

APPENDIX

**THE PRINCIPLES
OF THE TREATY OF WAITANGI**

Note: This appendix was compiled by Dr Janine Hayward.

This appendix draws together some statements by the courts, the Waitangi Tribunal, and the Government in New Zealand regarding the interpretation and application of the principles of the Treaty of Waitangi. The discussion is divided into three sections. The first part investigates the principles of the Treaty according to some seminal judgments of the courts in New Zealand since 1840, with an emphasis on the 1987 Court of Appeal decision in the case of *New Zealand Maori Council v Attorney-General*. The second part discusses the principles identified in some of the Waitangi Tribunal reports released since 1983. The final part presents the principles established by the Labour Government in 1989.

Two important points underlie this discussion. First, the Treaty is a living document to be interpreted in a contemporary setting. Therefore, new principles are constantly emerging from the Treaty and existing ones are modified. Professor Gordon Orr of the Waitangi Tribunal has observed that it may never be possible to formulate a comprehensive or complete set of principles because the Tribunal has dealt with only a limited range of cases and has not speculated about principles relevant to cases yet to be heard.¹ Secondly, and perhaps most importantly, the provisions of the Treaty itself should not be supplanted by the principles emerging from it. In the words of Justice Richardson in the 1987 case:

much of the contemporary focus is on the spirit rather than the letter of the Treaty, on adherence to the principles rather than the terms of the Treaty. Regrettably, but reflecting the limited dialogue there has been on the Treaty, it cannot yet be said that there is broad general agreement as to what those principles are.²

APP. I TREATY PRINCIPLES EMERGING FROM THE COURTS, 1840–1995

The attitude of New Zealand courts towards the Treaty of Waitangi has undergone significant development since 1840. This discussion is not exhaustive; rather it identifies significant cases that demonstrate an initial enthusiasm by the courts for upholding native title to land immediately after the signing of the Treaty in 1840, followed by a period from the mid-1860s well into the twentieth century during which the courts' interpretation gave the Treaty considerably less weight. A further turning point came in 1987 with *New Zealand Maori Council v Attorney-General*.

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1. G S Orr, 'Principles Emerging from Waitangi Tribunal Decisions', unpublished paper presented to Tribunal members, 1989, p 1
 2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 672–673

APP. I. I *R v Symonds* (1847)

The case of *R v Symonds* in 1847 questioned the competence of the settlers to buy land direct from Maori owners (as a departure from the Crown's right of pre-emption stated in the Treaty). In his ruling, Justice Chapman upheld the notion of native title and observed:

Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of their country, whatever may be their present clearer and still growing conception of their dominion over land, 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.³

Justice Martin, Chapman's fellow judge, similarly ruled that the Crown's title to land within the colony was subject to the aboriginal rights of Maori which could only be removed through voluntary act by the native owners.⁴

On the matter of the Treaty itself, Chapman declared that it was simply a declaration of the law the court had applied in making its judgment on this matter. He said:

It follows . . . that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.⁵

APP. I. 2 *In re The Landon and Whitaker Claims Act 1871* (1872)

The courts expressed a similar attitude toward native title *In re The Landon and Whitaker Claims Act 1871*. On this occasion, the court ruled that:

The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of native proprietary rights. Whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand vested and resides in the Crown, until it be parted with by grant from the Crown.⁶

Despite judgments such as the two discussed above, the courts' attitude towards native title was not upheld over subsequent years. In particular, it was to change when Chief Justice James Prendergast was appointed in 1875. For the 20 years he was in office, Prendergast consistently denied that aboriginal title had any legal character or that the Treaty reaffirmed or created rights enforceable in the courts. In particular, in the case of *Wi Parata v The Bishop of Wellington* (1877), Justice Prendergast transformed the position of aboriginal title from one subsisting at law, to one held on sufferance of the Crown. He also ruled that the Treaty of Waitangi, 'could not transform the natives' right of occupation into one of legal character since, so far as it purported to cede the sovereignty of New Zealand, it was a simple nullity for no body politic existed capable of making cession of sovereignty'.⁷ This set the precedent for Prendergast's subsequent decisions, and those of other judges. In

3. *R v Symonds* (1847) NZPCC 388

4. *Ibid*, p 395

5. *Ibid*, p 390

6. *In re The Landon and Whitaker Claims Act 1871* (1872) 2 NZCA 41, 49

7. *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72

particular, the decisions of Sir Robert Stout, as chief justice of the local courts, upheld and reinforced the *Wi Parata* decision. This and other decisions that denied customary Maori title to land at law and reduced or rejected the role of the Treaty will not be discussed here, but examples of unsuccessful appeals to the courts by Maori include *Nireaha Tamaki v Baker* (1901) NZPCC 371; (1902) AC 561; *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 (CA); *Baldick v Jackson* (1911) 13 GLR 398; *Tamihana Korokai v Solicitor General* (1912) 32 NZLR 321; *Waipapakura v Hempton* (1914) 33 NZLR 1065; and *Hoani Te Heuheu Tukino v Aotea District Maori Land Court* (1941) AC 308.

