‘Flowing from the Treaty’s Words’: The Principles of the Treaty of Waitangi

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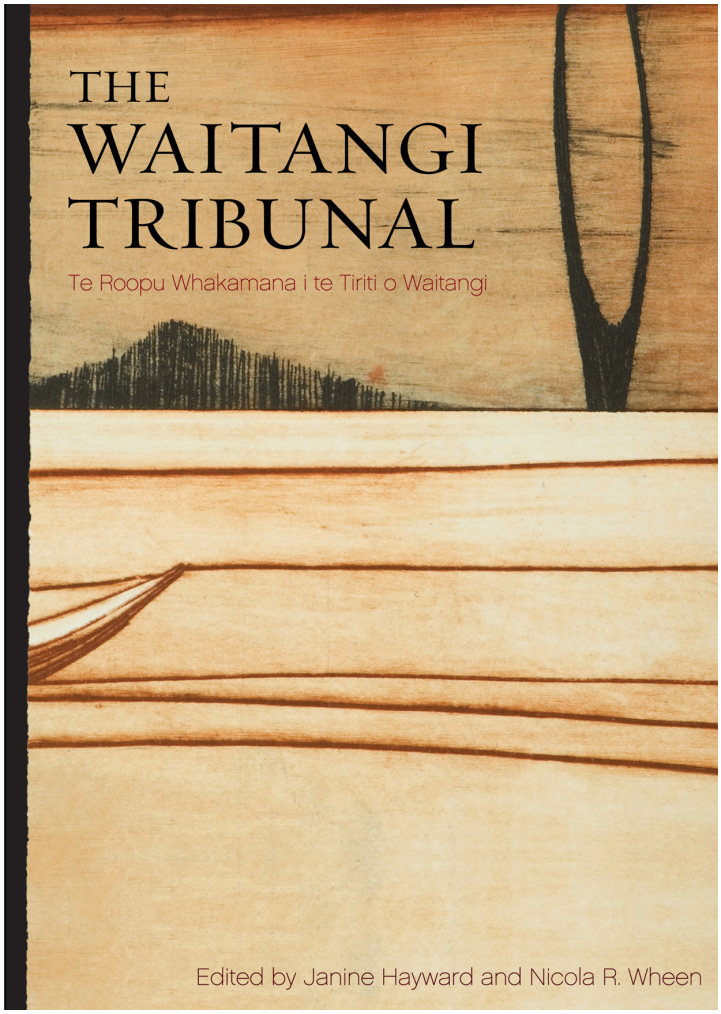

The Waitangi Tribunal sits at the heart of the Treaty settlement process, with a unique remit to investigate claims and recommend settlements. But although the claims process has been hugely controversial, little has been written about the Tribunal itself. These essays, by leading academics, lawyers and researchers, successfully fill that gap, examining the Tribunal’s role in reshaping Māori identity and society, the Tribunal’s future mission, and its contribution to ideas of justice and reparation. This perceptive analysis of a key institution is vital reading for anyone seeking to understand Treaty settlements.

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'Flowing from the Treaty's Words'

The Principles of the Treaty of Waitangi

Janine Hayward

The principles of the Treaty of Waitangi are central to the Waitangi Tribunal's jurisdiction and function. The Treaty of Waitangi Act 1975 (as amended in 1985) states that a claim to the Tribunal may be lodged (to paraphrase) by any Maori or group of Maori prejudicially affected, or likely to be prejudicially affected, by any ordinance, regulation, policy, practice, or action (done or omitted) by or on behalf of the Crown since 6 February 1840 which is *inconsistent with the principles of the Treaty*. The Tribunal's function, therefore, involves evaluating the Crown's action or inaction against the intent of the parties that signed the Treaty. The Tribunal's findings and recommendations are expressed in the currency of Treaty principles – which principles are applicable to the particular case, and how the Crown breached those principles, if at all. The Tribunal's jurisdiction is broad in this regard – it has the authority to establish the benchmarks against which action is judged, and has the capacity, through its interpretations of the Treaty, to make findings as to whether the Crown has breached Treaty principles. It is then left to the Crown's discretion whether it accepts those recommendations.

