

# Overview

## The constitutional significance of the Treaty of Waitangi



The Treaty of Waitangi is the founding document of New Zealand. It was signed in 1840 by representatives of the British Crown and approximately 500 Māori chiefs representing many, though not all, of the hapū of New Zealand. It was an exchange of promises between two sovereign peoples, giving rise to obligations for each party. Under the Treaty, Māori ceded to the British Crown the power to govern in New Zealand and in exchange the Crown promised to protect their chiefly authority, including their rights to their lands and other possessions. The Crown also promised to extend to Māori the same rights and privileges as British citizens. The Treaty is a forward-looking document and, whatever its precise status in domestic and international law, it is clear that the British Crown saw the acquisition of substantial Māori consent as a political prerequisite to the annexation of New Zealand as British territory. The Treaty is therefore an important part of the foundation upon which British assumption of legal sovereignty over New Zealand was based.<sup>4</sup> As New Zealand became constitutionally independent from Britain, the Treaty obligations of the British Crown were transferred to the Crown in New Zealand.<sup>5</sup>

New Zealand's constitution is constantly changing. The precise constitutional status of the Treaty has evolved over time and will continue to do so. Unlike most other countries, New Zealand does not have a single written constitution that overrides other law, but rather a more organic collection of legislation and customs which together establish the framework of our government.<sup>6</sup> The Treaty by itself cannot properly be described as a “constitution”, but it is clear that it is an integral part of New Zealand's constitutional arrangements and a key source of the government's moral and political claim to legitimacy in governing the country.<sup>7</sup> The Waitangi Tribunal has suggested that the Treaty must be seen as a “basic constitutional document”,<sup>8</sup> and the Privy Council commented in 1994 that the Treaty “is of the greatest constitutional importance to New Zealand”.<sup>9</sup> As with other core constitutional documents, such as the Magna Carta, the constitutional import of the Treaty does not depend on its formal legal status, but rather derives from the acknowledged importance of the values it represents.<sup>10</sup> As Justice Chilwell said in a key High Court case in 1987, the Treaty is “part of the fabric of New Zealand society”.<sup>11</sup>

In 1990 Sir Robin Cooke,<sup>12</sup> the then President of the Court of Appeal, speaking extra-judicially, said of the Treaty: “It is simply the most

important document in New Zealand's history".<sup>13</sup> Later, in the *Sealords* case (1993) President Cooke referred to the ongoing relevance of the Treaty when discussing the impact of the deed recording the negotiated agreement in the fisheries settlement. Here President Cooke expressly left open the question of the Treaty's precise constitutional status:

*... a nation cannot cast adrift from its own foundations. The Treaty stands. Parliament is free, if it sees fit, to repeal s 88(2) of the Fisheries Act and to make other legislative changes envisaged in the deed. Parliament was free to do so before the deed and remains free to do so afterwards. Whatever constitutional or fiduciary significance the Treaty may have of its own force, or as a result of past or present statutory recognition, could only remain.*<sup>14</sup>

Unless given force of law by an Act of the New Zealand Parliament treaty duties do not give rise to legal obligations on the Crown. Despite the limits on the legal enforceability of the Treaty of Waitangi, discussed in the next section, like all treaties it gives rise to duties on the Crown which as a matter of conscience the Crown should comply with as far as practicable. This moral obligation has been referred to as the honour of the Crown.<sup>15</sup>

The Courts and the Waitangi Tribunal have located the core meaning of the Treaty in the central exchange of law-making power for the protection of chiefly authority. At the time of the Treaty signing, Māori outnumbered Pākehā settlers by an estimated 40 to one,<sup>16</sup> and the tribes represented a powerful military force. Many commentators have suggested that in such circumstances, it seems unlikely that Māori would have agreed to the unqualified transfer of their authority to the new arrivals, and instead consider that it is more probable that they understood that the Treaty guaranteed the continuation of tribal jurisdiction over tribal affairs.<sup>17</sup>

In the important *Lands* case (1987) the Court of Appeal said that the Treaty should be interpreted as a "living instrument",<sup>18</sup> which laid the foundation for "an ongoing partnership"<sup>19</sup> between Māori and the Crown, and which must be seen as "an embryo rather than a fully developed and integrated set of ideas".<sup>20</sup> In later judgments, the Court re-emphasized that "the Treaty has to be applied in the light of developing national circumstances"<sup>21</sup> and that "the principles of the Treaty have to be applied to give fair results in today's world".<sup>22</sup> Similarly, the Waitangi Tribunal considers that the Treaty evolves in response to changing circumstances;<sup>23</sup> that the Treaty was "not intended to fossilize the status quo, but to provide direction for future growth and development ... it was not intended as a finite contract but as a foundation for a developing social contract".<sup>24</sup>