Well into the twentieth century, debate about native land rights and the Treaty within the courts reappeared, but still with little success for Maori (in particular, see *Re the Bed of the Wanganui River* (1963) and *In re the Ninety Mile Beach* (1955)⁸). A significant development came with *Te Weehi v Regional Fisheries Officer* (1986), which tested the notion of customary Maori fishing rights when a Maori was charged with being in possession of paua smaller than the minimum size permissible under the Fisheries Regulations 1983. The judge found that ‘the appellant was exercising a customary Maori fishing right within the meaning of section 88(2) of the Fisheries Act, [and in view of this conclusion] it follows that the other provisions of the Fisheries Act . . . did not affect his right to take the paua’.⁹

APP. I.3 *New Zealand Maori Council v Attorney-General* (1987)

In 1987, a case was brought to the High Court by the New Zealand Maori Council and its Chairman, Sir Graham Latimer, who applied (the application then being transferred to the Court of Appeal) that, despite section 27 of the State-owned Enterprises Act 1986 (which dealt with land subject to claim under the Treaty of Waitangi Act), the Crown was able to transfer to State enterprises lands that were subject to claims to the Waitangi Tribunal lodged after 18 December 1986 (as well as claims that were not yet lodged) and that this was contrary to the principles of the Treaty of Waitangi according to section 9 of the State-owned Enterprises Act. The duty fell upon the Court of Appeal to determine the principles of the Treaty with which the Crown’s actions had been inconsistent. The court asserted the following principles.

(I) *The acquisition of sovereignty in exchange for the protection of rangatiratanga*

Justice Cooke observed that the ‘spirit’ rather than the strict text of the Treaty should be considered. The basic terms of the Treaty bargain, according to Justice Cooke, were ‘that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainship and possessions were to be protected, but that sales of land to the Crown could be negotiated’. Justice Cooke further observed that ‘these aims are partly conflicting.’¹⁰ In addition, Justice Richardson stated:

There is . . . one overarching principle . . . that . . . the Treaty must be viewed as a solemn compact between two identified parties, the Crown and the Maori, through which the colonisation of New Zealand was to become possible. For its part the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return it gave certain guarantees.¹¹

8. See *Re the Bed of the Wanganui River* [1963] NZLR 673; *In re Ninety Mile Beach* [1955] NZLR 419

9. *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, 693

10. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 663

11. *Ibid*, p 673

(2) *The Treaty established a partnership, and imposes on the partners the duty to act reasonably and in good faith*

The principle that the Treaty established a partnership and imposed on the partners the duty to act reasonably and in good faith was independently agreed to by all five members of the Court of Appeal, though it was expressed differently by each. Justice Cooke characterised this duty as ‘infinitely more than a formality’. He stated that, ‘If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured.’¹² Furthermore, he said:

the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.¹³

Justice Richardson similarly observed the reciprocal obligations of the Treaty partners in stating that, ‘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.’¹⁴

(3) *The freedom of the Crown to govern*

On the freedom of the Crown to govern, Justice Cooke ruled 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 those principles.¹⁵

Also, Justice Bisson observed that:

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.¹⁶

(4) *The Crown’s duty of active protection*

Justice Cooke stated that ‘the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable’.¹⁷ This principle in particular had been identified by the Waitangi Tribunal prior to 1987 and was further discussed and developed in Tribunal reports following the court’s ruling in 1987 (see the later discussion).

(5) *Crown duty to remedy past breaches*

On the matter of remedy, Justice Cooke stated that:

[a] duty to remedy past breaches was spoken of. I would accept that suggestion, in the sense that if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should

12. *New Zealand Maori Council v Attorney-General*, p 667

13. *Ibid*, p 664

14. *Ibid*, p 682

15. *Ibid*, pp 665–666

16. *Ibid*, p 716

17. *Ibid*, p 664

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.¹⁸

(6) *Maori to retain rangatiratanga over their resources and taonga and to have all the rights and privileges of citizenship*

In relation to the rights of Maori under the Treaty, Justice Bisson noted:

The Maori Chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of the utmost good faith in the matter in which their existing rights would be guaranteed and in particular guaranteed down to each individual Maori the full and exclusive and undisturbed possession of their lands which is the basic and most important principle of the Treaty in the context of the case before this Court.¹⁹

(7) *Duty to consult*

On the question of whether the Crown has an obligation to consult Maori, Justice Cooke advised:

in any detailed or unqualified sense the duty to consult is elusive and unworkable. Exactly who should be consulted before any particular legislative or administrative step which might affect some Maoris, it would be difficult or impossible to lay down.²⁰

Moreover, he said, ‘wide ranging consultations could hold up the processes of Government in a way contrary to the principles of the Treaty.’²¹ Similarly, Justice Richardson stated that:

the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty . . . [however] . . . the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on . . . the Crown, when acting within its sphere to make an informed decision.²²

Following the 1987 Court of Appeal judgment, the Treaty principles were developed and reconsidered in a variety of cases. Some of these cases are discussed below.