The concept of Treaty principles is controversial. Do they allow the Treaty to be applied to contemporary contexts, or do they water down the terms of the original Treaty unnecessarily? Will (and should) the creation of new principles by the Tribunal and the courts continue ad infinitum? Indeed, the importance of Treaty principles to the Tribunal's function was recognised when the Treaty of Waitangi Bill was introduced in the 1970s. Questions were raised in the House

of Representatives as to what the 'Treaty principles' might be. Venn Young (Member for Egmont) said at the second reading of the Bill:

> One of the responsibilities of the new tribunal is to re-examine, and, if necessary reinterpret the treaty … The political and ultimate practical consequences of the exercise by the tribunal of this function cannot be foreseen at this point in time. It is possible that conclusions reached by the tribunal and published by it will lead to debate, dissension, and even divisiveness within the community.[1]

Since its earliest reports in the 1980s, the Waitangi Tribunal has grappled with the concept of 'Treaty principles'. It has described the principles generally as flowing from the Treaty's words and from 'the evidence of the surrounding sentiments, including the parties' purposes and goals'.[2] More specifically, the Tribunal's reports have fulfilled the legislative requirement and identified principles that relate to the particular claim under investigation. Subsequent reports may build on and bring new dimensions to existing principles, or alternatively derive entirely new principles from the circumstances of the claim. Each Tribunal report is, therefore, not strictly bound by the precedent of earlier reports. The particular membership of each Tribunal is required to determine the principles of each claim on a case-by-case basis. Nonetheless, there is a natural evolution to the development of the Tribunal's Treaty principles, and specific milestones are evident.

Following the Treaty of Waitangi Act 1975, other legislation has also made reference to the principles of the Treaty. The Environment Act 1986, the State-owned Enterprises Act 1986 (discussed later), the Conservation Act 1987 and the Resource Management Act 1991, to name but a few, require decision-makers to take account of, recognise, or give effect to the principles of the Treaty. The courts too have played a major role in determining the Treaty principles on a case-by-case basis. While the courts are not bound by Tribunal findings, they do pay them full regard. However, with the exception of the 1987 Court of Appeal finding on Treaty principles, this discussion will focus on the principles identified in Waitangi Tribunal reports.

Early Tribunal reports and the Court of Appeal 'Lands case'

In 1990, Paul Temm identified the four 'cornerstone decisions' of the Waitangi Tribunal as those on the Motunui-Waitara, Kaituna, Manukau and Te Reo Maori claims. He argued that these early decisions were fundamental to the later success of the Tribunal in winning the confidence of Maori claimants (and

others).[3] The Tribunal reported on these claims prior to 1985, during which time its jurisdiction was limited to claims against the Crown's acts and omissions *since 1975*. The claims were contemporary in nature, and tended to focus on environmental issues that could not be considered by the Planning Tribunal. They were, as Temm recognised, of a particular genre, and laid the foundation for the Tribunal's subsequent reports on claims going back to 1840, after its jurisdiction was extended in 1985.

The 'cornerstone' claims are also significant in terms of Treaty principles. They were distinctive in their discussion of the texts and terms of the Treaty, and the historical context in which it was signed. Once the text and terms were established, subsequent reports could be more confident in identifying Treaty principles. The *Motunui-Waitara Report* (1983), for example, returned to the events of 1840 to give context to the Treaty's words and terms, and explained in detail the differences between the English and Maori texts. It ventured into the uncharted territory of Treaty principles, however, when it asserted that: 'A Maori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts literal or narrow interpretations out of place.'[4]

