the Māori seats would be inconsistent with the obligations of the Crown under the Treaty of Waitangi. Article 3 is a guarantee of substantive equality. It places an obligation on the Crown to ensure that Māori are represented in Parliament in proportion to their numbers in the national population. Despite the greatly improved representation of Māori under MMP it is still too early to conclude that the advent of MMP means that the Māori seats should be abolished. Māori have not yet achieved proportional representation in the list and general electorate seats. Moreover, as the provision of the Māori seats alongside the MMP system enhances the incentives provided by MMP

134 Supra n28, at 517 per Lord Woolf.
135 Supra n118, at 274.
136 Ibid.
137 See supra n10 and accompanying text.
for parties to ensure adequate representation of Māori, the abolition of the seats is likely to reduce Māori representation in Parliament. Accordingly, the status quo, which ensures roughly proportional representation of Māori, ought to be retained.

The seats are also guaranteed by Article 2 of the Treaty through its protection of rangatiratanga. The Māori seats provide representatives that are solely and directly accountable to Māori in the most powerful political and lawmaking institution in the country. They are therefore an important symbolic and practical aspect of rangatiratanga that should be entrenched in order to give effect to the Treaty.