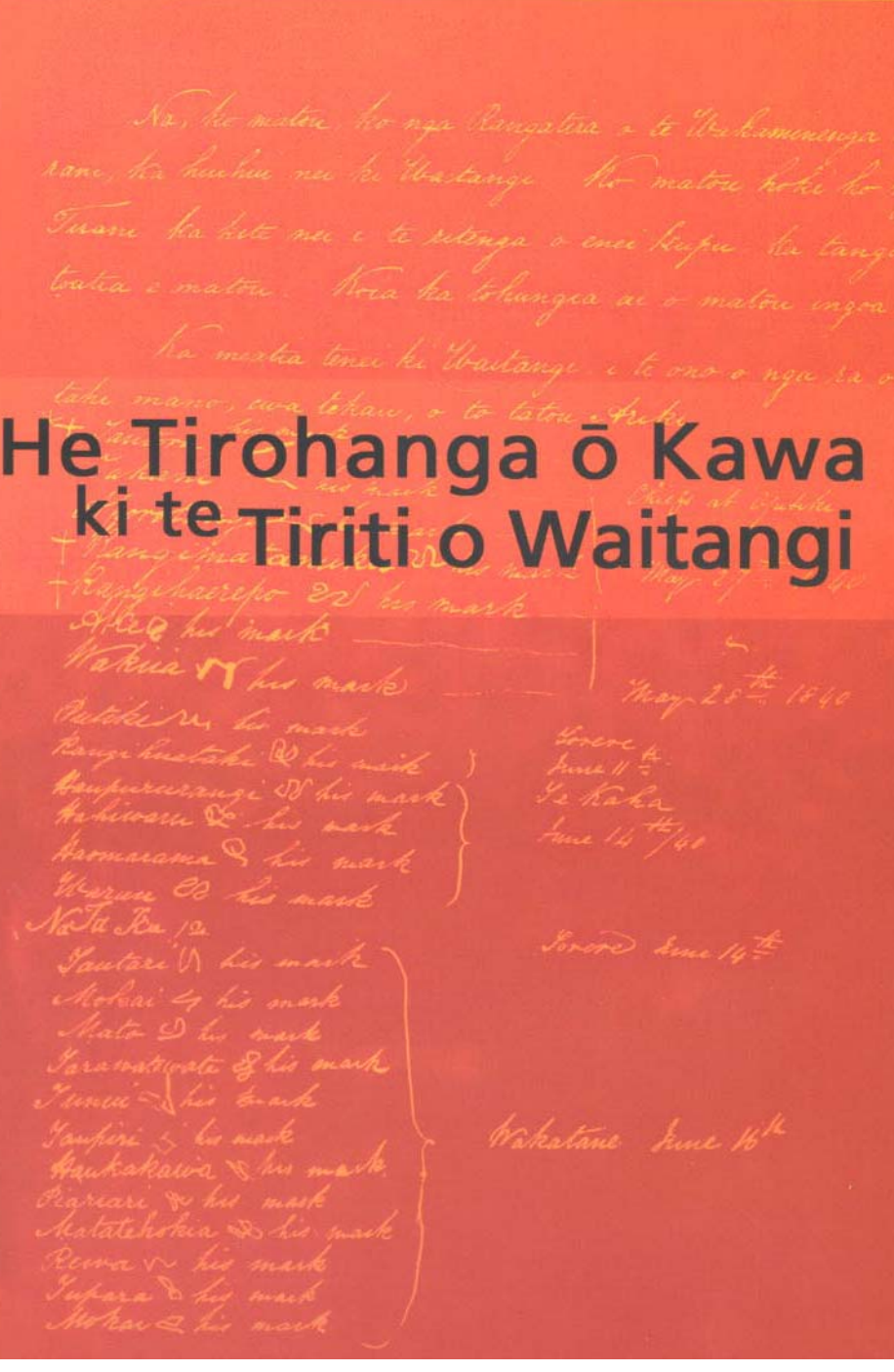
# He Tirohanga ō Kawa ki te Tiriti o Waitangi



# He Tirohanga ō Kawa ki te Tiriti o Waitangi

**A Guide to the Principles of the Treaty of Waitangi**

**as expressed by**

**the Courts and the Waitangi Tribunal**

This guide has been prepared as a resource for policy analysts who are called upon to formulate policy and advise on the application of Treaty principles. Every effort has been made to ensure the accuracy of this publication and to provide a comprehensive selection of jurisprudence from the Courts and the Waitangi Tribunal in this area as at the date of publication. However, no liability is accepted for any inaccuracy or omission. The contents of the document are not legal advice and should not be relied upon for that purpose.

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**He rangi tā Matawhāiti**
**He rangi tā Matawhānui**

The person with a narrow vision sees a narrow horizon
The person with a wide vision sees a wide horizon

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## Kupu Whakataki

He pukatohu tēnei nā Te Puni Kōkiri e whai wāhi atu ana ki te whāinga o te Kāwanatanga, arā, kia pūmau ki ngā mātāpono o te Tiriti o Waitangi. He āwhina tēnei mā ngā kaitātari kaupapa here a Te Puni Kōkiri, e whakahiato ana i ngā kaupapa here ka pā mai ki te haere ngātahi a te Karauna rātou ko te Māori ka tahi, ki te tuku whakamaherehere mō te wāhi a ngā mātāpono a te Tiriti ka rua. Ka kitea pea e ētahi atu o te rāngai tūmatanui, o waho ake rānei, he āwhina i te pukatohu nei.

Ko te pūtake o te pukatohu nei, ko te whakatakoto i ngā mātāpono o te Tiriti o Waitangi, i te tirohanga o ngā Kōti, o te Rōpū Whakamana i te Tiriti hoki; i tua atu ko te whakarato pārongo e kuhuna ai ngā mātāpono nei ki ngā take whanake kaupapa here. Ko ētahi atu o ngā take ka puta i te pukatohu nei, ko te whakaemi i ngā tohe a tēnā, a tēnā mō te tūranga o te Tiriti i raro i te ture; ko te whakatakoto i ētahi o ngā kōrero hītori o te Tiriti; ko te whakamārama hoki i ētahi o ngā ariā matua o roto o te Tiriti. Hei tāpiritanga atu, ko ētahi rauemi awhi i ngā kai-tātari kaupapa here i roto i ā rātou rangahau i ngā mātāpono o te Tiriti.

Me kī, ko te take nui o ngā mātāpono o te Tiriti, ko ngā whakahaere i waenganui i te Karauna rāua ko te Māori. Ko te whakahau mai ngā Kōti, mai te Rōpū Whakamana i te Tiriti hoki, kia aronuitia te Tiriti, me te hono ā-Tiriti, kia mahi ngā taha e rua i runga i te pai, i te tika, i te ngākau mārie, tētahi ki tētahi. Ko te kī anō a ngā Kōti rātou ko te Rōpū Whakamana i te Tiriti, ehara i te mea kua kōhatu kē te takoto o ngā mātāpono nei, whāia, tērā pea ka rerekē haere ā te wā. I runga i tērā o ngā whakaaro, kāore i takoto e rātou tētahi rārangi o ngā mātāpono nei. Waihoki, ka haere tonu ā rātou rangahau i ngā whakamāramatanga mō ngā nekenekenga hou. Ahakoa te mea he uaua ki te wehewehe i ngā mātāpono tēnā ki konā, tēnā ki konā, ko tā te pukatohu nei, he kohikohi ki ngā wāhanga e māmā ai te whātoro atu. Tērā pea, he hanganga tika i tua atu o tēnei.

He wāhi nui tō te Tiriti i roto i tā tātou anga ture, me te mea anō, kāore ia e noho ki tētahi āhua mō ake; ka huri, ka rerekē, ka whanake tōna tino, pēneki tonu i ētahi atu mātāpono, tikanga ā-ture. Kāore e kore ka haere tonu ngā whitiwhiti kōrero puta noa i te motu, mō ngā kaupapa ture, ngā matatika me te ia o te whakahaere o ngā take e pā ana ki te Tiriti.

Kei te tautokona e te Tiriti ētahi anō mātāpono ture e pā ana ki ngā tāngata whenua o te ao, a, ka whai wāhi ki te hātepe hanga kaupapa here. Hei tauira atu, he wāhi nui whakahirahira kua whakatakotoria i roto i ētahi whakaritenga o ngā whenua o te ao, ki ngā tāngata whenua me ngā iwi iti o tēnā, o tēnā whenua. Kua whakaae ētahi o ngā whenua nei, kia whakatairangatia ngā tāngata katoa, tae noa ki ngā tūmomo iwi nei, mā te noho pūmau ki ngā kawenga i whakaaetia e ngā whenua katoa o te ao e hāngai ana ki te mana tangata, te tiaki taiao, ngā mahi tauhokohoko, te mana whakairo hinengaro hoki. Waihoki, he rite te kawenga o te Kāwanatanga o Aotearoa i te whakaakoranga ture tuku iho mō te taitara tangata whenua, tae noa ki ōna kawenga e pa ana ki ngā tāngata

whenua, me te tiaki i ngā pānga o te tangata whenua, ki te kawenga o ngā Kāwanatanga o ngā whenua pēnei i a Kānata, i a Amerika, i a Ahitereiria. Ehara i te mea mā te Tiriti o Waitangi ka tū, ka hinga rānei ēnei whitiwhitinga kōrero, engari he whakaata noa mai kei ngā koko katoa o te ao ēnei ariā e rere ana.

Kia maumahara, ehara i te mea e tuku whakamaherehere ture ana te pukatohu nei, e noho ana rānei ia hei whakatakotoranga kaupapa here a te Kāwanatanga, ehara hoki i te mea mā te pukatohu nei e whakawātea i te tūranga nui o ngā tuhituhinga ake. Hei ētahi wā, he mea pai ki te anga atu te titiro a te kai-tātari kaupapa here ki tua atu o ngā kaupapa here o te wā, e aha, e tareka ai te whanaketanga o aua kaupapa here. Me kī, koianei te tino take i hangaia te pukatohu nei, arā, i te kitenga atu i te iti o te māramatanga i ētahi wāhi o te hātepe whakahiato kaupapa here e hāngai ana ki te Tiriti. Kia maumahara, ehara tēnei pukatohu i te waka kawe kaupapa here, ehara hoki tana kaupapa i te whakaata i ngā tirohanga Māori. Me whai wāhi tika te tirohanga Māori ki ngā tūtohunga kaupapa here katoa mō te Tiriti; i koneki me noho ngā taha e rua ki te whitiwhiti kōrero. Ko tā te pukatohu, he tautoko i ngā tūtohunga ka whanakehia, kia aha, kia hua ake ngā whitiwhitinga kōrero ka tūpono ki te Māori. He maha ngā takenga mai o te kaupapa here – te ao tōrangapū, ōhanga, te ture, te aha noa; tae rawa ki ngā tautohetohe i hua ake i muri o te whākina mai o ngā whāinga o ngā Kōti, o te Rōpū Whakamana i te Tiriti hoki. Ko tā te pukatohu nei, he whakaraupapa i ngā kōrero katoa mai te takenga kotahi, arā, ngā whāinga o ngā Kōti me te Rōpū Whakamana i te Tiriti e pā ana ki ngā mātāpono o te Tiriti.

Ko ngā kaituhi o te pukatohu nei ko Frances Hancock rāua ko Kirsty Gover, he kaitātari kaupapa here matua; ka nui ngā āwhina mai ngā kaimātai o roto, o waho hoki o Te Puni Kōkiri.

## Introduction

Te Puni Kōkiri offers this guide as a contribution towards the Government's stated goal of upholding the principles of the Treaty of Waitangi. It is addressed to Te Puni Kōkiri policy analysts, who are called on to formulate policy which impacts on the Crown-Māori relationship and to advise on the application of Treaty principles. Others in the state sector and outside government may also find the guide a useful resource.

The purpose of the guide is to outline the principles of the Treaty as expressed by the Courts and Waitangi Tribunal, and to provide other information that might facilitate the application of these principles in policy development. The guide also canvases current debates on the constitutional and legal status of the Treaty, provides an overview of the historical background of the Treaty and explains key concepts in the Treaty exchange. It includes as appendices additional resources to assist analysts in addressing the principles of the Treaty in their work.

Treaty principles are primarily concerned with the way in which the Crown and Māori behave in their interactions with one another. The Courts and the Tribunal emphasize the need for recognition and respect in the Treaty partnership and stress the parties'

shared obligation to act reasonably, honourably and in good faith towards each other. The Courts and Tribunal have emphasized that the principles of the Treaty are not set in stone and that they may change as the Treaty partnership evolves. Accordingly, they have not developed an exhaustive list of principles and continue to refine their explanations in response to new circumstances. While the principles are interdependent and are not easily compartmentalised, the guide is intended to categorize them in an accessible and logical way. Other constructions may be equally viable.

The Treaty is an integral part of our constitutional framework and its status will continue to evolve along with other constitutional principles and norms. Constitutional, legal, ethical, and procedural issues associated with the Treaty are likely to remain a focus of discussion and be debated in various settings.

The Treaty is supported by other principles of law affecting indigenous peoples, which are relevant to the policy-making process. For example, some international instruments accord to indigenous peoples and minority cultures special recognition. Some States have agreed to recognise the entitlements of these groups in their adherence to international obligations in the fields of human rights, environmental protection, trade and intellectual property. Similarly, the common law doctrine of aboriginal title and the obligations of the Crown in respect of indigenous peoples are shared by States such as Canada, the United States and Australia. These sources of debate do not depend on the Treaty of Waitangi, but rather demonstrate the universality of the ideas contained in it.

It is important to note that this guide is neither legal advice, nor a statement of government policy. It is also not intended as a substitute for referral to the original sources. Advisers must sometimes look beyond existing policy in order to develop it, and it is precisely because policy on the Treaty remains unformed in many areas that we believe such a guide is needed. The guide does not, however, propose policy, and does not purport to reflect Māori views. Any policy proposal on the Treaty must of course be properly informed by Māori perspectives, which may require consultation. The guide is offered rather as an aid to developing proposals upon which fruitful consultation with Māori might occur. Policy grows from many sources - political, economic, legal, amongst others. The debates generated by the findings of the Courts and the Tribunal are themselves a source of policy. This book tries to convey in an organised fashion, just one source, the findings of Courts and the Waitangi Tribunal on the principles of the Treaty.

This guide was authored by senior policy advisers, Frances Hancock and Kirsty Gover; and benefited greatly from the contributions of peer reviewers within and outside Te Puni Kōkiri.

# Texts of the Treaty

# The Treaty of Waitangi (English text)

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

## Article the first

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

## Article the second

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

## Article the third

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

(signed) W. Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

## Te Tiriti o Waitangi 1840 (Māori text)

Ko Wikitōria te Kuini o Ingarani i tana mahara atawai ki ngā Rangatira me ngā Hapū o Nu Tirani i tana hiahia hoki kia tohungia ki a rātou ō rātou rangatiratanga me tō rātou wenua, ā kia mau tonu hoki te Rongo ki a rātou me te Ātanoho hoki kua wakaaro ia he mea tika kia tukua mai tētahi Rangatira - hei kai wakarite ki ngā Tāngata māori o Nu Tirani - kia wakaaetia e ngā Rangatira māori te Kāwanatanga o te Kuini ki ngā wāhikatoa o te Wenua nei me ngā Motu - nā te mea hoki he tokomaha kē ngā tāngata o tōna Iwi Kua noho ki tēnei wenua, ā e haere mai nei.

Nā ko te Kuini e hiahia ana kia wakaritea te Kāwanatanga kia kaua ai ngā kino e puta mai ki te tangata Māori ki te Pākehā e noho ture kore ana.

Nā, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kāwana mō ngā wāhi katoa o Nu Tirani e tukua āianei, amua atu ki te Kuini, e mea atu ana ia ki ngā Rangatira o te wakaminenga o ngā hapū o Nu Tirani me ērā Rangatira atu ēnei ture ka kōrerotia nei.

### Ko te Tuatahi

Ko ngā Rangatira o te wakaminenga me ngā Rangatira katoa hoki kī hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu - te Kāwanatanga katoa ō rātou wenua.

### Ko te Tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki ngā Rangatira ki ngā hapū - ki ngā tāngata katoa o Nu Tirani te tino rangatiratanga o ō rātou wenua ō rātou kāinga me ō rātou taonga katoa. Otiia ko ngā Rangatira o te wakaminenga me ngā Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wāhi wenua e pai ai te tangata nōna te Wenua - ki te ritenga o te utu e wakaritea ai e rātou ko te kai hoko e meatia nei e te Kuini hei kai hoko mōna.

### Ko te Tuatoru

Hei wakaritenga mai hoki tēnei mō te wakaaetanga ki te Kāwanatanga o te Kuini - Ka tiakina e te Kuini o Ingarani ngā tāngata māori katoa o Nu Tirani ka tukua ki a rātou ngā tikanga katoa rite tahi ki ana mea ki ngā tāngata o Ingarani.

(signed) W. Hobson
Consul & Lieutenant Governor

Nā ko mātou ko ngā Rangatira o te Wakaminenga o ngā hapū o Nu Tirani ka huihui nei ki Waitangi ko mātou hoki ko ngā Rangatira o Nu Tirani ka kite nei i te ritenga o ēnei kupu, ka tangohia ka wakaaetia katoatia e mātou, koia ka tohungia ai ō mātou ingoa ō mātou tohu.

Ka meatia tenei ki Waitangi i te ono o ngā rā o Pēpueri i te tau kotahi mano, e waru rau e wā te kau o tō tātou Ariki.

## An English translation of the Māori text

The following is a modern English translation of the Māori text of the Treaty as interpreted by Professor Sir Hugh Kawharu.[1] The translation is an "attempt at a reconstruction of the literal translation" and was accepted by the Court of Appeal for the purposes of the important *Lands* case (1987), and by the parties to the case, the Crown and the New Zealand Māori Council. It is recorded and discussed in the judgment,[2] and is also discussed by Professor Kawharu in his contribution as editor to: *Waitangi: Māori and Pākehā Perspectives on the Treaty of Waitangi* (1989),[3] a collection of papers on the Treaty.

### Translation by Professor Sir Hugh Kawharu

Victoria, the Queen of England, in her concern to protect the chiefs and subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order considers it just to appoint an administrator one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands and also because there are many of her subjects already living on this land and others yet to come.

So the Queen desires to establish a government so that no evil will come to Māori and European living in a state of lawlessness.

So the Queen has appointed me, William Hobson a Captain in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

### The First

The Chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.

### The Second

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell the land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

### The Third

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

(signed) W. Hobson
Consul & Lieutenant Governor

So we, the Chiefs of the Confederation and of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and our marks thus.

Was done at Waitangi on the sixth of February in the year of our Lord 1840.

# Overview

## The constitutional significance of the Treaty of Waitangi

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

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

In 1990 Sir Robin Cooke,[12] the then President of the Court of Appeal, speaking extra-judicially, said of the Treaty: "It is simply the most

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

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

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

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

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

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

> *Ministers must confirm compliance with legal principles or obligations in a number of areas when bids are made for Bills to be included in the programme and priorities are awarded. In particular, Ministers must draw attention to any aspects that have implications for, or may be affected by:*
>
> - *the principles of the Treaty of Waitangi;*
> - *the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;*
> - *the principles in the Privacy Act 1993;*
> - *international obligations;*
> - *the guidelines contained in* LAC Guidelines: Guidelines on Process and Content of Legislation ...[26]

This requirement imposes a constitutional obligation on Ministers, officials and Parliamentary Counsel drafting the legislation.[27]

## The legal force of the Treaty today

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

## Summary

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

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

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

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

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

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

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

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

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

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

## The status of the Treaty at international law

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

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

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

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

## The role of the Courts

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

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

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

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

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

## Treaty clauses

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

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

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

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

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

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

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

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

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

> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (te Tiriti o Waitangi).*

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

## Where there is no Treaty clause

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

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

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

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

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

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

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

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

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

# Historical background

## Introduction

This section provides an historical context for discussion on the key concepts of the Treaty and its principles. The aim is to provide a brief overview of important events preceding the signing of the Treaty, the social context in which the Treaty negotiations took place, the stance of the British Crown in respect of New Zealand, and differences between the two texts of the Treaty. This overview draws on some primary historical materials as well as commentary by New Zealand historians. The use of historical sources raises issues of perspective and interpretation. Many of the sources referred to draw on European accounts or interpretations. As noted later in the discussion of Māori responses to the British Crown's proposal of a treaty, the surviving European accounts of the Treaty signings may reflect the translator's understanding more than Māori intentions and must be read accordingly with this in mind. Further, a brief overview can hope to provide no more than a summary. Readers are encouraged to refer directly to original sources and to the more extended works of various New Zealand historians, some of which inform this section.

## The Declaration of Independence - He Whakaputanga o te Rangatiratanga o Nu Tireni

James Busby was appointed as a British Resident in New Zealand in 1832 under the guidance of the Governor of New South Wales. His appointment followed appeals to the British Government from settlers in New Zealand, and from some Māori, who were concerned about law and order and intertribal warfare.

Busby arrived in New Zealand in May 1833 and had few formal powers, acting instead as a liaison with local settlers, traders and Māori communities and as an intermediary in disputes.[69] He was concerned about the limit of his powers in the absence of a formal justice system, especially given the extent of intertribal warfare. Busby sought to encourage local chiefs in the Bay of Islands region to establish an arrangement for a collective pan-tribal governance structure. To prompt a collective response from the chiefs, Busby first suggested that Māori should establish a system of ship registration for their trading vessels and called a meeting at Waitangi in 1834 at which 25 northern chiefs voted for a flag.[70] According to one historian, though the flag

received a mixed reception, its significance for Māori lay in a belief "that the mana of New Zealand, closely associated with the mana of the chiefs, had been recognised by the British Crown".[71]

The following year, Busby heard that a Frenchman, Baron Charles de Thierry was planning to set up a "sovereign independent state" in the Hokianga. This news and other events prompted him to call a second meeting on 28 October 1835, attended by 34 northern chiefs, at which they signed a document drafted by Busby and translated into Māori, entitled: The Declaration of Independence - He Whakaputanga o te Rangatiratanga o Nu Tireni.[72] The English text of the Declaration asserts the independence of New Zealand, "under the designation of The United Tribes of New Zealand", and states that:

> *... all sovereign power and authority within the territories of the United Tribes of New Zealand ... reside[s] entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity, who also declare that they will not permit any legislative authority separate from themselves … nor any function of government to be exercised within the said territories, unless by persons appointed by them and acting under the authority of laws regularly enacted by them in Congress assembled.*[73]

In the Declaration, the United Tribes ask King William the VI to "continue to be the parent of their infant State" and to "become its Protector from all attempts upon its independence". Other tribes were invited to sign the Declaration, and the number of signatories reached 52 in 1839, mostly representing tribes from the north of the North Island.[74] Despite this support, a pan-tribal form of governance did not eventuate.

The Declaration was acknowledged by the Colonial Office with the assurance that the King would protect the Māori people, provided this protection was consistent with a due regard to "the just rights of others and to the interests of His Majesty's subjects".[75] The response of the British Colonial Office indicates that New Zealand was recognised as an independent state, albeit one in a protectorate relationship with Britain. Later, as preparations were made for the drafting of the Treaty of Waitangi, British officials instructed Hobson to take special care to obtain the signatories of those chiefs who had signed the Declaration of Independence.

Today, the Declaration is considered by the Courts to be of no legal effect in New Zealand,[76] and has not been accepted as a basis for any legal rights or duties. It retains significance in political and constitutional discussion, and is of special importance to the

descendants of its signatories. In addition, the translation of the English text of the Declaration, involving concepts of independence and sovereignty, informs discussions of the differences between the Māori and English versions of the Treaty of Waitangi. This discussion is summarised below.

## Why a treaty?

Historical reports show that there were several issues facing Māori and the British Crown in 1840. Prior to the Treaty, Māori communities had expressed concerns over law and order issues, particularly the unruly and unsanctioned behaviour of some settlers in the areas of European settlement, and the devastating impact of musket warfare in intertribal disputes. Māori chiefs were also disturbed by the impact of introduced diseases on their communities and by the increasing pressure from settlers seeking to acquire Māori lands. At the same time, most Māori, if not all, were keen to explore ways to further secure and expand their trading interests, thus strengthening their communities and enhancing their tribal tino rangatiratanga.

The British Crown was aware of the increasing interest of other imperial powers, including France and the United States, and was concerned to secure British trading interests and settlement. Humanitarian concerns, raised in an 1837 *Report of the House of Commons Committee on Aborigines in British Settlements*, were also pressing upon the Crown. This report drew attention to the worst consequences of uncontrolled European settlement and trade on indigenous peoples in other British settlements, warning of the effects of "seizing their lands, warring upon their people, and transplanting unknown disease, and a deeper degradation".[77] Groups in Britain advocated strongly for measures to ensure that these consequences did not eventuate in New Zealand.

Britain was initially reluctant to take steps to assert its sovereignty over New Zealand. As the pace of settlement accelerated, however, the pressure on Britain to exercise authority in the territory also increased. The Crown was aware that in the absence of a treaty, it had limited authority to intervene in a territory that it had already recognised as an independent State[78] and came to see the formal acquisition of Māori consent[79] as a necessary precursor to the establishment of a settled form of civil government in New Zealand. The perceived need for consent was no doubt intensified by the significant military threat posed by the tribes. By initiating the treaty-signing process, the Crown intended to seek Māori permission to proceed with its wider goals, namely to:

- ensure the orderly, controlled and peaceful settlement of an anticipated influx of British subjects;
- establish law and order mechanisms to resolve lawlessness among existing British settlers and to control intertribal fighting;
- establish civil government as an adjunct to colonial rule from New South Wales;
- secure its interest in New Zealand before other foreign powers, particularly France, became established there; and
- address humanitarian concerns for the welfare of Māori peoples by protecting their property and other rights.