APP.I.4 *Tainui Maori Trust Board v Attorney General (1989)*

The issue at question in this case was whether the granting of coal mining rights by the Crown to Coalcorp represented a transfer of Tainui’s ‘interests in the land’ subject to the protection of the Treaty of Waitangi (State Enterprises) Act 1988. Furthermore, whether the proposed transfers of land direct to third parties would be inconsistent with the principles of the Treaty of Waitangi and the Crown’s obligation to evolve a system for safeguarding Maori claims before the Tribunal.²³ In finding in favour of Tainui on both matters, the judge ruled that:

18. Ibid, pp 664–665

19. Ibid, p 715

20. Ibid, p 665

21. Ibid, p 665

22. Ibid, p 683

23. *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513

the Crown should take no further action...in selling, disposing of or otherwise alienating the said lands until such time as the Crown has established a scheme of protection in respect of the rights of the plaintiffs [Tainui].²⁴

The judge also expressed the sentiment that:

the principles of the Treaty of Waitangi . . . are taking effect only slowly but nevertheless surely. It is as well to stress also that they are of limited scope . . . As regards those Crown assets to which the principles do apply, this Court has already said in the forests case that partnership certainly does not mean that every asset or resource in which Maori have some justifiable claim to share must be divided equally.²⁵

Justice Cooke also acknowledged that coal did not seem to have been of particular importance to Tainui at the time of the land confiscations (in the 1860s) and that what mattered to them was the general use of their land. However, the judge qualified this observation with the warning that any attempt to shut out in advance a claim by Tainui to be awarded some interests in the coal would not be consistent with the Treaty. For that reason, the judge explained, the interim order made by the High Court for Crown action to cease until the matter was resolved by the Waitangi Tribunal was upheld.²⁶

APP. I.5 *New Zealand Maori Council v Attorney-General (1989)*

Following the Court of Appeal's decision regarding the transfer of state assets to State-owned enterprises in 1987, the Crown proposed to sell forestry rights but not the ownership of land on which exotic forests are planted. The New Zealand Maori Council subsequently applied to the Court of Appeal that the Government's proposal to dispose of forestry assets was inconsistent with the judgment delivered by the Court of Appeal in 1987. In ruling on the matter and in considering the significance of the Treaty principles, the Court of Appeal in 1989 held that for the Government to present Maori with a forestry proposal that was a 'fait accompli' 'would not represent the spirit of partnership which is at the heart of the principles of the Treaty of Waitangi'.²⁷

APP. I.6 *Ngai Tahu Maori Trust Board v Director-General of Conservation (1995)*

In December 1992, four appellants, collectively known as Ngai Tahu, who, at the time of the case, held permits for commercial whale watching, challenged the Director-General of Conservation's intention to issue a further permit for commercial whale-watching (and other activities) by boats off the Kaikoura coast.²⁸ The judge hearing the case admitted that the Director-General ought to have consulted Ngai Tahu interests, but dismissed the applicants' claim for entitlement by virtue of the Treaty or applications of the principles of the Treaty, to a period of operation protected from competition. Ngai Tahu appealed and Justice Cooke, having heard the case at the Court of Appeal, made the following observations in his ruling.

24. *Tainui Maori Trust Board v Attorney-General*, p 527

25. *Ibid*, p 527

26. *Ibid*, p 530

27. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, 513 (CA)

28. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 534, 535

First, it was noted that the Conservation Act 1987 required that the director-general administer the Marine Mammals Protection Act so as to give effect to the principles of the Treaty.²⁹ In acknowledging that both active protection and consultation were appropriate principles for the court to consider in this case, the question remaining was whether the right to conduct commercial boat tours was within the scope of the Treaty or aboriginal title.³⁰ On this matter, the court ruled that the development right was not unlimited:

however liberally Maori 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. Ngai Tahu's claim to a veto must be rejected.³¹

Nevertheless, the judge found in favour of Ngai Tahu that, although a commercial whale-watching business is not a taonga:

certainly it is so linked to taonga and fisheries that a reasonable Treaty partner would recognise that Treaty principles were relevant. Such issues are not to be approached narrowly . . . [and] the Crown is not right in trying to limit those principles to consultation . . . since . . . it has been established that principles require active protection of Maori interests. To restrict this to consultation would be hollow.³²

APP.I.7 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General (1994)*

In 1994, a case was brought in the Court of Appeal by certain Maori against the transfer of property rights in the Rangataiki River and the Wheao River to the Bay of Plenty Electric Power Board and the Rotorua Electricity Authority, pending the resolution of a claim to the rivers lodged by Maori with the Waitangi Tribunal. While the appeal was unsuccessful, it did address the question of the limits to aboriginal title. In an earlier High Court decision on the same case, the judge had stated that:

The Treaty of Waitangi 1840 guaranteed to Maori, subject to British kawatanga or government, their tino rangatiratanga and their taonga. In doing so the Treaty must have intended effectively to preserve for Maori their customary title. However liberally Maori customary title and treaty rights might be construed, they were never conceived as including the right to generate electricity by harnessing water power.³³

The High Court had also observed that:

It is as well to underline that in recent years the Courts in various jurisdictions have increasingly recognised the justiciability of the claims of indigenous people either by developing the principle of fiduciary duty linked with aboriginal title . . . or in New Zealand decisions in which it has been seen, not only that the Treaty of Waitangi has been acquiring some permeating influence in New Zealand law, but also that treaty rights and Maori customary rights tend to be partly the same in content.³⁴

In hearing the appeal, Justice Cooke endorsed the High Court's ruling on the matter and also dismissed the appeal, stating that:

29. Ibid, p 540

30. Ibid, p 541

31. Ibid, p 543

32. Ibid, p 544

33. *Te Runanga o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 21

34. Ibid, p 21

The essence of what has been said above is that neither under the common law doctrine of aboriginal title, nor under the Treaty of Waitangi, nor under any New Zealand statute have Maori . . . had preserved or assured to them any right to generate electricity by the use of water power.³⁵