The *Kaituna River Report* (1984) was preoccupied with the text of the Treaty, and in particular the term 'kawanatanga'. It argued that: 'In agreeing to cede "kawanatanga" to the Queen of England [Maori] would have known that by doing so they would be gaining "governance" especially law and order for which the missionaries had long been pressing.'[5] The *Manukau Report* (1985) elaborated on the differences between the English and Maori texts, and considered the relationship between the concepts of 'rangatiratanga' and 'kawanatanga', as well as the meanings of 'mana' and 'taonga'. It concluded, in terms of Treaty principles, that the Treaty of Waitangi 'obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them'.[6]

It is not surprising that, in these early claims, the Tribunal took the opportunity to document and explore the Treaty itself before extending the discussion into Treaty principles. The first reports thus provided the foundation stones, consisting of the Treaty's text, terms and history, on which the Treaty principles subsequently developed. This process was dramatically advanced in 1986 by the Labour government's State-owned Enterprises (SOE) Act, which allowed for the corporatisation of state assets. Under the Act, approximately ten million hectares of land would pass to SOEs. Maori in the Far North submitted to the Waitangi Tribunal that this action would prejudice their claims relating to SOE land, and the Tribunal agreed. The government responded by inserting two sections in the

Act to protect Maori interests. Section 9 stated 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', and section 27 protected existing claims to land. With these safeguards in place, the government proceeded with the transfer of assets.

In 1987, sections 9 and 27 were put to the test in the landmark case *New Zealand Maori Council* v *Attorney-General*, otherwise known as the 'Lands case'. This was the first opportunity for the Court of Appeal to consider the principles of the Treaty in relation to section 9 of the SOE Act. As Cooke P noted: 'This case [was] perhaps as important for the future of our country as any that has come before a New Zealand Court.'[7] He also explained that the Court had given 'much weight to the opinions of the Waitangi Tribunal reports to date'.[8] The Court held that:

> The Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith. The relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. The duty of the Crown is not merely passive but extends to active protection of Maori people in their use of their lands and waters to the fullest extent practicable.[9]

Each judge in the Lands case delivered his own judgment, but all were in general agreement that the most important principle for the purposes of this case was the duty of the Treaty partners to act towards each other reasonably and with the utmost good faith.[10] Cooke P identified the interrelated concepts of partnership, fiduciary duties of the Crown and active protection; he talked also about the Crown's duty to be fully informed, but stopped short, as did the other judges, of recognising consultation as a Treaty principle. Cooke P stated that '[i]n any detailed or unqualified sense this [principle] is elusive and unworkable'. Richardson J agreed that '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'.[11]

The impact of the Lands case, and a changing jurisdiction

Before the Lands case, the Treaty of Waitangi Act was amended in 1985 to allow Maori to lodge claims against the Crown for action and inaction dating back to 6 February 1840. The impact of this dramatic extension of the Tribunal's jurisdiction, in conjunction with the Lands case, should not be underestimated. The Lands case introduced new terminology to the Tribunal's interpretation of the Treaty principles within its new legislative framework. The *Waiheke Island*

and *Orakei* reports mark a transition in this regard. Both claims were filed before the Act was amended, and were reported on in 1987, the same year as the Lands case. There is little evidence of the Lands case in the *Waiheke Island Report* – it may be that the Tribunal had finished its deliberations by the time the case was heard. Nevertheless, the report explored concepts beyond the wording of the Treaty. Chair of the Tribunal and Chief Judge of the Maori Land Court, E. T. Durie, stated that the Treaty 'obliges the Crown … to consider always future survival of local tribes'.[12] He went on to say: 'The duty corresponding to the Crown's right of pre-emption is properly to be stated, in my opinion, as a duty to ensure that each tribe maintained a sufficient endowment for its foreseen needs.'[13]

The *Orakei Report*, released in November 1987, does make reference to the Lands case to support the view that compensation recommended by the Tribunal need not be scaled down to what is considered 'practical'.[14] Yet there is little evidence in the report of the broad and sustained discussion of Treaty principles that became commonplace in Tribunal reports in subsequent years. In style and substance, the *Waiheke Island* and *Orakei* reports were more like Temm's 'cornerstone' decisions.