## Instructions given to Hobson for negotiating the Treaty

Captain William Hobson arrived in New Zealand in early 1840 with written instructions from the Marquis of Normanby, also known as Lord Normanby, the Secretary of State for the Colonies, to "treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any parts of those islands which they may be willing to place under Her Majesty's dominion".[80]

Hobson was instructed to obtain the "free and intelligent consent"[81] of Māori, overcoming any initial distrust in or aversion to a treaty by conducting himself with "mildness, justice, and perfect sincerity"[82] in his dealings with them. He was to:

> *… frankly and unreservedly explain to the natives, or their chiefs, the reasons which should urge them to acquiesce [to] the proposals … [pointing] out to [the chiefs] the dangers to which they may be exposed by residence amongst them of settlers amenable to no laws or tribunals of their own; and the impossibility of Her Majesty's extending to them any effectual protection unless the Queen be acknowledged as the sovereign of their country ...*[83]

Lord Normanby also considered:

> *It is further necessary that the chiefs should be induced, if possible, to contract with [Hobson], as representing Her Majesty, that henceforward no lands shall be ceded, either gratuitously or otherwise, except to the Crown of Great Britain … You will, therefore, immediately on your arrival, announce, by a proclamation addressed to all the Queen's subjects in New Zealand, that Her Majesty will not acknowledge as valid any title to land which either has been, or shall hereafter be acquired, in that country which is not either derived from, or confirmed by, a grant to be made in Her Majesty's name, and on her behalf.*[84]

In conducting land sales, Hobson was advised that:

> *All dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice, and good faith, as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all; they must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves. To secure the observance of this, - will be one of the first duties of their official protector.*[85]

The role of the Official Protector of the Aborigines in the colonial government was to safeguard Māori interests in land negotiations. Lord Normanby also outlined other measures to protect Māori welfare, and, as one historian notes, these were ultimately aimed not at preserving traditional Māori society but at amalgamating Māori with the British settler community:[86]

> *There are yet other duties owing to the aborigines of New Zealand, which may be all comprised in the comprehensive expression of promoting their civilisation, - understanding by that term whatever relates to the religious, intellectual, and social advancement of mankind. For their religious instruction liberal provision has already been made by the zeal of the missionaries … and it will be at once the most important, and the most grateful of your duties … to afford the utmost encouragement, protection and support to their Christian teachers ... The establishment of schools for the education of the aborigines in the elements of literature will be another object of your solicitude; and until they can be brought within the pale of civilized life, and trained to the adoption of its habits, they must be carefully defended in the observance of their own customs, so far as these are compatible with the universal maxims of humanity and morals.*[87]

Lord Normanby advised that it remained to be considered how the provisions of the instructions were to be brought into effect. The instructions, dated 14 August 1839 and some pages in length, recognised that:

> *… we [the British Government] acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible*

*to make that acknowledgement in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate predecessor, disclaims, for herself and for her subjects, every pretension to seize on the islands of New Zealand, or to govern them as a part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall first be obtained.*[88]

## The Treaty signing process

There are two texts of the Treaty: a Māori text and an English text. There is some evidence that the original English text, from which the current Māori translation was made, has in fact been lost.[89] The Māori text of the Treaty was signed by over 500 Māori chiefs, including 13 Māori women. Over 40 chiefs signed the Māori text at Waitangi on 6 February 1840,[90] and similar gatherings were held elsewhere over the following seven months, enabling more chiefs to sign other copies of the Māori text. The signatures of 39 chiefs were appended to the English text at Waikato Heads in March or April 1840 and at Manukau on 26 April 1840.[91] There are differences between the English and Māori texts of the Treaty, which are discussed in detail later.

A number of prominent chiefs refused to sign the Treaty on the grounds that their chiefly authority would be restricted and other chiefs were never reached.[92] Some non-signatories may have later supported the Treaty at the major hui held at Kohimarama in 1860 and Orakei in 1879,[93] which perhaps may indicate the speed at which the power relationship between Māori and the State changed in the decades following the signing of the Treaty. The Treaty signing process concluded in September 1840.

## Assurances and explanations given to Māori prior to signing the Treaty

Discussions of events at the Treaty signings are necessarily speculative. Historical reports describe some common themes, however, in the way in which the texts were presented to Māori. It seems clear that the differences between the texts were not always apparent in discussions, and that for a number of reasons, debate was often cut short or rushed. The explanations given by the Crown representatives and missionaries were intended to assuage the key misgivings felt by

Māori, by reassuring them that their mana would remain uncompromised. The Crown's benevolence and protection were emphasized instead. It seems probable that Māori placed at least as much emphasis on these comments as they did on the commitments recorded in the texts, given their traditional familiarity with verbal pacts and agreements.[94] Most Māori present at the signings were probably left with the idea that their authority over their customs and law would remain intact, that their tribal rangatiratanga would be enhanced,[95] and that British governance would restore law and order and ward off French interest in the new colony.

Hobson, through his interpreters, gave repeated categorical assurances at Waitangi and Hokianga "that the Queen did not want the land, but merely the sovereignty, that she, by her officers, might be able more effectually to govern her subjects who had already settled … or might … arrive, and punish those of them who might be guilty of crime".[96] Hobson, through his representatives, also pledged that "[Māori] land would never be forcibly taken" and that "truth and justice would always characterize the proceedings of the Queen's Government".[97] Both Hobson and Busby assured the chiefs that "all lands unjustly held would be returned" to Māori.[98] At Kaitaia, Hobson's representative, Lt. Willoughby Shortland, conveyed the Governor's explicit message that: "The Queen will not interfere with your native laws or customs".[99]

Henry Williams, a senior Anglican missionary at Waitangi, assured the chiefs that:

> *… the missionaries fully approved the Treaty, that it was an act of love towards [the chiefs] on the part of the Queen, who desired to secure them in their property, rights, and privileges. That this Treaty was a fortress to them against any foreign power which might desire to take possession of their country …*[100]

The assurances of the missionaries were instrumental in persuading the chiefs to sign the Treaty and in forging an idea among some Māori that the Treaty was like a religious covenant.[101] Hobson later acknowledged the pivotal role of the missionaries.[102] One historian adds that "by the 1840s Māori engagement with Christianity was real, deep and broad",[103] which likely contributed to the significance of missionary persuasion during the Treaty signing process.[104]

The right of pre-emption was presented either as a benefit to be gained or as a concession for retaining tino rangatiratanga. Māori chiefs at Coromandel were told by Major Bunbury (Hobson's representative), through missionary interpreters, that pre-emption was intended "to check their imprudently selling their lands without sufficiently benefiting themselves or obtaining fair equivalent".[105] The Crown, he

pointed out, would instead purchase the land directly from the chiefs at a more just valuation than any speculator might offer.[106] At Tauranga others were told that pre-emption was "intended equally for their benefit and to encourage industrious white men to settle amongst them", rather than absentee land speculators taking hold of the land.[107] While humanitarian concerns were certainly at work and protection emphasized, it is unlikely that the Crown's other interests were fully communicated to Māori signatories. One of the Crown's aims was to help finance the development of the new colony through the profits from land sales, making it financially self-sufficient as soon as possible.[108] It is unlikely that Māori were told that Hobson's instructions were to pay an amount for their lands that would "bear an exceedingly small proportion to the price for which the same land would be resold by the Government to the Settlers".[109] Indeed, it appears that Hobson may not have made this apparent to others negotiating the Treaty on his behalf. Busby later reported that neither he nor Williams grasped the full significance of pre-emption.[110]

In giving effect to Lord Normanby's instructions to gain the "free and intelligent consent" of the chiefs, it seems likely that Hobson did not encourage comprehensive debate at Waitangi and elsewhere. The debates at Waitangi and Hokianga were reportedly cut short by Hobson, whose primary concern was to quickly secure the cession of sovereignty. Before his representatives took copies of the Treaty elsewhere for signing, Hobson warned them to expect long speeches "full of angry opposition, and very little to the purpose".[111] He advised them to seek the friendship of influential chiefs, who could be counted on to persuade others.[112]

## Māori responses to the Treaty proposal

Some of the speeches given by the chiefs at the Waitangi signing were transcribed by British observers, and indicate some of the concerns Māori had about the proposed Treaty, at least as those concerns were understood by these observers. Māori responses to the proposal of a treaty were delivered within Māori customary procedure of debate. Such procedure may have been unfamiliar to some European observers[113] and surviving European accounts may "represent the translator's understanding more than Māori intentions".[114]

The account below of the Waitangi signing is based on the recorded observations of Colenso, a mission printer who attended the gathering. Colenso's account suggests strong and lengthy challenges, including allegations and impassioned claims, a firm rejection of the Treaty proposal, the timely appearance of leading rangatira offering persuasive oratory in favour of the Treaty, and final consent to the

proposal. According to Colenso the debate at Waitangi went on for some hours, and included personal attacks directed at Busby, Williams and others, over their land purchases, drawing attention to overriding Māori concerns about the loss of their lands and land sales transactions in the Bay of Islands.[115] The chiefs initially rejected Hobson's proposal of a treaty, fearing that their own chiefly status might be undermined and preferring instead to continue with existing arrangements. Te Kemara, the senior local chief and tohunga of Ngāti Kawa, responded first:

> *Health to thee, O Governor! This is mine to thee, O Governor! I am not pleased towards thee. I do not wish for thee. I will not consent to thy remaining here in this country. If thou stayest as Governor, then, perhaps Te Kemara will be judged and condemned. Yes, indeed, and even more than that – even hung by the neck. No, no, no; I shall never say 'Yes' to your staying. Were all to be on an equality, then, perhaps, Te Kemara would say, 'Yes;' but for the Governor to be up and Te Kemara down – Governor high up, up up, and Te Kemara down low, small, a worm, a crawler – No, no, no. O Governor! this is mine to thee. O Governor! my land is gone, gone, all gone. The inheritances of my ancestors, fathers, relatives, all gone, stolen, gone with the missionaries. Yes, they have it all, all, all. That man there, the Busby, and that man there, the Williams, they have my land. The land on which we are now standing this day is mine. This land, even this under my feet, return it to me. O Governor! return me my lands … O Governor! I do not wish thee to stay ... And Te Kemara says to thee, Go back, leave to Busby and to Williams to arrange and to settle matters for us natives as heretofore.*[116]

Rewa, a Kororareka chief, reiterated these views:

> *What do Native men want of a Governor? We are not whites, nor foreigners. This country is ours, but the land is gone. Nevertheless we are the Governor – we, the chiefs of this our fathers' land. I will not say 'Yes' to the Governor's remaining. No, no, no; return. What! this land to become like Port Jackson and all other lands seen (or found) by the English. No, no. Return. I, Rewa, say to thee, O Governor! go back.*[117]

Moka, a chief of the Patukeha tribe, from Rawhiti, also spoke against accepting the Treaty on the grounds that it would not prevent further land sales:

> *Who will listen to thee, O Governor? Who will obey thee? Where is Clendon? Where is Mair? Gone to buy our lands notwithstanding the book (Proclamation) of the Governor.*[118]

Tamati Pukututu, a chief of the Te Uri-o-te-hawato tribe broke in, suggesting that the Treaty might serve to ensure that Māori land remained under Māori control: "This is mine to thee, O Governor! Sit, Governor, sit, a Governor for us – for me, for all, that our lands may remain with us ... Remain here a father for us …".[119] Matiu, a chief of the Uri-o-ngongo tribe, supported this turn in direction, emphasizing the good that might arise from a treaty, stating:

> *O Governor! Sit, stay, remain – you as one with the missionaries, a Governor for us. Do not go back, but sit here, a Governor, a father for us, that good may increase, may become large to us …*[120]

The debate continued back and forth, some rejecting and others accepting the Treaty proposal. It appears from Colenso's account that a critical turning point came with the intervention of Hone Heke, Tamati Waaka Nēne, and Patuone Nēne, all long-time associates of the missionaries and influential speakers, who spoke in support of the Treaty. Hone Heke spoke first to the Governor:

> *To raise up, or to bring down? to raise up, or to bring down? Which? which? Who knows? Sit, Governor, sit. If thou shouldst return, we Natives are gone, utterly gone, nothinged, extinct. What then shall we do? Who are we? Remain, Governor, a father for us. If thou goest away what then? We do not know. This, my friends, (addressing the Natives around him), is a good thing. It is even as the word of God (the New Testament, lately printed in Māori at Paihia and circulated among the Natives). Thou to go away! No, no, no! For then the French people or the rum-sellers will have us Natives …*[121]

Hone Heke further argued that the chiefs should rely on the direction of the missionaries in deciding this matter. An impassioned speech by Tamati Waaka Nēne followed:

> *I shall speak first to us, to ourselves, Natives … What do you say? The Governor to return? What, then, shall we do? … Is not the land already gone? Is it not covered, all covered with men, with strangers, with foreigners – even as the grass and herbage – over whom we have no power? We, the chiefs and Natives of this land, are down low; they are up high, exalted. What, what do you say? The Governor to go back? I am sick, I am dead, killed by you. Had you spoken thus in the old time, when the traders and grog-sellers came – had you turned them away, then you could well say to the Governor, 'Go back,' and it would have been correct, straight; and I would also have said with you, 'Go back' – yes, we together as one man, one voice.*

> *But now as things are, no, no, no … (Turning to Hobson, Tamati Waaka Nēne continued:) O Governor, sit … Do not thou go away from us; remain for us – a father, a judge, a peacemaker. Yes, it is good, it is straight. Sit thou here, dwell in our midst …*[122]

Patuone Nēne, a leader among Ngāpuhi, followed his elder brother, supporting his views and associating the Governor with the benefits brought by the missionaries and the 'Word of God':

> *What shall I say on this great occasion, in the presence of all these great chiefs of both countries? Here, then, this is my word to thee, O Governor! Sit, stay – thou, and the missionaries, and the Word of God …*[123]

Issues debated at Waitangi were reiterated at other Treaty signings. At Hokianga, Hobson was met with strong opposition by the local chiefs. Taonui reiterated the significance of land to Māori:

> *We are not good (or willing) to give up our land. It is from the earth we obtain all things. The land is our Father; the land is our chieftainship; we will not give it up.*[124]

Kaitoke charged that Māori had been cheated in their dealings with the Pākehā:

> *We gave you land, you gave us a pipe, that is all. We have been cheated, the Pākehās are thieves. They tear a blanket, make two pieces of it and sell it for two blankets. They buy a pig for one pound in gold, and sell it for three. They get a basket of potatoes for six pence, sell it for two shillings. This is all they do; steal from us, this is all.*[125]

At Kaitaia, Māori concerns to ensure that their own laws would remain intact were repeated. Nopera Panakareao, the leading rangatira of Muriwhenua, voiced an oft-quoted phrase: "The shadow of the land goes to the Queen, but the substance remains with us".[126] The remarks of Nopera Panakareao clearly communicated his understanding that Māori law, customs, and authority over their lands were to be preserved and respected.[127] The remark followed assurances from the Crown's representative, Lt. Willoughby Shortland, that Governor Hobson would strictly honour all the obligations which the Treaty imposed on him in the Queen's name.

## Events which established the British Crown's sovereignty over New Zealand

Hobson assumed that sovereignty was vested in the Crown at Waitangi and ratified by later signings. Within a few months of the Waitangi signings, however, he became anxious about news that the New Zealand Company settlers intended to establish their own form of self-government at Port Nicholson (Wellington).[128] On 21 May 1840, Hobson accordingly declared sovereignty over the whole of New Zealand; over the North Island on the grounds of cession through the Treaty (referring to the Treaty of Waitangi signed on 6 February 1840) and over the South Island and Stewart Island on the grounds of discovery by Captain Cook in 1769, although by May 1840 some South Island chiefs had already signed the Treaty. On 2 October 1840 the acquisition of New Zealand by the Crown was officially announced in the London Gazette. As stated by Justice Richardson in the *Lands* case (1987), it seems widely accepted that as a matter of international and colonial law, the May proclamations along with the subsequent Gazette notice established Crown sovereignty over New Zealand.[129] In a High Court decision, Justice Durie, also the Chairperson of the Waitangi Tribunal, said:

> *[The Treaty of Waitangi] was no doubt an extremely important document in underpinning the decision of the Crown to annex New Zealand and giving it some moral validity to do so and assisting the Crown at that time to stand out against what were then rival interests from other Governments and in particular a Government of France. However, the Treaty of Waitangi while underpinning the Government's decision to annex New Zealand is not in fact the basis in law on which the Government has legal authority. Its authority arises from the Proclamation of Sovereignty.*[130]

Even given the dispute over the language used in the respective texts of the Treaty, and the uncertainty surrounding the events by which British authority was established, it is generally thought that by building on the sovereignty proclaimed in May 1840, Parliament gained full powers to make law for New Zealand.[131]

## Differences between the English and Māori texts of the Treaty

As discussed above, it seems very likely that during the Treaty signings, Māori were given verbal promises in addition to those recorded in the texts of the Treaty. There were several versions of the English text of the Treaty, and it also seems likely that the original English text, used to provide the Māori translation, has been lost.

Neither official text is a direct translation of the other, and these differences have given rise to different understandings of the Treaty. The main differences follow.

## Preamble

The preamble outlines the overall purposes and intentions of the Treaty. The English text emphasized the Queen's concern "to protect [the] just Rights and Property" of the chiefs and tribes, to provide for British settlement resulting from "the rapid extension of Emigration", to secure the "recognition of Her Majesty's Sovereign authority over the whole or any part of those lands" and "to establish a settled form of Civil Government" to secure peace, law and order for both settlers and Māori.

In the Māori text, however, guarantees preserving tino rangatiratanga and Māori land ownership were emphasized, along with promises of protection for Māori chiefs and sub-tribes, maintaining peace and good order, and acknowledging the presence of settlers. Further, in the Māori text the expected influx of settlers was referred to as "others yet to come". The Queen's "Sovereign authority" is described in the Māori text in words which have been translated as "the Queen's Government being established over all parts of this land and (adjoining) islands".[132]

## Article I

Article I of the Treaty refers to the British Crown's right to govern in New Zealand based on the consent of the Māori signatories. In the English text, Māori ceded "all the rights and powers of sovereignty" to the Crown, while in the Māori text, Māori agreed to the Crown's "kāwanatanga" over their lands. The term kāwanatanga was a recently coined word derived from the word governorship. Māori are likely to have understood this term in the context of biblical references to Pontius Pilate, the governor of Rome, whose authority was subordinated to that of the Emperor and whose power was more abstract than concrete.[133] By contrast "tino rangatiratanga" had been chosen by Busby in the 1835 Declaration of Independence to refer to New Zealand's "independence". It seems likely that Māori felt that their tribal authority "on the ground" would be confirmed in return for a limited concession of power in the form of kāwanatanga.[134] Many commentators are of the view that the word "mana" is a closer Māori equivalent to the word sovereignty than kāwanatanga, and in the 1835 Declaration of Independence, "mana" is used to describe "all sovereign power and authority". In the view of the Waitangi Tribunal no chief in 1840 would have relinquished his or her mana to the Queen,[135] and the connection of mana with Māori gods and spirituality may further explain why the term kāwanatanga was favoured.[136]

The term sovereignty used in the English text is a complex and culturally embedded European concept, which was unfamiliar to most Māori and which may not have had any direct parallel with Māori conceptions of political and social organisation. The Māori understandings were almost certainly that something less than sovereignty had been given away, possibly only allowing the Crown the right to govern its own (British) people in New Zealand and mediate in intertribal disputes. Many Māori may have believed that they were agreeing to a protectorate arrangement in which their internal power and authority would be preserved.

## Article II

In Article II of the English text, the chiefs were guaranteed the "full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession". Article II of the Māori text guaranteed the chiefs "te tino rangatiratanga o ō rātou wenua o rātou kāinga me o rātou taonga katoa", which has been translated as "the unqualified exercise of their chieftainship over their lands, villages and their treasures".[137] The concept of tino rangatiratanga can be interpreted in various ways, and is generally understood to refer to the unqualified exercise of chiefly authority. While the English text clearly guarantees Māori property rights, the tino rangatiratanga guaranteed in the Māori version conveys a broader capacity. Māori almost certainly understood that they would continue to exercise complete authority over their tribal domains. Similarly, the use of the term "taonga" (translated variously as "treasures" or "all things highly prized") in the Māori text was a more abstract and wide-ranging term than the "properties" in the English text, and is likely to have included intangible valued possessions such as genealogical knowledge and important customs.[138]

Article II also gave the Crown the right to purchase any Māori land which Māori wished to sell. The English text defines this as the exclusive right of pre-emption, whereby only the Crown can purchase Māori land and so extinguish customary title. The Māori text does not convey this notion of exclusivity, and it is possible that Māori thought they were agreeing to give the Crown the first right of refusal. They may not have understood that under the exclusive right of pre-emption if the Crown did not want to purchase land, then Māori would be prevented from negotiating a sale with other parties.[139] In addition, given traditional forms of land tenure, Māori may also have considered that any land transactions would be akin to a leasing arrangement.[140]

### Article III

This Article was designed to serve the goal of settlement while satisfying humanitarian interests.[141] In the English text, the Crown extended to Māori people "Her Royal Protection" and imparted to them "all the rights and privileges of British subjects". Similarly, in the translated Māori text, the Crown promised to protect "all the ordinary people of New Zealand and give them the same rights and duties of citizenship as the people of England". Māori almost certainly understood that their existence as a distinct people and their ways of life would be protected (reinforcing the Crown's obligations in Article II), and that they would enjoy an equitable share in all the benefits and innovations of settlement.

### Postscript

The Postscript refers to those willing to witness their agreement to the Treaty by recording their signatures or marks. While the English text emphasized that the chiefs had "been made to fully understand the Provisions of the foregoing Treaty" and entered into its "full spirit and meaning", the translated Māori text records that the chiefs "meeting here at Waitangi having seen the shape of these words … accept and agree to record our names and marks thus".

The English text would certainly have conveyed to the Colonial Office that Hobson had followed Lord Normanby's instructions, requiring that the chiefs be fully cognisant of the implications of signing the Treaty by giving their "free intelligent consent", thus enabling the British Crown to establish lawful government in New Zealand. The Waitangi Tribunal interprets the emphasis on the full spirit of the Treaty in the English text as being essential to interpreting its meaning and significance today, which also accords with Māori familiarity with intertribal oral compacts upheld by concepts of mana. The Courts have held that this approach accords with a Māori customary view.

### The "fourth Article" of the Treaty

During the Waitangi signing of the Treaty, debate concerning ongoing respect for Māori customs and authority "became mixed with a dispute amongst the representatives of the missionary churches".[142] The French Roman Catholic Bishop, Pompallier, was concerned that the predominance of the Anglican faith amongst the British representatives and missionaries would discourage Māori from adopting Catholicism. Pompallier intervened, asking the Governor to give the assembled chiefs a guarantee that their religious freedom would be protected. A declaration was accordingly drafted, accepted by Hobson, and read to those assembled, the text of which is recorded as:

> *E mea ana te Kāwana ko ngā whakapono katoa o Ingarani, o ngā Wēteriana, o Rōma, me te ritenga Māori hoki e tiakine ngātahitia e ia.*[143]
>
> *The Governor says the several faiths of England, of the Wesleyans, of Rome, and also the Māori custom, shall be alike protected by him.*[144]

The declaration was never added to the text of the Treaty, and so is not regarded as an official Article of the Treaty, but nonetheless it undoubtedly informed the views of Māori considering the Treaty at Waitangi. The "fourth Article" retains significance for many Māori today, who regard it as an important supplement to the promises made to them in Articles II and III of the Treaty, particularly that Māori customs and authority would be protected.[145]

## Where has the Treaty been all these years?

In recent decades, the Treaty has gained a new public prominence. This most recent phase in the life of the Treaty has as its immediate source a wave of Māori activism in the 1960s, building on the long tradition of Māori efforts to have the Treaty guarantees upheld. This section summarizes the changing status of the Treaty from its signing, up to the 1975 establishment of the Waitangi Tribunal, and records the approach taken by the Courts over this time. The history of the Crown-Māori relationship is a complex and hotly debated one, and this brief summary does not claim to do justice to the varied perspectives of those with an interest in the story.