However, in setting these limits to customary title, the court admitted that Maori enjoy some water rights under the Treaty. In particular the court advised that if control over the rivers for the dams had been assumed by the Crown without Maori consent, that may well be the basis for a breach of the Treaty. The judgment records that ‘The Crown emphasises that it acknowledges that the appellants may well have a well-founded grievance in terms of the Treaty of Waitangi Act 1975’³⁶ and that Maori remedy under such circumstances would appropriately lie in a claim to the Waitangi Tribunal or court-based action regarding Maori customary title or the Crown’s fiduciary duty.³⁷

APP. I.8 *Taiaroa v the Minister of Justice (1994)*

This case to the High Court concerned the ‘Maori option’ which required Maori, over a limited period in 1994, to choose between enrolment on the Maori electoral and general roll. This choice and the results of the option would carry repercussions for the number of Maori constituency seats in the first mixed member proportional Parliament in 1996. Maori who brought the case to the High Court (and the subsequent appeal to the Court of Appeal) claimed that the policy was conducted unlawfully in that it was held without adequate notice, and without adequate Crown resources devoted to informing voters.³⁸ In ruling on the case, Justice McGechan identified a number of principles which would guide him. He stated that he would not attempt to state the full content of tino rangatiratanga preserved in article 2, but would ‘readily accept it encompassed a claim to an ongoing distinctive existence as a people, albeit adapting as time passed and the combined society developed’.³⁹ In particular, Justice McGechan advised that with regard to the Maori seats in parliament and the so-called ‘Maori option’:

there is no doubt Treaty principles impose a positive obligation on the Crown, within constraints of the reasonable, to protect the position of Maori under the Treaty and the expression from time to time of that position . . . It is a broad obligation of good faith. Maori representation – Maori 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 Maori representation.⁴⁰

In drawing on the principle of redress, Justice McGechan found that, ‘The Crown, as a Treaty partner acting in good faith, should recognise past error when it comes to light, and consider the possibility of remedy under present conditions.’⁴¹ Despite this, the High Court rejected the complaints brought by Maori, who subsequently appealed. In hearing the appeal, Justice Cooke said:

35. *Te Runanga o Te Ika Whenua Inc Society v Attorney-General*, p 25

36. *Ibid*, p 26

37. *Ibid*, p 25

38. *Taiaroa v Minister of Justice* unreported, 29 August 1994, McGechan J, HC Wellington CP 99/94, pp 2–3

39. *Ibid*, p 69

40. *Ibid*, p 69

41. *Ibid*, p 70

Special obligations to the Maori people, whether arising from the Treaty of Waitangi, partnership principles, fiduciary principles or all three sources in combination, are not needed to give rise to an implication that reasonable notice of such an option is inherent in it.⁴²

Justice Cooke nevertheless also rejected the Maori argument that reasonable notice had not been given.

APP.1.9 *New Zealand Maori Council v Attorney-General* (1995)

New Zealand Maori Council v Attorney-General was an appeal to the Privy Council against the decision by the Court of Appeal and the High Court in New Zealand that the Crown could transfer broadcasting assets to Radio New Zealand and Television New Zealand under the State-owned Enterprises Act. In making the appeal, the New Zealand Maori Council argued that the proposed transfer was illegal with regard to section 9 of the State-owned Enterprise Act, which requires that the Government not act in a manner inconsistent with the principles of the Treaty of Waitangi. The Council submitted that the transfer was inconsistent with the Treaty's principles because it indicated that the Crown was not taking necessary steps to protect the Maori language with respect to television and radio in New Zealand. While the appeal was unsuccessful, it prompted further development by the courts of the principle of active protection.

In considering the case, Lord Woolf of the Privy Council acknowledged that:

Foremost amongst [the] principles are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori.⁴³

He said also that:

This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. 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.⁴⁴

In making his ruling and dismissing the appeal, Lord Woolf concluded that 'The purpose of section 9 is not, however, to provide a lever which can be used to compel the Crown to take positive action to fulfil its obligations under the Treaty.'⁴⁵

APP.2 PRINCIPLES EXPRESSED IN TRIBUNAL REPORTS, 1983–87

The Treaty of Waitangi Act 1975 requires that claims brought to the Tribunal by any Maori or group of Maori relate to actions and policies by the Crown that were or are inconsistent with the principles of the Treaty of Waitangi. This discussion distinguishes between principles emerging from Tribunal reports released before and after the 1987 Court of Appeal decision (discussed in the previous section), thereby demonstrating the impact this

42. *Taiaroa v Minister of Justice* [1995] 1 NZLR 513, 517

43. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517

44. *Ibid*, p 517

45. *Ibid*, p 520

ruling had on the development of the Tribunal's Treaty principles.⁴⁶ Not all Tribunal reports are included in this discussion, which is intended to be introductory only, and not comprehensive or exhaustive.

APP.2.1 The Treaty implies a partnership, exercised with the utmost good faith

The principle that the Treaty implies a partnership, exercised with the utmost good faith, was first established in the *Manukau Report*, where it is stated that the interests recognised by the Treaty give rise to a partnership, 'the precise terms of which have yet to be worked out'.⁴⁷ Further, more extensive, references were made to this principle in other Tribunal findings following the ruling by the Court of Appeal in 1987 (see the later discussion).

