

Na, ko matou, ko nga Rangatira o te Ika  
rono, ka kuhua nei ki Waikato. Ko matou  
Tusau ka hiri nei i te pitanga o enei kaupapa  
tata i matou. Koia ka tohanga ai o...

## The principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal

Kaupururanga D his mark  
Kehiwaru E his mark  
Koromama G his mark  
Whareu H his mark  
Nataka I

Tautari V his mark  
Mokai G his mark  
Mata D his mark  
Taranaki G his mark  
Tunoi J his mark  
Tupiri S his mark  
Hakakawa W his mark  
Piriri W his mark  
Matatehokia D his mark  
Reina V his mark  
Tupara D his mark  
Mokai G his mark

Ys Kaka  
June 14/60

Signed done

Wakatane June

## Introduction

This section of the guide elaborates principles of the Treaty expressed by the Courts and the Waitangi Tribunal in the context of particular cases and claims. It begins with a brief explanation of why legislative references to the Treaty refer to its principles and also offers an overview of the different jurisdictions of the Courts and the Tribunal as well as their understanding of what principles signify.

Some earlier compilations of Treaty principles may be found in the following sources: Parliamentary Commissioner for the Environment, *Environmental Management and the Principles of the Treaty of Waitangi: Report on Crown Response to the Recommendations of the Waitangi Tribunal 1983-1988* (November 1988); *Report of the Royal Commission on Social Policy Volume III* (April 1988); and Alan Ward, *National Overview Volume Two of the Waitangi Tribunal Rangahaua Whanui Series* (1997), see especially the appendix by Dr Janine Hayward entitled: The Principles of the Treaty of Waitangi.

## Legislative references to the principles of the Treaty

The differences in the Māori and English texts of the Treaty of Waitangi have led to different understandings of the meaning of the Treaty. These differences, coupled with the need to apply the Treaty in contemporary circumstances, led Parliament to refer to the *principles* of the Treaty in legislation, rather than to the Treaty texts. It is the principles, therefore, that the Courts have considered when interpreting legislative references to the Treaty. As Justice McKay noted in the *Broadcasting* case (1992):

*It is the principles of the Treaty which are to be applied, not the literal words. The English and Māori texts in the first schedule to the Treaty of Waitangi Act 1975 are not translations the one of the other, and the differences between the texts and shades of meaning are less important than the spirit.*<sup>298</sup>

The Waitangi Tribunal has a more general jurisdiction to consider the Treaty “as embodied in its two texts”<sup>299</sup> in the course of considering whether the Crown has acted in a manner “inconsistent with the principles of the Treaty”.<sup>300</sup> The Tribunal has accordingly produced findings on specific aspects of the texts, such as the meaning of tino

rangatiratanga, and also on wider questions, such whether sovereignty was ceded under the Treaty, in addition to developing the principles.

The Courts generally comment only on the specific issues which need to be addressed for the purposes of the case at hand, such as the interpretation and application of a Treaty clause. While the opinions of the Tribunal are considered by the Court of Appeal to be of “great value”<sup>301</sup> to the Court, and are often given considerable weight in its judgments, Courts are nonetheless not obliged to give effect to Tribunal findings.<sup>302</sup> The recommendations of the Tribunal have no force in law unless accepted and acted on by a Court. This distinction was explained by President Cooke in *Te Rūnanga o Muriwhenua v Attorney-General* (1990), who when discussing the Tribunal’s findings on the nature of customary title noted:

*The crucial point is that the Waitangi Tribunal is not a Court and has no jurisdiction to determine issues of law or fact conclusively. Under s 6 of the 1975 [Treaty of Waitangi] Act it may make findings and recommendations on claims, but these findings and recommendations are not binding on the Crown of their own force. They may have the effect of contributing to the working out of the content of customary or Treaty rights; but if and when such rights are recognised by the law it is not because of the principles relating to the finality of litigation. Thus a Waitangi Tribunal finding might well be accepted by a Court as strong evidence of the extent of customary title; but unless accepted and acted on by a Court it has no effect in law. If accepted and acted on by the Court, it takes effect because the Court is determining the extent of legal rights in applying, for instance, the legal doctrine of customary title. The Court’s decision will operate as *judicata*, but not the finding of the Tribunal.*<sup>303</sup>

In the *Lands* case (1987) the Court of Appeal elaborated the principles of the Treaty as required by section nine of the State Owned Enterprises Act 1986 (the SOE Act). As President Cooke explained in that case:

*The differences between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit. This approach accords with the oral nature of Māori tradition and culture. It is necessary also because the relatively sophisticated society for whose needs the State-Owned Enterprises Act has been devised could not possibly have been foreseen by those who participated in the making of the 1840 Treaty.*<sup>304</sup>

The *Broadcasting Assets* case (1994) also concerned section nine of the SOE Act, and required the Privy Council to consider the application

of that section to the proposed corporatisation of the Crown's broadcasting assets. In this case, Lord Woolf made the following comment:

*In Their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty placed on the parties. They reflected the intention of the Treaty as a whole and included, but were not confined to, the express terms of the Treaty (bearing in mind the period of time which elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the [Treaty of Waitangi and State-Owned Enterprises] Acts do not refer to the terms of the Treaty). With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms.<sup>305</sup>*

The Waitangi Tribunal has said that: "the essence of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretation out of place".<sup>306</sup> In the *Te Roroa Report* (1992), the Tribunal explained its approach to the principles: "We have taken the word "principles" in the preamble [of the Act establishing the Tribunal] to mean "fundamental source" or "fundamental truth as basis for reasoning" (Concise Oxford Dictionary, 7<sup>th</sup> ed.)".<sup>307</sup> In the *Kaituna River Report* (1984) the Tribunal explained its jurisdiction as follows:

*Our statutory authority is to make a finding as to whether any action of the Crown, or any statute or Order in Council is inconsistent with the principles of the Treaty [emphasis in original]. This wide power enables us to look beyond strict legalities so that we can in a proper case, identify where the spirit of the Treaty is not being given true recognition.<sup>308</sup>*

In its *Muriwhenua Land Report* (1997), the Waitangi Tribunal further elaborated its view of Treaty principles and their relationship with the terms of the Treaty:

*Although the [Treaty of Waitangi] Act refers to the principles of the Treaty for assessing State action, not the Treaty's terms, this does not mean that the terms can be negated or reduced. As Justice Somers held in the Court of Appeal, 'a breach of a Treaty provision ... must be a breach of the principles of the Treaty'. As we see it, the 'principles' enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time. Conversely, a focus on the terms alone would negate the Treaty's spirit and lead to a narrow and technical approach. The Treaty cannot be read as a contract to*

*build a house or buy a car. It was a political agreement to forge a working relationship between two peoples and must be seen in light of the parties' objectives. The principles of the Treaty are ventilated by both the document itself and the surrounding experience.*<sup>309</sup>

Treaty principles are therefore informed by various sources, including the literal terms of both texts, the cultural meanings of words, the influences and events which gave rise to the Treaty, as far as these can be determined from historical sources, as well as contemporary explanations and legal interpretations.<sup>310</sup> These principles interpret the Treaty as a whole, including its underlying meaning, intention and spirit, to provide further understanding of the expectations of signatories.<sup>311</sup> In the view of the Courts and the Waitangi Tribunal, Treaty principles are not set in stone. They are constantly evolving as the Treaty is applied to particular issues and new situations. Neither the Courts nor the Waitangi Tribunal have produced a definitive list of Treaty principles. As President Cooke has said: “The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change”.<sup>312</sup>

## The principle of partnership

The principle of partnership is well-established in Treaty jurisprudence. Both the Courts and the Waitangi Tribunal frequently refer to the concept of partnership to describe the relationship between the Crown and Māori. Partnership can be usefully regarded as an overarching tenet, from which other key principles have been derived. While there appears to be substantial concurrence in the views of the Courts and Tribunal on the issue of partnership, the two bodies have sometimes differed in the language they use to give substance to the principle.