In the decade immediately following the signing of the Treaty, the power balance between Europeans and Māori remained in favour of the tribes. The number of European settlers was low, and the relatively small amount of land alienated to accommodate the new arrivals posed little threat to the power base of the tribes. Iwi and hapū retained substantive control over their tribal domains, which included small communities of settlers, dependent on the tribes for protection and for their food supply. The relationship between Māori and Crown was conducted as a type of diplomatic relationship between Queen Victoria and her colonial representatives on the one hand, and the chiefs on the other. The Crown and Māori both referred to the Treaty as the basis for their relationship, and Māori relied on the Treaty when objecting to actions of the colonial government. In 1847, concerned by news that the Crown might be preparing to confiscate uncultivated tribal lands, Te Wherowhero and four other major Waikato chiefs prepared a petition to Queen Victoria, requesting her personal assurance that the Treaty guarantees would be given effect. The reassurance sought was given to the chiefs through Governor Grey.[146]

The first reported case of New Zealand's colonial Supreme Court, *R v Symonds* (1847),[147] was decided just seven years after the signing of the Treaty. This case concerned the effect of a purported waiver of the Crown's exclusive right of pre-emption, where a settler relied on a waiver issued by the then Governor Fitzroy to purchase land directly from its Māori owners. The Court found that the title was invalid, holding that settlers could not obtain a valid private title to land directly from Māori, since the Crown had an exclusive right to extinguish aboriginal title which was not simply a right of first refusal.[148] The Court affirmed the doctrine of aboriginal title and recognised the Treaty of Waitangi as declaratory of that existing doctrine.[149]

In the 1850s, settlement rates accelerated and tensions over land began to emerge. In an effort to empower the tribes through unification and to facilitate the retention of land, Waikato Māori came together in an alliance that became known as the King Movement. By 1860, the movement had attracted considerable pan-tribal support, and exercised exclusive control over the central region of the North Island (the King Country) until well into the 1870s.[150] In 1860, armed conflict broke out between Māori and British troops in the Taranaki settlement of Waitara over disputed land transfers. Concerns about events at Waitara and about the developing King Movement prompted the then Governor Browne to call a meeting of chiefs in 1860, hoping to secure their support for government actions at Waitara and rejection of the King Movement.[151] These Kohimarama meetings were attended by over 200 chiefs, including many who had signed the Treaty on behalf of their tribes. Discussions centered on the meaning of the Treaty, and proceedings of the meetings convey the chiefs' understanding of the nature of the Treaty relationship.[152] A unanimous resolution – the Kohimarama Covenant - was passed by the conference, recognising the sovereignty of the Crown, an act that has been described as a "ratification of the Treaty" which affirmed the rangatiratanga of the chiefs.[153] Resolutions condemning the King Movement and endorsing government policy on the Waitara conflict attracted much less support.

The 1860s was a pivotal decade in the Crown-Māori relationship. Between 1840 and 1859 the Pākehā population had grown thirtyfold and by 1860 the two populations were almost the same size.[154] By 1865 nearly two thirds of New Zealand had been acquired by the Crown, that is, almost all of the 34 million acres of the South Island and over seven million acres of the North Island.[155] The pressure on Māori to sell their land was intensifying and placed a strain on collective controls over tribal land. The fighting in Waitara erupted into large-scale warfare in Taranaki and the Waikato in what are now known as the Land Wars, also described as the Wars of Sovereignty.[156] The colonial administration saw the organised Māori resistance as a direct challenge to British sovereignty, and responded with an emphatic show of force. British troops (supported by some Māori) greatly outnumbered their

Māori opponents and, eventually, important Māori communities were overwhelmed and dismantled, debilitating some tribes.

In 1863 the New Zealand Parliament passed legislation allowing the Crown to confiscate land from tribes who had fought against it during the wars, and in 1865 the Native Land Court was established to convert Māori customary land rights into Crown-granted titles to allow dealings in this land, a process which had the effect of dismantling Māori collective ownership of land.[157] Between 1865 and 1899 some 11 million acres were further acquired by the Crown under the Native Land legislation.[158] By forcibly suppressing Māori protest in the central North Island during the 1860s, and by confiscating land from tribes involved in the wars (so removing the economic base on which tribal infrastructures depended), the colonial government consolidated its sovereignty over the tribes and ceased to refer to the Treaty as the basis for its relationships with Māori.[159]

In the 1870s, the modern infrastructure of New Zealand's colonial society began to take shape. The Treaty appears to have dropped from settler consciousness during this period, even though Māori continued to assert it in their dealings with the Crown.[160] In this context, the New Zealand Supreme Court decided *Wi Parata v the Bishop of Wellington*.[161] The *Wi Parata* decision signalled a turning point in judicial consideration of the Treaty. Chief Justice Prendergast made the comment that: "so far as it purported to cede sovereignty ... [the Treaty] must be regarded as a simple nullity".[162] The Chief Justice based his stance on the assertion that in international law, the tribes had insufficient legal capacity to cede sovereignty, commenting that:

> *On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British government desired and endeavoured to recognise the independent nationality of New Zealand. But the thing neither existed nor at that time could be established. The Māori tribes were incapable of performing the duties and therefore assuming the rights of a civilised community … no body politic existed capable of making cession of sovereignty, nor could such a thing exist.*[163]

Chief Justice Prendergast also held that customary title could not be recognised by the Courts in the absence of statutory recognition, and that "native proprietary rights" could be disposed of by the Crown whenever it chose by simply acquiring the land, with no need for a sale, or for extinguishing legislation. The *Wi Parata* decision was followed by New Zealand Courts for many decades. The Privy Council, however, took a different view on a number of occasions.

In the case of *Nireaha Tamaki v Baker* (1901)[164] the Privy Council disagreed with parts of the Court's findings in the *Wi Parata* case, holding that Māori customary title to land was recognised by both common law and statute, and that executive action such as a Crown grant could not by itself extinguish native title to land. The Privy Council, commenting on the finding in *Wi Parata* that unextinguished customary title could not be recognised by a Court, noted that: "… this argument goes too far, and ... it is rather late in the day for such an argument to be addressed to a New Zealand Court".[165] The New Zealand Courts, however, disregarded the Council's findings, and continued to apply the principles expressed by Chief Justice Prendergast in the *Wi Parata* case.[166] In a second case several years later, *Wallis v Solicitor-General* (1903),[167] the Privy Council again asserted the existence of Māori customary rights to land as part of the common law of New Zealand. The Judges of the colonial Courts responded to the case with outrage,[168] and after much heated discussion the colonial government enacted section 84 of the Native Land Act 1909, barring the enforcement of customary title to land against the Crown. This bar survives today via Te Ture Whenua Māori Act 1993 as an amendment to the Limitations Act 1950, with the effect that claims for the recovery of customary rights to land are only valid if asserted against the Crown within 12 years of the breach. This effectively bars most potential claims dating back to 1840.

The Māori population dropped dramatically in the decades following the signing of the Treaty,[169] while the settler population increased rapidly. By 1878 Māori were outnumbered by ten to one.[170] By the turn of the century the European population numbered around 770,000 compared to around 45,000 Māori (a ratio of around sixteen to one);[171] and the Crown had acquired over 80 percent of the country's territory. Despite or perhaps because of the unsympathetic stance of the New Zealand Courts and colonial legislature, Māori protest intensified during the 1880s**.** In this decade, Māori directed hundreds of petitions to the government, sent two deputations to England,[172] and presented thousands of petitions to the colonial Parliament.[173] Throughout this period, Māori sought to strengthen their position through unification and repeatedly petitioned the Crown to pass legislation establishing a separate Māori Parliament. The Crown declined to do so, and the tribes eventually established their own Parliament – Te Kotahitanga o te Tiriti o Waitangi - which met for the first time in 1892 and continued to operate for 11 years before gradually losing support.[174] Other important pan-tribal national bodies evolved as Māori worked to redress the power imbalance between the tribes and the Crown. The King Movement in the central North Island established its own Parliament – the Kauhanganui – and in 1913 Te Rata, the fourth Māori King, formed a delegation and traveled to England to appeal to the British Crown to intervene in New Zealand

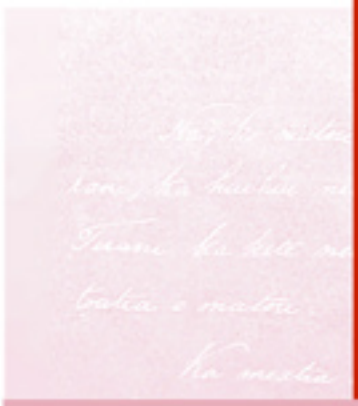
to rectify breaches of the Treaty.[175] The mission was accorded an audience with King George V and Queen Mary, but Te Rata was instructed to refer his grievances to the New Zealand colonial authorities. The Ratana Church emerged as a powerful pan-tribal grouping around 1918, and in 1924 the head of the Church, Tahupotiki Wiremu Ratana, took a petition to England, requesting the establishment of a Commission to examine Māori grievances. He too was instructed to direct his concerns to the New Zealand authorities.

In the period following the First World War, there was little significant case-law on the Treaty, until the decision of *Te Heu Heu Tukino v Aotea Māori District Land Board* (1941).[176] In this case the paramount chief of Tuwharetoa, Te Heu Heu Tukino, sought to rely on Article II of the Treaty to challenge a statutory endorsement of a Land Board decision concerning ancestral tribal land. The Privy Council held that a claim could not be rested on rights and duties set out in the Treaty in the absence of statutory recognition of those rights, and noted that the New Zealand legislature had not adopted the Treaty as law, stating that: "any rights purported to be conferred by ... a treaty of cession cannot be enforced by the Courts, except in so far as they have been incorporated in the municipal law".[177] The rule established in the *Te Heu Heu Tukino* case has not been displaced and remains the orthodox position in respect of the Treaty's status in law, although some trends in statutory interpretation and administrative law may provide new avenues for the consideration of the Treaty by the Courts.[178]

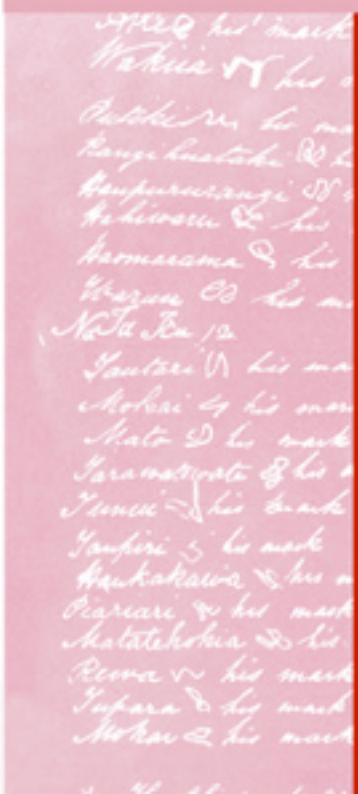
Following the Second World War, a number of cultural changes in New Zealand society and the rapid urbanisation of Māori[179] coincided with increased public awareness of the Treaty, including a growing sense of detachment from Britain, and the influence of human rights based movements in other countries and in the United Nations. Māori activism in the 1960s and 1970s raised public awareness of the Treaty, and Māori representatives in Parliament worked hard to convey the intensity of Māori grievances in respect of the Treaty. In 1975 the Treaty of Waitangi Act was passed, establishing the Waitangi Tribunal as a commission of inquiry to consider claims by Māori against the Crown regarding breaches of principles of the Treaty and to make recommendations to the Crown. In 1985 the Tribunal's jurisdiction was extended to cover all Crown acts and omissions dating back to 1840.

When the Fourth Labour Government began to implement its economic reforms in 1984, Māori expressed concern that the Crown might divest itself of resources which could be used as redress for Treaty breaches. In 1986, Parliament enacted the State-Owned Enterprises Act, including section nine, which required that the Act be

implemented in accordance with the principles of the Treaty. The first major Court of Appeal case of the "new era" of Treaty jurisprudence, *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (the *Lands* case) concerned the interpretation of this section.



# Key concepts in the Treaty exchange



## Introduction

While this guide seeks to outline the principles of the Treaty, it is clear that these must be derived from the texts of the Treaty and from the terms of the exchange recorded in its Articles, as well as from other sources. A comprehensive debate about the meaning of the words used in the Treaty continues in political, public and academic settings, and forms the social backdrop to legal processes and the elaboration of Treaty principles by the Courts and Waitangi Tribunal. Wider constitutional debates about the relationship between the Crown and Māori, and the constitutional place of Māori groups in New Zealand, continue independently of legal consideration of the Treaty, and need not be confined by it.

This section of the guide outlines what the Courts and the Waitangi Tribunal have said about some of the key concepts included in the Treaty: tino rangatiratanga, kāwanatanga, sovereignty, governance and taonga. These concepts are, of course, integral to the principles of the Treaty. Legal commentary on their meaning also provides a useful preliminary to the consideration of Treaty principles defined by the Courts and Waitangi Tribunal because it demonstrates the premises on which these bodies have based their construction of the principles. This commentary is presented here as a way of addressing how the Courts and the Waitangi Tribunal understand the interests at stake in the partnership, to which the Treaty principles are applied.

This section also addresses legal interpretations of fiduciary duty and indigenous developmental rights. To varying extents, the Courts and the Tribunal have located these concepts in the Treaty partnership, and have also acknowledged that they arise in legal analysis independently of the Treaty (as they have in other jurisdictions) as aspects of the common law doctrine of aboriginal title. Notwithstanding the high degree of overlap between these concepts and Treaty principles, they are addressed here separately, since they can both be regarded as arising from the Treaty, and as running parallel to it.

It should be noted here that the roles of the Waitangi Tribunal and the Courts are very different. The Courts interpret legislation, while the Tribunal has jurisdiction to measure legislation against Treaty principles. The Courts have consistently stated that sovereignty was acquired by the Crown, and that this includes Parliamentary supremacy – the right of Parliament to enact laws without restriction. The Courts

do not conceptualize the relationship between the Crown and Māori as one in which kāwanatanga is restrained by tino rangatiratanga, but rather emphasize the Crown's moral obligation to exercise its unlimited powers honourably and in accordance with the Treaty principles. Both the Courts and the Tribunal have acknowledged the reciprocity inherent in balancing these concepts.[180] Both bodies have also acknowledged that at times it may be necessary for the Crown to exercise kāwanatanga to override Māori interests for the public good. When such an override will be appropriate is a matter that the Courts have currently commented on only by reference to specific areas, particularly in respect of conservation issues. The Tribunal's consideration has been much broader, and in some instances the Tribunal's conception of an appropriate balance has differed from that expressed by the Court in respect of conservation issues. The Waitangi Tribunal takes the approach that sovereignty was ceded to the Crown, but that this is a limited form of sovereignty, which requires the Crown to respect Māori authority over their own affairs as far as possible.

## Tino rangatiratanga

The Courts have noted but not defined tino rangatiratanga, in the context of considering the nature of Māori commercial fishing rights,[181] the exclusivity of iwi boundaries,[182] customary fishing rights,[183] and the scope of taonga.[184] Although the Courts have not defined the concept, they have noted the difficulty of translating the term into English,[185] and its connection to concepts of guardianship or control.[186] The Court of Appeal has never been directly required to define the precise nature of the relationship between kāwanatanga and tino rangatiratanga in the course of interpreting a Treaty clause or otherwise referring to the Treaty. The Tribunal conceptualizes the Treaty partnership as a balance between kāwanatanga and rangatiratanga, and has commented extensively on the scope of tino rangatiratanga.

### The Courts

In the *Lands* case of 1987, the Court of Appeal was given its first opportunity to consider the principles of the Treaty for the purposes of section nine of the State-Owned Enterprises Act 1986. In order to elaborate the principles of the Treaty, it had first to consider the two language texts and to derive an understanding of the basic agreement between the parties to the Treaty. The President of the Court summarized this agreement as follows:

> *In brief the basic terms of the bargain were that the Queen was to govern and the Māoris were to be her subjects; in return*

> *their chieftainship and possessions were to be protected, but sales of land to the Crown could be negotiated. These aims partly conflicted.*[187]

In the High Court, Justice McGechan made some observations on the scope of tino rangatiratanga while considering the Crown's handling of the 1994 Māori Electoral Option in *Taiaroa and Others v Attorney-General* (1994). The meaning of tino rangatiratanga was not directly relevant to the question before him, but the judge took the opportunity to make the following comment:

> *I do not attempt to state the full content of tino rangatiratanga preserved by Article 2. It probably is neither possible nor desirable. However, I readily accept it encompassed a claim to an ongoing distinctive existence as a people, albeit adapting as time passed and the combined society developed.*[188]

## The Waitangi Tribunal

The Tribunal, as noted above, has a wider scope of concern in which to consider the Treaty, and has produced more detailed discussion of its terms. In the course of considering claims against the Crown, the Waitangi Tribunal is mandated to interpret the Treaty and discuss the differences between the two texts.[189] In its reports, the Tribunal has offered useful comments on the relationship between kāwanatanga and tino rangatiratanga, describing it in terms of an exchange between the parties. The Waitangi Tribunal understands this exchange as the Treaty principle of reciprocity,[190] that is: "[the principle that] the cession by Māori of sovereignty to the Crown was in exchange for the protection by the Crown of Māori rangatiratanga".[191] In the Tribunal's view, the maintenance of a separate Māori sovereignty was not sustainable under the Treaty:

> *From the Treaty as a whole is obvious that it does not purport to describe a continuing relationship between sovereign States. Its purpose and effect was the reverse, to provide for the relinquishment by Māori of their sovereign status and to guarantee their protection upon becoming subjects of the Crown.*[192]

In its *Muriwhenua Fishing Claim Report* (1988), the Waitangi Tribunal explained that:

> *In any event on reading the Māori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga, therefore, refers not to a separate sovereignty but to tribal self-management on lines similar to what we understand by local government.*[193]

In the *Māori Electoral Option Report* (1994), the Tribunal discussed the tension between tino rangatiratanga and kāwanatanga in the following way:

> *The precise meaning of tino rangatiratanga in the Treaty and its relationship to the kāwanatanga which was ceded in Article I has been much debated. Some have argued that tino rangatiratanga was a guarantee of Māori sovereignty; others a right to self-determination; others again a right of self-management. The difficulty is that no one of these English constitutional terms properly captures the Māori meaning, or meanings, of tino rangatiratanga, a term which is eminently adaptable to time and circumstance. But if we look beyond the strict literal meaning of the Treaty to its broader principles, it is clear that the exercise of tino rangatiratanga, like kāwanatanga, cannot be unfettered; the one must be reconciled with the other ... In constitutional terms this could be seen as entitling Māori to a measure of autonomy, but not full independence outside the nation State they helped to create in signing the Treaty.*[194]

This concept of balancing tino rangatiratanga and kāwanatanga features strongly in the Tribunal's analysis. The Tribunal considers that while sovereignty was ceded to the Crown, in agreeing to the Treaty the Crown accepted certain limitations in the exercise of its power – namely, the protection of the capacity of Māori to exercise rangatiratanga:

> *It is clear that cession of sovereignty to the Crown by Māori was conditional. It was qualified by the retention of tino rangatiratanga. It should be noted that rangatiratanga embraced protection not only of Māori land but of much more, including fisheries ... The Crown in obtaining the cession of sovereignty under the Treaty, therefore obtained it subject to important qualifications upon its exercise. In short, the right to govern which it acquired was a qualified right.*[195]

The Tribunal considers that the Crown can override tino rangatiratanga in the national interest, but only in exceptional circumstances. It is not enough that a Crown proposal is in the public interest or can be justified for reasons of convenience or economy.[196] In the *Ngāi Tahu Sea Fisheries Report* (1992) the Tribunal stated:

> *Māori insistence on their right to retain tino rangatiratanga over their land resulted in the inclusion of article 2 of the Treaty, and was a measure of the depth and intensity of their relationship to the land and other natural resources. It follows that if the Crown is ever to be justified in exercising its power to gov-*

> *ern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Māori in article 2 it should be only in exceptional circumstances and as a last resort in the national interest.*[197]

In the *Ngāwhā Geothermal Resources Report* (1993), the Tribunal explained that: "The tribal right of self-regulation or self-management is an inherent element of tino rangatiratanga".[198] In its *Te Arawa Representatives Geothermal Resources Report* (1993), the Tribunal considered that this included a guarantee of "tribal control of Māori matters, including the right to regulate access of tribal members and others to tribal resources".[199] The concept of self-management was discussed by the Tribunal in the context of Māori educational facilities in the *Wānanga Capital Establishment Report* (1999). The Tribunal found that:

> *Rangatiratanga involves, at the very least, a concept of Māori self-management ... the efforts of these tribal groups [that is, Māori iwi groups] to create and sustain [tertiary education institutions] are a vital exercise of rangatiratanga. The establishment of wānanga as [tertiary education institutions] recognised by the State represents an attempt to engage actively with the Crown in the exercise of rangatiratanga in the management of new forms of tribal and Māori education. The Crown's Treaty obligation is to foster, support, and assist these efforts.*[200]

Referring to the lack of tribal structures which might provide an effective interface with the Crown, the Tribunal commented that: "The Crown, in our view, has much work to do to complete its Treaty undertakings. It must provide a legally recognisable form of tribal rangatiratanga or management, a rangatiratanga the Treaty promised to uphold".[201]

As to the practices and possessions included in the exercise of tino rangatiratanga, in *Te Whānau o Waipareira Report* (1998), the Waitangi Tribunal considered that tino rangatiratanga:

> *… applies to much more than the customary ownership of lands, estates, forests, fisheries and other taonga. It describes a value that is basic to the Māori way of life, that permeates the essence of being Māori.*[202]

The Tribunal has stated that the guarantee of Article II preserves for Māori "full authority status and prestige with regard to their possessions and interests".[203] In its *Muriwhenua Fishing Claim Report* (1988), the Tribunal made the following comment:

> *There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically, and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly the exercise of authority was not only over property but of persons within the kinship group and their access to tribal resources.*[204]

The Tribunal has emphasized the close relationship between the concepts of mana and rangatiratanga. In the *Orakei Report* (1987), the Tribunal explained that:

> *In Māori thinking "rangatiratanga" and "mana" are inseparable. One cannot have one without the other. The Māori text of the Treaty conveyed to the Māori people that, amongst other things, they were to be protected not only in the possession of their lands but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences.*[205]

The Tribunal went on to elaborate this concept, commenting that:

> *The conferral in the Māori text of "te tino rangatiratanga" of their lands on the Māori people carries with it, given the nature of their ownership and possession of their lands, all the incidents of tribal communalism and paramountcy. These include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion.*[206]

In the *Taranaki Report* (1996), the Waitangi Tribunal considered that "Māori autonomy" was guaranteed by the Treaty, and that: "Autonomy is the inherent right of all peoples in their native countries".[207] The Tribunal's commentary on the term "autonomy" indicates an increasing acknowledgement of the extent to which issues affecting indigenous peoples have become internationalised:

> *Broadly ... we consider 'aboriginal autonomy' to describe the rights of indigenes to constitutional status as first peoples, and their right to manage their own policies, resources, and affairs (within rules necessary for the operation of the State) and to enjoy cooperation and dialogue with the Government.*[208]

The Tribunal continues:

> *The international term of 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as first peoples and their rights to manage their own policy, resources and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Māori words are "tino rangatiratanga", as used in the Treaty, and "mana motuhake" as used since the 1860s.*[209]

In the *Te Whānau o Waipareira Report* (1998), the Tribunal considered a claim by a Māori charitable trust that government departments (the Community Funding Agency and the Department of Social Welfare) had failed to recognise the special Treaty status of the trust and to consult with it in terms of Article II of the Treaty. The claim was unusual for several reasons. First, it dealt with welfare spending, as opposed to historical injustice, and secondly, it involved a non-tribal group, that is, a group not linked by kinship, arguing that it could exercise rights arising from rangatiratanga and was therefore one of the Crown's Treaty partners. The Tribunal entered into a detailed discussion of the meaning of tino rangatiratanga in contemporary circumstances, having identified the exercise of rangatiratanga as the characteristic which qualified a Māori community for special recognition under the Treaty. The Tribunal noted that: "The principle of rangatiratanga may be applied to a variety of Māori activities each with the goal of promoting a Māori responsibility for Māori affairs".[210] The Tribunal continued:

> *The principle of rangatiratanga appears to be simply that Māori are guaranteed control of their own tikanga, including their social and political institutions and processes and, to the extent practicable and reasonable, they should fix their own policy and manage their own programmes.*[211]

The Tribunal emphasized the internal relationships in groups that allow the exercise of rangatiratanga: "It is the reciprocal relationship of rangatiratanga between leadership and membership that binds people together in a Māori community".[212] The Tribunal noted also that: "Rangatiratanga is not absolute. The character of rangatiratanga depends on the internal dynamics of the community, and it may well fade around the edges, and can change over time".[213] The Tribunal went on explain that:

> *The political success of a rangatira may wax and wane, ebb and flow; yet rangatiratanga itself endures as a fundamental value in Māori culture, and the key customary principle in Māori social, political, and economic organisation. Kinship and descent*

> *provide ready-made networks of relationships among Māori, but it is rangatiratanga that determines which of those relationships have current significance.*[214]

The Tribunal has also emphasized the spiritual aspects of rangatiratanga, saying that:

> *For Māori, rangatiratanga has both sacred and secular aspects, neither of which should be isolated from the other. So, for example, even commercial activity may be subject to ritual constraints. This is especially so where rangatiratanga applies to taonga, as is envisaged in article 2.*[215]

The Tribunal noted that rangatiratanga was often exercised in respect of taonga:

> *The relationship between rangatiratanga and taonga is as subject to object. The exercise of rangatiratanga over taonga proceeds from the perception that the people and taonga are part of the same universe, regulated by the atua (gods). In exercising care and protection, nurturing, conserving and maintaining taonga for the future benefit of the group (commonly called kaitiakitanga), rangatira have always sought divine sanction for the responsible use of those taonga.*[216]

The Tribunal found that in certain circumstances, groups other than traditional tribes may be entitled to the special protection of the Crown under the Treaty. This is particularly so if the group is "distinctively Māori" in adhering to customary values and in seeking to promote the welfare of its community. Factors could include the way in which the community had emerged (by addressing Māori needs, based on a marae, involving the development of a network of kaumātua and so on), and the adherence to Māori values in the basic approach of the organisation including the roles of kaumātua, a focus on nurturing, and the continued provision of services even when funding is not available.

## Kāwanatanga

In considering the principles of the Treaty, the Courts have emphasized the concepts of good faith, and of reasonableness. In order to give effect to the Treaty principles, the Crown must ensure that the exercise of its law-making power in respect of its Māori Treaty partner is honourable. The Courts have commented that the Crown is free to decide among a number of possible ways of meeting Treaty obligations, provided it can show that it is acting reasonably in choosing a particular

course of action. President Cooke explained in the *Lands* case (1987), which considered the capacity of the Crown to transfer assets in which Māori have asserted an interest, that:

> *… it does not follow that in each instance the question will admit of only one answer. If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Māori claims do not require retention of certain land, no principle of the Treaty will prevent a transfer.*[217]

The Courts have also emphasized that the New Zealand Parliament is supreme, and that the Treaty does not act as a legal restriction on its capacity to make laws.