APP.2.2 The exchange of the right to make laws for the obligation to protect Maori interests

The *Motonui–Waitara Report* discussed the principle of exchange between gifts, as 'The gift of the right to make laws, and the promise to do so as to accord the Maori interest an appropriate priority'.⁴⁸ Later, in the *Manukau Report*, the Tribunal suggested that, under article 1 of the English text of the Treaty, Maori ceded all rights and powers of sovereignty to the Crown. It also stated that, under the Maori version of article 1, Maori ceded 'kawanatanga', or the authority to make laws for the good and security of the country, subject to an undertaking to protect particular Maori interests.⁴⁹

APP.2.3 The Maori interest should be actively protected by the Crown

With regard to the matter of active protection, the Tribunal has frequently stated that article 2 of the Treaty 'confirms and guarantees' to the Maori their property and other rights and that the preamble to the Treaty expresses the Queen's anxiety to protect the just rights and property of Maori. For example, the *Manukau Report* said that 'The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them.'⁵⁰ Similarly, the *Te Reo Maori Report* stated that in the enjoyment of their culture and language:

the word (guarantee) means more than merely leaving the Maori people unhindered . . . It requires active steps to be taken to ensure that Maori people have and retain the full exclusive and undisturbed possession of their language and culture.⁵¹

46. See 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', Wellington, 1988, and also see, Orr, 'Principles Emerging from Waitangi Tribunal Decisions and Court Decisions'.

47. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed, Wellington, Department of Justice: Waitangi Tribunal, 1989 (the *Manukau Report*), p 70

48. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motonui–Waitara Claim*, 2nd ed, Wellington, Government Printing Office, 1989 (the *Motonui–Waitara Report*), p 52

49. *Manukau Report*, p 69

50. *Ibid*, p 70

51. Waitangi Tribunal, *Report of the Waitangi Tribunal on Te Reo Maori Claim*, 4th ed, Wellington, GP Publications, 1996 (the *Te Reo Maori Report*), p 20

APP.2.4 The needs of both Maori and the wider community must be met, which will require compromise on both sides

The principle of compromise was first enunciated in the *Motonui–Waitara Report*, which advised that ‘It is not inconsistent with the Treaty of Waitangi that the Crown and Maori people should agree upon a measure of compromise and change.’⁵² The *Te Reo Maori Report* identified compromise of a different sort when it urged that the language of both of the partners must be recognised if the Treaty is to find expression.⁵³

APP.2.5 The courtesy of early consultation

The principle of consultation was first raised in the *Manukau Report*, in which the Tribunal noted 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.⁵⁴

This principle was further developed by the Tribunal following the Court of Appeal’s ruling in 1987 (see the later discussion).

APP.2.6 The Crown cannot evade its obligations under the Treaty by conferring authority on some other body

The principle that the Crown cannot evade its obligations under the Treaty by conferring authority on some other body was first established in 1983 with the *Motonui–Waitara Report* and was confirmed in subsequent reports. For example, within the *Manukau Report*, the observation was made that ‘the Crown cannot divest itself of its Treaty obligations or confer an inconsistent jurisdiction on others’. The Tribunal explained 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.⁵⁵

APP.2.7 The Treaty is an agreement that can be adapted to meet new circumstances

In 1983, the *Motonui–Waitara Report* advised that the Treaty ‘was not intended to fossilise the status quo, but to provide a direction for future growth and development . . . as the foundation for a developing social contract’. It further stated that the Tribunal considered the Treaty ‘capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles’.⁵⁶ Following the Court of Appeal decision in 1987, a modified version of the principle emerged as the principle of development, which was further developed in subsequent Tribunal reports (discussed later).

52. *Motonui–Waitara Report*, p 52

53. *Te Reo Maori Report*, p 20

54. *Manukau Report*, p 87

55. *Ibid*, p 73

56. *Motonui–Waitara Report*, p 52

APP.2.8 Tino rangatiratanga includes management of resources and other taonga according to Maori cultural preferences

The meaning of tino rangatiratanga in the Treaty was discussed extensively in the Tribunal's early reports. The *Motonui–Waitara Report* stated:

We consider that the Maori text of the Treaty would have conveyed to Maori people that amongst other things they were to be protected not only in the possession of their fishing grounds, but in the mana to control them and then in accordance with their own customs and having regard to their own cultural preferences.⁵⁷

A similar interpretation of the rangatiratanga guarantee was noted in the *Kaituna River Report* in 1984.⁵⁸ In the *Manukau Report*, 'te tino rangatiratanga' was further defined as 'full authority status and prestige with regard to [Maori] possessions and interests'.⁵⁹

APP.2.9 Taonga includes all valued resources and intangible cultural assets

In the *Motonui–Waitara Report*, the *Kaituna River Report*, and the *Manukau Report*, the Tribunal noted that taonga means 'all things highly prized' by Maori, which includes tangibles such as fishing grounds, harbours, and foreshores (as well as the estuary and the sea, together with the use and enjoyment of the flora and fauna adjacent to it) and intangibles such as the Maori language and the mauri (life force) of a river.⁶⁰

APP.3 PRINCIPLES EXPRESSED IN SOME TRIBUNAL REPORTS, 1987–95

Subsequent to the Court of Appeal ruling in 1987, the Tribunal discussed new principles, including the right of development, the right of trial self-regulation, the Crown's obligation legally to recognise tino rangatiratanga, and the principle of options. The Treaty implies a partnership, exercised with the utmost good faith.