Today the New Zealand Government recognises the Treaty of Waitangi as a basis for constitutional government in this country and as the foundation for the relationship between Māori and the Crown. The Government is committed to resolving grievances arising from historical breaches of the Treaty and has explicitly stated that it will “at all times ... endeavour to uphold the principles of the Treaty of Waitangi”.<sup>25</sup> Treaty principles, as interpreted by the Courts and the Waitangi Tribunal, are derived from the spirit, intent, circumstances and terms of the Treaty. The Treaty plays an important part in government decision-making. Regarding Cabinet proposals that have legislative implications, the *Cabinet Manual* states:

*Ministers must confirm compliance with legal principles or obligations in a number of areas when bids are made for Bills to be included in the programme and priorities are awarded. In particular, Ministers must draw attention to any aspects that have implications for, or may be affected by:*

- *the principles of the Treaty of Waitangi;*
- *the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;*
- *the principles in the Privacy Act 1993;*
- *international obligations;*
- *the guidelines contained in LAC Guidelines: Guidelines on Process and Content of Legislation ...*<sup>26</sup>

This requirement imposes a constitutional obligation on Ministers, officials and Parliamentary Counsel drafting the legislation.<sup>27</sup>

## **The legal force of the Treaty today**

As described above, the Treaty is a document of considerable moral force based on the honour of the Crown. These moral obligations are significant, notwithstanding the limits of the legal enforceability of the Treaty in the Courts, and the legal status of the Treaty is not the sole determinant of its constitutional significance. While the Courts have moved towards recognition of the Treaty of Waitangi as a relevant consideration in administrative law, the orthodox proposition remains that the Treaty is not directly enforceable in the absence of statutory incorporation. In recent years, New Zealand governments have made some progress in giving effect to Treaty principles and redressing past breaches, and the Treaty is a key component of decision-making processes in the public sector.

## Summary

In New Zealand’s constitutional system, Parliament is supreme, and unlike other nations, there are no formal limits to its law-making power.<sup>28</sup> The New Zealand Courts cannot strike down legislation. Instead, the role of the Courts is to interpret and apply statutes in accordance with Parliament’s intent, and to develop case law where there is no applicable statutory rule. The Courts have indicated that when interpreting ambiguous legislation, or interpreting an express reference to the Treaty, they would not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty.<sup>29</sup> If the provisions of the statute are not clearly inconsistent with the Treaty principles, and more than one interpretation is possible, then in the process of determining what Parliament intended, the Courts will endeavor to interpret statutes in a manner consistent with the Treaty.<sup>30</sup>

The Treaty does not limit the law-making capacity of Parliament, but imposes moral obligations on the Crown. This basic principle was affirmed by the Court of Appeal in the *Lands* case (1987):

*Neither the provisions of the Treaty of Waitangi nor its principles are, as a matter of law, a restraint on the legislative supremacy of Parliament.*<sup>31</sup>

Parliament can impose a legal obligation on the executive to act in accordance with the Treaty by enacting a section in legislation that refers to the Treaty – a Treaty clause. In *Lands* (1987), Justice Richardson acknowledged that the Court’s role in developing the principles of the Treaty depended largely on a Parliamentary invitation to the Courts through a Treaty clause: “If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity”.<sup>32</sup>

As with other treaties, the orthodox view on the legal effect of the Treaty of Waitangi is that since it has not been adopted or implemented by statute, it is not part of our domestic law and creates no rights directly enforceable in Court.<sup>33</sup> In *Te Heu Heu Tukino v Aotea District Māori Land Board* (1941), the Privy Council ruled that:

*It is well settled that any rights purported to be conferred by such a Treaty of cession cannot be enforced by the Courts, except in so far as they have been incorporated in municipal law.*<sup>34</sup>

To date, this decision has been followed by the New Zealand Court of Appeal, even though some early comments from the Court suggested that the *Te Heu Heu* rule might be vulnerable to challenge.<sup>35</sup> The prevailing position in law remains that Māori seeking to assert their

Treaty rights in Court must point to a statutory reference, such as a Treaty clause. In the *Broadcasting* case (1992) Justice McKay, speaking for the majority of the Court of Appeal, reaffirmed that: “Treaty rights cannot be enforced in the Courts except in so far as they have been given recognition by statute”.<sup>36</sup> This is in keeping with the general rule that the executive, which has a monopoly on international treaty-making, cannot alter the law except through the authority of Parliament.<sup>37</sup>