The Waitangi Tribunal agrees that sovereignty was ceded by Māori, but stresses that this transfer was conditional on the guarantees made to Māori, specifically the retention of tino rangatiratanga. The Tribunal emphasizes the balance between kāwanatanga and rangatiratanga, commenting that each is qualified by the other.[218]

## The Courts

In the *Lands* case (1987), several of the judges commented on the constitutional supremacy of Parliament in New Zealand. Justice Somers affirmed that Parliament's legislative powers cannot be checked by the Courts, adding that even though the Courts cannot unilaterally enforce the Crown's Treaty obligations, the Crown's moral duties remain:

> *Neither the provisions of the Treaty of Waitangi nor its principles are, as a matter of law, a restraint on the legislative supremacy of Parliament. This is not to suggest that the Courts have ever supposed that the Crown was not under an obligation to have regard to the Treaty although that duty was not justiciable in this country, at least when the dispute was not with the Crown in respect of its prerogative or Royal rights.*[219]

Justice Somers acknowledged that the Treaty signatories held different understandings as to its meaning, and concluded that: "Notwithstanding that feature I am satisfied that the question of sovereignty in New Zealand was not in doubt".[220] He concluded, referring to the 1840 Proclamations, that: "The sovereignty of the Crown was then beyond dispute and the subsequent legislative history of New Zealand clearly evidences that. Sovereignty in New Zealand resides in Parliament".[221] Justice Somers went on to note that:

> *Where the word "Sovereignty" is used in the English text the word "Kāwanatanga" is used in the Māori version. This has the connotation of government or governance. The concept of sovereignty as understood in English law was unknown to Māori.*[222]

Justice Bisson, in the same case, also observed that the principles of the Treaty accommodate the right of the Crown to govern in the interests of all New Zealanders, taking into account the circumstances of the time:

> *… it is in accordance with the principles of the Treaty that the Crown should provide laws and make related decisions for the community as a whole having regard to the economic and other needs of the day.*[223]

The Court was also of the view that Māori owed a duty of cooperation to the Crown in the reasonable exercise of its governance right. President Cooke commented that: "For their part the Māori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable cooperation".[224] He went on to confirm that:

> *The principles of the Treaty do not authorise 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 the principles.*[225]

In the *Whales* case (1995), the Court of Appeal addressed the relationship between conservation law and Māori interests. Discussing the definition of "kāwanatanga", the Court said:

> *Alternative English renderings sometimes given of the latter word are "complete government" (see Professor Sir Hugh Kawharu's version reproduced in [the Lands case, at 662-663]) or "governance". Clearly, whatever version or rendering is preferred, the first article must cover power in the Queen in Parliament to enact comprehensive legislation for the protection and conservation of the environment and natural resources. The rights and interests of everyone in New Zealand, Māori and Pākehā and all others alike, must be subject to that overriding authority.*[226]

## The Waitangi Tribunal

The Tribunal considers that sovereignty was ceded to the Crown under the Treaty, but in recent reports, has argued that the Crown is limited

in its exercise of sovereignty by the promises made in the Treaty of Waitangi. In this respect, as was earlier noted, the role of the Tribunal differs from that of the Courts. The Courts interpret legislation, while the Tribunal has jurisdiction to measure legislation against the Treaty principles. In the *Muriwhenua Fishing Claim Report* (1988), the Tribunal expressed the view that despite the differences in the texts of the Treaty, Māori understood the Queen's role as a mediator of intertribal disputes and that kāwanatanga therefore was exercised at a supra-tribal level:

> *... the Queen promised peace. The Treaty would guarantee the status of the tribes without the need for war. It was obvious that to do that, the Queen's authority had to be supreme. The concept of a national controlling authority with kāwanatanga (lit. governship), or the power to govern or make laws, was new to Māori, divided as they were to their respective tribes. But the supremacy of this new form of control was clear. The Queen as guarantor and protector of the Māori interest ... had perforce an overriding power.*[227]

In numerous reports, the Tribunal has examined what it describes as the essential exchange of sovereignty for the protection of tino rangatiratanga, and has noted that the authority exercised by one Treaty partner qualifies that of the other. In the *Muriwhenua Fishing Claim Report* (1988), the Tribunal explained that:

> *The cession of sovereignty or kāwanatanga gives power to the Crown to legislate for all matters relating to "peace and good order"; and that includes the right to make laws for conservation control. Resource protection is in the interests of all persons. Those laws may need to apply to all persons alike. The right so given however is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise a control. Sovereignty is limited by the rights reserved in article the second.*[228]

In the view of the Tribunal, kāwanatanga clearly allocated to the Crown the right to legislate, providing that the interests of the Māori Treaty partner were recognised and upheld. In the *Mohaka River Report* (1992), the Tribunal referred to the Crown's obligation and right to enact laws for conservation: "Undoubtedly the Crown does have a right and a duty to make laws for the conservation of natural resources. But this need not be inconsistent with the exercise of rangatiratanga".[229] In the *Ngāti Rangiteaorere Report* (1990), the Tribunal referred to the procedural requirements attached to the exercise of kāwanatanga in respect of Māori lands:

> *In the view of the Crown the exercise of kāwanatanga, 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 Māori and their lands and other resources, without consultation.*[230]

The Tribunal has noted that both rangatiratanga and sovereignty are evolving concepts, stating that: "Sovereignty is a complex concept, the meaning of which has changed over time".[231] In the *Turangi Township Report* (1995), the Tribunal elaborated its understanding of the limited sovereignty ceded to the Crown under the Treaty:

> *The limited sovereignty acquired by the Crown under the Treaty does not create a constitutional problem. Few, if any, Western governments enjoy unqualified sovereign power. Apart from the legal constraints imposed by entrenched constitutions, where these exist, the power of modern States are being increasingly constrained by international agreements.*[232]

In the *Orakei Report* (1987), the Tribunal explained that the concept of sovereignty in the English text of the Treaty was a culturally embedded one, composed of attributes which were unknown to Māori in 1840, but which nonetheless was accepted by the chiefs as an overarching, albeit qualified power:

> *To the Crown was given "Kāwanatanga" in the Māori text, not "mana" for as we have noted in the* Manukau Report *(1985:8.3) the missionaries knew well enough no Māori would cede that. "Kāwanatanga" was another missionary coined word, and for reasons given in the above report, likely meant to the Māori, the right to make laws for peace and good order and to protect the mana Māori. That, on its face, is less than the supreme sovereignty of the English text and does not carry the English cultural assumptions that go with it, the unfettered authority of Parliament or the principles of common law administered by the Queen's judges in the Queen's name. But nor does the Māori text invalidate the proclamation of sovereignty that followed the Treaty. Contemporary statements show well enough Māori accepted the Crown's higher authority and saw themselves as subjects, be it with the substantial rights reserved to them under the Treaty.*[233]

As to the meaning of kāwanatanga, in the *Manukau Report* (1985), the Tribunal made the following comment:

> *In the Māori text of the [Treaty] the Māori chiefs ceded to the Queen 'kāwanatanga'. We think this is something less than the*

> *sovereignty (or absolute authority) ceded in the English text. As used in the Treaty it means the authority to make laws for the good order and security of the country but subject to an undertaking to protect particular Māori interests.*[234]

The Tribunal has discussed the transferability of kāwanatanga, particularly where the Crown's governance functions appear to have been devolved to local government or private entities. The Tribunal's basic understanding was set out in the *Manukau Report* (1985) where it found that: "There is a duty on the Crown not to confer authority on an independent body without ensuring that the body's jurisdiction is consistent with the Crown's Treaty promises".[235] This understanding was further elaborated in the *Te Arawa Representatives Geothermal Resources Report* (1993) where the Tribunal held that: "If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled".[236] In respect of the transfer of property to local authorities, the Tribunal in the *Ngāwhā Geothermal Resources Report* (1993) considered that:

> *In return for the powers ceded to Māori by the Crown in article 1, the Crown, in article 2, guaranteed to protect Māori rangatiratanga over their taonga. This obligation is a continuing one and cannot be avoided or modified by the Crown delegating its power or Treaty obligations to the discretion of local authorities ... if the Crown chooses to so delegate, it must do so in terms which ensure its Treaty duty of protection is fulfilled.*[237]

## Taonga

Article II of the Māori language version of the Treaty makes reference to "ō rātou taonga katoa". Professor Sir Hugh Kawharu, a respected scholar and former member of the Waitangi Tribunal, translated taonga as "treasures".[238] This definition was later accepted by the Privy Council in the *Broadcasting Assets* case (1994).[239] The Waitangi Tribunal agrees that the term refers to "anything highly prized", including the "forests fisheries and other properties" listed in the English text of the Treaty.[240]

### The Courts

Court cases concerning the concept of taonga have largely centered on the Crown's obligation under the Treaty to protect te reo Māori. The Crown has recognised te reo Māori as a taonga, and this acknowledgement appears in the preamble to the Māori Language Act 1987, which establishes te reo Māori as an official language of New Zealand.

In the *Broadcasting Assets* case (1994), the Privy Council considered the application of the principles of the Treaty in respect of the Māori language as a taonga. The Council emphasized that the Crown's obligation to actively protect taonga was not an absolute one:

> *It is therefore accepted by both parties 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.*[241]

In this case, the Privy Council referred to the need for the Crown to match its response to the vulnerability of the taonga in question:

> *… 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.* [242]

The Privy Council considered that the responsibility for the preservation of taonga does not lie solely 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".[243]

In the *Coal* case (1989), the then President Cooke offered a personal view on the status of coal as a taonga, saying that:

> *Let it be clear that this is only a personal suggestion ... The demand for coal and the establishment of the New Zealand coal industry have come largely from European or Western civilisation. Even so coal can be classified as a form of taonga, and there was apparently some limited Māori use of it before the Treaty, and there has been the Māori contribution to the industry.*[244]

In the *Whales* case (1995), the Court of Appeal determined that although fisheries and fishing practices are clearly covered by Article II, a commercial whale-watching business could not be regarded as a taonga. However, the issue deserved close attention:

> *Although a commercial whale-watching business is not taonga or the enjoyment of a fishery within the contemplation of the treaty, certainly it is so linked to taonga and fisheries that a reasonable treaty partner would recognise that treaty principles are relevant.*[245]

The High Court considered the relevance of the Treaty of Waitangi to a case concerning the guardianship of a Māori child. In *Barton-Prescott v Director-General of Social Welfare* (1997), the Court found that the Treaty should have a direct bearing on the interpretation of family legislation even though those statutes made no explicit reference to the Treaty. The Court went on to state: "We also take the view that the familial organisation of one of the peoples a party to the treaty, must be seen as one of the taonga, the preservation of which is contemplated".[246]

## The Waitangi Tribunal

In its early reports, the *Motunui-Waitara Report* (1983), the *Kaituna River Report* (1984), the *Manukau Report* (1985), and the *Te Reo Māori Report* (1986), the Tribunal noted that taonga include all valued resources or tangibles such as fishing grounds, harbours and foreshores (and the estuary and the sea, together with the use and enjoyment of the flora and fauna adjacent to it) as well as intangible valuables such as the Māori language and the mauri (or life-force) of a river.[247]

Clearly, the Tribunal has accepted that physical resources and possessions can be taonga. In the *Motunui-Waitara Report* (1983), the Tribunal accepted the approach of the Te Atiawa people for whom "'taonga' embraces all things treasured by their ancestors, and includes specifically the treasures of the forests and fisheries".[248] The Tribunal further explained that:

> *… the Māori language is generally metaphorical and idiomatic … The use of the word "taonga" in a metaphorical sense to cover a variety of possibilities rather than itemized specifics is consistent with the Māori use of language … We consider that the Treaty envisaged protection for Māori fishing grounds because the English text specifically provided for that while the Māori text implied it.*[249]

The Tribunal also considers that intangible valuables can also be taonga. In its *Manukau Report* (1985), the Waitangi Tribunal explained that: "A river may be a taonga as a valuable resource. Its 'mauri' or 'life-force' is another taonga".[250] In the *Wānanga Capital Establishment Report* (1999) the Tribunal noted that language and Māori customary knowledge were taonga:

> *It is clear that te reo and mātauranga Māori are taonga. It is also clear that these three wānanga are playing an important role in studying, transmitting and preserving these taonga. To meet its Treaty obligation to protect these taonga, the Crown should provide wānanga with adequate support and resources in an appropriate manner.*[251]

In the *Orakei Report* (1987), other examples of intangible taonga were given:

> *We emphasise here, as described in our earlier reports, that "taonga" is not limited to property and possessions. Ancient sayings include the haka (posture dance) as a "taonga" presented to visitors. "Taonga" may even include thoughts. We have found that it includes fisheries ... and language.*[252]

On the other hand, in its *Kiwifruit Marketing Report* (1995) the Tribunal expressed the view that while "in pre-contact times the exchange of treasures by iwi and hapū might have been regarded as a taonga", there was insufficient evidence "to conclude that post-contact trade in the period prior to 1840 was a taonga protected by the Treaty".[253] The Māori claimants asserted the right to export kiwifruit free of legislative restrictions, claiming that the right is a taonga requiring protection under Article II of the Treaty. The Tribunal's central finding was that the sovereignty ceded under the Treaty included the right to regulate trade. The rangatiratanga retained was not therefore a separate sovereignty, but rather a right to tribal self-management.[254] In the Tribunal's view, then, the regulation of trade was a legitimate act of kāwanatanga.

Elsewhere the Waitangi Tribunal has explained the need to view "taonga" in the context of Māori cultural values and especially the complex relationship between Māori peoples and their ancestral lands and waters. In its *Muriwhenua Fishing Claim Report* (1988), the Tribunal stated:

> *The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or "belonging", but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a "hurt" to the environment or to the fisheries may be felt personally by a Māori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana. The fisheries taonga, like other taonga, is a manifestation of a complex Māori physico-spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.*[255]

In the *Ngāwhā Geothermal Resources Report* (1993) that Tribunal considered that in exercising its duty of active protection, the Crown should take advice on the nature of the taonga from those exercising rangatiratanga over it:

> *The Crown obligation actively to protect Māori Treaty rights cannot be fulfilled in the absence of a full appreciation of the nature of the taonga including its spiritual and cultural dimensions. This can only be gained from those having rangatiratanga over the taonga.*[256]

In its *Te Whānau o Waipareira Report* (1998), the Tribunal further emphasized the strong spiritual component to the meaning of taonga:

> *While the term taonga is not easily defined, a spiritual link with the people and an obligation on them to protect it for future benefit is commonly a critical element, as is conveyed, for example, in the following pepeha:* Kia ūhia rā anō te mana, te ihi, te wehi, te tapu a te Atua ki runga, kātahi ka waiho ai ki ngā kaitiaki hei manaaki mā ngā whakatupuranga e tupu ake – he taonga kei reira. *A property (material or non-material) becomes a taonga when, with divine blessing, it is entrusted for the benefit of future generations.*[257]

In the *Radio Spectrum Final Report* (1999), the three members of the Tribunal were divided on the issue of the status of the electromagnetic spectrum as a taonga. The majority of the Tribunal (J M Anderson and Professor M P K Sorrenson**)** accepted "the claimant's argument that the electromagnetic spectrum, in its natural state, was known to Māori and was a taonga".[258] The majority found that in earlier times Māori were aware of the existence of various natural phenomena and made use of them – an example given was the use of the light of stars for navigation. They found that Māori had incorporated these phenomena into their philosophical world-view and that accordingly Māori had traditional knowledge of the electromagnetic spectrum which entitled them to Treaty rights, particularly to the development of the taonga through new technology.[259]

The minority of the Tribunal considering the Radio Spectrum claim (Judge P J Savage, the presiding officer) found that the Treaty did not reserve to Māori "taonga katoa" (all treasures), but "rātou taonga katoa" (all *their* treasures).[260] He did not accept that this would include the radio spectrum, electromagnetic spectrum or resources generally.[261] Judge Savage said that if Māori had a right to a fair and equitable share of the radio or electromagnetic spectrum, then they had such a right in respect of all resources, since there was nothing about the spectrum which required it "to be dealt with in a different way from other assets of mankind".[262]

## Common law parallels - fiduciary duty and developmental rights

### Fiduciary duty

In elaborating the principles of the Treaty, the Courts have drawn an analogy between partnership and a fiduciary relationship. The doctrine of fiduciary duty has been referred to and discussed, but has not yet directly been applied by the Court as a basis of a Crown obligation which is independent of the Treaty. This guide deals with fiduciary duty separately in order to address the content of this obligation and to acknowledge that it may arise independently of the Treaty.

In other areas of law, fiduciary relationships arise where one party to a relationship has a legal power which will affect the interests of the other. In such a relationship, the party exercising the power often has a fiduciary obligation to act in a way which protects the interests of the affected party.[263] This analogy raises the possibility of the emergence of a cause of action for Māori, separate from the Treaty, by which they could assert that their interests have been adversely affected by Crown action in breach of its fiduciary duties. To date, to the extent that the Court has referred to the doctrine as a potential source of Crown obligation, its findings have been based on the interpretation of a legislative reference to the Treaty. In jurisdictions where fiduciary duties have been found to exist between the Crown and indigenous peoples, the form of the fiduciary obligation is sui generis, or unique in law.

### The Courts

In the *Lands* case (1987), President Cooke concluded that "the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties".[264] In a later case, he summarised the unanimous findings of the five judges in the *Lands* case as follows: "The Treaty created an enduring relationship of a fiduciary nature akin to partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards each other".[265]

In 1993, the Court of Appeal considered Māori customary rights as part of its judgment in the *Sealords* case.[266] The Court referred again to key judicial decisions from other jurisdictions, particularly Canada and Australia, saying that:

> *The opinions expressed in this Court in the cases already mentioned as to fiduciary duties and a relationship akin to partnership have now been further strengthened by judgments in the*

> *Supreme Court of Canada and the High Court of Australia. In these judgments there have been further affirmations that the continuance after British sovereignty and treaties of unextinguished aboriginal title gives rise to a fiduciary duty and constructive trust on the part of the Crown ... clearly there is now a substantial body of Commonwealth case law pointing to a fiduciary duty. In New Zealand the Treaty of Waitangi is major support for such a duty. The New Zealand judgments are part of widespread international recognition that the rights of indigenous people are entitled to some effective protection and advancement.*[267]

In a case decided later in the same year, the Court of Appeal also considered a claim against the Crown brought by Māori with an interest in the Rangitaiki and Wheao rivers, asserting that in order to protect those interests, the Crown should not allow the corporatisation of hydroelectric dams on those rivers. President Cooke, delivering the judgment of the Court, said: "An extinguishment [of native title] by less than fair conduct or on less than fair terms would be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power".[268] In this case, the Court admitted the possibility of Māori claims to natural resources alleging a breach of the Crown's fiduciary duties. The Court commented on potential Māori rights to river water, noting that if the Crown had assumed control of rivers without consent, then a remedy conceivably lay in Court action based on fiduciary duty.[269]

Although the Court gave consideration to this concept, it has not yet been applied in New Zealand. In considering whether it might be applied in the future, President Cooke has indicated that: "In New Zealand we would have to be guided by our conception of the strength of the competing arguments and any others relevant to this country's circumstances".[270] President Cooke has also stated that Canadian judgements on fiduciary duty in respect of indigenous peoples will "be found of major guidance when such matters come finally to be decided in New Zealand",[271] noting that "in interpreting New Zealand Parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Māori people are less respected than the rights of aboriginal peoples are in North America".[272]

The possibility of a claim based on common law fiduciary duty is significant because Treaty rights cannot be directly enforced by the Courts unless referred to in legislation, whereas breaches of fiduciary duty can be considered and remedied by a Court as part of its normal functions.

## The Waitangi Tribunal

The Waitangi Tribunal has often referred to the fiduciary obligations of the Crown, which it says "includes the obligation to act in the best interests of Māori".[273] In the *Te Maunga Railways Land Report* (1994), the Tribunal described the fiduciary duties of the Crown in the following way:

> *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. One side is thus in a position of vulnerability and must rely on the integrity and good faith of the other. When the Treaty of Waitangi was signed the Crown undertook to protect and preserve Māori rights in lands and resources in exchange for recognition as the legitimate government of the whole country in which Māori and Pākehā had equal rights and privileges as British subjects. Because the Crown is in the powerful position as the government in this partnership, the Crown has a fiduciary obligation to protect Māori interests.*[274]

In the *Tūrangi Township Report (1995)* the Tribunal considered "whether the fiduciary obligations can be argued as arising from, as being enacted in, or as arising independently of the Treaty of Waitangi".[275] The Tribunal noted that the Court of Appeal has not yet decided a case based solely on the Crown's common law fiduciary duties to Māori, that is, reference to fiduciary duty in the Court has so far also involved the interpretation of a legislative reference to the Treaty. After noting the comments made in the Court of Appeal indicating that the Treaty parties had responsibilities "which are said to be analogous to 'fiduciary duties' or 'of a fiduciary nature'," and that these responsibilities have their source in the Treaty, the Tribunal further commented:

> *In deference to the courts, whose function it is to declare the common law, this Tribunal must await an authoritative decision from them on the question. … (However) [t]here is no suggestion [thus far] that [fiduciary obligations] arise independently of the Treaty or have their source in the common law. We do not, of course, foreclose the possibility that at some future time the New Zealand Court of Appeal may so hold.*[276]

In *Te Maunga Railways Land Report (1994)* the Waitangi Tribunal considered the issue of land taken from Māori under the Public Works Act. It found that the Crown's fiduciary duties as a Treaty partner required it to protect Māori interests by facilitating the return of the land when it was no longer needed for the purpose for which it was taken:

> *The Crown has the discretion to decide on what terms it may be returned when no longer required for any public purpose. We believe that it is inherent in the fiduciary obligation of the Crown under the Treaty of Waitangi that this discretion be used positively, to ensure that Māori are not prevented from having their ancestral land returned to them by the requirement to pay full market value as a condition of return.*[277]

The Tribunal has also said that the Crown's general fiduciary obligations to Māori required it to take steps to ensure that it did not discriminate between Māori groupings in giving effect to its Treaty obligations:

> *It is fundamental that a fiduciary must act fairly as between beneficiaries rather than allowing one of the group to be favoured. Whether or not the duty arises in a particular case, however, must depend on the circumstances. There may well be circumstances in which the Crown has good cause to promote the interests of one particular sector of the Māori community defined, for example, by need, gender, age or tribe, thereby positively discriminating between Māori groupings. However, where the Crown's purpose is to promote projects for the benefit of Māori generally, clearly it should act impartially and adopt fair procedures to achieve that end.*[278]

## Developmental rights

As discussed earlier, the Courts have frequently referred to the Treaty as an evolving instrument, capable of adaptation to modern circumstances. Development rights are relevant to the application of Article II guarantees in a contemporary environment, such as when Māori assert their Treaty rights in respect of resources or property interests which did not exist in 1840, or could not be exploited at that time. The issue concerns the degree to which modern technologies can be used by Māori to give effect to their Article II rights. Clearly the signatories to the Treaty could not have envisaged the vast array of new technologies and property rights which have come into existence since 1840, but it is also apparent that it was the intention of both parties to benefit from their association with one another, and the Treaty clearly anticipated the emergence of new and hybridized cultural practices. The Courts and the Tribunal have endorsed the approach taken by their counterparts in other jurisdictions by emphasizing that the Treaty partnership survives societal change, and that Māori are entitled, within certain limits, to develop traditional practices and exploit their resources by acquiring and adapting new skills and technology in the same way as other communities.

## The Courts

The Court of Appeal noted in the *Whales* case (1995) that: "A right of development of indigenous rights is indeed coming to be recognised in international jurisprudence, but any such right is not necessarily exclusive of other persons or other interests".[279] In discussing the Crown's obligation to actively protect Māori property interests, the Courts have sometimes determined that the property right asserted by Māori applicants was too far beyond the original conceptions of the signatories to the Treaty, or too far beyond the scope of customary rights, to fall within those interests requiring the Crown's protection. In effect, the Courts have been engaged in the task of identifying the limits to the range of Māori property rights which could attract the Crown's obligation of active protection.