The Court of Appeal has referred to the Treaty relationship as “akin to a partnership”, and therefore uses the concept as an analogy, emphasizing a duty on the parties to act reasonably, honourably, and in good faith. The Waitangi Tribunal has also emphasized the obligation on both parties to act reasonably, honourably, and in good faith, but derives these duties from the principle of reciprocity and the principle of mutual benefit. The Tribunal has also emphasized the equal status of the Treaty partners, and the need for accountability and compromise in the relationship. The Courts on the other hand have not commented on the relative status of the parties to the partnership, other than to note that the Treaty partnership does not necessarily describe a relationship where the partners are equal. Both bodies have identified fiduciary duties as an aspect of partnership, and these discussions are addressed in the previous section of this guide.

The following discussion outlines the findings of the Courts and the Tribunal which give substance to the concept of a partnership between the parties to the Treaty, with the understanding that the concepts described below are interdependent and not easily compartmentalised. Included in this section is a discussion of the duty to make informed decisions, as a key aspect of the principle of partnership.

## The Courts

The duty to act reasonably, honourably, and in good faith

The Court of Appeal has discussed partnership at length, including the rights and obligations flowing from it, but as with other Treaty principles, no exhaustive definition of this principle has been attempted.<sup>313</sup> As noted above, the Court has commented that the Treaty established a relationship *akin* to a partnership, which imposes on the partners the duty to act reasonably, honourably, and in good faith. In the *Lands* case (1987), the Court of Appeal unanimously held that:

*The Treaty signified a partnership between races, and it is in this concept that the answer to the present case has to be found ... In this context the issue becomes what steps should have been taken by the Crown, as a partner acting towards the Māori partner with the utmost good faith which is the characteristic obligation of partnership ...*<sup>314</sup>

In *Te Rūnanga o Wharekauri Rekohu v Attorney-General* (1993) the then President of the Court of Appeal, Cooke, summarised the views of the judges in the *Lands* case in respect of partnership:

*It was held unanimously by a Court of five judges, each delivering a separate judgment, that the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably, and honourably towards the other. The words of the reasons for the judgment of the five judges differed only slightly; the foregoing is a summary of their collective tenor.*<sup>315</sup>

The Court has drawn on principles of good faith inherent in partnerships in civil law to aid its interpretation of Treaty principles. In the *Lands* case (1987), Justice Somers observed that: “Each party in my view owed to the other a duty of good faith. It is the kind of duty which in civil law partners owe to each other”.<sup>316</sup> It is important to note, however, that the Court of Appeal did not perceive partnership to mean “equal shares” between the partners nor was the analogy intended to import the law applying to business partnerships. In the *Forests* case (1989), the Court of Appeal commented that:

*Partnership certainly does not mean that every asset or resource in which Māori have some justifiable claim to share must be divided equally. There may be national assets or resources as regards which, even if Māori have some fair claim, other initiatives have still the greater contribution.*<sup>317</sup>

The then President of the Court, Cooke, explains elsewhere that the judges did not apply the term partnership in the sense of the parties “embarking on a business in common with a view to profit” but rather recognised that ‘shares’ in partnerships vary, as they do in many legal practices.<sup>318</sup> The Court found the analogy of partnership useful “because of the connotation of a continuing relationship between parties working together and owing each other duties of reasonable conduct and good faith”.<sup>319</sup>

In the *Lands* case (1987), President Cooke described the duty to act reasonably, honourably, and in good faith as “infinitely more than a formality”.<sup>320</sup> He explained that the term “reasonably” was used in the sense of what any reasonable person would decide in such circumstances, that is:

*... in the ordinary sense of, in accordance with or within the limits of reason. The distinction between on the one hand what a reasonable person could do or decide, and on the other hand what would be irrational or capricious or misdirected.*<sup>321</sup>

He further observed that Treaty principles impose a requirement for reasonable cooperation on both Treaty partners. In the *Coal* case (1989), President Cooke commented that the principles of the Treaty require the partners to make a genuine effort to work out agreements over issues arising between them,<sup>322</sup> and that “judicial resolution should be very much a last resort”.<sup>323</sup> Similarly, in *Lands*, President Cooke noted that: “the Māori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Minister, and reasonable cooperation”.<sup>324</sup> He went on to explain that:

*The principles of the Treaty do not authorize unreasonable restrictions on the right of a duly elected government to follow its chosen policy. Indeed to try and shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other cooperation.*<sup>325</sup>

The Privy Council, in considering the *Broadcasting Assets* case (1994) agreed with the Court of Appeal that the relationship envisaged in the Treaty was one “founded on reasonableness, mutual cooperation



and trust”.<sup>326</sup> The nature of this relationship requires the Crown in carrying out its Treaty obligations to take “such action as is reasonable in prevailing circumstances”.<sup>327</sup> The Court of Appeal further asserted in the *Māori Electoral Option* case (1995) “that the test is reasonableness, not perfection”.<sup>328</sup>

Justice Casey, in the *Lands* case (1987), noted that the partnership implicit in the ongoing relationship established in the Treaty required the Crown to recognise and actively protect Māori interests. In his view, to assert this was “to do no more than assert the maintenance of the ‘honour of the Crown’ underlying all its treaty relationships”.<sup>329</sup> Justice Richardson agreed that an emphasis on the honour of the Crown was important especially where the focus is on the role of the Crown and the conduct of the government, but also emphasized the reciprocal nature of Treaty obligations, requiring both partners to act reasonably and in good faith. He stated that the concept of the honour of the Crown:

*... captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners. In the domestic constitutional field ... there is every reason for attributing to both partners that obligation to deal with each other and with their treaty obligations in good faith. That must follow from the nature of the compact and its continuing application in the life of New Zealand and from its provisions.*<sup>330</sup>

## The Waitangi Tribunal

The principle of partnership was first identified explicitly in the Tribunal’s *Manukau Report* (1985).<sup>331</sup> In this report, the Tribunal held that the interests recognised by the Treaty give rise to a partnership, “the precise terms of which have yet to be worked out”.<sup>332</sup> As noted earlier, the Tribunal’s view of partnership emphasizes the obligation on both parties to act reasonably, honourably, and in good faith as duties derived from the principles of reciprocity and mutual benefit. Integral to the Tribunal’s understanding are the following concepts: the status and accountability of the Treaty partners, the need for compromise and a balancing of interests, the Crown’s fiduciary duty,<sup>333</sup> and the duty to make informed decisions.

### The principle of reciprocity

The Waitangi Tribunal’s understanding of the principle of reciprocity is derived from Articles I and II of the Treaty and captures the “essential



bargain” or “solemn exchange” agreed to in the Treaty by Māori and the Crown: the exchange of sovereignty for the guarantee of tino rangatiratanga. For the Tribunal, this exchange lies at the core of the concept of partnership. In the *Muriwhenua Fishing Claim Report* (1988), the Tribunal stated:

*It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle fundamental to our perception of the Treaty’s terms. The Treaty extinguished Māori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Māori eyes, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.*<sup>334</sup>

The Tribunal considers the following concepts integral to the principle of reciprocity: the equal status of the Treaty partners, the Crown’s obligation to actively protect Māori Treaty rights, including the right of tribal self-regulation or self-management, the duty to provide redress for past breaches, and the duty to consult.<sup>335</sup> The latter concepts are discussed later in this guide. For now it is helpful to consider an underlying premise on which the principle of reciprocity appears to be founded, namely the equal status of the Treaty partners.