However, as with other treaties, the Treaty of Waitangi can be relevant to the resolution of an issue at law in ways which do not call for the direct enforcement of its provisions.<sup>38</sup> Some cases show that in certain circumstances a Court will refer to the Treaty when interpreting legislation even though there is no Treaty reference. The Courts have always been able to draw on principles and material outside the text of particular statutes when considering the interpretation or application of the legislation. Recent jurisprudence may indicate that the New Zealand Courts are increasingly willing to refer to the Treaty as one such extrinsic aid to interpretation. In addition in some cases the Courts have said that the Treaty should have been taken into account by decision-makers as a relevant consideration, even where there is no explicit statutory direction to do so. Some commentators believe that while this evolving judicial practice leaves the rule in the *Te Heu Heu* case intact, it amounts in practice to an erosion of that rule, since it provides a way for the Courts to discuss the meaning of the Treaty, and to require decision-makers to consider it.<sup>39</sup>

In some circumstances, including especially in cases concerning criminal law, the Courts have expressly stated that the Treaty is not relevant to the case at hand. These cases emphasize the application of legislation to all New Zealanders whether they are Māori or not, and that Parliament’s law-making capacity does not derive from, nor is it limited by, the Treaty of Waitangi.

### **The status of the Treaty at international law**

The New Zealand Courts have not attempted to address the issue of the status of the Treaty at international law, except to note that it is an important question which has yet to be explicitly addressed in any case.<sup>40</sup> The question concerns the international legal capacity of Māori in 1840 to conclude an international treaty of cession. This requires an analysis of international law as it existed in 1840, and in particular, an assessment of whether Māori possessed the attributes necessary to have international treaty-making capacity.<sup>41</sup> Based on different understandings of the status of indigenous peoples at international law in 1840, scholars continue to debate the status of the Treaty of Waitangi at international law.

Notwithstanding the controversy surrounding the Treaty's international status, international law contains rules for the interpretation of treaties, which might apply to the Treaty of Waitangi.<sup>42</sup> Without stating that the Treaty is valid at international law, the Waitangi Tribunal has explicitly imported international rules on the interpretation of treaties.<sup>43</sup> Similarly, New Zealand Courts have not explicitly imported international law rules on interpretation, but it is clear that the approach taken by the Courts has strong parallels with the international law on treaty interpretation.

International interpretative rules include the international legal doctrine of good faith, which includes the rule that parties to treaties must perform their obligations in good faith.<sup>44</sup> Principles of estoppel and preclusion at international law provide that parties to a treaty are entitled to rely on the acceptance of treaty obligations by other State parties, and to act accordingly. This has parallels with the domestic concept of the honour of the Crown.<sup>45</sup> The Waitangi Tribunal has also referred to the rule of *contra proferentem* applied by some international tribunals to bilingual treaties, which dictates that in cases of ambiguity, a treaty is to be interpreted against the party drafting it. Courts in North American jurisdictions have applied an adaptation of this international law rule to treaties concluded between indigenous peoples and North American governments, and these authorities have been cited with approval by the Waitangi Tribunal.<sup>46</sup>

*In the United States, which has had considerable experience in the interpretation of treaties with the Indian people, the Supreme Court has laid down an indulgent rule which requires treaties to be construed "in the sense which they would naturally be understood by the Indians" – see Jones v Meehan (1899) 175 US 1 ... It may be regarded as an extension of the contra proferentem rule that in the event of ambiguity a provision should be construed against the party which drafted or proposed that provision. Relevant in this context is the predominant role the Māori text played in securing the signature of the various chiefs.<sup>47</sup>*

## The role of the Courts

When considering the application of Treaty clauses, the Courts have assumed what might be described as a "process role", consistent with the role played by the Courts in administrative law. This means that the Courts have not attempted to dictate a particular solution or to develop a model for resolving the grievance brought before them. Instead the Courts have reviewed the proposed or actual Crown action to assess its consistency with Treaty principles. Where the process of action has been found to be in breach of statutorily recognised Treaty

principles, the Courts have issued a declaration that the proposed decision or action should be delayed in order to require the establishment of a process designed to respect the relevant Māori interest or right. The Courts have taken the approach that, having received their views on the principles of the Treaty, it is the Crown's responsibility to decide on appropriate policy in accordance with relevant legislation and preferably in consultation with Māori.<sup>48</sup> Justice McKay of the Court of Appeal commented on the role of the Courts in the 1992 *Broadcasting* case:

*As [Justice McGechan] commented earlier in his judgment, however, it is not the role of the Court to make the policy decisions as to the particular manner in which the Crown is to carry out its Treaty obligations ... It is not the Court's role to make policy decisions or to decide on the concrete steps which would have to be taken as a minimum in order to comply with Treaty principles.<sup>49</sup>*

The following comment made by President Cooke in the *Radio Frequencies No 1* case (1991) also gives some insight into the way in which the Courts perceive their role:

*... the Treaty principles of partnership and protection of taonga, past neglect of them at times, and New Zealand's international obligations can be argued to combine to make it incumbent on the Crown to take reasonable steps to enable Māori language and culture to be promoted by broadcasting. But there is no need to express an opinion on that argument, because even on that approach I do not think that it could possibly be said that the precise path to be followed could only be defined by the Courts. The Waitangi Tribunal and Parliament have accepted that the Treaty guarantees protection for the Māori language as a taonga, but the Treaty certainly does not lay down what should be done for that purpose in allocating radio frequencies. It is a field in which, on any view, a range of options is open. If the Government, giving due weight to the Treaty principles, elects between the available options reasonably and in good faith, it seems to me that the Treaty is complied with. That would be so no matter what may be the precise legal status of the Treaty.<sup>50</sup>*

### **Treaty clauses**

As of May 2001 there were over thirty pieces of legislation that refer to the Treaty of Waitangi or its principles,<sup>51</sup> some of which require persons exercising powers and functions under an Act to consider or give effect to the principles of the Treaty when making decisions. The degree of

priority to be given to the principles of the Treaty depends on such factors as the wording of the Treaty clause (that is, how specific is the obligation?), the status of the clause in the context of the rest of the statute (that is, is it described as a priority consideration, or is it one of a number of criteria to be considered?)<sup>52</sup> and whether the clause imposes a mandatory obligation or a discretionary power. At a very general level, it could be said that some clauses direct more substantive outcomes. These clauses typically provide that conduct under the legislation must be consistent with the principles of the Treaty or must “give effect to the principles of the Treaty”. Other Treaty clauses are intended to impose what are essentially process obligations. Such clauses typically require those exercising powers under the legislation to “have regard to” or “take into account” Treaty principles.

Section nine of the State-Owned Enterprises Act 1986 (SOE Act), for example, provides that: “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”. Section nine was the subject of the important *Lands* case (1987), in which the Court of Appeal unanimously concluded that “the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act”.<sup>53</sup> The Court of Appeal issued a declaration that it would be unlawful for the Crown to transfer assets to state-owned enterprises without establishing a system to consider whether such transfers would be inconsistent with the principles of the Treaty. The Court called on the Crown to prepare a scheme of safeguards giving reasonable assurance that lands and waters would not be transferred to State-owned enterprises in such a way as to prejudice past and future Māori claims to the Waitangi Tribunal. Negotiation between the New Zealand Māori Council and the Government led to the enactment of the Treaty of Waitangi (State Enterprises) Act 1988, which is designed to give effect to section nine of the SOE Act, and confers on the Waitangi Tribunal the power to make binding orders for the return of land.<sup>54</sup>

Section four of the Conservation Act 1987 states: “This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi”. In the *Whales* case (1995) the Court of Appeal considered the application of this clause to the Marine Mammals Protection Act 1978, which was included in a schedule to the Conservation Act. The Court noted that when seeking to apply the Act to whale-watching, “the conservation object must be paramount”,<sup>55</sup> and went on to say:

*Statutory provisions giving effect to the principles of the Treaty of Waitangi in matters of interpretation and administration should not be narrowly construed. Section four of the Conservation Act 1987 required the Marine Mammals Protection Act*

*1978 and 1992 regulations (SR 1992/322) to be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi, at least to the extent that the provisions of the Marine Mammals Protection Act and regulations were not clearly inconsistent with those principles.*<sup>56</sup>

It is notable here that the Marine Mammals Act was only indirectly referred to in the Conservation Act 1987, suggesting that where an Act containing a Treaty clause requires the administration of related Acts, the Treaty principles are relevant to their implementation also.