In the *Whales* case (1995) the Court of Appeal discussed the status of a whale-watching enterprise as a taonga requiring the Crown's active protection,[280] and determined that:

> *However liberally Māori customary title and Treaty rights may be construed, tourism and whale watching are remote from anything in fact contemplated by the original parties to the Treaty. Ngāi Tahu's claim to a veto must be rejected.*[281]

In a case concerning Māori interests in hydroelectric dams, the Court of Appeal determined that despite its evolving status, the Treaty could not be interpreted as extending the protection of Māori rights to the generation of electricity. President Cooke, endorsing an earlier decision of the High Court, held that:

> *However liberally Māori customary title and Treaty rights might be construed, they were never conceived as including the right to generate electricity by harnessing water power ... The Treaty of Waitangi is to be construed as a living instrument, but even so it could not sensibly be regarded today as meant to safeguard rights to generate electricity.*[282]

## The Waitangi Tribunal

The Waitangi Tribunal has discussed the right to development in a more explicit way. It considers that the right is recognised in domestic and international law,[283] and that the concept that "all peoples" have a right to development "is an emerging concept in international law",[284] requiring that:

> *States should adopt special measures in favour of groups in order to create conditions favourable for their development. If a*

> *group claims that the realisation of its right to development requires a certain type of autonomy, such a claim should be considered legitimate.*[285]

The Tribunal has considered the right to development in the broader context of the Treaty principle of mutual benefit, emphasizing that both parties to the Treaty intended to benefit from the agreement they had made. In the Tribunal's view, the Treaty principle of mutual benefit,[286] encompasses the right of Māori to continue to acquire and adapt new technologies brought by European settlers, consistent with the right to development. In its *Muriwhenua Fishing Claim Report* (1988) the Tribunal discussed the extent of Māori rights to fisheries, including those fisheries exploitable by the use of new technology, and provided its views on the nature of the Crown's obligation to protect Māori interests in those resources. The report contains key Tribunal findings on the issue of developmental rights:

> *Both parties expected to gain from the Treaty, the Māori from new technologies and markets, non-Māori from the acquisition of settlement rights and both from the cession of sovereignty to a supervisory State power. For Māori, access to new markets and technologies necessarily assumes a sharing with the settlers who provide them, and for non-Māori, a sharing in resources requires that Māori development be not constrained but perhaps even assisted where it can be. But neither partner in our view can demand their own benefits if there is not also an adherence to reasonable State objectives of common benefit. It ought not to be forgotten that there were pledges on both sides.*[287]

In the same report, the Tribunal made the general point that: "The Treaty offered a better life for both parties. A rule that limits Māori to their old skills forecloses upon their future. That is inconsistent with the Treaty".[288] It further elaborated the following points:

> *(a) The Treaty does not prohibit or limit any specific manner, method or purpose of taking fish, or prevent the tribes from utilising improvements in techniques, methods or gear.*
> *(b) Access to new technology and markets was part of the quid pro quo for settlement. The evidence is compelling that Māori avidly sought Western technology well before 1840 ...*
> *(c) An opinion that Māori fishing rights must be limited to the use of the canoes and fibres of yesteryear ignores the fact that the Treaty was also a bargain. It leads to the rejoinder that if settlement was agreed to on the basis of*

> *what was known, non-Māori also must be limited to their capabilities at 1840.*[289]

In the *Ngāi Tahu Sea Fisheries Report* (1992) the Tribunal noted that both the Crown and the claimants accepted that a right to development is inherent in the Treaty.[290] However the parties disagreed on aspects of the content and scope of such a right. In the context of the sea fishing rights of Ngāi Tahu, the Tribunal found that traditional Māori fishing rights include a right to develop the industry including the right to employ new techniques, knowledge and equipment for commercial purposes, and Ngāi Tahu were entitled to a reasonable share of the new fisheries made accessible by the evolution of fishing technology.[291] The Tribunal further noted that:

> *The Treaty guarantee extended not merely to those sea fisheries over which Māori exercised rangatiratanga in 1840 but to such extended fisheries in which they subsequently became entitled to an exclusive share under the right to development inherent in the Treaty.*[292]

In its *Radio Spectrum Final Report* (1999), the Tribunal considered developmental rights in the course of determining the extent of Māori rights to the electromagnetic spectrum, and to the newly-created property rights in spectrum. The majority of the Tribunal found that the electromagnetic spectrum in its natural state was known to Māori and was a taonga, and held that in creating new property rights in the spectrum, the Crown was obliged to consult and negotiate with Māori a fair and equitable share of the property.[293] It determined that the following principles were relevant:

> Mutual Benefit: *Māori expected, and the Crown was obliged to ensure, that they and the colonists would gain mutual benefits from colonisation and contact with the rest of the world, including the benefits of new technologies.*
>
> Development: *Māori expected and were entitled to develop their properties and themselves and to have a fair and equitable share in Crown-created property rights, including those made available by scientific and technical developments. The Treaty – or rather the two Treaties that the parties agreed to – needed to evolve to meet new and changing circumstances.*[294]

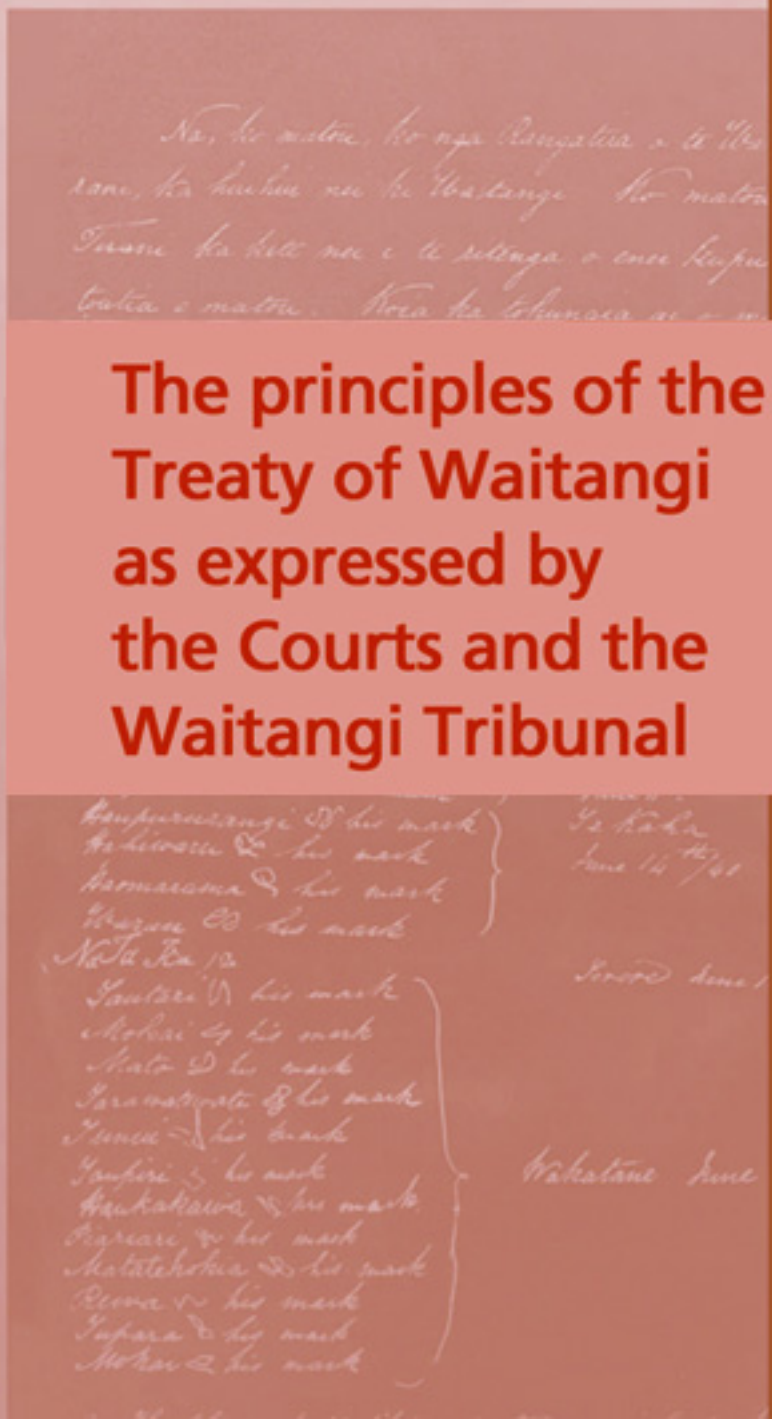
The dissenting view of Judge Savage in the *Radio Spectrum Final Report* (1999) should be noted. The judge held that the right to development was not a generalised concept, but could only be applied to an existing right. He did not consider that a right to develop resources not known about or used in a traditional manner at 1840 was inherent in the Treaty principle of partnership.[295]

In the *Muriwhenua Fishing Claim Report* (1988), the Tribunal introduces the related concept of the "principle of options", by which Māori individuals retained the ability to determine the course of their cultural and economic development:

> *Neither text prevents individual Māori from pursuing a direction of personal choice. The Treaty provided an effective option to Māori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds. That same option is open to all people, is currently much in vogue and may represent the ultimate in partnership. But these are options, that is to say, it was not intended that the partner's choices could be forced.*[296]

In the *Ngāi Tahu Sea Fisheries Report* (1992), the Tribunal elaborated this idea:

> *In essence [the principle of options] is concerned with the choice open to Māori under the Treaty. Article 2 contemplates the protection of tribal authority and self-management of tribal resources according to Māori culture and customs. Article 3 in turn conferred on individual Māori the rights and privileges of British subjects. The Treaty envisages that Māori should be free to pursue either or indeed both options in appropriate circumstances. The Crown is obliged to offer reasonable protection to Māori in the exercise of the rights so guaranteed them.*[297]



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

## 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.*[298]

The Waitangi Tribunal has a more general jurisdiction to consider the Treaty "as embodied in its two texts"[299] in the course of considering whether the Crown has acted in a manner "inconsistent with the principles of the Treaty".[300] 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"[301] to the Court, and are often given considerable weight in its judgments, Courts are nonetheless not obliged to give effect to Tribunal findings.[302] 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.*[303]

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 possible have been foreseen by those who participated in the making of the 1840 Treaty.*[304]

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.*[305]

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".[306] 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, 7th ed.)".[307] 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.*[308]

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.*[309]

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.[310] These principles interpret the Treaty as a whole, including its underlying meaning, intention and spirit, to provide further understanding of the expectations of signatories.[311] 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".[312]

## 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.[313] 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 …*[314]

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.*[315]

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".[316] 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.*[317]

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.[318] 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".[319]

In the *Lands* case (1987), President Cooke described the duty to act reasonably, honourably, and in good faith as "infinitely more than a formality".[320] 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.*[321]

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,[322] and that "judicial resolution should be very much a last resort".[323] 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".[324] 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.*[325]

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

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".[329] 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.*[330]

## The Waitangi Tribunal

The principle of partnership was first identified explicitly in the Tribunal's *Manukau Report* (1985).[331] 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".[332] 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,[333] 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.*[334]

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.[335] 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".[336] 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.[337] 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".[338]

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.*[339]

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.*[340]

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".[341] 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".[342] 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.*[343]

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.*[344]

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".[345]

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".[346] 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.*[347]

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.[348] 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"[349] 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.*[350]

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".[351] 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.[352]

### 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".[353]

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.[354]

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".[355] The Tribunal found the

Government's past "refusal to respect Māori authority by treating Māori as the equals that they were"[356] as well as its unilateral policy to dominate Taranaki Māori by imposing its will[357] and to reject or ignore Taranaki Māori requests for mutually acceptable agreements[358] 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".[359]

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.*[360]

## 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.[361] 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.*[362]

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.*[363]

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.*[364]

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".[365] 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".[366] 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".[367]

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".[368] 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".[369] 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".[370]

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.*[371]

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[372] 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.[373]

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,[374] 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".[375] 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".[376] 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.[376] 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.*[378]

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).[379]

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.[380] In other cases, such as *Te Rūnanga o Tauramere v Northland Regional Council* (1996),[381] 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[382] 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".[383]

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".[384] 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",[385] and that: "Consent authorities receiving and processing resource consent applications ... are bound to take into account the principles of the Treaty".[386] 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".[387]

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".[388] 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.*[389]

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.*[390]

### 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.*[391]

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.*[392]

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.*[393]

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.*[394]

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.*[395]

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.*[396]

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".[397] 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".[398]

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.[399] 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.*[400]

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.*[401]

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.*[402]

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".[403] 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.*[404]

The Tribunal also cautioned that the Crown should seek to ensure that consultation forums involving government agencies do not "overwhelm the Māori voices".[405]

## 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)[406] and to "protect [tribal] just rights and property and to secure to them the enjoyment of Peace and Good Order" (in the English text).[407] 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".[408] 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.*[409]

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.*[410]

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".[411] 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.*[412]

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.*[413]

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.[414]

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.*[415]

## 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.*[416]

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.*[417]

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".[418] 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".[419] 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.*[420]

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.*[421]

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".[422] 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".[423] 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.*[424]

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".[425] 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.*[426]

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.*[427]

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.*[428]

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?*[429]

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.*[430]

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".[431]

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".[432] 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.*[433]

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.*[434]

## 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.*[435]

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.*[436]

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.*[437]

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.*[438]

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.[439] 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.*[440]

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.*[441]

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".[442] 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.*[443]

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.*[444]

## 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".[445] 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".[446] 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".[447] 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.*[448]

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.* [449]

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".[450] 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.[451]

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".[452] 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.*[453]

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.*[454]

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.[455] The Tribunal also emphasized a requirement for a diversity of remedies to achieve reconciliation between the Treaty partners.[456] 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.*[457]

By way of an example, in its interim report on the Taranaki claim, the *Taranaki Report* (1996),[458] 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 destablisation and the consequential prejudice to social and economic outcomes, for example.*[459]

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

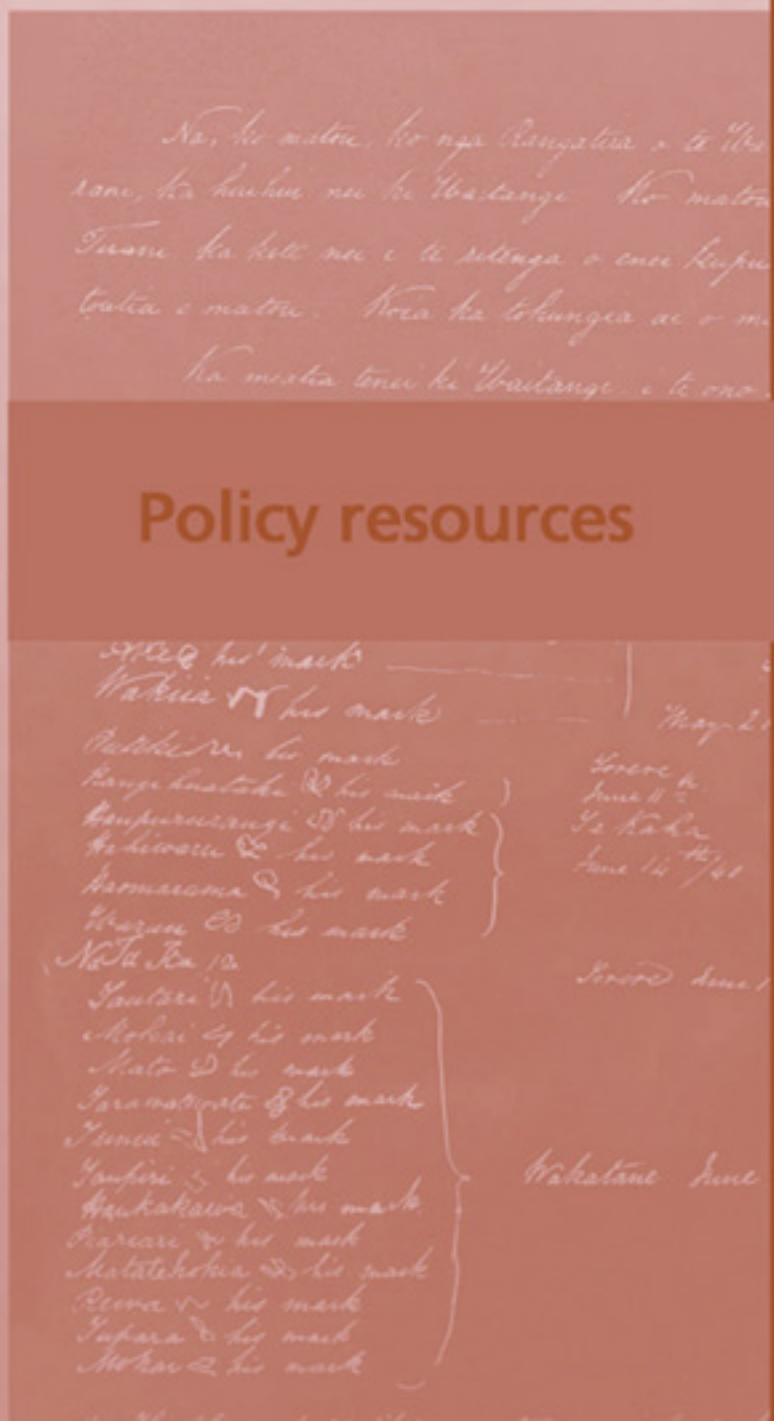
> *A vibrant Māori society was broken … [therefore] it is group compensation that is most needed for future cultural survival, with compensation to be held for general group purposes of those who belong to the hapū. It is the group, not the individual, to whom the land belonged; it is the group, not 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.*[460]

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.*[461]

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.[462]

# Policy resources



## summary of policy resources

This section outlines some relevant resources to assist analysts in considering the Treaty implications in their work. The resources include: legislation with Treaty references; Government policy; relevant government publications, organisational expertise, and international conventions.

### Legislation with Treaty references

As noted earlier in the section concerning the legal status of the Treaty, there are now over 30 pieces of legislation that refer to the Treaty of Waitangi or its principles. A list of this legislation is provided in Appendix One.

### Government policy

In February 2000, the Cabinet agreed to six government goals to guide public sector policy and performance. These include a goal to uphold the principles of the Treaty of Waitangi (see Appendix Two).

In 2000, the Government (through the Minister in Charge of Treaty of Waitangi Negotiations) issued a set of six principles it will use to negotiate further settlements of historical Treaty claims. The six principles provide that Treaty settlements will: be negotiated in good faith; contribute to the restoration and development of Treaty relationships; offer just redress; reflect fairness between claims; be transparent; and be government-negotiated (see Appendix Three).

### Relevant government publications

Other relevant government publications may also offer useful guidance in complying with the principles of the Treaty of Waitangi, in addition to this guide. These include: public sector guides, other departmental guides or related reports, and the Cabinet Manual (see Appendix Four).

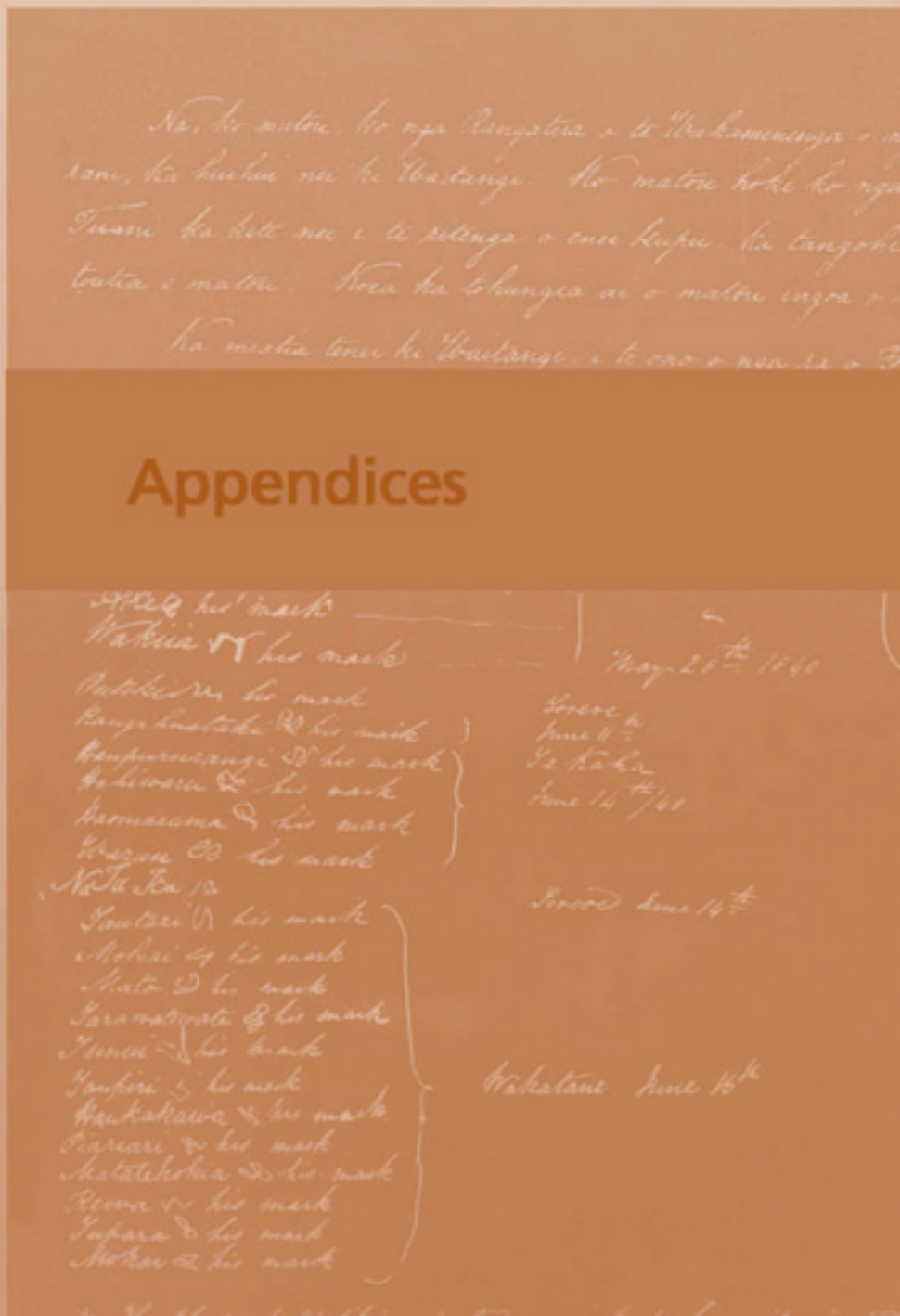
## Organisational expertise

A number of government departments or agencies have key functions in respect of Treaty issues. These are: Te Puni Kōkiri, the Office of Treaty Settlements, the Crown Law Office, the Ministry of Justice, the Treasury, and the Department of Conservation. Judicial and quasi-judicial bodies are: the Waitangi Tribunal, the Māori Land Court and the Environment Court. Other bodies include the Human Rights Commission, the Office of the Race Relations Conciliator, the Law Commission, the Crown Forestry Rental Trust and Te Ohu Kai Moana – the Treaty of Waitangi Fisheries Commission (see Appendix Five).

## International instruments

A number of New Zealand's international commitments impact directly on the Crown-Māori relationship and the interests of Māori. A list of relevant international conventions and regional agreements is provided in Appendix Six.

# Appendices



# Appendix One: legislation containing Treaty references

## Legislation containing clauses requiring some action in respect of the Treaty

Conservation Act 1987 (section 4)
Crown Pastoral Land Act 1998 (section 25, section 84)
Crown Research Institutes Act 1992 (section 10)
Crown Minerals Act 1991 (section 4)
Education Act 1989 (section 181(b) (added 1990))
Energy Efficiency and Conservation Act 2000 (section 6)
Foreshore and Seabed Endowment Revesting Act 1991 (section 3)
Harbour Boards Dry Land Endowment Revesting Act 1991 (section 3)
Hauraki Gulf Marine Park Act 2000 (section 6)
Hazardous Substances and New Organisms Act 1996 (section 8)
New Zealand Public Health and Disability Act 2000 (section 4)
Resource Management Act 1991 (section 8)
State-Owned Enterprises Act 1986 (section 9)
Treaty of Waitangi Act 1975 (section 6 (1))

## Legislation containing other Treaty references not amounting to a direction to act

Crown Forests Assets Act 1989
Education Lands Act 1949
Environment Act 1986 (long title)
Fisheries Act 1996
Legal Services Act 1991
Local Legislation Act 1989
Māori Fisheries Act 1989
Māori Language Act 1987
Ngāi Tahu Claims Settlement Act 1998
Ngāi Tahu (Pounamu Vesting) Act 1997
Ngāi Tahu (Tutaepatu Lagoon Vesting) Act 1998
Ngāti Tūrangitukua Claims Settlement Act 1999
Orakei Act 1991
Te Ture Whenua Māori (Māori Land) Act 1993
Treaty of Waitangi (Fisheries Claims) Settlement Act 1992
Treaty of Waitangi (State Enterprises) Act 1988
Waikato Raupatu Claims Settlement Act 1995
Waitutu Block Settlement Act 1997

# Appendix Two: key government goals to guide public sector policy and performance

The primary purpose of this goal statement is to provide a clear frame of reference to the public sector. The statement enables Chief Executives and agencies to understand the Government's overall direction, so that they can actively progress policy and delivery guided by the longer-term results this Government wants to achieve. The goals will also provide an organizing framework that will assist Cabinet in prioritizing budget and legislative bids, as well as for monitoring the progress of key initiatives associated with each goal. The goals were agreed to by Cabinet on 21 February 2000.[463]

### Strengthen national identity and uphold the principles of the Treaty of Waitangi

Celebrate our identity in the world as people who support and defend freedom and fairness, who enjoy arts, music, movement and sport, and who value our cultural heritage; and resolve at all times to endeavour to uphold the principles of the Treaty of Waitangi.

### Grow an inclusive, innovative economy for the benefit of all

Develop an economy that adapts to change, provides opportunities and increases employment, and while closing the gaps, increases incomes for all New Zealanders.

### Restore trust in government and provide strong social services

Restore trust in government by working in partnerships with communities, providing strong social services for all, building safe communities and promoting community development, keeping faith with the electorate, working constructively in Parliament and promoting a strong and effective public service.

### Improve New Zealanders' skills

Foster education and training to enhance and improve the nation's skills so that all New Zealanders have the best possible future in a changing world.

### Close the gaps for Māori and Pacific people in health, education, employment and housing

Support and strengthen the capacity of Māori and Pacific Island communities, particularly through education, better health, housing and employment, and better co-ordination of strategies across sectors, so that we may reduce the gaps that currently divide our society and offer a good future for all.

### Protect and enhance the environment

Treasure and nurture our environment with protection for ecosystems so that New Zealand maintains a clean, green environment and rebuilds our reputation as a world leader in environmental issues.