Inherent in the Tribunal’s view of the principle of reciprocity is its understanding that: “The Treaty was an acknowledgement of Māori existence, of their prior occupation of the land and of an intent that the Māori presence would remain and be respected”.<sup>336</sup> In the Tribunal’s view, it is the constitutional status of Māori as the first inhabitants of New Zealand which gives rise to a Māori expectation of equal status with the Crown. In its interim *Taranaki Report* (1996), the Tribunal recognised an obligation on the Crown to acknowledge the existence and constitutional status of Māori as the prior inhabitants of New Zealand. Accordingly the Crown is obliged to respect Māori autonomy as far as practicable, that is, Māori authority and rights to manage their own policies, resources and affairs according to their own preferences.<sup>337</sup> In the *Wānanga Capital Establishment Report* (1999), the Tribunal reiterated that the reciprocal relationship between Māori and the Crown was interpreted by Māori to mean “equality of status in the partnership created by the Treaty”.<sup>338</sup>

In the *Muriwhenua Land Report* (1997) the Tribunal anchored its view of the equal status of the Treaty partners in likely Māori perspectives at the time of signing the Treaty:

*That Māori and the Governor would be equal, not one above the other. A persistent metaphor [during the northern Treaty debates] was that the Governor should not be up and Māori down.*<sup>339</sup>

The relative status of the Treaty partners was further addressed in the Tribunal’s *Te Whānau o Waipareira Report* (1998). In this report, the Tribunal noted that neither Treaty partner was subordinate to the other, and that the rights owing to each were not absolute but rather subject to the other’s needs, and to the duties of mutual respect:

*Partnership thus serves to describe a relationship where one party is not subordinate to the other but where each must respect the other’s status and authority in all walks of life. In this situation neither rights of autonomy nor rights of governance are absolute but each must be conditioned by the other’s needs and duties of mutual respect. If a power imbalance lies heavily in favour of the Crown, it should be offset by the weight of the Crown duty to protect Māori rangatiratanga. But most of all the concept of partnership serves to answer questions about the extent to which the Crown should provide for Māori autonomy in the management of Māori affairs, and more particularly how Māori and the Crown should relate to each other that such issues might be resolved.*<sup>340</sup>

The Tribunal suggested that the Crown should exercise a “double trusteeship” role to offset the power imbalance between the partners, namely “a duty to protect the Māori duty to protect and an obligation to strengthen Māori to strengthen themselves”.<sup>341</sup> According to the Tribunal, Māori communities protect and strengthen themselves through the exercise of tino rangatiratanga, therefore the Crown must recognise the status of Māori groups exercising rangatiratanga in order to honour its Treaty obligations.

### The principle of mutual benefit

The Tribunal has found that the principle of mutual benefit or mutual advantage is a cornerstone of the Treaty partnership. An underlying premise is that both partners signed the Treaty expecting to benefit from the arrangement. This principle requires that “the needs of both cultures must be provided for and compromise may be needed in some cases to achieve this objective”.<sup>342</sup> In the *Mangonui Sewerage Report* (1988), the Tribunal notes:

*The basic concept was that a place could be made for two people of vastly different cultures, of mutual advantage, and where the rights, values and needs of neither would necessarily be subsumed ... It is obvious however that to achieve the objective, compromises on both sides are required and a balance of interests must be maintained.*<sup>343</sup>

In its interim *Radio Frequencies Report* (1990), the Tribunal commented on factors that must be considered in arriving at an acceptable compromise over the allocation of radio spectrum:

*As we see it the ceding of kāwanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources. Neither Treaty partner can have monopoly rights in terms of the resource. Māori interests in natural resources are protected by the distinctive element of tino rangatiratanga ... Tribal rangatiratanga gives Māori greater rights of access to the newly discovered spectrum. In any scheme of spectrum management it has rights greater than the general public, and especially when it is being used for the protection of taonga of the language and culture.<sup>344</sup>*

In the Tribunal's view, Treaty obligations in this situation "require that the Māori partner be allocated a fair and equitable access to radio frequencies. Equity in these terms does not mean a percentage, or an arithmetically calculated share".<sup>345</sup>

In the *Ngāi Tahu Sea Fisheries Report* (1992), the Tribunal further held that the principle of mutual advantage was applicable in the context of sea fisheries. However, in arriving at a reasonable solution "neither partner in our view can demand their own benefits if there is not also an adherence to reasonable State objectives of common benefit".<sup>346</sup> In the Tribunal's opinion:

*... it was envisaged at the outset that the resources of the sea would be shared ... [This principle] recognises that benefits should accrue to both Māori and non-Māori as the new economy develops but this should not occur at the expense of unreasonable restraints on Māori access to their sea fisheries.<sup>347</sup>*

While it is clear, in the Tribunal's opinion, that Ngāi Tahu never disposed of its exclusive right to sea fisheries twelve miles out from the shoreline, the fixing of a *reasonable share* of sea fisheries beyond this zone was more difficult and must have regard to the expectations of Ngāi Tahu arising from its Treaty right of development and to the Māori Fisheries Act 1989 including any amendments providing for additional quota allocation.<sup>348</sup> The Tribunal further considered that consultation and negotiation was required between the parties to reach an acceptable compromise, and that: "the findings of the Tribunal [were] intended to provide a basis for the discussions"<sup>349</sup> between the Treaty partners. In the same report, the Tribunal elaborates a principle of compromise, outlining its nature and value:

*It is however evident that there is a need for the Crown and Ngāi Tahu to exercise utmost good faith and good will in negotiating a compromise. A compromise does not always involve a settlement based solely in the issues. It may take into account a number of external circumstances such as the public conscience, the nation's ability to meet the costs and the desirability of a permanent solution. There are also to be measured the benefits that should flow from an agreed settlement and such intangibles as the satisfaction of a long outstanding grievance and the unity of people resulting therefrom. It must be an honourable settlement and the Crown, following the sad history of the loss of Ngāi Tahu land and mahinga kai resource, has need to retrieve its honour.*<sup>350</sup>

In its *Radio Spectrum Final Report* (1999), the Tribunal reiterated: “Once again, we do not attempt to prescribe what the Māori share should be, since that is a matter for negotiation between the Treaty partners”.<sup>351</sup> The Tribunal concluded that the principle of partnership (and a fiduciary duty) requires the Crown to protect the properties of its Treaty partner, ensuring that Māori benefit equitably from new technologies (including spectrum) through ownership and management of the resource, and not merely as consumers.<sup>352</sup>

#### The duty to act reasonably, honourably, and in good faith

Drawing on the *Lands* case in 1987, the Tribunal stated in its *Orakei Report* (1987) that: “The Treaty signifies a partnership between the Crown and Māori people and the compact rests on the premise that each partner will act reasonably and in utmost good faith towards the other”.<sup>353</sup>

The Tribunal has found that acting reasonably, honourably, and in good faith requires both Treaty partners to acknowledge each other's respective interests and authority over natural resources. In its *Mohaka River Report* (1992), the Tribunal interpreted this obligation to mean that both Ngāti Pahauwera and the Crown are bound to recognise the interests of each other in the river. This responsibility required the Treaty partners to seek arrangements which acknowledge the wider public interest responsibilities of the Crown (to ensure that proper arrangements for the conservation, control and management are in place), but which at the same time protect tribal tino rangatiratanga.<sup>354</sup>

The obligation to act reasonably, honourably, and in good faith also demands that the Treaty partners accord each other respect in their interactions with each other. In the *Taranaki Report* (1996) the Tribunal recognised the right of Māori to “enjoy cooperation and dialogue with the Government”.<sup>355</sup> The Tribunal found the

Government’s past “refusal to respect Māori authority by treating Māori as the equals that they were”<sup>356</sup> as well as its unilateral policy to dominate Taranaki Māori by imposing its will<sup>357</sup> and to reject or ignore Taranaki Māori requests for mutually acceptable agreements<sup>358</sup> represented a failure on the part of the Crown to honour its Treaty obligations. The Tribunal also observed that “it was also plain good manners and common sense to treat with the leaders of a place before entering it”.<sup>359</sup>

In *Te Whānau o Waipereira Report* (1998), the Tribunal commented that partnership (and the duty to act reasonably, honourably, and in good faith) gives rise to some level of accountability between the Treaty partners:

*It is fundamental to a partnership that there is some level of accountability to each other, as a prerequisite for shared control. It is self-evident, too, that if no consideration is given to a Māori community’s values and aspirations in assessing the performance of Crown agencies, it cannot be said that the Crown and Māori are working together, nor that the principle of rangatiratanga is in fact being maintained.*<sup>360</sup>

## The duty to make informed decisions

### The Courts

The Courts have found that it is inherent in the Crown’s obligation to act in good faith that it is obliged to make informed decisions on matters affecting the interests of Māori. This obligation will in some circumstances require the Crown to consult with Māori, depending on the importance of the issue in question. The duty to make informed decisions is a legal obligation on the Crown, where the Crown is exercising a discretion under legislation containing an appropriately worded Treaty clause.<sup>361</sup> In the *Lands* case (1987), Justice Richardson observed that:

*The responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it had proper regard to the impact of the principles of the Treaty.*<sup>362</sup>

The onus on the Crown to be sufficiently informed in its decision-making on matters affecting its Treaty partner does not, however, extend to an absolute duty to consult. Justice Richardson earlier observed that:

*What is involved in the application of that fundamental good faith principle of the Treaty must depend upon the circumstances of the case ... In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty.*<sup>363</sup>

President Cooke added that the duty to consult:

*... in any detailed or unqualified sense is elusive and unworkable. Exactly who should be consulted before any particular legislative or administrative step which might affect some Māoris, it would be difficult or impossible to lay down. Moreover, wide-ranging consultations could hold up the processes of Government in a way contrary to the principles of the Treaty.*<sup>364</sup>

While the Court of Appeal did not regard the duty to consult as an absolute duty, it nonetheless recognised that it is an obvious way for the Crown to demonstrate good faith as a Treaty partner. Justice Somers observed in the same case that “while each side is entitled to the fullest good faith by the other I would not go so far as to hold that each must consult with the other. Good faith does not require consultation although it is an obvious way of demonstrating its existence”.<sup>365</sup> The Court recognised that in some cases the fulfilment of the obligation of good faith may require extensive consultation, in others the Crown may argue that it is already in possession of sufficient information “for it to act consistently with the principles of the Treaty without any specific consultation”.<sup>366</sup> In a later case, the Environment Court noted that: “The question of consultation is to be approached in a holistic manner, not as an end to itself, but in order to take the relevant Treaty principles into account”.<sup>367</sup>

Good faith implies, however, that sometimes the importance of the issue at stake will mean that the Crown cannot be regarded as sufficiently informed in the absence of consultation. In the *Forests* case (1989), the Court of Appeal observed: “We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clearly beyond argument”.<sup>368</sup> Regarding Crown commercial forestry assets, the Court ruled that it would be “inconsistent with the principles [of the Treaty] to reach a decision as to whether there should be a sale without consultation”.<sup>369</sup> The Court further observed that where consultation is required, presenting Māori with a *fait accompli*, that is, a proposal that has already been decided that you cannot correct, “assuredly would not represent the spirit of partnership which is at the heart of the principles of the Treaty of Waitangi referred to in s.9 of the State-Owned Enterprises Act”.<sup>370</sup>

A 1993 Court of Appeal case, *Wellington International Airport Ltd v Air New Zealand*, gives some direction as to the required attributes of a valid consultation exercise, although this case was not related to Treaty principles. Discussing a statutory requirement on the Wellington International Airport Authority to consult with airlines and airport users on the setting of landing fees, the Courts of Appeal held that:

*The word “consultation” did not require that there be agreement as to the (fees) nor did it necessarily involve negotiations towards an agreement, although this might occur particularly as the tendency in consultation was at least to seek consensus. It clearly required more than mere prior notification. If a party having the power to make a decision after consultation held meetings with the parties it was required to consult, provided those parties with relevant information and with such further information as they requested, entered the meetings with an open mind, took due notice of what was said and waited until they had had their say before making a decision: then the decision was properly described as having been made after consultation.*<sup>371</sup>

In other areas not directly related to the Treaty, the Courts have further elaborated their understanding of the attributes of genuine consultation. They have stated that consultation does not mean agreement nor necessarily negotiation<sup>372</sup> and is meaningful when parties are provided with sufficient information to enable them to make “intelligent and useful responses” and is undertaken with an open mind.<sup>373</sup>

Where the Crown is to give effect to the principles of the Treaty under relevant legislation, the Court has found that consultation alone cannot satisfy its obligation to actively protect the interests of Māori. In *Whales* (1995), concerning the application of section four of the Conservation Act 1987,<sup>374</sup> the Court held that it is not permissible for the Crown to try to limit the principles of the Treaty to mere consultation, when its obligation included the principle of active protection. President Cooke stated: “Since the *Lands* case ... it has been established that the principles [of the Treaty] require active protection of Māori interests. To restrict this to consultation would be hollow”.<sup>375</sup> Regarding the quality of the consultation conducted, President Cooke held that “an empty obligation to consult” by the Crown is unacceptable. President Cooke considered, in this case, that the Crown’s approach lacked “any recognition of the value to Ngāi Tahu of the right to be consulted” and reflected “an absence and even a repudiation of any suggestion that Ngāi Tahu’s representations could materially affect the decision”.<sup>376</sup> The Court also rejected the proposition that Ngāi Tahu had a veto over the allocation of new whale-watching permits under



the Marine Mammals Protection Regulations 1992.<sup>376</sup> In a later case, *Watercare Services v Minhinnick* (1998), the Court of Appeal held that:

*s 8 [of the Resource Management Act 1991] in its reference to the principles of the Treaty did not give any individual the right to veto any proposal ... It is an argument which serves only to reduce the effectiveness of the principles of the Treaty rather than to enhance them.*<sup>378</sup>

The Environment Court has produced a significant volume of findings on the obligations to Māori of local government (not considered to be “the Crown”) and has placed emphasis on a duty to consult as an aspect of section eight of the Resource Management Act 1991 (the RMA).<sup>379</sup>

The Environment Court has confirmed that the duty to consult entails a decision maker being fully informed. Where this standard has been met, the decision maker’s decision has been supported by the Court as an appropriate exercise of their role.<sup>380</sup> In other cases, such as *Te Rūnanga o Tauramere v Northland Regional Council* (1996),<sup>381</sup> consultation with Māori did not reach the standard required by section eight. In this case, the Environment Court (the then Planning Tribunal) identified a principle of consultation<sup>382</sup> and held that: “[Treaty principles] ... deserve more than lip-service but are intended by Parliament to affect the outcome of resource management in appropriate cases”.<sup>383</sup>

The Environment Court has rejected the proposition that the duty to consult under section eight of the RMA “is no more than procedural or deliberative”.<sup>384</sup> In *Hanton v Auckland City Council* (1994), the Environment Court considered that a consent authority was not obliged to consult tangata whenua when processing a resource consent application. The Court noted in its discussion that: “Because of its place in Part II of the Act, and because of its subject matter, section [eight] is an important provision, to be given fair, large and liberal construction, and not read down”,<sup>385</sup> and that: “Consent authorities receiving and processing resource consent applications ... are bound to take into account the principles of the Treaty”.<sup>386</sup> The Court found, however, that where the consent authority is not the Crown, section eight does not include “any imposition on consent authorities of the obligations of the Crown under the Treaty or its principles”.<sup>387</sup>

The Environment Court has found that in respect of consultation, a shared duty exists. In *Rural Management Limited v Banks Peninsula District Council* (1994), the Court noted that “the Treaty of Waitangi requires a partnership between the peoples of New Zealand. The

highest Courts of the lands have held that this partnership requires consultancy between Māori and European”.<sup>388</sup> The Court went on to explain that:

*... consultancy is a two-way process, particularly within the partnership concept. If one party is actively facilitating a consultative process and the other party chooses to withdraw as happened in the present case then the party who chooses to withdraw without giving any reasons for that withdrawal cannot, in our opinion, be later heard to complain that the principles of the Treaty have been infringed.*<sup>389</sup>

In *Ngāti Kahu v Tauranga District Council* (1994), the Environment Court found that consultation need not result in consensus:

*The council is not bound to consult [local hapu] for however long it takes to reach a consensus. It must consult for a reasonable time in a spirit of goodwill and open-mindedness, so that all reasonable (as distinct from fanciful) planning options are carefully considered and explored. If after this process the parties are in a position of ultimate disagreement, this must be accepted as the outcome. If consensus is reached, the council can provide no guarantee of inalterability.*<sup>390</sup>

### The Waitangi Tribunal

The Waitangi Tribunal has also placed emphasis on informed decision-making, particularly the value and utility of consultation in upholding the Treaty partnership. In its *Manukau Report* (1985), the Tribunal considered that:

*Consultation can cure a number of problems. A failure to consult may be seen as an affront to the standing of the indigenous tribes and lead to a confrontational stance. Admittedly some values and traditions are not negotiable but the areas for compromise remain wide.*<sup>391</sup>

In the *Mangonui Sewerage Report* (1988), the Tribunal recognised the value of early discussions with affected parties prior to formal consultation, stating:

*Early discussions build better understandings in an area of cultural contact where the potential for conflict is high. Agreements may not be reached but new insights may be obtained and the subsequent debate may at least be better informed.*<sup>392</sup>

The Tribunal also acknowledged the challenges arising when a statutory body is unclear about whom to consult, noting that when particular

local projects are proposed, consultation should occur with the district tribes, and that the tribes should be supported in developing tribal mechanisms for effective interaction with the Crown:

*It appears to us that a great deal needs to be done to give formal recognition to properly structured tribal bodies, to define their roles, to provide for consultation between local and tribal authorities in proper cases, and to furnish the resources for tribal councils to be adequately informed and effectively involved.<sup>393</sup>*

The Tribunal went on to say that:

*... there should be consultations with the district tribes in our view, when certain local projects are proposed. An individual right of objection is not an adequate response to the Treaty's terms ... Criticism that a tribe has failed to object is largely to blame the victim of the historic process for its current condition ... Modern circumstances compel the need for legally cognisable forms of tribal institutions with authority to represent the tribe on local issues and adequate resources to assist the formulation of tribal opinion.<sup>394</sup>*

In the *Muriwhenua Fishing Claim Report* (1988), the Tribunal considered that in circumstances where the rights of Māori might be compromised, the Crown is obliged not only to consult with Māori, but to negotiate with them to ensure they retain sufficient resources for their survival and well-being:

*In protecting the Māori interest [the Crown's] duty was rather to acquire or negotiate for any major public user that might impinge upon it. In the circumstances of Muriwhenua, where the whole sea was used, and having regard to its solemn undertakings, the Crown ought not to have permitted a public commercial user at all, without negotiating for some greater right of public entry. It was not therefore that the Crown has merely to consult, in the case of Muriwhenua; the Crown had rather to negotiate for a right ... As we have said, the principle was that despite settlement, Māori would not be relieved of their important properties without an agreement; and for their own protection there was a duty to ensure that they retained sufficient for their subsistence and economic well-being.<sup>395</sup>*

In its *Radio Frequencies Report* (1990) the Tribunal noted that consultation requires a concerted effort by both Treaty partners:

*... to determine the precise extent of present and future needs on the one hand, and realistic obligations on the other, if in-*

*formed decisions are to be made ... consultation must recognise (as it does in this case) that Māori are not a homogenous group and that the Treaty talks of tribes rather than an amorphous body now called “Māoridom”. The protection of tino rangatiratanga means that iwi and hapū must be able to express their autonomy in the maintenance and development of their language and their culture. This inevitably involves taking more time over the consultation process, but this may provide a refreshing experience and an opportunity to get it right the first time, in pragmatic terms.*<sup>396</sup>

In this report, the Tribunal stressed the need for adequate time to be given to consultation processes. The Tribunal found that the Crown had “failed to recognise the extent to which consultation with iwi would be necessary, and the time which ought to have been allowed for this purpose”.<sup>397</sup> The Tribunal considered that allowing insufficient time and making a premature government announcement on the allocation of frequencies to iwi effectively terminated the consultation process before it was complete. In the Tribunal’s opinion, the Crown’s “allocation became a unilateral act impeding the process of protection, promotion and development”.<sup>398</sup>

Elsewhere the Tribunal has noted a strong preference within Māori communities for face to face consultation or *kanohi ki te kanohi*, *kanohi kitea*. The Tribunal has noted that: “the Māori consensus process requires a high level of community involvement and debate” and that tribal leaders are reluctant to express views that have not been tribally approved.<sup>399</sup> Thus, to fulfil the purpose of consultation, the process may need to include *hui* where information is received, further *hui* where Māori debate and consider the information, and then again, *hui* where Māori make their views known.

In the *Ngāi Tahu Report* (1991) the Tribunal, accepting that the Court of Appeal in the *Lands* case (1987) had rejected an absolute duty of consultation, outlined areas where consultation was required to uphold Treaty obligations. The Tribunal expressed the view:

*... that in some areas more than others consultation by the Crown will be highly desirable, if not essential, if legitimate Treaty interests of Māori are to be protected. Negotiation by the Crown for the purchase of Māori land clearly requires full consultation. On matters which might impinge on the tribe’s rangatiratanga consultation will be necessary. Environmental matters, especially as they may affect Māori access to traditional food resources – mahinga kai – also require consultation with the Māori people concerned. In the contemporary context, resource and other forms of planning, insofar as they may im-*

*pinge on Māori interests, will often give rise to the need for consultation. The degree of consultation required in any given instance may ... vary depending on the extent of consultation necessary for the Crown to make an informed decision.*<sup>400</sup>

Where matters impinge on the rangatiratanga of tribes, then consultation is clearly required. In the *Ngāi Tahu Sea Fisheries Report* (1992) the Tribunal noted:

*The duty to consult does not exist in all circumstances ... [However] (g)iven the express guarantee to Māori of sea fisheries, consultation by the Crown before imposing restrictions on access to or the taking by Māori of their sea fisheries is clearly necessary. Such matters plainly impinge on the rangatiratanga of tribes over their sea fisheries.*<sup>401</sup>

The Waitangi Tribunal advanced a similar view in response to a Treaty claim concerning the ownership of and right to control the Ngāwhā geothermal resource. In its *Ngāwhā Geothermal Resources Report* (1993), the Tribunal concluded that if the obligation of active protection of Māori Treaty rights is to be fulfilled, then:

*Before any decisions are made by the Crown or those exercising statutory authority on matters which may impinge upon the rangatiratanga of a tribe or hapū over their taonga, it is essential that full discussion with Māori take place.*<sup>402</sup>

In later reports the Tribunal noted that consultation between the Crown and Māori communities should enhance the exercise of rangatiratanga and serve to strengthen the Treaty partnership. In its *Te Whānau o Waipareira Report* (1998) the Tribunal expressed the view that the proper balancing of tino rangatiratanga and kāwanatanga is to be found in consultation and negotiation, “conducted in a spirit of partnership with the mutual goal of enhancing the status of the other party and the quality of the relationship”.<sup>403</sup> The Tribunal found that Te Whānau o Waipareira exercises rangatiratanga in matters of welfare, and it should be consulted by the Crown when its interests are affected, including in respect of services planning in the district. The Tribunal further commented that consultation should include each Māori group delivering social services in an area, including the local tangata whenua:

*... each Māori group in a district should be consulted about how delivery of and funding for social services might best promote the development of Māori communities in the district ... However, because of the dynamic interplay of rangatiratanga, several Māori communities may coexist in one area, and each is*

*entitled to similar consideration. So, for example, Ngāti Whatua as tangata whenua in West Auckland should also be consulted on services planning and funding priorities.*<sup>404</sup>

The Tribunal also cautioned that the Crown should seek to ensure that consultation forums involving government agencies do not “overwhelm the Māori voices”.<sup>405</sup>

## The principle of active protection

The Crown’s duty of active protection is a central Treaty principle, which was first raised by the Waitangi Tribunal in its early reports, and affirmed by the Court of Appeal in 1987, in the *Lands* case. The Tribunal further elaborated the principle in its post-1987 reports. The principle encompasses the Crown’s obligation to take positive steps to ensure that Māori interests are protected. The Courts have considered the principle primarily in association with the property interests guaranteed to Māori in Article II of the Treaty. The Waitangi Tribunal has also emphasized the Crown’s stated aims in the preamble of the Treaty and in Article III.

The Preamble records the Queen’s desire to “protect the chiefs and subtribes of New Zealand” (in the English translation of the Māori text)<sup>406</sup> and to “protect [tribal] just rights and property and to secure to them the enjoyment of Peace and Good Order” (in the English text).<sup>407</sup> By Article III of the English text, the Queen extends her “royal protection to the Natives of New Zealand”, and in the translation of the Māori text, the Queen promises to “protect all the ordinary people of New Zealand”.<sup>408</sup> The Tribunal has elaborated the principle of protection as part of its understanding of the exchange of sovereignty for the protection of rangatiratanga, and has explicitly referred to the Crown’s obligation to protect Māori capacity to retain tribal authority over tribal affairs, and to live according to their cultural preferences. Later Tribunal reports also place emphasis on the Crown’s duty to protect Māori as a people, and as individuals, in addition to protecting their property and culture.