The implications of the 1987 Lands case are perhaps most clearly seen in the *Muriwhenua Fishing Report* (1988), which identified the principle of protection (of Maori by the Crown), the principle of mutual benefit (in that both parties would gain from the Treaty), and the principle of options (in that Maori could pursue a direction of personal choice).[15] In 1990, the *Allocation of Radio Frequencies Report* also drew on the Lands case, and added to the principles of partnership and consultation. With regard to the latter, it stated: 'The Treaty granted sovereignty and the delegation to govern but subject to the limitations of the special interests of rangatiratanga. This means that consultation between partners is vital to the Treaty itself and to its spirit.'[16] It proposed a hierarchy of interests in natural resources, based on the twin concepts of kawanatanga and tino rangatiratanga: '… first in the hierarchy comes the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Secondly comes the tribal interest in the resource. Then follows those who have commercial or recreational interests in the resource.'[17]

The three-volume *Ngai Tahu Report* (1991) also drew on the Lands case, and laid the foundation for the overarching 'principle of exchange' – explained as the fundamental compact or accord embodied in the Treaty, and as being of paramount importance. Inherent in this principle of exchange is the notion of reciprocity – 'the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands and all other valued possessions'.[18] The *Ngai Tahu Sea Fisheries Report* (1992) reiterated this

fundamental principle and went further, subordinating within it several concepts that had earlier been characterised (by the Court of Appeal and the Tribunal) as principles in their own right. These included the Crown's obligation actively to protect Maori Treaty rights; the tribal right of self-regulation; the right of redress for past breaches; and the duty to consult.[19]

This overarching 'exchange' and its sub-principles set a precedent for many subsequent Tribunal reports, which quoted verbatim, paraphrased and developed the principles identified in the various Ngai Tahu reports. This brought stability – almost predictability – for some time. These subsequent reports included *Ngawha Geothermal Resource Report* (1993), *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (1993), *Maori Development Corporation Report* (1993), *Te Whanganui-a-Orotu Report* (1995), *The Turangi Township Report* (1995), *Te Ika Whenua Rivers Report* (1998), *The Whanganui River Report* (1999), and *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (2001). Some of these reports emphasised particular sub-principles in a way that was appropriate to their own claim and at variance with the *Ngai Tahu* reports. In the *Te Ika Whenua Rivers Report*, for example, the Tribunal acknowledged the Ngai Tahu precedent, but chose to bring the principle of protection out from under the overarching principle of exchange. The report argued that 'the most important [principle] is that the Crown must actively protect Maori property interests to the fullest extent reasonably practicable … It is derived from the Crown's Article 2 guarantee of tino rangatiratanga over properties (taonga) and in our view extends to the right of development.'[20]

In addition to the overarching principle of exchange (and its sub-principles), the *Ngai Tahu Report* had also identified the principle of partnership, again drawing on the Lands case. It stated: 'The Treaty signifies a partnership and requires the Crown and Maori partners to act toward each other reasonably and with the utmost good faith.'[21] Once again, the *Ngai Tahu Sea Fisheries Report* went one step further to set this principle apart from the overarching principle of exchange, along with the principles of mutual benefit and of options.[22] This also set a precedent for some subsequent reports such as the *Maori Development Corporation Report* (1993), which reiterated the *Ngai Tahu Report*'s discussion of partnership. Reports in recent years have re-examined the partnership principle in a variety of contexts. The *Te Whanau o Waipareira Report* (1998) emphasised partnership, stating that 'most of all, the concept of partnership serves to answer questions about the extent to which the Crown should provide for Maori autonomy in the management of Maori affairs, and more particularly how Maori and the Crown should relate to each other that such issues might be resolved'.[23] The *Wananga Capital Establishment Report* (1999) identified

biculturalism as 'an integral part of the overall Treaty partnership. It involves both cultures existing side by side in New Zealand, each enriching and informing the other.'[24]