# Appendix Three: new principles to guide the settlement of historical Treaty claims

The following principles were adopted by the Government in July 2000 to guide it in negotiating settlements of historical claims under the Treaty of Waitangi.[464] The six key principles are:

## Good faith

The negotiating process is to be conducted in good faith, based on mutual trust and cooperation towards a common goal.

## Restoration of relationship

The strengthening of the relationship is an integral part of the settlement process and will be reflected in any settlement. The settlement of historical grievances also needs to be understood within the context of wider government policies that are aimed at restoring and developing the Treaty relationship - for example, the Government's "Closing the Gaps" programme and the development of policy to address contemporary claims.

## Just redress

Redress should relate fundamentally to the nature and extent of breaches suffered. This government has ensured the final abolition of the "fiscal envelope" policy of the former National Government, while maintaining a fiscally prudent approach. Existing settlements will be used as benchmarks for future settlements where appropriate. While the Government will continue to honour the relativity clause in the Tainui and Ngāi Tahu settlements, it will not be included in future settlements. The reason for this is that each claim is treated on its merits and does not have to be fitted under a predetermined fiscal cap, as was the case under National's policy.

## Fairness between claims

There needs to be consistency in the treatment of claims. In particular "like should be treated as like" so that similar claims receive a similar level of fiscal redress.

### Transparency

The Government will give consideration to how to promote greater understanding of the issues. First, it is important that claimants have sufficient information to enable them to understand the basis on which claims are settled. Secondly, there is a need to promote greater public understanding of the Treaty and the settlement process.

### Government-negotiated

The Treaty settlement process is necessarily one of negotiation between claimants and the Government as the only two parties who can, by agreement, achieve durable, fair and final settlements. The Government's direct negotiation with claimants ensures delivery of the agreed settlement and minimises costs to all parties.

# Appendix Four: relevant government publications

## Public sector guides

In 1988 the Parliamentary Commissioner for the Environment published a report entitled *Environmental Management and the Principles of the Treaty of Waitangi: Report on the Crown's Response to the Recommendations of the Waitangi Tribunal 1983-1988*, which takes into account the principles of the Treaty in its environmental planning and management.

*The Royal Commission on Social Policy* (1988) did not seek to compile a definitive list of Treaty principles, rather it focussed on "three principles – partnership, protection, participation – [which it considered] crucial to an understanding of social policy and upon which the Treaty of Waitangi impacts".[465]

In 1995 the State Services Commission issued a document entitled *The Public Service and the Treaty of Waitangi,* which provides an introduction to the law and issues concerning the Treaty of Waitangi, including discussion on the principles of the Treaty. This document is part of the Commission's guidance series: *Public Service Principles, Conventions and Practice.*

*The Third Report of the Controller and Auditor-General for 1998* provides an audit model for public sector organisations aimed at processes necessary in delivering effective outputs for Māori. This model set outs expectations on public sector organisations for strategic planning, policy advice and service delivery, human resources, structures and working environment, taking into account various factors including: the Treaty of Waitangi, the Crown's position on Treaty issues, government goals, Māori perspectives, and impacts on Māori.

In 1999 the Office of Treaty Settlements produced a practical guide entitled *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown.*

## Examples of other departmental guides or related reports

A report commissioned by the Ministry of Agriculture and Fisheries in 1990 entitled *The Impact of the Treaty of Waitangi on Government Agencies,* which takes account of activities relating to the Treaty up to March 1990.

A guide entitled *Resource Management: Consultation with Tangata Whenua* produced in 1991 and a paper entitled *Taking into Account*

*the Principles of the Treaty of Waitangi: Ideas for the Implementation of Section 8, Resource Management Act 1991* produced by the Ministry for the Environment in 1993 to assist local authorities, policy makers and planners in meeting Treaty obligations under the Resource Management Act 1991.

*Māori Participation – Strategies for Government Departments* produced by the State Services Commission in 1993.

*A Guide for Departments on Consultation with Iwi,* offering guidelines for formulating consultation mechanisms appropriate to a situation, produced by Te Puni Kōkiri in 1993.

*A Guide for Consultation with Māori*, a set of guidelines on consulting with Māori for staff of the Ministry of Justice produced by the Ministry in 1997.

*Cultural Audit and Review of the Lottery Network: Responsiveness to Māori and Recognition of the Principles of the Treaty of Waitangi*, Wellington, Department of Internal Affairs, 1997.

*Consultation and Engagement with Māori: Guidelines for the Ministry of Education* produced by that Ministry in 1999.

A booklet entitled *Better Relationships for Better Learning,* guidelines for Boards of Trustees and Schools on engaging with Māori parents, whānau, and communities and produced by the Ministry of Education in 2000.

*Talking Constructively: A Practical Guide for Local Authorities on Building Agreements with Iwi, Hapū and Whānau* produced by the Ministry for the Environment in 2000.

## Cabinet Manual

The *Cabinet Manual*[466] is the authoritative guide to central government decision making, for those working within government. It is also a primary source of information for those outside government on constitutional and procedural matters. Successive governments have recognised the need for a Cabinet Manual, to provide the basis on which they will conduct themselves while in office. The endorsement of the Manual is an item on the agenda of the first Cabinet meeting of a new government, to provide for the orderly re-commencement of the business of government. It was recently updated in 2001 to reflect the evolution of coalition government under proportional representation.

The overview section of this guide (which considers the constitutional significance of the Treaty of Waitangi) refers to requirements in the *Cabinet Manual* relating to cabinet proposals that have legislative implications, including those which have implications for or, may be affected, by the principles of the Treaty of Waitangi.

The *Step by Step Guide: Cabinet and Cabinet Committee Processes*[467] (a companion guide to the *Cabinet Manual*) sets out processes approved by Cabinet for Cabinet and its committee. It currently requires that, where necessary, submissions to Cabinet should include sections on financial and legislative implications, human rights issues, and gender implications. While there is no requirement for a section on Treaty implications, there are, as noted above, requirements in the *Cabinet Manual* concerning cabinet proposals that have legislative implications for Treaty principles .

# Appendix Five: organisational expertise

## Government departments

The following departments have key government advisory functions in respect of Treaty issues.

### Te Puni Kōkiri – Ministry of Māori Development

The Ministry of Māori Development Act 1991 established Te Puni Kōkiri, the Ministry of Māori Development, in 1992. The functions of Te Puni Kōkiri are set out in this Act and have since been enhanced to assist the Government in achieving its objectives for Māori. Te Puni Kōkiri currently provides policy advice to the Government and other agencies; provides some services to assist whānau, hapū, iwi and Māori achieve their development aims; audits programmes delivered by iwi or other Māori authorities and those delivered by mainstream agencies; works with other government departments to ensure that mainstream programmes work to eliminate social inequality and monitors progress towards Māori development targets.

In addition to its other functions, Te Puni Kōkiri provides policy advice on the Crown's relationship with iwi, hapū, and Māori, and the Government's objectives, interests and obligations concerning Māori, including Treaty of Waitangi obligations. This advice is informed by the Ministry's Treaty Framework. Te Puni Kōkiri is responsible for developing advice on Treaty settlement policies, on specific claims, on claimant representation and mandate, on cultural heritage and international indigenous issues, and the Crown's obligations under the Treaty of Waitangi. The Ministry also provides advice to the Minister of Māori Affairs and to other agencies on Treaty issues and Māori interests arising in proposed legislative reforms or initiatives, legislative reviews, and legislative administration. In addition, it offers expertise in designing and managing consultation processes with Māori and, through its Regional Offices, in managing the Crown-Māori relationship at a local level.

### The Office of Treaty Settlements

The primary functions[468] of the Office of Treaty Settlements (OTS) are to:

- negotiate on behalf of the Crown the settlement of historical grievances under the Treaty of Waitangi;
- implement settlements that have been reached; and
- administer the Protection Mechanism for surplus Crown land (a

function formerly administered by Land Information New Zealand).

OTS is also responsible for:

- managing the portfolio of land and property that is set aside for possible use in future settlement packages, known as land banks; and
- providing generic and claim-specific advice relating to representation, mandating issues and processes, advising on Crown positions on types of outstanding historical Treaty claims and liaising with other agencies on new policy issues arising out of specific Treaty claim negotiations.

### Crown Law Office

The Crown Law Office operates as a government department with the Solicitor-General as its Chief Executive. It provides legal advice and representation to the government in matters affecting the Crown, and in particular, government departments. It has two primary aims. First, to ensure that the operations of executive government are conducted lawfully and second, to ensure that the Government is not prevented, through the legal process, from lawfully implementing its chosen policies.

The Crown Law Office is organised into nine specialist teams, which provide legal advice and litigation services in the area of criminal, public and administrative law. The Treaty Issues and International Law Team work on the legal and historical issues relating to the Treaty of Waitangi. This work includes: claims made to the Waitangi Tribunal general advice to ministries and departments on Treaty issues, and involvement in the Treaty settlement process. It also represents the government before the Waitangi Tribunal and the Courts. In recent years, developments in the impact of New Zealand's international obligations on New Zealand law have provided another area of responsibility for the team.

The Crown Law Office maintains a Register of Crown Commitments in Treaty Litigation. The Register contains a brief description of commitments given by the Crown to the Courts and to Māori in litigation concerning the Treaty, together with a copy of the documentation relating to the commitments.

### Ministry of Justice

The Ministry of Justice provides strategic and policy advice across the justice sector. Justice policy is based primarily on a concern for the

rights and responsibilities of the individual in regard to his/her relationships with other individuals, communities and the State. It is also concerned with advice on fundamental constitutional matters such as: rights, the body of law and democratic processes, and the relationships between Treaty partners.

### The Treasury

As the Government's lead agency on economic policy, the Treasury is responsible for managing the public purse and providing advice on how to get the best quality and value out of public spending. It is also responsible for developing strategic advice for the Treasury Ministers and Cabinet on the future shape and direction of New Zealand's economy. The Treasury is one of three central agencies (along with the Department of the Prime Minister and the Cabinet and the State Services Commission) responsible for coordinating and managing public sector performance. In particular, the Treasury provides sectoral policy advice on issues affecting Māori and strategic advice on the management and negotiation of generic policy for Treaty of Waitangi claims. Treasury's role in the settlement of historical Treaty claims is to monitor the fiscal and commercial aspects of settlement (this includes the quantum and Crown properties that comprise the total fiscal redress), and to assess any associated risks.[469]

### The Department of Conservation

The primary role of the Department of Conservation is to protect and restore New Zealand's natural and historic heritage in those places set aside by the Government for this purpose. The Department's mission is "to conserve New Zealand's natural and historic heritage for all to enjoy now and in the future". The Department acknowledges that in order to achieve this mission, it needs to focus on conservation partnerships, or partnerships with the community. The practical expression of a Treaty partnership with iwi Māori is a key consideration for the Department in establishing and maintaining this concept of conservation partnerships.

Section four of the Conservation Act 1987 requires that the Act is to be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi. Section four also applies to other legislation administered by the Department. A Court of Appeal judgment in *Ngai Tahu Māori Trust Board v Director-General of Conservation* (1995) 3 NZLR 553 stated that: "section [four] applies to the Acts in the First Schedule (including their dependent Regulations) except to the extent that it may be inconsistent with the specific legislation".

There are Treaty claims against much of the land and many of the resources administered by the Department. While the Office of Treaty Settlements has primary responsibility for the Treaty Settlements process, the Department of Conservation makes a significant contribution to Crown teams working on the preparation, negotiation and implementation of Treaty Settlements.

## Judicial and quasi-judicial bodies

### The Waitangi Tribunal

The Tribunal was established in 1975 as a permanent commission of inquiry to investigate claims by Māori against the Crown for breaches of the principles of the Treaty in government legislation, policies and practices, and to report its findings and any recommendations to the Crown. The role of the Tribunal is set out in the Treaty of Waitangi Act 1975 which deals with actions or omissions of the Crown from 1975. The Treaty of Waitangi Amendment Act 1985 extended the Tribunal's jurisdiction to include historical claims dating back to 1840. The Tribunal's role may include examining and reporting on any proposed legislation referred to it by the House of Representatives or a Minister of the Crown; and making recommendations or determinations in respect of certain Crown forest land, railways land, State-owned enterprise land, and land transferred to educational institutions.

The Tribunal has exclusive authority, for the purposes of the Act, to determine the meaning and effect of the Treaty. Under the Act, the Tribunal must consider both the Māori and English texts when interpreting the meaning and effect of the Treaty and decide issues raised by the differences between them.

The Tribunal consists of 16 members appointed by the Governor-General on the recommendation of the Minister of Māori Affairs. It also has a chairperson, who is either a judge or a retired judge of the High Court or the chief judge of the Māori Land Court, and a deputy chairperson, who is a judge of the Māori Land Court. Approximately half the members are Māori and half are Pākehā.

The Tribunal is supported in its role by the Department for Courts, through the Waitangi Tribunal Business Unit, which provides administrative, research, and support services.

## Māori Land Court

The Māori Land Court and Māori Appellate Courts are constituted under the Te Ture Whenua Māori Act 1993 (the Act) and have jurisdiction to hear matters relating to Māori land. The function of the Māori Land Court is to contribute to the administration of Māori land, the preservation of taonga Māori and the promotion of the management of Māori land by its owners. The Māori Land Court has a variety of functions under the Act, including the power to:

- call meetings of owners to consider alienation of use of Māori land;
- make vesting orders on succession in certain circumstances to those proved entitled to succeed to a deceased owner of Māori freehold land;
- appoint trustees for persons under disability;
- grant partition orders and vesting orders transferring or gifting land or interests in land under section 164 of the Act;
- make orders creating incorporation of Māori land owners under section 247 of the Act;
- confirm the alienation of Māori land under section 326 of the Te Ture Whenua Māori Act 1993;
- appoint trustees to carry out certain functions for the benefit of the beneficial owners;
- make charging orders in respect of rates owning; and
- appoint agents for various purposes.

The Māori Appellate Court is a court of record originally constituted under the Māori Land Court Act 1894. It hears appeals from the Māori Land Court.

## The Environment Court

The Environment Court, formerly called the Planning Tribunal, is constituted by the Resource Management Amendment Act 1996. It is a court of record consisting of Environment Judges (who are also District Court Judges) and Environment Commissioners. The Court is not bound by the rules of evidence and the proceedings are often less formal than the general courts. In addition to the Resource Management Act, this Court has jurisdiction under the Public Works Act; Historic Places Act; Forests Act; Local Government Act; and the Transit New Zealand Act. The Environment Court's work covers a wide range of natural resource issues in which Māori have an interest, and includes interpretation and enforcement of the provisions of the Resource Management Act 1991 which refer to the Treaty, to Māori cultural and spiritual issues, and the relationship of Māori with their ancestral land.

## Other bodies

### The Human Rights Commission

The Human Rights Commission is a statutory body that administers the Human Rights Act 1993 (the Act). The Act is intended to provide for the protection of human rights in New Zealand, and empowers the Commission to:

- promote, by education and publicity, respect for and observance of human rights;
- conciliate and/or investigate complaints of unlawful discrimination.

The advisory functions of the Commission include making public statements, receiving representations and advising and reporting on "any matter affecting human rights", including the desirability of legislative, administrative, or other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights. The Commission also has a complaints jurisdiction under the Act, by which it s empowered to hear applications from persons claiming that their rights under the Act have been violated. The Commission has both mediative and quasi-judicial functions.

### The Office of the Race Relations Conciliator

The Office of the Race Relations Conciliator administers the race provisions of the Human Rights Act 1993 and is mandated to investigate, and attempt to resolve, complaints of racial discrimination when these occur in the areas of employment, training, housing, education, access to public places and the provision of goods, services and facilities. Racial harassment and racial disharmony can also be unlawful.

The Conciliator also has the responsibility, through the general provisions of the Human Rights Act 1993, to respond to broader issues to do with race and race relations. These include addressing institutional racism; promoting positive race relations through education and public promotions; monitoring and providing advice on policies affecting race relations and commenting on the implications of any relevant proposed legislation.

### The Law Commission

The Law Commission is an independent, government-funded organisation, established by statute in 1985, which reviews areas of the law that need updating, reforming or developing. It is funded to

investigate and report to the Minister of Justice on how New Zealand laws can be improved, and makes recommendations to Parliament. The Law Commission's goal is to achieve law that is just, principled, accessible, and reflects the heritage and aspirations of the peoples of New Zealand. The Commission also assists government departments and Crown entities in reviews of the law and is regularly called on to assist parliamentary select committees. Over the years, the Commission has undertaken work to give effect to Māori values in the laws of New Zealand, including for example, questions about the status of Māori custom in New Zealand law. The Commission has produced a number of relevant publications including: *Justice: The Experiences of Māori Women: Te Tikanga o te Ture Te Matauranga o nga Wahine Māori e pa ana ki tenei* (1999); *Coroners* (2000); *Determining Representation Rights under Te Ture Whenua Māori Act 1993: An Advisory Report for Te Puni Kōkiri* (March 2001); and *Māori Custom and Values in New Zealand* (2001). The latter study paper includes discussion on indigenous custom law and the doctrine of aboriginal rights, and Māori custom law and the Treaty of Waitangi.

### The Crown Forestry Rental Trust

The Crown Forestry Rental Trust (CFRT) was established under the Crown Forest Assets Act 1989. It is an independent Trust that receives the rental proceeds from licensees of Crown forest land (through Land Information New Zealand). CFRT invests the rental proceeds, holding the funds in trust until ownership of the land is confirmed. CFRT uses the interest earned from the investment of rental proceeds to assist Māori claimant communities in preparing, presenting and negotiating Treaty of Waitangi claims that involve, or could involve, certain Crown forest land.

CFRT's vision is to enhance the capacity within Māori communities to achieve their desired outcomes from Treaty claims. Its mission is to work with Māori to provide support and services to achieve high levels of efficiency and effectiveness in the resolution of their claims through enhanced capabilities and skills and the design of effective organisations.

### Te Ohu Kai Moana - The Treaty of Waitangi Fisheries Commission

In 1989 and 1992, Māori and the Crown agreed to a settlement in which ownership of a significant portion of New Zealand's commercial fisheries was returned to Māori. This settlement was aimed at redressing Treaty of Waitangi grievances in respect of commercial fisheries. The fisheries assets are the result of a 1989 interim settlement

and a 1992 final settlement and are vested with the Treaty of Waitangi Fisheries Commission.

The Commission (Te Ohu Kai Moana) is responsible for getting Māori into the business and activity of fishing. It is also required to develop a method for allocating the assets to Iwi, ultimately for the benefit of all Māori. The value of the assets has increased significantly under Te Ohu Kai Moana management. Te Ohu Kai Moana is governed by two main pieces of legislation: the Māori Fisheries Act 1989 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

## Appendix Six: international instruments

A number of New Zealand's international commitments impact on the Crown-Māori relationship and the interests of Māori. In particular those dealing with matters such as:

- Intellectual and cultural property
- Foreign investment and trade
- Genetic resources
- Indigenous flora and fauna
- Natural physical resources
- Human rights
- Language and culture
- Indigenous rights
- Kōiwi tangata and mokomokai
- Immigration

Relevant international instruments include the following. These include agreements to which New Zealand is a party along with other instruments which remain in draft form or to which New Zealand is not a party.

- The International Covenant on Civil and Political Rights, including especially Article 27 (and the First Options Protocol)
- The International Covenant on Economic, Social and Cultural Rights
- The International Convention on the Elimination of All Forms of Discrimination Against Women ( and the Optional Protocol)
- The Convention on the Elimination of All Forms of Racial Discrimination
- The Convention on the Rights of the Child
- Convention on Biological Diversity
- World Trade Agreement (including General Agreement on Tariffs and Trade, General Agreement on Trade in Services, and Trade–related Aspects of International Property Rights (TRIPS)
- Convention Against Illegal Trade and Endangered Species
- Draft United Nations Declaration on the Rights of Indigenous Peoples
- International Labour Organisation Convention 169 on Indigenous and Tribal Peoples
- UNCED Agenda 21 and associated statements
- Multilateral Agreement on Investment (MAI)

## Appendix Seven: glossary of Māori terms

This glossary seeks to provide the reader with translations that relate to the context in which Māori words are used in the guide, recognizing that words may have multiple meanings.

Some meanings of kāwanatanga, tino rangatiratanga, and taonga are discussed in detail in the sections on Historical Background and Key Concepts in the Treaty Exchange, and are therefore not translated here. Likewise, the term mana is also discussed in the Historical Background section of the guide and is not translated here.

| | |
|---|---|
| *Haka* | posture dance |
| *Hapū* | collection of families with common ancestry and common ties to land |
| *Iwi* | nation, people, collection of hapū |
| *Kaitiakitanga* | the practice of guardianship |
| *Kōiwi tangata* | repatriated remains, bones |
| *Mahinga kai* | places where food was gathered |
| *Māori* | indigenous person/s or descendant of indigenous person/s of New Zealand |
| *Marae* | village courtyard; the spiritual and symbolic centre of tribal affairs |
| *Mātauranga Māori* | knowledge of things Māori |
| *Maunga* | mountain |
| *Mauri* | life principle or life force |
| *Mokamokai* | dried human head |
| *Ngā tikanga katoa* | all customs |
| *Pākehā* | European (not Māori) |
| *Pukapuka* | usually refers to a book; used here to refer to the Treaty of Waitangi |
| *Rangatira* | chief or leader |
| *Raupatu* | the confiscation of land |
| *Rūnanga* | council |
| *Tangata whenua* | person or people of a given place |
| *Te Ohu Kai Moana* | Treaty of Waitangi Fisheries Commission |
| *Te Puni Kōkiri* | Ministry of Māori Development |
| *Te reo* | the (Māori) language |
| *Tikanga* | custom(s) |
| *Tohunga* | expert |
| *Wānanga* | modern tertiary education providers based on an ancient Māori institution of advanced learning known as whare wānanga |
| *Whānau* | family |
| *Whenua* | land |

# Appendix Eight: bibliography

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## Appendix Nine: footnotes

1 Kawharu (ed.), *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (1989) p 321.
2 *Lands* (CA) [1987] at 662–663.
3 Kawharu (ed.), *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (1989) pp 320-21.
4 Elias, "Treaty of Waitangi and the Separation of Powers" in Gray and McClintock (ed.) *Courts and Policy: Checking the Balance* (1995) p 206. See also *Whiti Te Ra Kaihau v New Zealand Police* (HC) [2000] at 4: "… the Treaty of Waitangi while underpinning the Government's decision to annex New Zealand is not in fact the basis in law on which the Government has legal authority. Its authority arises from the Proclamation of Sovereignty". See also *M W Manukau and Others v Attorney-G*eneral (HC) [2000] at 4.
5 See the *Broadcasting Assets* (PC) [1994] at 517, where Lord Woolf of the Privy Council confirmed that: "… the obligations of her Majesty, the Queen of England, under the Treaty of Waitangi were now those of the Crown in the right of New Zealand".
6 Increasingly, elements of New Zealand's constitution are set out in legislation. Examples are the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 and arguably the Treaty of Waitangi Act 1975 (establishing the Waitangi Tribunal).
7 Palmer and Palmer, *Bridled Power: New Zealand Government under MMP* (1997) p 287.
8 Waitangi Tribunal, *Ngāi Tahu Report* (1991) p 224.
9 *Broadcasting Assets* (PC) [1994] per Lord Woolf at 516.
10 Boast, "The Treaty of Waitangi" in *Māori Land Law* (1999) p 272.
11 *Huakina Development Trust v Waikato Valley Authority* (HC) [1987] at 210.
12 Now Lord Cooke of Thorndon.
13 Cooke, "Introduction" in *New Zealand University Law Review* (1990) p 1.
14 *Sealords* (CA) [1993] at 308-309. Elsewhere in this case at 305, it was noted: "In [the *Coal* case (1989)], as in the lands and the forests cases, the basic arguments did not go beyond s 9 of the State-Owned Enterprises Act and more fundamental questions of the place of the Treaty in the New Zealand constitutional system were left open ... Such dicta bearing on the wider questions as are to be found in these or other cases of recent times can be no more than obiter, for the subject of the foundations of the New Zealand constitutional system remains unargued, except that occasionally (as in the present case) it has been lightly touched on, and there is no need for or advantage in trying to embark on that profound subject in this judgment".
15 *Lands* (CA) [1987] per Casey J at 703.
16 Pool, *Te Iwi Māori* (1991) p 61; see also pp 237-238.
17 See, for example, Belich, *Making Peoples: A History of the New Zealanders – From Polynesian Settlement to the End of the Nineteenth Century* (1996) chapter 7, especially pp 194, 202; Orange, *The Treaty of Waitangi* (1987) pp 46, 58; and Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (1999) pp 89, 103-105.
18 *Lands* (CA) [1987] per Cooke P at 656.
19 *Lands* (CA) [1987] per Casey J at 702-703.
20 *Lands* (CA) [1987] per Cooke P at 663.
21 *Te Rūnanga o Muriwhenua Inc v Attorney-General* (CA) [1990] per Cooke P at 655.

22 *Coal* (CA) [1989] per Cooke P at 530.

23 Waitangi Tribunal, *Motunui-Waitara Report* (1983) p 52; see also Richardson J in *Lands* (CA) [1987] at 673: "[The Treaty] must be capable of adaptation to new and changing circumstances as they arise".

24 Waitangi Tribunal, *Motunui-Waitara Report* (1983) p 52.

25 *Key Government Goals to Guide Public Sector Policy and Performance*, DPMC refers, 22 February 2000; see Appendix Two.

26 *Cabinet Manual* (2001) chapter 5 (Legislation and the Executive) section 5.35 (Compliance with Legal Principles and Obligations) pp 68-69.

27 For a discussion of the significance of these requirements, see Joseph, "Constitutional Review Now" in *New Zealand Law Review* (1998) p 90.