## The Courts

In the *Lands* case (1987), the Court of Appeal accepted earlier Tribunal findings that the Crown had a positive duty to protect Māori property interests, saying that:

*... the duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable. There are passages in*

*the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Māori reports that support that proposition and are undoubtedly well founded.*<sup>409</sup>

The Crown's duty to actively protect te reo Māori as a taonga was discussed by Justice Hardie Boys of the Court of Appeal in the *Broadcasting* case (1992):

*It was not disputed either that the prime objective of the Treaty was to ensure a proper place in the land for the two peoples on whose behalf it was signed. Nothing could be further from that objective than the obliteration of the culture of one of them or its absorption into that of the other. Thus protection of the Māori language, an essential element of Māori culture, was and is a fundamental Treaty commitment on the part of the Crown.*<sup>410</sup>

In the subsequent appeal to the Privy Council, the duty of active protection was further elaborated. The *Broadcasting Assets* case (1994) contains an important and detailed analysis of the scope of the Crown's duty of active protection under the Treaty. The Council advised that the Crown's duty was not an absolute one, but was an obligation which could change in accordance with the extent of the Crown's other responsibilities and the vulnerability of the taonga in question. The Council also referred to the need for Māori to take steps to ensure the survival of the language in partnership with the Crown: "Under the Treaty the obligation is shared. Māori are also required to take reasonable action, in particular action in the home, for the language's preservation".<sup>411</sup> The Council linked the duty to actively protect Māori interests with the concept of reasonableness:

*Foremost among [Treaty] "principles" are the obligations which the Crown undertook of protecting and preserving Māori property, including the Māori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Māori ... It does not however mean that the obligation is unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Māori and the Crown. The relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For exam-*



*ple in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant.*<sup>412</sup>

The Privy Council noted that the duty of active protection requires vigorous action where a taonga is threatened, especially where its vulnerability can be traced to earlier breaches of the Treaty:

*... if as is the case with the Māori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations. This may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches of the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action.*<sup>413</sup>

In the *Whales* case (1995), the Court of Appeal considered that where the Crown is directed to give effect to Treaty principles, this included the duty of active protection, and the duty could not be limited to consultation or mere matters of procedure.<sup>414</sup>

In a High Court decision concerning the Crown's handling of the 1994 Māori Electoral Option, *Taiaroa and Others v Attorney-General*, Justice McGechan took the opportunity to offer some observations about the possibility of a Crown Treaty duty to protect the Māori Parliamentary seats, if Māori wished to retain them:

*The seats became a Treaty icon. Equally there is no doubt Treaty principles impose a positive obligation on the Crown, within constraints of the reasonable, to protect the position of Māori under the Treaty and the expression from time to time of that position ... Māori representation – Māori seats – have become such an expression. Adding this together, for my own part I consider the Crown was and is under a Treaty obligation to protect and facilitate Māori representation.*<sup>415</sup>

## **The Waitangi Tribunal**

As noted earlier, the Tribunal locates the principle of protection in the fundamental exchange recorded in the Treaty: the cession of sovereignty in return for the guarantee of tino rangatiratanga. The Tribunal's conception of the Māori interests to be protected go beyond property and encompass tribal authority, Māori cultural practices and Māori themselves, as groups and individuals. The Tribunal has endorsed a holistic reading of the Treaty, and presents the principle

of protection as a theme fundamental to the entire document, which is explicitly referenced in the Preamble and Article III, and which is not confined to Article II matters.

One of the first references to the principle of protection can be found in the Tribunal's *Manukau Report* (1985):

*The Treaty of Waitangi obliges the Crown not only to recognise the Māori interests specified in the Treaty but actively to protect them. The possessory guarantees of the second article must be read in conjunction with the preamble (where the Crown is “anxious to protect” the tribes against envisaged exigencies of emigration) and the third article where a “royal protection” is conferred. It follows that the omission to provide that protection is as much a breach of the treaty as a positive act that removes those rights.*<sup>416</sup>

In its *Waiheke Island Report* (1987), the Tribunal linked the principle of protection to the honour of the Crown, addressing the Crown's exercise of its right of pre-emption with respect to Māori lands:

*In approaching the specific terms of the Treaty then, the honour of the Crown is always involved and no appearance of delimiting the Crown's undertaking should be sanctioned. I do not consider therefore that the Crown's pre-emptive right, conferred in Article the second, is to be construed as meaning that the Crown is not honour bound to afford some greater protection than that of enquiring on the willingness to sell.*<sup>417</sup>

Tribunal reports produced following the 1987 *Lands* case frequently cite with approval President Cooke's comment on the duty of active protection. The *Mohaka River Report* (1992) employs the language used by the Court in *Lands* to confirm that: “It is a principle, and indeed a very important principle of the Treaty, that the Crown is obliged to protect Māori property interests to the fullest extent reasonably practicable”.<sup>418</sup> In *Te Whanganui-ā-Orotu Report* (1995), the Tribunal endorsed the view of the Privy Council in the *Broadcasting Assets* case (1994): “It appears to us that the Privy Council's statement that the Crown's undertaking to protect and to preserve Māori taonga (property) is foremost among the Treaty principles”.<sup>419</sup> The high priority to be given to the principle of protection was stated in the *Muriwhenua Land Report* (1997):

*The principles of the Treaty flow from its words and the evidence of the surrounding sentiments, including the parties' purposes and goals. Four are important in this case: protection, honourable conduct, fair process and recognition, though all may be seen as covered by the first.*<sup>420</sup>

The scope of those interests protected under the Treaty was explained in the *Muriwhenua Fishing Claim Report* (1988):

*In article 3, the Crown’s protection applies in respect of “nga tikanga katoa” – all customs and values – just as it did to those of British subjects; and the term “taonga” in article 2 encompasses all those things which Māori consider important to their way of life, which rangatiratanga so clearly is. For so long as there is adherence to such fundamental values as rangatiratanga entails, Māori custom survives, although in a number of new institutions and forms, and is guaranteed Crown protection.*<sup>421</sup>

In the *Ngāi Tahu Fisheries Report* (1992) the Waitangi Tribunal located the Crown’s obligation to protect Māori property rights within its obligation to protect Māori rangatiratanga: “The Crown obligation to protect Māori rangatiratanga required it actively to protect Māori Treaty rights, including Māori fisheries rights”.<sup>422</sup> In the *Te Reo Māori Report* (1986), the Tribunal applied the principle of protection to Māori language and culture: “The word [guarantee] means more than merely leaving the Māori people unhindered ... It requires steps to be taken to ensure that Māori people have and retain the full exclusive and undisturbed possession of their language and culture”.<sup>423</sup> In the *Māori Electoral Option Report* (1994) the Tribunal found:

*... that the Crown is under a Treaty obligation actively to protect Māori citizenship rights and, in particular, existing Māori rights to political representation conferred under the Electoral Act 1993. This duty of protection arises from the Treaty generally and in particular from the provisions of article 3.*<sup>424</sup>

The Tribunal, in the *Ngāti Rangiteaorere Report* (1990), said that: “The Crown’s obligation under the Treaty to protect the Māori and their lands involved also an obligation properly to consult them before disposing of their lands to the Crown, or by way of Crown grant, to any other party”.<sup>425</sup> In the *Te Maunga Railways Report* (1994), the Tribunal noted the Crown’s duty to protect rangatiratanga, and applied this duty to lands compulsorily acquired by the Crown under the Public Works Act 1928:

*The Crown has a duty of active protection of Māori rangatiratanga. It may be interpreted as a positive and proactive use of the discretion of the Crown toward the Māori partner in the Treaty of Waitangi to return Māori lands compulsorily taken, and no longer required for the purposes for which they were taken, without requiring payment at market value.*<sup>426</sup>

The *Ngāwhā Geothermal Resources Report* (1993) contains an

important Tribunal analysis of the component parts of the Crown's duty of protection:

*The duty of active protection applies to all interests guaranteed to Māori under article 2 of the Treaty. While not confined to natural and cultural resources, these interests are of primary importance. There are several important elements including the need to ensure:*

- *that Māori are not unnecessarily inhibited by legislative or administrative constraint from using their resources according to their cultural preferences;*
- *that Māori are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued use or enjoyment of their resources whether in spiritual or physical terms;*
- *that the degree of protection to be given to Māori resources will depend upon the nature and value of the resources. In the case of a very highly valued rare and irreplaceable taonga of great spiritual and physical importance to Māori, the Crown is under an obligation to ensure its protection (save in very exceptional circumstances) for so long as Māori wish it to be protected ... The value to be attached to such a taonga is a matter for Māori to determine;*
- *that the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled.<sup>427</sup>*