First established in the *Manukau Report* and reinforced in the 1987 Court of Appeal decision, the principle of partnership was reiterated in the *Orakei Report*. The Tribunal supported the court's ruling that a leading principle was partnership between the races, inherent in which is an obligation to act towards each other (as Justice Cooke said) 'with the utmost good faith'.⁶¹

The *Te Roroa Report* in 1992 reiterated that the Treaty is a sacred covenant entered into by the Crown and Maori 'based on the promises of two people to take the best possible care they can of each other' and that both parties have a common moral duty to abide by the Christian and traditional Maori values it embodies.⁶² The *Ngai Tahu Sea Fisheries Report 1992* advised that the Treaty signified a partnership between Pakeha and Maori requiring

57. *Motonui–Waitara Report*, p 51

58. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim*, 2nd ed, Wellington, Government Printing Office, 1989 (the *Kaituna River Report*), p 13

59. *Manukau Report*, p 67

60. *Motonui–Waitara Report*, p 50; *Kaituna River Report*, p 13; *Manukau Report*, p 67

61. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed, Wellington, GP Publications, 1996, (the *Orakei Report*), p 147; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed, Wellington, GP Publications, 1996, (the *Muriwhenua Fishing Report*), pp 190–192

62. Waitangi Tribunal, *The Te Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 30

each other to act towards the other reasonably and with the utmost good faith.⁶³ In the *Ngawha Geothermal Resources Report 1993*, the Tribunal's statement on partnership was reiterated with the statement that:

with the Treaty principle of partnership, the needs of both cultures must be provided for and compromise may be needed in some cases to achieve this objective. At the same time the Treaty guarantee of rangatiratanga requires a high priority for Maori interests when proposed works may impact on Maori taonga.⁶⁴

In 1995, the *Turangi Township Report* reiterated the statement first made in the *Muriwhenua Fishing Report* that:

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 Maori sovereignty and established that of the Crown. In doing so it substituted a charter, or a covenant in Maori eyes for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.⁶⁵

Furthermore, the *Turangi Township Report 1995* argued that the responsibilities of the parties to the Treaty were 'analogous to fiduciary duties' or 'of a fiduciary nature' and had their source in the Treaty, not outside it or within the common law.⁶⁶ The *Te Maunga Railways Report* had also earlier found that there was a fiduciary obligation on the Crown as a part of its obligation to protect the interests of Maori (in this instance to facilitate the return of former Maori land taken by the Crown when no longer required for the purposes for which it was taken).⁶⁷

APP.3.I The exchange of the right to make laws for the obligation to protect Maori interests

This principle had been previously discussed by the Tribunal and was further developed in the *Orakei Report*, which confirmed that:

The Treaty was an acknowledgment of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. It made us one country, but acknowledged that we were two people.⁶⁸

The Tribunal also stated that article 2 of the Maori text conveyed an intention that Maori would retain full authority over their lands, homes, and things important to them – their mana Maori – while the English text was limited to a guarantee of 'the full, exclusive and undisturbed possession of lands, estates and forests, fisheries and other property'.⁶⁹ The *Muriwhenua Fishing Report* similarly stated that 'The principle that emerges is the

63. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 273

64. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, p 137

65. Waitangi Tribunal, *The Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, p 289

66. *Ibid*, p 289

67. Waitangi Tribunal, *Te Maunga Railways Land Report*, 2nd ed, Wellington, GP Publication, 1996, p 80

68. *Orakei Report*, p 130

69. *Ibid*, p 134

protection of Maori interests to the extent consistent with the cession of sovereignty'.⁷⁰ It went on to say:

Maori were protected in their lands and fisheries (English text) and in the retention of their tribal base (Maori text). In the context of the overall scheme for settlement, the fiduciary undertaking of the Crown is much broader and amounts to an assurance that despite settlement Maori would survive and because of it they would also progress.⁷¹

In the *Ngai Tahu Report 1991*, it was observed that 'the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga'.⁷² Moreover, in the *Ngai Tahu Sea Fisheries Report 1992*, this principle of exchange was extended to embody four principles which had previously been identified separately.⁷³ These were the principles of active protection, the tribal right to self-regulation, the right of redress for past breaches, and the duty to consult. Subsequently, the *Ngawha Geothermal Resource Report* and the *Turangi Township Report 1995* also presented an overarching principle of exchange, which incorporated the principles of active protection, tribal self-regulation, redress, and the duty to consult.⁷⁴

APP.3.2 The Crown obligation actively to protect Maori Treaty rights

While the principle of active protection was raised by the Tribunal prior to 1987, it was more widely developed following the Court of Appeal judgment. For example, the *Orakei Report* stated the position previously advanced in the *Te Reo Maori Report* that:

the word 'guarantee' meant more than merely leaving the Maori people unhindered in their enjoyment of language and culture. It required active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture.⁷⁵

In the *Mohaka River Report*, the very important principle of active protection meant that 'the Crown is obliged to protect Maori property interests to the fullest extent reasonably practicable'.⁷⁶ As mentioned earlier, the *Ngai Tahu Sea Fisheries Report 1992* spoke of the Crown's obligation of active protection within the larger principle of an exchange between the Crown's right to make laws and its obligation to protect Maori interests. The report stated that 'The Crown obligation to protect Maori rangatiratanga required it actively to protect Maori Treaty rights, including Maori fisheries rights'.⁷⁷ Similarly, both the *Ngawha Geothermal Resources Report* and the *Turangi Township Report 1995* identified the duty of active protection within the overarching principle of exchange between Maori and Crown.⁷⁸ Finally, the *Te Whanganui-a-Orotu Report* in 1995 stated that matters arising in the claim