28 In practice, there are a number of important conventions, or customs, to which Parliament adheres in exercising its powers. These are political constraints on Parliament that go to the core of its legitimacy of law-making. In practice, many argue, there are certain acts which Parliament will not undertake, even though it is technically capable of them, and some indications from the Courts that they would not enforce legislation which violated certain fundamental rights. See *Taylor v New Zealand Poultry Board* (CA) [1984] per Cooke J (as he then was) at 398.

29 This was explicitly recognised in *Lands* (CA) [1987] at 655-656, where President Cooke said that: "The Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty". See also *Coal* (CA) [1989] per Cooke P at 518.

30 See the comments of Cooke P in *Whales* (CA) [1995] at 558: "Statutory provisions for giving effect to the principles of the Treaty of Waitangi in matters of interpretation and administration should not be narrowly construed … at least to the extent that the provisions of the [relevant Act are] not clearly inconsistent with those principles". See also Joseph, "Constitutional Review Now" in *New Zealand Law Review* (1998) p 90; Boast, "Māori Land Law and the Treaty of Waitangi" in Boast, Erueti, McPhail, Smith, *Māori Land Law* (1999) p 273; and Burrows, *Statute Law in New Zealand*, (1999) p 302.

31 *Lands* (CA) [1987] per Somers J at 691.

32 *Lands* (CA) [1987] per Richardson J at 668.

33 Burrows, *Statute Law in New Zealand* (1999) pp 300-301.

34 *Te Heu Heu Tukino v Aotea District Māori Land Board* (PC) [1941] at 324.

35 In *Lands* (CA) [1987] Cooke P said of the *Te Heu Heu Tukino* case at 667: "That judgment represented wholly orthodox legal thinking, at any rate from a 1941 standpoint ...". See also the comments made by McGechan J in *Taiaroa and Others v Attorney-General* (HC) [1994] at 19: "The Treaty does not in itself give rise to legal rights enforceable in this Court. Perhaps that will change some day, but for the moment I am bound by *Te Heu Heu Tukino v Aotea District Māori Land Board* . . .".

36 *Broadcasting* (CA) [1992] per McKay J at 603; see also *Broadcasting Assets* (PC) [1994] per Lord Woolf at 515, where the Privy Council noted that: "… the appellants [had] not attempted to challenge or avoid the decision of the Privy Council in Te Heu Heu case …".

37 Keith, "The Treaty of Waitangi in the Courts" in *New Zealand Universities Law Review* (1990) p 47.

38 Ibid., p 45.

39 Joseph, "Constitutional Review Now" in *New Zealand Law Review* (1998) p 85.

40 See President Cooke's comments in *Lands* (CA) [1987] at 655: "…

other issues, however important and interesting in themselves, are probably better left free of crumbs of dicta. For example, whether the Treaty of Waitangi has a status in international law; what are the principles for interpreting international treaties ... These are big questions, not sensibly to be answered by an individual Judge's impressions based on argument and materials touching but not closely focussed on them".

41 See, for example, the conclusions drawn by Joseph, *Constitutional and Administrative Law in New Zealand* (1993) pp 43-46. In particular his comment on p 45: "The status of the Treaty must be assessed according to those customary rules of international law ascendant at the time. And these rules withheld from tribal societies juridical standing – at least for a cession of sovereignty and not some lesser estate approximating to derivative roots of title". Compare to the comments of Kingsbury, "The Treaty of Waitangi: Some International Law Aspects" in Kawharu (ed.), *Waitangi: Māori and Pākehā Perspective of the Treaty of Waitangi* (1989) pp 121ff. In addressing the assertion that the Treaty of Waitangi was a nullity and of no international legal significance, Kingsbury states on pp 121-122: "As a matter of international law, this proposition is clearly untenable. The Treaty was a valid international treaty of cession, and the parties in 1840 were recognised as having the necessary legal capacity to enter into such a treaty. This is clear from an examination of the general context of British policy towards indigenous peoples in the 1830s and 1840s, the specific instructions given by the British Government to her emissaries to New Zealand, the attitude taken by France and the United States as third party States directly interested, and subsequent international arbitral decisions".

42 For a discussion of relevant international legal principles, see Kingsbury, "The Treaty of Waitangi: Some International Law Aspects" in Kawharu (ed.), *Waitangi: Māori and Pākehā Perspective of the Treaty of Waitangi* (1989) p 121.

43 See the following Waitangi Tribunal Reports: *Motunui-Waitara Report* (1983) pp 47-49; *Orakei Report* (1987) pp 148-149.

44 See Articles 26 and 31(1) of the *Vienna Convention on the Law of Treaties*. Note that in the *Lands* case (CA) [1987] Richardson J at 682 refers to a statement from a Canadian judge on the international legal principle of good faith, which includes reference to the Vienna Convention articles.

45 See the discussion in *Lands* (CA) [1987] per Richardson J at 682.

46 See the following Waitangi Tribunal Reports: *Motunui-Waitara Report* (1983) pp 47-49; *Manukau Report* (1985) p 65; *Orakei Report* (1987) pp 148–149; *Ngāti Rangiteaorere Report* (1990) p 47; *Mohaka River Report* (1992) p 34.

47 Waitangi Tribunal, *Manukau Report* (1985) p 65.

48 See the discussion in Keith, "The Tribunal, The Courts and The Legislature" in *Treaty Settlements, the Unfinished Business* (1995) pp 43–44.

49 *Broadcasting* (CA) [1992] at 598.

50 *Radio Frequencies No 1* (CA) [1991] per Cooke P at 136.

51 See Appendix One for a current list of legislation with Treaty references.

52 Such as any provisions to which the Treaty clause might directly relate, or which indicated Parliament's intentions in enacting a Treaty reference, or which elevated the significance of other features of the statute (for example, the paramount objective of conservation in the Conservation Act).

53 *Lands* (CA) [1987] per Cooke P at 667.

54 Treaty of Waitangi (State Enterprises) Act 1988, section 4 and section 9.

55 *Whales* (CA) [1995] at 554.
56 Ibid., at 553 and 558.
57 See *Lands* (CA) [1987]; *Coal* (CA) [1998]; and *Forests* (CA) [1989].
58 The Solicitor-General's opinion, in *The Crown's Obligations Under the Treaty of Waitangi as at 1992*, Memorandum for Cabinet Strategy Committee, New Zealand Solicitor General, 8 May 1992, p 20.
59 In the *Ngāwhā Geothermal Resources Report* (1993), the Waitangi Tribunal considered the meaning of section eight of the Resource Management Act 1991, noting on p 145 that the section does not compel compliance with the Treaty and so in the Tribunal's view does not go far enough to protect Māori interests. The Tribunal considered that: "Implicit in the requirement to 'take into account' Treaty principles is the requirement that the decision-maker should weigh such principles along with other matters required to be considered, such as the efficient use and development of geothermal resources. It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed". For further discussion on the application of section eight in jurisprudence concerning the Resource Management Act 1991, see the later section in this guide on Treaty principles which refers to the duty to make informed decisions.
60 *The Crown's Obligations Under the Treaty of Waitangi as at 1992*, Memorandum for Cabinet Strategy Committee, New Zealand Solicitor General, 8 May 1992, p 20.
61 Ibid., pp 15-19.
62 Sections of the Children, Young Persons and Their Families Act 1989 refer to the interests of whānau, hapū and iwi in respect of the welfare of their children, and the child's corresponding interest in remaining with their whānau, hapū or iwi. See in particular sections 5 and 13.
63 *Barton-Prescott v Director-General of Social Welfare* (HC) [1997] at 184.
64 Ibid., at 184.
65 Now called the Environment Court.
66 *Huakina Development Trust v Waikato Valley Authority* (HC) [1987] at 210.
67 It should be noted that although the *Huakina Development Trust v Waikato Valley Authority* case was decided by the High Court in 1987, the subsequent use of the Treaty as an extrinsic aid in this second approach has not yet been applied in the Court of Appeal.
68 *Warren v Police* (HC) [2000]; *Kohu v Police* (HC) [1989]; *Berkett v Tauranga District Court* (HC) [1992]; *R v Pairama* [1995]; *R v Fuimaono* (CA) [1996]; *R v Clarke and Another* (CA) [1998]; *Knowles v Police* (HC) [1998]; *Haira v Police* (HC) [1999]; and *R v Waetford* (CA) [1999].
69 For a discussion on the role of the Resident see Moon, *Hobson: Governor of New Zealand 1840-1842* (1998) pp 26-27.
70 Orange, *Treaty of Waitangi* (1987) p 21.
71 Ibid., p 20.
72 Other historical evidence suggests that Busby was also seeking to consolidate his own authority in response to the appointment and subsequent actions of Thomas McDonnell as Additional British Resident at Hokianga in August 1835. See: Ross, "Busby and the Declaration of Independence" in *The New Zealand Journal of History* (1980) pp 83-89. An alternative interpretation of the development of the United Tribes of New Zealand, drawing on Māori oral traditions

restated in a submission to the Select Committee on Māori Fisheries from Rūnanga Ko Huirau, can also be found in Cox, *Kotahitanga: The Search for Māori Political Unity* (1993) pp 42-43. The latter evidence indicates a greater level of Māori involvement in the initiation of the Confederation of United Tribes, which according to Cox may explain Busby's uncharacteristic hasty actions and his subsequent inability to maintain the momentum of the movement.

73 This and subsequent references to the English text of the Declaration of Independence were cited in Orange, *The Treaty of Waitangi* (1987) pp 255-256. Orange quotes from *Facsimiles of the Declaration of Independence and the Treaty of Waitangi* (1877, reprinted by the Government Printer, 1976). The original may be found in the National Archives, Wellington.

74 Including also Te Hapuku from Hawke's Bay and Te Wherowhero from the Waikato. See Orange, *The Treaty of Waitangi* (1987) p 22.

75 Ibid., p 21.

76 Waitangi Tribunal, *Manukau Report* (1985) p 7. See also *Warren v Police* (HC) [2000]; and *R v Pairama* [1995].

77 Report of the House of Commons Committee on Aborigines in British Settlements, June 26, 1837 cited in *The Treaty of Waitangi: Its Origins and Significance,* Victoria University Extension Publication No.7 (1972) p 10.

78 This was acknowledged in the 1835 Declaration of Independence and later in Lord Normanby's 1839 instructions to Captain Hobson.

79 Especially the consent of the Māori signatories to the 1835 Declaration of Independence.

80 "Instructions from the Marquis of Normanby to Captain Hobson 14 August 1839" in *British Parliamentary Papers: Colonies New Zealand*, Vol. 3, 1835, p 86.

81 Ibid., p 86.

82 Ibid., p 86.

83 Ibid., p 86.

84 Ibid., pp 86-87.

85 Ibid., p 87.

86 Orange, *The Treaty of Waitangi* (1987) p 2.

87 "Instructions from the Marquis of Normanby to Captain Hobson 14 August 1839" in *British Parliamentary Papers: Colonies New Zealand*, Vol. 3, 1835, pp 87-88.

88 Ibid., pp 85-86.

89 Boast, "The Treaty of Waitangi" in *Māori Land Law* (1999) p 269; see also Moss, "Te Tiriti o Waitangi: Texts and Translations" in *New Zealand Journal of History*, (1972) p 133.

90 There are conflicting reports on the exact number of chiefs signing at Waitangi. New Zealand historian Claudia Orange notes that some reports are as high as 52, but she considers that 43 Māori signatories is more likely. See Orange, *An Illustrated History of the Treaty of Waitangi* (1990) p 130.

91 Moss, "Te Tiriti o Waitangi: Texts and Translations" in *The New Zealand Journal of History* (1972) p 136.

92 Orange, *An Illustrated History of the Treaty of Waitangi*, (1990) p 36. See also Cox, *Kotahitanga: The Search for Maori Political Unity* (1993) pp 29-30 regarding the concerns of some non-signatory tribes.

93 Spiller, Finn and Boast, *A New Zealand Legal History* (1995) pp 132–133.

94 Richardson J noted in *Lands* (CA) [1987] at 671 that: "Given the emphasis on oral discussion and decision making and limited literacy their understanding would necessarily have depended on what

explanations were given to the particular signatories and their appreciations of the concepts involved". In its *Waiheke Island Report* (1987) on pp 39-40 the Waitangi Tribunal referred, with approval, to a decision of the Canadian Court of Appeal concerning the interpretation of a treaty between the Crown and an Indian band (*R v Taylor and Williams* (CA) [1981] (2d) 360): "Despite the clear words of the Treaty the Court had no difficulty in referring to the surrounding circumstances, tribal needs, and recorded statements, made during negotiations, holding, following a review of those things, that there could have been no intention to part with hunting rights on the ceded lands, and that the 'oral terms recorded in the minutes' form part of the Treaty too".

95 Orange, *The Treaty of Waitangi* (1987) p 89.

96 Ibid., pp 64-65.

97 Ibid., p 65.

98 Ibid., p 97.

99 Cited in Durie, "Will the Settlers Settle? Cultural Conciliation and Law" in *Otago Law Review* (1996) p 460.

100 Buick, *The Treaty of Waitangi or How New Zealand Became a British Colony* (1914) p 101.

101 Orange, *The Treaty of Waitangi* (1987) p 4.

102 Ibid., p 65.

103 See Belich, *Making Peoples: A History of the New Zealanders – From Polynesian Settlement to the End of the Nineteenth Century* (1996) pp 217-223. Belich notes evidence which suggests that by the 1850s over 60 percent of Māori counted themselves as Christians. He further notes various possible Māori motivations for 'conversion' to Christianity such as religious sympathies, increasing one's mana, and better access to trading opportunities and literacy education.

104 See, for example, Orange, *The Treaty of Waitangi* (1987) who notes that the missionary William Williams, the brother of Henry Williams, was charged with taking the Treaty from the East Cape to Ahuriri (Napier) for signatories. According to Orange, he combined his treaty business with missionary work. Orange states: "Some East Coast Māori were reassured by the fact that the treaty was carried to them by William Williams" (p 72).

105 The Waitangi Tribunal, *Orakei Report* (1987) p 203, citing Adams, *Fatal Necessity: British Intervention in New Zealand 1830-1847* (1977) p 199.

106 Buick, *The Treaty of Waitangi or How New Zealand Became a British Colony* (1914) p 172.

107 Waitangi Tribunal, *Orakei Report* (1987) p 203.

108 Orange, *The Treaty of Waitangi* (1987) p 100.

109 Lord Normanby did not consider this policy to be unjust because he believed that a considerable amount of Māori land was "of no actual use, and in their hands, it possesses scarcely any exchangeable value". The Waitangi Tribunal considers that Lord Normanby's instructions also set limits on the Crown exercising its right to pre-emption. All dealings with Māori were to be conducted on the basis of sincerity, justice and in good faith, and Māori were not to enter contracts injurious to their interests. Instead, it was intended that Māori should retain lands essential to their livelihood and, in so doing, benefit from colonisation as their land values increased over time. See Waitangi Tribunal, *Orakei Report* (1987) pp 200 ff; also refer to "Instructions from the Marquis of Normanby to Captain Hobson, 14 August 1839" in *British Parliamentary Papers: Colonies New Zealand*, Vol. 3, 1835, p 87.

110 Orange, *The Treaty of Waitangi* (1987) p 101.
111 Adams, *Fatal Necessity: British Intervention in New Zealand 1830-1847* (1977) pp 163-164.
112 Ibid., pp 163-164.
113 For a more extended discussion of Māori debating procedures during the Treaty signings and contemporary perspectives of the issues raised by Māori during the Treaty debate at Waitangi see the Waitangi Tribunal's *Muriwhenua Land Report* (1997) pp 110-115.
114 Ibid., p 111. On p 110 of the *Muriwhenua Land Report* (1997) the Tribunal notes: "The record is important, though again it must be treated cautiously, since the debate in Māori has not survived but only English interpretations of it".
115 The Waitangi Tribunal in its *Muriwhenua Land Report* (1997) notes on p 111: "It was said that the Governor was harangued with allegations, but impassioned declamation is also a standard oratorical tool. It solicits a clear position on a point of issue … The Māori way is to clear the air by so averring, in order to compel a forthright denial". The Tribunal suggests that this oratorical tool was designed to invite the Govenor to affirm that he would ensure that Māori were not left landless or be robbed of their lands. The Tribunal also notes on p 112: "Care is needed, too, with accounts that Māori complained of land loss through sales. The debate was all in Māori, there was no language equivalent for a land 'sale', and nothing survives of the Māori words used". In the Tribunal's view, the alarm about land loss may have been over-emphasized in the accounts of European observers, given that Māori in the area measured in their thousands whereas Europeans were but a few hundred in the Bay of Islands. The Tribunal considers that: "The Treaty rhetoric was rather, a warning that Māori would entertain no diminution of their authority and expected, at the very least, that power would be shared in arrangements made with the missionaries and the Governor"(p 113).
116 Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (1890) pp 17-18.
117 Ibid., p 19.
118 Ibid., p 19.
119 Ibid., pp 21-22.
120 Ibid., p 22.
121 Ibid., pp 25-26.
122 Ibid., pp 26-27.
123 Ibid., p 27.
124 Buick, *The Treaty of Waitangi or How New Zealand Became a British Colony* (1914) p 138.
125 Ibid., p 138.
126 Ibid., p 150.
127 See Durie, "Will the Settlers Settle? Cultural Conciliation and Law" in *Otago Law Review* (1996) p 460; see also the Waitangi Tribunal's *Muriwhenua Land Report* (1997) pp 112-113.
128 Buick, *The Treaty of Waitangi or How New Zealand Became a British Colony* (1914) pp 193-194.
129 *Lands* (CA) [1987] per Richardson J at 671; see also per Somers J at 690. Some legal historians suggest that British claims to sovereignty over New Zealand predate the Treaty, originating from the Letters Patent of 15 June 1839. The Letters Patent extended the commission of the Governor of New South Wales to include "any territory which is or may be acquired in sovereignty … within that group of Islands … commonly called New Zealand". See Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p 44.

130 *Whiti Te Ra Kaihau v New Zealand Police* (HC) [2000] at 4; see also *M W Manukau and Others v Attorney-G*eneral (HC) [2000] at 4.

131 Keith, "The Treaty of Waitangi in the Courts" in *New Zealand Universities Law Review* (1990) at 41; see also Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (1999).

132 See the English translation of the Māori text of the Treaty by Professor Sir Hugh Kawharu provided earlier in the guide, also in Kawharu (ed.), *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (1989) p 321.

133 Orange, *The Treaty of Waitangi* (1987) p 41.

134 Ibid., p 41.

135 Waitangi Tribunal, *Mohaka River Report* (1992) p 63.

136 It is noted by historian Claudia Orange that Henry Williams, a respected missionary, was responsible for translating the English Text of the Treaty into Māori, with the assistance of his son, Edward who had some facility with spoken Māori, particularly the Ngāpuhi dialect, although neither men were experienced translators. See Orange, *The Treaty of Waitangi* (1987) p 39.

137 See the English translation of the Māori text of the Treaty by Professor Sir Hugh Kawharu provided earlier in the guide, also in Kawharu (ed.), *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (1989) p 321.

138 See the section following on the meaning of taonga, for a discussion on the existence of intangible taonga.

139 The Crown's view of pre-emption was based on the English land title system, which required that all private freehold titles emanate from the Crown. For further information on pre-emption, see Orange, *The Treaty of Waitangi* (1987) pp 100 ff.

140 Many commentators have described the reciprocal nature of land agreements in traditional Māori law, and have suggested that at the time of the Treaty signing, the concept of the total and permanent alienation of land may have been foreign to Māori. For a discussion of key elements of Māori customary land tenure and the values underpinning it see: Durie, "Will the Settlers Settle? Cultural Conciliation and Law" in *Otago Law Review* (1996) pp 449-462. The Waitangi Tribunal has considered whether the right of pre-emption (in effect "a valuable monopoly right") conferred on the Crown by the Māori chiefs imposed a reciprocal duty on the Crown. In its *Orakei Report* (1987) at 206, the Tribunal considers, in light of Normanby's instructions and the assurances given to Māori at the time of the Treaty signing, that: "… read as a whole Article two imposed on the Crown certain duties and responsibilities, the first to ensure that the Māori people in fact wished to sell; the second to ensure that they were left with sufficient land for their maintenance and support or livelihood or, as Chief Judge Durie puts it in the *Waiheke Report* (1987:77), that each tribe maintained a sufficient endowment for its foreseen needs".

141 Orange, *The Treaty of Waitangi* (1987) p 112.

142 Durie, "Will the Settlers Settle? Cultural Conciliation and Law" in *Otago Law Review* (1996) p 460.

143 The Māori translation of the fourth Article was cited in a recent study paper by the Law Commission, *Māori Custom and Values in New Zealand Law* (2001) p 73.

144 Orange, *The Treaty of Waitangi* (1987) p 53.

145 For further discussion see Waitangi Tribunal, *Muriwhenua Land Report* (1997) pp 113-114; see also Durie, "Will the Settlers Settle? Cultural Conciliation and Law" in *Otago Law Review* (1996) pp 460-462.

146 Orange, *The Treaty of Waitangi* (1987) p 128.

147 *R v Symonds* [1847].

148 Ibid. The Court held that the Crown's right of pre-emption did not derive from the Treaty, but was confirmed by it. Consequently, the Māori version of the Treaty (which many argue does not convey the notion of exclusiveness inherent in the right of pre-emption in the English version), was not considered, even though Chief Justice Martin was proficient in te reo Māori.

149 Ibid. Referring to native (or customary) title to land in New Zealand, Justice Chapman said at 390: " ... it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi ... does not assert either in doctrine or in practice anything new and unsettled".

150 Belich, "The Governor and the Māori" in Sinclair, *The Oxford Illustrated History of New Zealand,* 2nd ed. (1996); see also Orange, *The Treaty of Waitangi* (1987) p 142.

151 Orange, *The Treaty of Waitangi* (1987) p 145.

152 Ibid., pp 145–150 for a useful and extended discussion.

153 Ibid., p 149.

154 Pool, *Te Iwi Māori: A New Zealand Population Past Present and Projected* (1991) p 61.

155 Ward, *National Overview Volume I, Waitangi Tribunal Rangahaua Whanui Series* (1997) p 8. Ward further notes that these North Island acquisitions involved Māori populations at least as large or larger than those of the South Island.

156 Orange, *The Treaty of Waitangi* (1987) pp 159ff.

157 For an in-depth discussion of the impact of the Native Land Court on Māori customary land tenure see Kawharu, *Māori Land Tenure*: *Studies of a Changing Institution* (1977). See also Bryan D Gilling, "Engine of Destruction? An Introduction to the History of the Māori Land Court" in *Victoria University of Wellington Law Review* Vol. 24 No. 2 (1994) p 115.

158 Ward, *National Overview Volume I, Waitangi Tribunal Rangahaua Whanui Series* (1997) p 8. Ward also notes that a further four million acres were purchased between 1900 and 1930, mostly under the Native Land Act 1909.

159 Orange, *The Treaty of Waitangi* (1987) p 3.

160 Ibid., p 3.

161 *Wi Parata v the Bishop of Wellington and the Attorney-General* [1877].

162 Ibid., at 78.

163 Ibid., at 78.

164 *Nireaha Tamaki v Baker* [1901].

165 Ibid., at 382.

166 See, for example, the decision in *Hohepa Wi Neera v Bishop of Wellington* (1902).

167 *Wallis v Solicitor-General* (CA) [1903] at 188.

168 For a discussion of the "Protest of Bench and Bar" see: Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p 57 and Mc Hugh, *The Māori Magna Carta - New Zealand Law and the Treaty of Waitangi* (1991) pp 119-120.

169 Pool, *Te Iwi Māori: A New Zealand Population Past Present and Projected* (1991) notes on p 238 that war and conquest were not responsible for this decline but the "seemingly more benign process

of land alienation, mainly through purchase. This opened the way for large-scale Pākehā settlement and the exposure of Māori to the demographic impacts of social disorganisation and disease diffusion". Pool further comments that the rapid decrease in the Māori population in the three to four decades following the signing of the Treaty was caused mainly by very high levels of mortality, indicating that Māori had still not developed immunity to common viral disorders.

170 Ibid., p 61.
171 Ibid., p 61.
172 Orange, *The Treaty of Waitangi* (1987) p 4.
173 Ibid., p 186.
174 Ibid., p 225.
175 Ibid., p 228.
176 *Te Heu Heu Tukino v Aotea District Māori Land Board* [1941].
177 Ibid., at 596.
178 See the earlier section on the Legal Status of the Treaty.
179 Durie, *Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination* (1998) pp 54-55, notes that in the space of 25 years following the Second World War, 80 percent of the Māori population moved away from tribal areas to live in cities and towns.
180 See *Lands* (CA) [1987] per Richardson J at 681, 682.
181 *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (CA) [2000] at 304, 305.
182 *Ngāti Apa Ki Te Waipounamu Trust v The Queen* (CA) [2000] at 699.
183 *McRitchie v Taranaki Fish and Game Council* (CA) [1999] at 139.
184 *Whales* (CA) [1995] at 561.
185 In *Lands* (CA) [1987] President Cooke noted at 663 that: "The word rangatiratanga, here rendered as chieftainship, may have no precise English equivalent".
186 *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] at 304-305.
187 *Lands* [1987] per Cooke P at 663.
188 *Taiaroa and Others v Attorney-General* (HC) [1994] at 69.
189 As noted above, the Waitangi Tribunal's statute grants it "exclusive authority to determine the meaning and effect of the Treaty as embodied in the [two] texts and to decide issues raised by the differences between them" (Treaty of Waitangi Act 1975, section 5(2)).
190 Refer to the later section in this guide on the partnership principle for a more thorough commentary on the Tribunal's understanding of the Treaty principle of reciprocity.
191 Waitangi Tribunal, *Māori Development Corporation Report* (1993) p 33.
192 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 187.
193 Ibid., p 187.
194 Waitangi Tribunal, *Māori Electoral Option Report* (1994) pp 3-4.
195 Waitangi Tribunal, *Ngāi Tahu Sea Fisheries Report* (1992) p 269; see also the *Turangi Township Report* (1995) pp 284-286; the *Te Arawa Representatives Geothermal Resources Report* (1993) p 31; the *Ngāi Tahu Report* (1991) pp 236–237; and the *Taranaki Report* (1996) p 20.
196 Waitangi Tribunal, *Turangi Township Report* (1995) p 285.
197 Ibid., p 285; see also the *Ngāwhā Geothermal Resources Report* (1993) in which the Tribunal states on p 102: "While the needs of both cultures must be provided for and compromise may be necessary in some cases to achieve this objective, the Treaty guarantee of rangatiratanga requires a high priority for Māori interests when proposed works may impact on Māori taonga".