Other reports have reconfigured the principle of partnership. The *Maori Electoral Option Report* (1994), for example, argued that 'the partnership relationship the Treaty envisages should be founded on reasonableness, mutual co-operation and trust. The Crown … is not required … to go beyond taking such action as is reasonable in the prevailing circumstances.'[25] In the *Radio Spectrum Management and Development Final Report* (1999), the dissenting opinion of the presiding officer stated that the Crown 'must not intrude into the proper realm of rangatiratanga and, likewise, Maori must not intrude into the proper realm of kawanatanga, except pursuant to their Article 3 rights as citizens. Between those two … is the area where the partnership between the two concepts and the two peoples has its domain.'[26]

The various *Ngai Tahu* reports certainly had an impact on the Tribunal's subsequent articulation of Treaty principles, but it is important not to overstate the case. Although some reports relied heavily on the *Ngai Tahu* framework, others chose to emphasise those principles that were appropriate to their own claim. Furthermore, the Tribunal's principles continued to evolve after the *Ngai Tahu* reports; in particular, the principles of rangatiratanga and the Crown fiduciary duty to Maori, which were not emphasised in the *Ngai Tahu* reports, underwent interesting developments in the 1990s as claims brought matters to the Tribunal's attention.

In 1992, the *Te Roroa Report* considered 'rangatiratanga'. It extended the familiar notion of exchange, arguing that the Treaty 'is essentially a contract or reciprocal arrangement between two parties, the Crown and Maori … In return for ceding sovereignty to the Queen, the chiefs, the hapu and all the people were guaranteed their tino rangatiratanga.'[27] The *Appointments to the Treaty of Waitangi Fisheries Commission Report* (1992) stated: 'There is a rangatiratanga that attaches in our view to whanau, hapu, iwi and the Maori as a people … the level at which Maori should be dealt with, must depend upon the case.'[28] The *Te Whanau o Waipareira Report* (1998) discussed the principle of rangatiratanga in rather more detail, stating:

> Rangatiratanga, in this context [i.e. of this report], is that which is sourced to the reciprocal duties and responsibilities between leaders and their associated Maori community. It is a relationship fundamental to Maori culture and identity and describes a leadership acting not out of self-interest but in a caring and nurturing way with the people close at heart, fully accountable to them

> and enjoying their support … But [rangatiratanga] is attached to a Maori community and is not restricted to a tribe. The principle of rangatiratanga appears to be simply that Maori should control their own tikanga and taonga, including their social and political organization, and, to the extent practicable and reasonable, fix their own policy and manage their own programmes.[29]

The *Wananga Capital Establishment Report* (1999) noted that rangatiratanga 'involves, at the very least, a concept of Maori self-management'.[30] Finally, the *Pakakohi and Tangahoe Settlement Claims Report* (2000) identified the relevant principles as 'those guaranteeing rangatiratanga to Maori groups in the conduct of their own affairs, requiring the Crown and Maori to act reasonably and with absolute good faith towards one another …'.[31]

As noted earlier, the principle of the Crown's fiduciary duty first arose in the Lands case in 1987. It re-emerged strongly in Tribunal reports in the early 1990s, when the Crown sought to dispose of assets in ways that might prejudice Maori claimants. In 1993, the *Interim Report on the Rangitaiki and Wheao Rivers Claim* stated that, under the Treaty of Waitangi, 'the Crown has a fiduciary responsibility to act fairly with regard to its treaty partner. We find it inconsistent with the principles of the Treaty of Waitangi that … assets should be placed into third party ownership … while they are affected by claims.'[32] In the *Te Maunga Railways Land Report* (1994), the Tribunal explained the nature of the Crown's fiduciary obligations to Maori as follows: 'A fiduciary relationship is founded on trust and confidence in another, when one side is in a position of power or domination or influence over the other … Because the Crown is in the powerful position as the government in this partnership, the Crown has a fiduciary obligation to protect Maori interests.'[33] Fiduciary obligations were also seen to apply in the *Te Ika Whenua – Energy Assets Report* (1993), *Radio Spectrum Management and Development Interim Report* (1999) and *Radio Spectrum Management and Development Final Report* (1999).