70. *Muriwhenua Fishing Report*, p 191

71. *Ibid*, p 194

72. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 1, p 236

73. *Ngai Tahu Sea Fisheries Report 1992*, p 269

74. *Ngawha Geothermal Resources Report*, pp 99–102, *Turangi Township Report 1995*, pp 284–288

75. *Orakei Report*, p 135

76. Waitangi Tribunal, *The Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications, 1996, p 77

77. *Ngai Tahu Sea Fisheries Report 1992*, p 270

78. See *Ngawha Geothermal Resources Report*, pp 100–101; *Turangi Township Report 1995*, pp 286–287

were found to be in breach of the general overarching principle that the Crown must actively protect Maori rangatiratanga over taonga.⁷⁹

In the case of the *Ngawha Geothermal Resources Report*, the Crown's obligation actively to protect Maori Treaty rights was seen to apply to all the interests guaranteed to Maori under article 2 of the Treaty which are not 'confined to natural and cultural resources'.⁸⁰ Furthermore, the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* found, as the *Ngawha Geothermal Resources Report* also had done, that the Crown was under a duty to protect Maori taonga, in this case the hot springs and baths.⁸¹

While the notion of tino rangatiratanga had been summed up previously in the *Motonui–Waitara Report* and developed in the *Manukau Report*, it fell within the principle of active protection in the *Orakei Report*, with the finding that:

The second article envisaged the retention of Maori lands by Maori people for as long as they wished to retain them and then in accordance with their customary lore and tenure. If anything other than that were intended it would need to have been expressly said.⁸²

APP.3.3 The need for compromise by Maori and the wider community

After 1987, the Tribunal continued to develop the notion raised in the *Motonui–Waitara* and *Manukau* reports that reconciling kawanatanga and tino rangatiratanga required compromise by both Maori and the Crown. In the *Orakei Report*, for example, it was reiterated that 'there is room for movement and scope for agreement between the Crown and Maori people which involves a measure of compromise and change'.⁸³ The report explained that, while the effective settlement of many claims will often depend upon the willingness of parties to seek a reasonable compromise, it follows that the mana to propose such a compromise vests not in the Tribunal but in the affected claimant tribes.⁸⁴ The *Muriwhenua Fishing Report* stated that:

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.⁸⁵

The *Waiheke Island Report* included the proviso 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'.⁸⁶ The principle was interpreted as the principle of mutual benefit, whereby both parties expected to gain from the Treaty: Maori from new technologies and markets, non-Maori from the acquisition of settlement rights, and both from the succession of sovereignty to a supervisory State power. Neither partner, the Tribunal advised, can demand their own benefits if there is not also an adherence to reasonable State objectives of common benefit.⁸⁷

79. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker's Ltd, 1995, pp 201–203

80. *Ngawha Geothermal Resources Report*, p 100

81. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, Wellington, Brooker and Friend Ltd, 1993, p 18

82. *Orakei Report*, p 135

83. *Ibid*, p 137

84. *Ibid*, p 186

85. *Muriwhenua Fishing Report*, p 195

86. *Waiheke Island Report*, ch 8

87. *Muriwhenua Fishing Report*, p 195

The principle of compromise was also explored in the *Mangonui Sewerage Report*, which stated that:

The Treaty . . . requires a balancing of interests in some cases, and a priority for Maori interests in others. This is one occasion where a balancing is needed and some compromises must be made.⁸⁸

The *Ngai Tahu Sea Fisheries Report 1992* reiterated the statement made in the *Muriwhenua Fishing Report* that ‘neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit’.⁸⁹ In the *Mohaka River Report*, this was expressed as the balancing of competing interests.⁹⁰

APP.3.4 A duty to consult?

The Tribunal continued to develop its interpretation of the principle of consultation following the Court of Appeal decision in 1987. In short, the principle developed from the courtesy of Crown consultation (as discussed earlier) to the Crown’s duty to consult with Maori. For example, in the *Mangonui Sewerage Report*, the Tribunal asserted the need for early consultation, saying ‘In accordance with the Treaty, there should be consultations with the district tribes in our view, when certain local projects are proposed.’⁹¹ However, at the same time, the Tribunal recognised the difficulty that often arises when the statutory body is unsure whom to consult.⁹²

The *Muriwhenua Fishing Report* advised that regard must be had to Maori interests and that may in practice require consultation in some cases.⁹³ The *Ngai Tahu Sea Fisheries Report 1992* stated (within the overall principle of ‘exchange’) that ‘the duty to consult with Maori does not exist in all circumstances’. However, the report affirmed that ‘environmental matters and . . . measures of resource control as they affect Maori access to traditional food resources – mahinga kai – require consultation with the Maori people concerned’.⁹⁴ Much the same argument was present in the *Turangi Township Report* in 1995.⁹⁵ The *Ngawha Geothermal Resources Report* more strongly asserted (still within the broader principle) that:

Before any decisions are made by the Crown . . . on matters which may impinge upon the rangatiratanga of a tribe or hapu over their taonga, it is essential that full discussion take place with Maori [if the obligation of active protection by the Crown is to be fulfilled].⁹⁶