Treaty clauses worded like those above will ordinarily require the person acting under the statute to act in accordance with the principles of the Treaty, by acting reasonably and in utmost good faith toward the Māori Treaty partner, making informed decisions, and avoiding impediments to the redress of past breaches. When considering such Treaty clauses, the Courts will seek to enforce substantive compliance with Treaty principles by the Crown. In cases where the Court has found a breach of section nine of the State-Owned Enterprises Act 1986, it has held the executive action concerned to be invalid.<sup>57</sup>

Other Treaty clauses require that decision-making processes “shall have due regard to”, “give consideration to” or “take into account” the principles of the Treaty. These various wordings impose procedural legal duties on decision-makers.<sup>58</sup> Section eight of the Resource Management Act 1991, for example, states:

*In 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 and physical resources, shall take into account the principles of the Treaty of Waitangi (te Tiriti o Waitangi).*

Clauses of this type are a direction to decision-makers to consider the principles of the Treaty in their decision-making, but the weight to be given to Treaty considerations is a decision left to those exercising the procedural functions.<sup>59</sup> A Court would not ordinarily interfere with a decision made in circumstances involving a clause like this, unless there was a failure to consider the Treaty principles, or if the decision is one which a reasonable person would not make. Generally, the decision-maker would be left to determine the priority to be given to Treaty principles in determining an outcome. The duty on decision-makers is to properly consider Māori perspectives before making a decision, and this may require some form of consultation.<sup>60</sup>

## Where there is no Treaty clause

In the absence of a reference to the Treaty in legislation, decision-makers are generally free from any legal obligations arising from the Treaty. It may be that Parliament has determined that with respect to the subject matter of the legislation, Māori should address any concerns to the Waitangi Tribunal. Parliament's silence may be interpreted as an indication that Treaty matters have been considered and a decision made that a legislative reference should not be included.

In some circumstances, however, the Courts have found that the need to consider Treaty principles may be inferred from the context and purpose of an Act, particularly where the Act relates to matters of particular concern to Māori. First, the Court may decide in such circumstances that extrinsic aids are required to determine and give effect to Parliament's intent. Second, administrative law principles may also provide a basis on which Treaty obligations may be brought to bear in the absence of a Treaty clause in legislation. These legal principles determine situations where the Court may review the decision-making process employed by a person exercising statutory discretions, and include: unreasonableness, failure to take into account relevant considerations, legitimate expectations of being heard prior to decision-making, or an error of fact on the face of the record.<sup>61</sup>

Situations where the Treaty is likely to be relevant in the absence of an explicit statutory reference can usefully be described in two categories. The first involves legislation that refers specifically to Māori or where Māori terms are used. The second arises where legislation refers to something that the Courts consider to be of special significance to Māori such as electoral processes or broadcasting. In the latter case, Māori terms will often appear in the legislation, but not always.

One example of the first approach is *Barton Prescott v Director-General of Social Welfare* (1997), where the High Court considered the Guardianship Act 1968 and the Children, Young Persons and Their Families Act 1989,<sup>62</sup> and decided that since the familial organisation of Māori must be seen as a taonga, "all Acts dealing with the status, future and control of children are to be interpreted as coloured by the principles of the Treaty of Waitangi".<sup>63</sup> The Court held that:

*We are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private, and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the Treaty in the statute.*<sup>64</sup>

An example of the second approach can be found in the High Court case of *Huakina Development Trust v Waikato Valley Authority* (1987). The case concerned the finding of the Planning Tribunal<sup>65</sup> that it could not consider Māori spiritual relationships with water bodies when allocating discharge permits under the Water and Soil Conservation Act 1967 (the Water Act). The Act does not include any references to the Treaty or to Māori values. To interpret the Act, the Court referred to a number of extrinsic aids including related legislation containing references to the Treaty and to Māori values, culture and traditions (the Treaty of Waitangi Act 1975 and the Town and Country Planning Act 1977). The Court held that the Treaty, along with Waitangi Tribunal interpretations of the Treaty, was therefore relevant to the interpretation of the Water Act. In considering the application of the Treaty, Justice Chilwell made the following comment:

*... the Treaty has a status perceivable, whether or not enforceable, in law ... There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.*<sup>66</sup>

In such instances, the Courts may consider relevant legal or moral obligations arising from the Treaty, which the Crown as a Treaty partner should comply with as far as it is reasonable and practicable to do so.<sup>67</sup>

In some cases, the Courts have expressly stated that the Treaty is not relevant to the circumstances under consideration.<sup>68</sup> Often, as noted earlier, these are cases concerning the application of criminal law, where the Treaty or an aspect of the Treaty has been argued as a defence to a criminal charge. These cases confirm that Acts of Parliament do not derive their authority from the Treaty of Waitangi or the Declaration of Independence 1835, and are binding on all persons within the territory of New Zealand, both Pākehā and Māori.