In seeking to discern patterns and benchmarks in the Tribunal's development of Treaty principles, it is difficult to ignore the lasting impact of the Lands case in 1987 and the *Ngai Tahu* reports in the early 1990s. But in acknowledging a certain progression of ideas from one report to the next, it is also important to note those reports that have bucked the trend and stirred up controversy in examining Treaty principles.

'Debate, dissension, and even divisiveness'

During the passage of the Treaty of Waitangi Bill, Venn Young had predicted that the defining of Treaty principles would cause 'debate, dissension, and even

divisiveness' within New Zealand society. Indeed, the Treaty principles have attracted attention as the Tribunal releases its reports. Of all the principles explored by the Tribunal (and the courts), none appears as contentious as the principles of consultation and development. Opinion on these has differed even from one Tribunal to the next, and between members of the same Tribunal. Both principles have tended to be associated with contemporary claims involving resource management disputes, which might in part explain their controversial nature. Parties other than Maori and the Crown are directly affected by the outcomes.

The Tribunal has tended to view consultation as a mechanism whereby the Treaty partners express Treaty principles such as partnership and active protection. Consultation was one of the concepts falling under the overarching principle of exchange set out in the *Ngai Tahu* reports, and was reiterated in subsequent reports. Nevertheless, consultation has become a Treaty principle in its own right, particularly in Tribunal reports in recent years. The *Ngati Rangiteaorere Claim Report* (1990) stated:

> We believe that the Crown's obligation under the Treaty to protect the Maori and their lands involved also an obligation properly to consult them before disposing of their lands … In the view of the Crown, the exercise of kawanatanga, or sovereignty in the English text, clearly included the right to legislate; but in our view this should not have been exercised in matters relating to Maori and their lands and other resources, without consultation.[34]

In the *Te Maunga Railways Land Report* in 1994, the Tribunal rather tentatively stated that 'the active protection of Maori rangatiratanga, and duty of reasonableness on both sides, suggest a more consultative approach to negotiation is appropriate'.[35]

The *Turangi Township Remedies Report* (1998) concluded more forcefully that inadequate consultation meant that the claimants were prejudicially affected by the failure of the Crown actively to protect the rangatiratanga of its Treaty partner under Article 2 of the Treaty.[36] The *Radio Spectrum Management and Development Interim Report* (1999) stated: 'there is the principle that any exercise of kawanatanga needed to be tempered by respect for tino rangatiratanga … This meant that the Crown was obliged to consult Maori over a variety of matters …'[37] Even the dissenting opinion in this report conceded that the duty to consult 'will wax and wane according to the subject matter'.[38] In the *Radio Spectrum Management and Development Final Report* (1999), consultation was directly linked to partnership:

> Consultation between Treaty partners acting reasonably and with the utmost good faith to one another required, in our view, fully fledged discussion … with every attempt to find an agreed position that was in accord with Treaty principles … we believe that the Crown was obliged to consult Maori as fully as practicable before proceeding with the auction of more spectrum rights.[39]

Not all Tribunal reports have found the Crown lacking on consultation, however. The *Kiwifruit Marketing Report* (1995) found that the claim under investigation was not well-founded, and stated: 'The Tribunal is of the opinion that … sufficient consultation took place before the regulations [concerning kiwifruit] were promulgated.'[40]

The principle of development has also had an interesting and contentious evolution. At issue is the resource to be developed; and in particular, whether that resource is a 'taonga'. The question also arises of whether there are limits to claims for Maori development. The *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (1993) argued that 'the claimants' interest in the resource is not confined by the traditional or pre-Treaty technology or needs, but includes the development of the resource for economic benefit and by modern technology'.[41] In the *Kiwifruit Marketing Report* (1995), however, which found that the claim was not well-founded, the Tribunal set limits to development, stating:

> It would, in our view, be an unjustified straining of Treaty principles to hold that the right to develop … a treasure could extend all the way to the modern kiwifruit export trade … The Tribunal was unable to agree that trade was a taonga, that Maori international trade existed at the time of the Treaty, and that there is article 2 protection available to the claimants.[42]