198 Waitangi Tribunal, *Ngāwhā Geothermal Resources Report* (1993) p 101.
199 Waitangi Tribunal, *Te Arawa Representatives Geothermal Resources Report* (1993) p 32.
200 Waitangi Tribunal, *Wānanga Capital Establishment Report* (1999) pp 47-48.
201 Waitangi Tribunal, *Mangonui Sewerage Report* (1988) p 5.
202 Waitangi Tribunal, *Te Whānau o Waipareira Report* (1998) p 26.
203 Waitangi Tribunal, *Manukau Report* (1985) p 67.
204 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 181; see also the *Ngāwhā Geothermal Resources Report* (1993) p 19.
205 Waitangi Tribunal, *Orakei Report* (1987) p 149.
206 Ibid., p 149; see also Waitangi Tribunal, *Ngāi Tahu Report (*1991) p 824; and *Mohaka River Report* (1992) p 100.
207 Waitangi Tribunal, *Taranaki Report* (1996) p 20.
208 Ibid., p 20.
209 Ibid., p 5, see also pp 19 ff.
210 Waitangi Tribunal, *Te Whānau o Waipareira Report* (1998) p 22.
211 Ibid., p 26.
212 Ibid., p 25.
213 Ibid., p 25.
214 Ibid., p 214.
215 Ibid., p 23.
216 Ibid., p 25.
217 *Lands* (CA) [1987] per Cooke P at 664.
218 See the following section of this guide which discusses the Waitangi Tribunal's understanding of the principle of reciprocity.
219 *Lands* (CA) [1987] per Somers J at 691.
220 Ibid., at 690.
221 Ibid., at 690.
222 Ibid., at 690.
223 *Lands* (CA) [1987] per Bisson J at 716.
224 *Lands* (CA) [1987] per Cooke P at 664.
225 Ibid., at 665-666.
226 *Whales* (CA) [1995] at 558.
227 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 186.
228 Ibid., p 232; see also *Te Arawa Representatives Geothermal Resources Report* (1993) p 32; and *Manukau Report* (1985) pp 66-67.
229 Waitangi Tribunal, *Mohaka River Report* (1992) p 65.
230 Waitangi Tribunal, *Ngāti Rangiteaorere Report* (1990) p 31.
231 Waitangi Tribunal, *Ngāi Tahu Report* (1991) p 228.
232 Waitangi Tribunal, *Turangi Township Report* (1995) pp 284-286.
233 Waitangi, Tribunal, *Orakei Report* (1987) p 189.
234 Waitangi Tribunal, *Manukau Report* (1985) pp 66-67.
235 Ibid., p 73.
236 Waitangi Tribunal, *Te Arawa Geothermal Representatives Geothermal Resources Report* (1993) p 34.
237 Waitangi Tribunal, *Ngāwhā Geothermal Resources Report* (1993) pp 134-144.
238 See the English translation of the Māori text of the Treaty by Professor Sir Hugh Kawharu provided earlier in the guide, also in Kawharu (ed.), *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (1989) pp 320-321.
239 *Broadcasting Assets* (PC) [1994] at 517.
240 Waitangi Tribunal, *Kaituna River Report* (1984) p 13; see also the *Muriwhenua Fishing Claim Report* (1988) where in regarding the Māori text of the Treaty the Tribunal states on p 174: "It is at once apparent

that estates, forests and fisheries are not specifically mentioned, but 'taonga' covers them all".

241 *Broadcasting Assets* (PC) [1994] at 517.
242 Ibid., at 517.
243 Ibid., at 519.
244 *Coal* (CA) [1989] at 529.
245 *Whales* (CA) [1995] at 561.
246 *Barton-Prescott v Director-General of Social Welfare* (HC) [1997] at 184.
247 Waitangi Tribunal, *Motonui-Waitara Report* (1983) p 50; *Kaituna River Report* (1984) p 13; *Manukau Report* (1985) p 67; *Te Reo Māori Report* (1986) p 20.
248 Waitangi Tribunal, *Motonui-Waitara Report* (1983) p 50.
249 Ibid., p 50; see also *Muriwhenua Fishing Claim Report* (1988) p 174.
250 Waitangi Tribunal, *Manukau Report* (1985) p 70.
251 Waitangi Tribunal, *Wānanga Capital Establishment Report* (1999) p xii.
252 Waitangi Tribunal, *Orakei Report* (1987) p 188; see also the *Te Reo Māori Report* (1986) in which the Tribunal concluded on p 20 that te reo Māori "is an essential part of the culture and must be regarded as a valued possession".
253 Waitangi Tribunal, *Kiwifruit Marketing Report* (1995) pp 11-12.
254 Ibid., p 13.
255 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 180. This section was excerpted and endorsed in the Tribunal's *Ngāi Tahu Fisheries Report (*1992) p 98.
256 Waitangi Tribunal, *Ngāwhā Geothermal Resources Report* (1993) pp 100–102.
257 Waitangi Tribunal, *Te Whānau o Waipareira Report* (1998) p 23.
258 Waitangi Tribunal, *Radio Spectrum Final Report* (1999) p 51.
259 Ibid., p 51.
260 Ibid., p 59.
261 Ibid., p 59.
262 Ibid., p 63.
263 McDowell and Webb, *The New Zealand Legal System: Structures, Processes and Legal Theory* (1995) p 201.
264 *Lands* (CA) [1987] per Cooke at 664.
265 *Sealords* (CA) [1993] at 301; note that in the 1996 *Radio NZ* case, Thomas J of the Court of Appeal held in a dissenting judgment at 182: "Māori also have a positive responsibility of a fiduciary nature under the treaty towards the Crown. They cannot sit on their hands".
266 Ibid., at 306.
267 Ibid., at 306.
268 *Dams* (CA) [1994] at 24.
269 Ibid., at 26.
270 Ibid., at 25.
271 *Te Rūnanga o Muriwhenua Inc v Attorney-General* (CA) [1990] at 655.
272 Ibid., at 655.
273 Waitangi Tribunal, *Māori Development Corporation Report* (1993) p 82.
274 Waitangi Tribunal, *Te Maunga Railways Land Report* (1994) p 68.
275 Waitangi Tribunal, *Turangi Township Report* (1995) p 289.
276 Ibid., pp 289-290.
277 Waitangi Tribunal, *Te Maunga Railways Land Report* (1994) p 67.
278 Waitangi Tribunal, *Māori Development Corporation Report* (1993) p 32.

279 *Whales* (CA) [1995] at 560.
280 Ibid., at 560.
281 Ibid., at 543.
282 *Dams* (CA) [1994] at 21.
283 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 234. In this report, the Tribunal refers to the Canadian Supreme Court decision in *Simon v The Queen* (1985) 24 DLR (4th) 390, 402, and to the Declaration on the Right to Development adopted on 4 December 1986 by 146 States (including New Zealand) in resolution 41/128 of the United Nations General Assembly.
284 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 235.
285 Ibid., p 235.
286 Ibid., p 194.
287 Ibid., pp 194-195; for a more detailed discussion of this principle see the following Treaty Principles section of this guide.
288 Ibid., p 234.
289 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 234.
290 Waitangi Tribunal, *Ngāi Tahu Sea Fisheries Report* (1992) p 299.
291 Ibid., pp 299-301.
292 Ibid., p 271.
293 Waitangi Tribunal, *Radio Spectrum Final Report* (1999) p 51.
294 Ibid., p 52.
295 Ibid., pp 57 ff.
296 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 195.
297 Waitangi Tribunal, *Ngāi Tahu Sea Fisheries Report* (1992) p 274.
298 *Broadcasting* (CA) [1992] per McKay J at 590, citing Cooke P in *Lands* (CA) [1987].
299 See section 5 (2) Treaty of Waitangi Act 1975.
300 See section 6 Treaty of Waitangi Act 1975.
301 *Lands* (CA) [1987] per Cooke P at 661.
302 Ibid., at 662. See also *Te Rūnanga o Muriwhenua v Attorney-General* (CA) [1990] at 651 on this point and for a more general discussion on the weight to be given to Tribunal findings as evidence in the Court of Appeal.
303 *Te Rūnanga o Muriwhenua v Attorney-General* (CA) [1990] per Cooke at 651, 652. This does not apply to the binding powers of the Tribunal in respect of certain lands transferred to state enterprises under the State-Owned Enterprises Act 1986, as set out in section nine of the Treaty of Waitangi (State Enterprises) Act 1988.
304 *Lands* (CA) [1987] per Cooke P at 663.
305 *Broadcasting Assets* (PC) [1994] per Lord Woolf at 513.
306 Waitangi Tribunal, *Orakei Report* (1987) p 209.
307 Waitangi Tribunal, *Te Roroa Report* (1992) p 32.
308 Waitangi Tribunal, *Kaituna River Report* (1984) p 18.
309 Waitangi Tribunal, *Muriwhenua Land Report* (1997) p 386. Refer also to the Tribunal's *Mohaka River Report* (1992) p.77; and *Lands* (CA) [1987] per Somers J at 693.
310 See Waitangi Tribunal, *Te Roroa* Report (1992) p 30.
311 In the *Muriwhenua Land Report* (1997), the Tribunal noted on p 388: "The principles of the Treaty flow from its words and the evidence of the surrounding sentiments, including the parties' purposes and goals".
312 *Te Rūnanga o Muriwhenua v Attorney-General* (CA) [1990] per Cooke P at 656.
313 *Radio NZ* (CA) [1996] per Thomas J at 169.
314 *Lands* (CA) [1987] per Cooke P at 664; see also *Lands* per Richardson J at 682; per Somers J at 692-693; and per Casey J at 702.
315 *Sealords* (CA) [1993] at 304.

316 *Lands* (CA) [1987] per Somers J at 693.
317 *Forests* (CA) [1989] at 152.
318 Cooke, "Introduction" in *New Zealand Universities Law Review* (1990) p 6.
319 Ibid., p 6.
320 *Lands* (CA) [1987] per Cooke P at 667.
321 Ibid., at 664.
322 *Coal* (CA) [1989] per Cooke P at 527.
323 Ibid., at 529.
324 *Lands* (CA) [1987] per Cooke P at 664.
325 Ibid., at 665-666.
326 *Broadcasting Assets* (PC) [1994] at 517.
327 Ibid., at 517.
328 *Māori Electoral Option* (CA) [1995] at 411.
329 *Lands* (CA) [1987] per Casey J at 703.
330 *Lands* (CA) [1987] per Richardson J at 682.
331 The Waitangi Tribunal's *Manukau Report* (1985) concerned a claim about the despoliation of the Manukau Harbour and the loss of certain surrounding lands of the Manukau tribes.
332 Ibid., p 70; see also *Ngāi Tahu Report* (1991) Vol. 2 p 240.
333 See preceding section on fiduciary duty.
334 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 192. This report concerned the loss or impairment of fishing interests and rights of the tribes of the Muriwhenua area. This point is also reiterated in the *Ngāi Tahu Sea Fisheries Report* (1992) p 273.
335 Waitangi Tribunal, *Māori Development Corporation Report* (1993) pp 33, 113 ff.
336 Waitangi Tribunal, *Orakei Report* (1987) p 183; see also *Motunui-Waitara Report* (1983) p 52.
337 Waitangi Tribunal, *Taranaki Report* (1996) pp 18-21. This report concerned the historical relationship between Taranaki Māori and the Crown, including the Crown's expropriation of Taranaki Māori lands.
338 Waitangi Tribunal, *Wānanga Capital Establishment Report* (1999) p 44. This report dealt with a claim for equitable funding of three tertiary educational institutions established as wānanga under the Education Act 1989.
339 Waitangi Tribunal, *Muriwhenua Land Report* (1997) p 114.
340 Waitangi Tribunal, *Te Whānau o Waipareira Report* (1998) sum. 8, p xxvi. This report concerned claims by Te Whānau o Waipareira that they were prejudiced by the policies and operations of the Community Funding Agency of the Department of Social Welfare.
341 Ibid., p 16.
342 Waitangi Tribunal, *Ngāwhā Geothermal Resource Report* (1993) p 137.
343 Waitangi Tribunal, *Mangonui Sewerage Claim Report* (1988) p 4. This report concerned a local sewerage scheme and the proposed siting of treatment ponds on Ngāti Kahu land in the far north. See also *Ngāwhā Geothermal Resources Report* (1993) p 137, wherein the Tribunal reiterates its view that: "in conformity with the Treaty principle of partnership, the needs of both cultures must be provided for and compromise needed in some cases to achieve this objective. At the same time the Treaty guarantee of rangatiratanga requires high priority for Māori interests when proposed works may impact on Māori taonga".
344 Waitangi Tribunal, *Radio Frequencies Report* (1990) pp 42-43. This report concerned claims related to the allocation of radio spectrum to Māori.
345 Ibid., p 43.
346 Waitangi Tribunal, *Ngāi Tahu Sea Fisheries Report* (1992) pp 194-95.

This report concerned Ngāi Tahu sea fishing interests and Treaty rights.

347 Ibid., pp 273-74.

348 Ibid., pp 306-307.

349 Ibid., p 307.

350 Ibid., pp 307-308.

351 Waitangi Tribunal, *Radio Spectrum Final Report* (1999) p 52. This report concerned the allocation of radio spectrum to Māori and upheld an earlier Tribunal finding that the Crown should reserve a fair and equitable portion of radio frequencies for Māori (see pp 52 ff).

352 Waitangi Tribunal, *Radio Spectrum Final Report* (1999), pp 41 and 51.

353 Waitangi Tribunal, *Orakei Report* (1987) p 207. The *Orakei Report* concerned the alienation of ancestral land essential to Ngati Whatua's survival and development.

354 Waitangi Tribunal, *Mohaka River Report* (1992) p 65. This report relates to a claim concerning the erosion of Ngāti Pahauwera's river rights.

355 Waitangi Tribunal, *Taranaki Report* (1996) p 20.

356 Ibid., p 55.

357 Ibid., pp 8-9 and 55.

358 Ibid., p 55.

359 Ibid., p 55.

360 Waitangi Tribunal, *Te Whānau o Waipareira Report* (1998) p 231.

361 See earlier section in the guide on the Legal Status of the Treaty, particularly discussion relating to Treaty clauses in legislation.

362 *Lands* (CA) [1987] per Richardson J at 682.

363 Ibid., at 682-683.

364 *Lands* (CA) [1987] per Cooke P at 665.

365 *Lands* (CA) [1987] per Somers J at 693.

366 *Lands* (CA) [1987] per Richardson J at 683.

367 *Mason-Riseborough v Matamata-Piako District Council* (EC) [1997] at 12.

368 *Forests* (CA) [1989] at 152.

369 Ibid., at 152.

370 Ibid., at 152.

371 *Wellington International Airport Ltd v Air New Zealand* (CA) [1993] per Cooke P at 672; see also at 674-676.

372 *New Zealand Fishing Industry v Minister of Agriculture and Fisheries* (CA) [1988] at 551.

373 *Wellington International Airport Ltd v Air New Zealand* (CA) [1993] per Cooke P at 676.

374 Section four of the Conservation Act 1987 states: "This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi".

375 *Whales* (CA) [1995] per Cooke P at 560. See *Lands* (CA) [1987] especially at 664, 674, 682, 693, 703, 717; and also *Radio NZ* (CA) [1996] per Thomas J at 169.

376 *Whales* (CA) [1995] per Cooke P at 560. It should be noted that, in delivering its judgment, the Court emphasized (at 562): "that it is the particular combination of features that has influenced us. The combination may well be unique. The precedent value of this case for other cases of different facts is likely to be very limited".

377 *Whales* (CA) [1995] at 560.

378 *Watercare Services v Minhinnick* (CA) [1998] at 307.

379 As noted earlier, section eight of RMA reads: "In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the

Treaty of Waitangi (Te Tiriti o Waitangi)".

380 See *Quarantine Waste (NZ) Ltd v Waste Resources Ltd* (HC) [1994] at 542: "… in the circumstances of this case the failure to undertake a direct consultation did not bring about a situation in which Manukau omitted to consider or take into account a material and relevant factor".

381 *Te Rūnanga o Tauramere v Northland Regional Council* (PT) [1996] at 77.

382 Ibid., at 94. See also *Ngātiwai Trust Board v Whangarei District* (EC) [1994] at 274: "It may be thought trite to repeat what has been more eloquently recorded in superior forums, but clearly the Treaty involves a solemn partnership, with a consequent duty to consult over significant issues arising. Failure to consult in the past has effectively meant lack of due recognition of the close binding relationship and need for continuing bilateral commitment which the Treaty established".

383 *Te Rūnanga o Tauramere v Northland Regional Council* (PT) [1996] at 95.

384 *Wellington Rugby Football Union Incorporated v Wellington City Council* (PT) [1993] per Judge Kenderdine at 22-23.

385 *Hanton v Auckland City Council* (HC) [1994] at 301.

386 Ibid., at 301.

387 Ibid., at 301.

388 *Rural Management Limited v Banks Peninsula District Council* (EC) [1994] at 423.

389 Ibid., at 423.

390 *Ngāti Kahu v Tauranga District Council* (EC) [1994] at 510.

391 Waitangi Tribunal, *Manukau Report* (1985) p 87.

392 Waitangi Tribunal, *Mangonui Sewerage Report* (1988) p 4.

393 Ibid., p 41.

394 Ibid., pp 47-48.

395 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 217.

396 Waitangi Tribunal, *Radio Frequencies Report* (1990) p 44.

397 Ibid., p 45.

398 Ibid., p 45.

399 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 157.

400 Waitangi Tribunal, *Ngāi Tahu Report* (1991) p 245. This report dealt with grievances arising from Crown land purchases of extensive areas of Ngāi Tahu territory and the Crown's failure to reserve and protect Ngāi Tahu rights over mahinga kai (food resources). For a more detailed discussion of the Tribunal's view of consultation with Māori on planning and environmental matters see sections 17.6.10 and 17.6.11 pp 914-916 in the *Ngāi Tahu Report.*

401 Waitangi Tribunal, *Ngāi Tahu Sea Fisheries Report* (1992) p 272.

402 Waitangi Tribunal, *Ngāwhā Geothermal Resources Report* (1993) pp 101-102.

403 Waitangi Tribunal, *Te Whānau o Waipareira Report* (1998) pp 225-6; see also pp 226-227.

404 Ibid., pp 225-226.

405 Ibid., pp 225-227.

406 Kawharu (ed.), *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (1989) pp 316-317; see also the discussion of the translation in the *Lands* case [1987] per Cooke at 662-663.

407 Ibid.

408 Ibid.

409 *Lands* (CA) [1987] per Cooke P at 664.

410 *Broadcasting* (CA) [1992] at 587.

411 *Broadcasting Assets* (PC) [1994] at 519.

412 Ibid., at 517.

413 Ibid., at 517.
414 *Whales* (CA) [1995] at 553, 561. This comment was quoted with approval by Thomas J in his dissenting judgment in *Radio NZ* (CA) [1996] at 182. This matter is taken up in the previous section under the duty to make informed decisions.
415 *Taiaroa and Others v Attorney-General* (HC) [1994] at 69.
416 Waitangi Tribunal, *Manukau Report* (1985) p 70. See also the Tribunal's *Orakei Report* (1987) p 149.
417 Waitangi Tribunal, *Waiheke Island Report* (1987) p 39. See also the *Ngāi Tahu Report Vol. 2* (1991) p 241: "Although in the early years of land purchase by the Crown it would have been unrealistic to expect the boundaries of a proposed purchase to be fixed by survey, it is implicit in the notion of consent that the Māori owners knew with reasonable certainty the area of land they were being asked to sell. The onus unquestionably lay on the Crown to ensure this. The duty of active protection required no less".
418 Waitangi Tribunal, *Mohaka River Report* (1992) p 77.
419 Waitangi Tribunal, *Te Whanganui-ā-Orotu Report* (1995) p 197.
420 Waitangi Tribunal, *Muriwhenua Land Report* (1997) p 388.
421 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 26.
422 Waitangi Tribunal, *Ngāi Tahu Sea Fisheries Report* (1992) p 270.
423 Waitangi Tribunal, *Te Reo Māori Report* (1996) p 20.
424 Waitangi Tribunal, *Māori Electoral Option Report* (1994) p 15.
425 Waitangi Tribunal, *Ngāti Rangiteaorere Report* (1990) pp 30–32.
426 Waitangi Tribunal, *Te Maunga Railways Report* (1994) p 67.
427 Waitangi Tribunal, *Ngāwhā Geothermal Resources Report* (1993) pp 100–102. These points are quoted with approval in the Tribunal's *Te Arawa Representative Geothermal Resource Report* (1993) pp 31-32.
428 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 219.
429 Waitangi Tribunal, *Fisheries Settlement Report* (1992) p 22; see also pp 8-11 for more detailed discussion of the Tribunal's understanding of the abrogation or extinguishment of Treaty fishing rights and the ongoing Treaty obligation to actively protect Māori fishing interests.
430 Ibid., p 11.
431 Ibid., p 24.
432 Waitangi Tribunal, *Te Whānau o Waipareira Report* (1998) p 16.
433 Ibid., p 16.
434 Ibid., p 21.
435 *Lands* (CA) [1987] per Cooke P at 664-665. Note in *Te Rūnanga o Muriwhenua Inc. v Attorney-General* (CA) [1990] at 651 the Court held that: "… outside the context of its powers of resumption the findings and recommendations of the Tribunal are not binding on the Crown of their own force".
436 *Lands* (CA) [1987] per Somers J at 693. This statement was acknowledged in the Tribunal's *Ngāwhā Geothermal Resources Report* (1993) at p 101.
437 *Lands* (CA) [1987] per Richardson J at 674.
438 *Lands* (CA) [1987] per Bisson J at 717.
439 *Lands* (CA) [1987] per Richardson J at 703-704.
440 *Coal* (CA) [1989] per Cooke P at 530.
441 *Broadcasting* (CA) [1992] per Cooke P at 583. See also *Taiaroa and Others v Attorney-General* (HC) [1994] per McGechan J at 70 for a similar comment made in a later case in the High Court.
442 *Dams* (CA) [1994] at 25.
443 Ibid., at 25.
444 *Radio NZ* (CA) [1996] at 188.
445 Waitangi Tribunal, *Manukau Report* (1985) p 99.

446 Ibid., p 98.
447 Ibid., pp 26 and 98-99.
448 Waitangi Tribunal, *Waiheke Island Report* (1987) p 36.
449 Ibid., pp 40-41.
450 Ibid., p 47. This comment was repeated in the *Muriwhenua Fishing Claim Report* (1988) p xxi.
451 Waitangi Tribunal, *Mangonui Sewerage Report* (1988) p 60.
452 Waitangi Tribunal, *Orakei Report* (1987) p 262.
453 Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 217.
454 Ibid., p xxi. The Tribunal also concluded on p 240 of the same report that: "Special account must be taken of the Muriwhenua dependence on the seas, the small land area available to them, the lack of alternative industries in the district and the need to rebuild their communities".
455 Waitangi Tribunal, *Ngāi Tahu Report* (1991) Vol. I pp 243-244, Vol. III p 1052; *Ngāwhā Geothermal Resource Report* (1993) p 101; *Ngāi Tahu Sea Fisheries Report* (1992) pp 272-273; *Māori Development Corporation Report* (1993) p 114; *Turangi Township Report* (1995) p 288.
456 See, as an alternative example to the Taranaki case study which follows, the final reports of the Waitangi Tribunal: *Ngāi Tahu Report* (1991) Vol. III pp 1954 ff; or *Wānanga Capital Establishment Report* (1999), see especially pp 53 ff.
457 Waitangi Tribunal, *Ngāi Tahu Report* (1991) p 245.
458 Waitangi Tribunal, *Taranaki Report* (1996). Following the publication of this interim report, Taranaki iwi proceeded to direct negotiations with the Crown.
459 Ibid., p 312.
460 Ibid., p 276.
461 Ibid., pp 314-315.
462 Ibid., p 315.
463 Goals cited on the website of the Department of the Prime Minister and Cabinet on 4 April 2001.
464 Published by the Government on 20 July 2000 and cited on the website of the New Zealand Government Executive on 4 April 2001.
465 *The Royal Commission on Social Policy*, 1988, p 49.
466 Background information on the Cabinet Manual was cited on the website of the Department of the Prime Minister and the Cabinet on 10 April 2001.
467 *Step by Step Guide: Cabinet and Cabinet Committee Process* (2001)
468 These functions were cited on the website of the Office of Treaty Settlements on 4 April 2000.
469 Information on the role of the Treasury was taken from its 1999 *Post Election Brief to the Incoming Minister* as cited on its website on 5 April 2001.