The *Muriwhenua Fishing Claim Report* (1988) contains a detailed analysis of the duty of protection applied to Māori fishing rights:

- (i) *The protection guaranteed applies to the fullest extent from time to time practicable ...*
- (j) *The duty to protect is an active duty and not merely passive. Accordingly,*
  - (i) *The Crown's protection is not limited today to a 3 mile coastal band if in fact the Crown's sovereignty was once so restricted to 3 miles ...*
  - (vi) *The guarantee is greater than a right to use or a shared right of access ...*
  - (vii) *The fact that a fishery may mean either a fishery according to a species or a fishing place or zone*

- cannot reduce the guarantee. The guarantee includes both the reservation of a right to fish and a protection of the place of fishing ...*
- (k) *The duty to protect is an active duty. It requires more than the recognition of a right. The Crown must take all necessary steps to assist Māori in their fishing to enable them to exercise that right.*<sup>428</sup>

In the 1992 *Fisheries Settlement Report* the Tribunal considered that the Crown’s obligation to protect the Māori fishing interest is an ongoing duty that cannot be extinguished, unless all who have an interest agree. The Tribunal stated:

*The Treaty promised protection for Māori fishing interests for so long as Māori wish to keep them. The extinguishment of those interests is quite a different matter from providing rules and policies to protect and manage them. Some general consensus may do for the latter, but the former requires the consent of all with an interest, or their appropriate representatives ... The Crown is obliged to actively protect the Māori fishing interest. This is not an obligation that can be extinguished, or got rid of at any one point in time. The most that can be said is that the Crown has acquitted itself well of its current obligations in the present circumstances. Who can say what the future may hold however, or what adjustments may be needed if fish management policies change?*<sup>429</sup>

Elsewhere in this report the Tribunal noted:

*Who can predict the future however? Circumstances change. The protection needed for today may be different for tomorrow. The essence of the Treaty is that it is all future looking. It is not about finite rules, or final pay-offs, no matter how handsome. It is about the maintenance of principle over ever-changing circumstances. Accordingly, the abrogation of the Treaty interest, and the implicit responsibility of the Crown that goes with it, is a contradiction of the Treaty’s terms.*<sup>430</sup>

The Tribunal therefore found that it was “inconsistent with the Treaty and prejudicial to Māori, to legislate for the extinguishment of treaty fishing interests; or otherwise to make those interests legally unenforceable”.<sup>431</sup>

In more recent reports, the Tribunal has turned its attention to the Crown’s duty to protect Māori institutions and ways of life. In the *Te Whānau o Waipareira Report* (1998), the Tribunal considered the Crown’s responsibilities to recognise and deal with non-traditional Māori groups, such as urban Māori authorities, as well as the tribes.

In the course of its analysis, the Tribunal emphasized that: “The Treaty was directed to the protection of Māori interests generally and not merely to the classes of property interest specified in article 2”.<sup>432</sup> It went on to explain that the duty was owed equally to non-traditional groupings:

*The second principle is that the Treaty promised protection in order that Māori would fully benefit from the settlement of Europeans to which they had generously agreed. That promise, in our view, was for all Māori and according to the circumstances that might pertain from time to time. It extends today to non-kin based Māori communities that, through choice or dint of circumstance, do not or are not able to participate in the traditional tribal way.*<sup>433</sup>

The Tribunal emphasized the explicit guarantee of active protection in Article III:

*... the principle [of protection] found expression in article 3, that “Her Majesty the Queen of England extends to the Natives of New Zealand Her Royal Protection”. This passage, in our view, and having regard to the context of the Treaty’s execution, is to be read separately from the words that follow – “and imparts to them all the Rights and Privileges of British Subjects” – so that article 3 contains two important messages, not one as Crown counsel assumed: the protection of the Māori as a people and the assurance to them of equal citizenship rights.*<sup>434</sup>

## The principle of redress



### The Courts

The Court of Appeal has acknowledged that it is a principle of partnership generally, and of the Treaty relationship in particular, that past wrongs give rise to a right of redress. This acknowledgment is in keeping with the fiduciary obligations inherent in the Treaty partnership. In the *Lands* case (1987), President Cooke accepted that the Treaty gave rise to an obligation on the Crown to remedy past breaches. He further observed that:

*... if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it – which would be only in very special circumstances, if ever. As mentioned earlier, I prefer to keep open the question whether the Crown ought ordinarily to grant any precise form of redress that may be indicated by the Tribunal.*<sup>435</sup>

Justice Somers, in the same case, considered that where breaches of the Treaty had occurred, then a fair and reasonable recognition of and recompense for the wrongdoing was required:

*The obligations of the parties to the Treaty to comply with its terms is implicit, just as the obligations of parties to a contract to keep their promises. So is the right of redress for a breach which may fairly be described as a principle, and was in my view intended by Parliament to be embraced by the terms it used in s 9 [of the State-Owned Enterprises Act 1986]. As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other – a fair and reasonable recognition of, and recompense for, the wrong that has occurred. That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal.<sup>436</sup>*

Justice Richardson, in the same case, considered that the Crown has a responsibility to take positive steps to remedy Treaty grievances, recognising the significance of land to Māori people:

*... the protection accorded to land rights is a positive “guarantee” on the part of the Crown. This means that where grievances are established, the State for its part is required to take positive steps in reparation ... [recognising] that [for Māori] possession of land and the rights to land are not measured simply in terms of economic utility and immediately commercial values.<sup>437</sup>*

Justice Bisson likewise noted that in some cases monetary compensation will not satisfy the Crown’s Treaty obligation to remedy breaches of the Treaty, suggesting that other forms of redress may be required:

*Regard must be had for the special relationship of the Māori people to their land, so that compensation in money terms is not a satisfactory recompense in the case of some grievances.<sup>438</sup>*

In this case the Court ruled that the Crown was obliged to ensure that in the transfer of lands from Crown control to state-owned enterprises, the Māori partner’s right of redress was not prejudiced.<sup>439</sup> In the *Coal* case (1989) President Cooke emphasized the Crown’s duty to fully honour its Treaty obligation to remedy past breaches and not to foreclose in advance available means of redress without the agreement of its Treaty partner. He states:

*It is obvious that, from the point of view of the future of our*



*country, non-Māori have to adjust to an understanding that does not come easily to all: reparation has to be made to the Māori people for past and continuing breaches of the Treaty by which they agreed to yield government. Lip service disclaimers of racial prejudice and token acknowledgements that the Treaty has not been honoured cannot be enough. An obligation has to be seen to be honoured ... What is clear in my opinion is that any attempt to shut out in advance any Tainui claim to be awarded some interest in the coal and surplus lands in issue in this case is not consistent with the Treaty. Unchallenged violations of the principles of the Treaty cannot be ignored. Available means of redress cannot be foreclosed without agreement.*<sup>440</sup>

President Cooke, in a later case, summarized the view of the Court of Appeal on the Crown's obligation to redress past breaches. In the *Broadcasting* case (1992) he commented:

*It was recognised by this court in New Zealand Māori Council v Attorney-General (1987) 1 NZLR 641 (the Lands case) that Treaty principles extend to requiring active and positive steps to redress past breaches.*<sup>441</sup>

In the *Dams* case (1994), Māori plaintiffs sought to prevent the Minister from approving a plan for the transfer of hydroelectric dams from Crown ownership. They were concerned that the transfer would remove the dams and their electricity production from the scope of properties which might be offered to them as redress for their claims to the Wheao and Anuwhenua rivers. The Court of Appeal held that: "The Treaty of Waitangi ... could not sensibly be regarded today as meant to safeguard rights to generate electricity".<sup>442</sup> The Court went on to say:

*... any negotiated redress for any Māori grievances relating to electricity generation cannot realistically be supposed to lie in a surrender or modification of the ownership of generating assets intended to serve district or regional or wider communities as a whole. With respect, we are not convinced by a suggestion to the contrary in the Waitangi Tribunal's Te Ika Whenua – Energy Assets Report (1993) at p 39.*<sup>443</sup>

In the *Radio NZ* case (1996), concerning the Crown's action in selling commercial radio to private enterprise, the Court of Appeal considered the Crown's fiduciary duties arising from the relationship established in the Treaty and the implications for redress. The Court considered that the obligation to act reasonably and in good faith:

*... cannot be divorced from past breaches [and] ... on the basis of established [legal] authority, therefore, it is open to Māori to argue that any such breaches, whether historical or recent, require affirmative action to be redressed. The fact that a sale of commercial radio may have been completed does not mean that Māori are without a remedy. Nor does it mean that the Crown has met the standard required pursuant to its fiduciary obligations, or that Māori may not have a real interest in establishing the Crown's default.<sup>444</sup>*

## **The Waitangi Tribunal**

The Waitangi Tribunal accepts that the Crown has an obligation to remedy past breaches of the Treaty, arising from its duty to act reasonably and in good faith as a Treaty partner. In considering a variety of claims, it has emphasized that redressing Treaty grievances is necessary to restore the honour and integrity of the Crown, and should serve to restore the mana and status of Māori. The Tribunal also considers that recognition of and compensation for Treaty grievances may require different forms of redress, acknowledging different forms of loss. The allocation of any settlement should be directed towards restoring the resource base of affected Māori groups and protecting their interests, and where possible be locally defined. An essential aspect of redress, in the Tribunal's opinion, is a commitment by the Crown to honour Treaty principles in the future to prevent continuing or new breaches of the Treaty.