The *Te Ika Whenua Rivers Report* (1998) brought new life to the development debate, stating that 'the Crown must actively protect Maori property interests to the fullest extent reasonably practicable … the Crown's article 2 guarantee of tino rangatiratanga over properties (taonga) … in our view extends to the right of development …'[43] The *Ngati Awa Raupatu Report* (1999) dwelt further on the notion of development. It argued that:

> … a tribe's right to hold possession of its traditional resources carried with it the right to possess in terms of its own laws and preferences according to how they existed then or might develop over time. We emphasise the development aspect. There is a European tendency to see Maori law as custom, and custom as static. We think it right, however, to emphasise instead that Maori law was in a continual state of development and that it is the right of all peoples not only to have their own laws but to develop them over time. Maori law

> is no different from European law in that it simply reflects the values of a community, and values change.[44]

Tribunals have not always agreed on the principle of development. In the *Radio Spectrum Management and Development Interim Report* (1999), the dissenting opinion stated: 'For me treaty principles do not refer to a bare right to develop. That is a matter for social conscience, social equity, politics and Article 3 and not the business and the expertise of this Tribunal.'[45] Furthermore, in the *Radio Spectrum Management and Development Final Report*, also in 1999, the Tribunal stated:

> There have been many differences between the courts and the Tribunal, and indeed between different Tribunals, over the extent to which the Treaty allowed development rights. While it has been generally accepted that there is a development right (which includes the use of technology unknown in 1840) for properties specified in the Treaty, such as land, forest, and fisheries, there has been little agreement over the unspecified 'other properties' of taonga … Since the spectrum was a 'natural resource' enveloping the whole of the earth, it could not be possessed by any one person or group; it was a 'taonga' to be shared by the tribes and by all mankind.[46]

The Napier Hospital claim, and beyond

The *Napier Hospital Report* (2001) provided a thorough examination of Treaty principles that was reminiscent of the framework established in the *Ngai Tahu Report*, while also demonstrating further evolution in the Tribunal's thinking. The report identified four relevant Treaty principles: the principle of active protection; the principle of partnership; the principle of equity; and the principle of options. It also identified two duties arising from those principles: the duty of good faith conduct, and the duty of consultation.[47]

As discussed earlier, the principles of active protection and partnership were established in the Lands case in 1987, and since then have had a long history of debate and discussion through Tribunal reports. The principles of equity and options, although not 'new', have been more fully elaborated in the *Napier Hospital Report* to reflect the issues under investigation in this particular claim. Thus the report illustrates the point developed in this chapter that the Tribunal has simultaneously built on the precedent of earlier reports and carved out new understandings of principles in responding to new claims. In this respect, the *Napier Hospital Report* recast the overarching principle of exchange as the principle of active protection. It quoted the *Turangi Township Remedies Report* (1998), stating that:

> … the principle that the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga is fundamental to the compact or accord embodied in the Treaty and is of paramount importance. It should be seen as overarching and far-reaching because it is derived directly from articles of the Treaty itself ...[48]

Reminiscent of the *Ngai Tahu Report*, the *Napier Hospital Report* also emphasised 'a second widely recognised principle, the principle of partnership', which arises from one of the Treaty's basic objectives: to create the framework for two peoples to live together in one country.

In the context of healthcare, the *Napier Hospital Report* saw the principle of equity as emerging from Article 3 of the Treaty, which granted to all Maori the status of British subjects, with implications for the state provision of social services and standards of healthcare for Maori. Finally, the principle of options arose from the different paths the Treaty opened up for Maori. Article 2 guaranteed self-management of tribal resources according to Maori tikanga, while Article 3 gave Maori access to the society, technology and culture of the settlers. The report emphasised that the right of choice is implicit in these options and an important principle for the provision of social services. The question remains: will this report 'stabilise' the Tribunal's Treaty principles as the *Ngai Tahu* reports did? Or is the evolution of the principles both inevitable and infinite?

In reflecting on this discussion of Tribunal reports, it is important to remember that each Tribunal is generally composed of a different combination of Tribunal members, and that no Tribunal is bound by the decisions of a previous Tribunal (or the courts) in reporting on its claim. Hence the principles articulated and applied in each report reflect the facts of the claim and the particular grievances under examination. Nonetheless, the Tribunal's Treaty principles demonstrate an evolution of ideas throughout the years. Within this evolution there have been certain milestones: the Court of Appeal decision in 1987 and the *Ngai Tahu* reports in the 1990s have had a lasting impact on the way Treaty principles are conceived of and articulated by subsequent Tribunals. Some principles, such as exchange, partnership and active protection, have consistently formed the basis of Tribunal reports, and are now well entrenched and widely accepted. From these, other principles such as rangatiratanga and fiduciary duty continue to be explored and developed in various contexts. Others still, such as consultation and development, are debated between various reports and among Tribunal members. And as the *Napier Hospital Report* illustrates, new facts and new grievances will no doubt continue to stimulate the development of new principles and sub-principles as each Tribunal reports its recommendations to the Crown.

77 'Decision of Tribunal and recommendation that land be no longer liable to resumption', 28 March 2001, W/SOE 2/58; W/SOE 2/59; W/SOE 2/66.
78 'Memorandum of Deputy Chairperson following judicial conference held 8 November 2000', 12 February 2001, W/SOE 2/60.
79 Clause 9A(1) of the second schedule to the Treaty of Waitangi Act 1975.
80 Clause 9A(1) of the second schedule to the Treaty of Waitangi Act 1975. However, where a claim is referred to a member, that member may not also be a member of the Tribunal that inquires into the claim: clause 9A(2) of the second schedule to the Treaty of Waitangi Act 1975.
81 Clause 9B of the second schedule to the Treaty of Waitangi Act 1975.
82 Waitangi Tribunal, *Guide to Practice and Procedure*, para 2.6.
83 The Office of Treaty Settlements and its predecessor, the Treaty of Waitangi Policy Unit, have produced booklets about the direct negotiations process but these are silent on the possibility of mediation under clause 9A of the Treaty of Waitangi Act 1975.
84 The Hauturu East 1A Block claim, Wai 51, concerned two relatively small pieces of land by the Waitomo caves that the Crown had acquired under public works legislation. The claimants contended that one area of land had been wrongly taken and that the other was no longer used for the purpose for which it had been taken. Unfortunately, the Tribunal's record of inquiry does not disclose the agreement that was achieved by the mediation.
85 The Mokau Mohakatino and Other Blocks (Maniapoto) claim (Wai 788) and the Ngati Maniapoto/Ngati Tama (Mokau) claim (Wai 800).
86 Waitangi Tribunal, *Guide to Practice and Procedure*, para 2.6.
87 Section 6(6) of the Treaty of Waitangi Act 1975. Anomalously, perhaps, section 6(6) does not appear to prevent the Tribunal from inquiring into a claim that relates to a proposed regulation or Order in Council.
88 Section 8 of the Treaty of Waitangi Act 1975.
89 1992 Deed of Settlement (Sealord deal), para 4.5.3.

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1 *New Zealand Parliamentary Debates*, 1975, Vol.33, p.4345.
2 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Department of Justice, Wellington, 1988, p.388.
3 P. Temm, *The Waitangi Tribunal: The Conscience of the Nation*, Random Century Press, Auckland, 1990.
4 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui-Waitara Claim*, Department of Justice, Wellington, 1983, p.47.
5 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim*, Department of Justice, Wellington, 1984, p.13.
6 The Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, Department of Justice, Wellington, 1985, p.95.
7 *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR, 641, 643.
8 *New Zealand Maori Council* v *Attorney-General* [1987], 661.
9 *New Zealand Maori Council* v *Attorney-General* [1987], 642.
10 *New Zealand Maori Council* v *Attorney-General* [1987], 664, 673, 703.
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