In its *Manukau Report* (1985) the Tribunal stated simply that “past wrongs can be put right, in a practical way, and it is not too late to begin again”.<sup>445</sup> In this report, the Tribunal considered, what it described as the enormous tribal and fishing losses of the Manukau tribes and the continuing impact of certain Crown policies “which prevented past wounds from healing”.<sup>446</sup> It stated that the losses of the peoples of the Makaurau, Pukaki and Te Puea marae, in particular, were not compensatable, although they had not sought compensation. The peoples of these marae had communicated instead to the Tribunal that they “wanted things restored to what they were”.<sup>447</sup> The Tribunal considered that this was unrealistic and that compensation should be provided to the marae as the only practical alternative. In responding to the claim overall, the Tribunal accepted that relief was required and recommended a variety of remedies, including changes to legislation and Crown policy, an affirmative action plan to clean up the harbour and restore its mana with the participation of tangata whenua, and the return of certain lands and fisheries.

Chief Judge Durie noted a continuing Crown duty to consider redress in the *Waiheke Island Report* (1987):

*I come to the conclusion [of a breach of Treaty principles in this case] having regard to a policy, fundamental to the execution of the Treaty in my view, that in the colonisation process the tribes would not be left landless, and by extrapolating from that, a continuing duty to consider redress where a current state of landlessness is in itself evidence that the Crown has not maintained that intent.<sup>448</sup>*

He further commented that the Crown should not resile from opportunities to remedy breaches of the Treaty. Rather it should seek ways to rebuild the tribes, particularly by ensuring sufficient lands for those tribes rendered landless from historical breaches of the Treaty:

*It seems then a reasonable expectation today, and in keeping with the spirit of the Treaty, that the Crown should not resile from any opportunity it may have to provide at least a part of those endowments that it ought to have guaranteed, and to ensure that proper policies to that end are maintained ... An exposure of past wrongs may be necessary and will no doubt bring new understandings and help to heal old wounds, but an eye for an eye approach to reparation or an overly tortious trend, may head us on an impossible path turning a Treaty of peace into a casus belli ... Another [approach to redress] is to move beyond guilt and ask what can be done now and in the future to rebuild the tribes and furnish those needing it with the land endowments necessary for their own tribal programmes. That approach seems more in keeping with the spirit of the Treaty and with those founding tenets that did not see the loss of tribal identity as a necessary consequence of European settlements. It releases the Treaty to the modern world, where it begs to be reaffirmed, and unshackles it from the ghosts of an uncertain past.<sup>449</sup>*

In the same report the Tribunal cautioned, however, that: “It is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party while creating another for another”.<sup>450</sup> In the *Mangonui Sewerage Report* (1988) the Tribunal noted that it is necessary to balance Māori concerns with those of the wider community, of which Māori form a part, in considering an appropriate remedy in order not to “over-redress” a breach of the Treaty.<sup>451</sup>

In the Tribunal’s opinion establishing “the effective settlement of many claims will often depend upon the willingness of parties to seek a reasonable compromise, but it follows that the mana to propose a compromise vests not in the Tribunal but the affected claimant tribes”.<sup>452</sup> In its *Muriwhenua Fishing Claim Report* (1988), the Tribunal noted that whenever possible the mana of the tribes to effect their

own arrangements in negotiation with the Crown should be upheld and supported. While Treaty principles require the Crown to meet proper standards of honesty and fairness when considering compensation, it must also respect those matters that are properly Māori business (such as which Māori have rights in land and how that land should be held). In the same report, the Tribunal noted that an appropriate settlement must be informed by what it described as a basic principle of the Treaty that:

*... Māori would not be relieved of their important properties without an agreement; and for their own protection there was a duty to ensure that they retained sufficient for their subsistence and economic well-being.*<sup>453</sup>

According to the Tribunal, establishing appropriate redress in response to the Muriwhenua claim required restoring the mana of the tribe through the restoration of its tribal base and the protection of their particular interests:

*It is the restoration of the tribal base that predominates amongst the Muriwhenua concerns. Any programme [of redress] would be misdirected if it did not seek to re-establish their ancestral association with the seas, providing for their employment, the development of an industrial capability, the restoration of their communities and the protection of their resource.*<sup>454</sup>

In later reports the Tribunal emphasized that the rights of redress arise when the Crown fails to honour its Treaty obligation to protect the rangatiratanga of a tribe or hapū, causing detriment to Māori communities.<sup>455</sup> The Tribunal also emphasized a requirement for a diversity of remedies to achieve reconciliation between the Treaty partners.<sup>456</sup> The Tribunal frequently refers to the Court of Appeal's finding on redress in the *Lands* case (1987). Notably, in the *Ngāi Tahu Report* (1991) the Tribunal adds in response to President's Cooke's comments in *Lands* that:

*It would appear to follow from this ruling that failure by the Crown, without reasonable justification, to implement the substance of a Tribunal recommendation may in itself constitute a further breach of the Treaty. It could well be inconsistent with the honour of the Crown.*<sup>457</sup>

By way of an example, in its interim report on the Taranaki claim, the *Taranaki Report* (1996),<sup>458</sup> the Tribunal considered the Crown's failure to protect the rangatiratanga of Taranaki hapū. It found that the principal losses in this claim to be the destruction of the culture and the society of the people, and of the resources that traditionally

underpinned them. The Tribunal concluded that:

*In historical claims, as distinct from actionable and recent losses to individuals, the long term prejudice to people may be more important than the quantification of past loss ... The extent of property loss is of course relevant but is not solely determinative. It appears that compensation should reflect a combination of factors: land loss, social and economic destabilisation and the consequential prejudice to social and economic outcomes, for example.*<sup>459</sup>

In regard to the Taranaki claim, the Tribunal concluded that:

*A vibrant Māori society was broken ... [therefore] it is group compensation that is most needed for future cultural survival, with compensation to be held for general group purposes of those who belong to the hapū. It is the group, not the individual, to whom the land belonged; it is the group, not the individual, that has been most deprived of benefit; and the Māori loss has been the loss of society that the group represents ... The money should stay where the land is, for the people belong to the land, not the land to the people.*<sup>460</sup>

In the Tribunal's view, reparation sufficient for affected Taranaki hapū to re-establish a durable economic base was essential for reconciliation between the Treaty partners. In this interim report, the Tribunal concluded that a generous approach was required in establishing an appropriate settlement, including active steps to prevent similar prejudice from arising in the future:

*Just as generous reparation is needed to restore the Crown's honour and re-establish sound relations, so too is a broad and unquibbling approach required for the terms and conditions on which the settlement is made ... Settlement of historical claims is not to pay off for the past, even were that possible, but to take those steps necessary to remove outstanding prejudice and prevent similar prejudice from arising; for the only practical settlement between peoples is one that achieves a reconciliation in fact.*<sup>461</sup>

In the Tribunal's opinion, reconciliation here required the Crown to provide adequate redress enabling Taranaki Māori to restore themselves as peoples, and to maintain a commitment to adhering thereafter to the principles of the Treaty of Waitangi.<sup>462</sup>