The duty to consult has also arisen in the respect of public works takings. For example, in the *Ngati Rangiteaorere Claim Report*, the Tribunal found that the Crown’s obligation to protect Maori and their lands also involved an obligation properly to consult with them before disposing of their lands to the Crown or, by way of Crown grant, to any other party. They were not to be deprived of their lands without due legal process or by unilateral

88. *Mangonui Sewerage Report*, p 7

89. *Muriwhenua Fishing Report 1992*, pp 194–195 (as cited in the *Ngai Tahu Sea Fisheries Report*, p 273)

90. *Mohaka River Report*, p 75

91. *Mangonui Sewerage Report*, p 47

92. *Ibid*, p 48

93. *Muriwhenua Fishing Report*, p 193

94. *Ngai Tahu Sea Fisheries Report 1992*, p 272

95. *Turangi Township Report 1995*, pp 287–288

96. *Ngawha Geothermal Resources Report*, pp 101–102

action. In that particular case, the Tribunal found that the Treaty had been breached by the Crown's failure to consult and protect Maori.⁹⁷ It stated that:

the Crown failed to consult with Ngati Rangiteaorere . . . in the first instance about the need for a public road, and it failed to negotiate genuinely with them to purchase the land. The Crown therefore had no right to proceed with compulsory acquisition. It was clearly in breach of article 2 of the Treaty.⁹⁸

APP.3.5 The Crown cannot divest itself of its obligations

The *Mangonui Sewerage Report* found that the principle that the Crown could not confer an inconsistent jurisdiction on others extended to the laying down of rules for local authorities and the Planning Tribunal.⁹⁹ The principle that the Crown cannot divest itself of its Treaty obligations by conferring authority on other bodies reappeared in the *Te Roroa Report* in 1992. The report stated that the duty of the Crown extends to agents of the Crown in their official capacities, as well as individuals (which included the Native Land Court).¹⁰⁰

APP.3.6 The right of development

As early as 1983, the Waitangi Tribunal was discussing the possibility that the Treaty was able to adapt to meet new circumstances. Following the 1987 Court of Appeal judgment, this principle was significantly modified and reappeared in the *Muriwhenua Fishing Report* with the statement that a fishery, 'As a property right, was not limited to the business as it was, or the places that existed, but had every facility to expand'.¹⁰¹ The *Ngai Tahu Sea Fisheries Report* also stated that:

It is common ground between the claimants, the Crown and the fishing industry that inherent in the Treaty of Waitangi is a right to development. This was recognised by the Muriwhenua tribunal in the context of a discussion of new technology and the right of development.¹⁰²

The principle of development has since been developed and tested further in court decisions (see, in particular, *Te Runanga o te Ika Whenua Society v Attorney-General* and *New Zealand Maori Council v Attorney-General*, both discussed earlier).

APP.3.7 The tribal right of self-regulation

The principle of the tribal right of self-regulation was first developed by the Tribunal in the *Muriwhenua Fishing Report* as an elaboration of the concept of tino rangatiratanga. The report explained that:

on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded [under article 1]. Tino rangatiratanga therefore refers not to a separate

97. *Ngati Rangiteaorere Claim Report*, p 31

98. *Ibid*, p 47

99. *Mangonui Report*, p 4

100. *Te Roroa Report*, p 31

101. *Muriwhenua Fishing Report*, p 220

102. *Ngai Tahu Sea Fisheries Report 1992*, pp 253–254

sovereignty but to tribal self management on lines similar to what we understand by local government.¹⁰³

The duty on the Crown to recognise tribal rangatiratanga was further emphasised in the *Mangonui Sewerage Report*, which stated that:

the nub of the problem is in the omission of the Crown to recognise the tribal position and to provide the legal foundation and resources for tribes to contribute more fully to local affairs and to take all necessary steps for the protection of tribal interests.¹⁰⁴

Finally, in the *Ngawha Geothermal Resources Report*, the tribal right of self-regulation (self-management) was also considered an inherent element of tino rangatiratanga.¹⁰⁵ Following this report in particular, the tribal right of self-management fell within the broader principle of the exchange of sovereignty for protection (see the earlier discussion).

APP.3.8 The Crown's obligation legally to recognise tribal rangatiratanga

In response to the difficulties facing the Crown in achieving effective consultation with Maori and in connection with the developing notion of tribal self-regulation, the *Mangonui Sewerage Report* explored, for the first time, the possibility that the Crown had an obligation legally to recognise tribal authorities under article 2 of the Treaty. It observed that, as a result of the signing of the Treaty, 'traditional mechanisms for tribal controls would continue to be respected and maintained' but that this had not happened. The problem was identified as 'the omission of the Crown to recognise the tribal position and to provide the legal foundation and resources for tribes to contribute more fully to local affairs'.¹⁰⁶

APP.3.9 The Crown's right of pre-emption and its reciprocal duties

From the *Orakei Report* emerged the new and important principle that, while under article 2 of the Treaty the Crown obtained the right of pre-emption over Maori land, the Crown should have left sufficient endowment for the present and future needs of Maori. In other words, according to the *Orakei Report*, the right of pre-emption was to be a limited one and did not extend to land needed by Maori.¹⁰⁷ The report stated that:

we find that Article 2, read as a whole, imposed in the Crown certain duties and responsibilities, the first to ensure that the Maori 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, . . . that each tribe maintained a sufficient endowment for its foreseen needs.¹⁰⁸

Later, in the *Muriwhenua Fishing Report*, it was explained that:

The essential point was that the Treaty both assured Maori survival and envisaged their advance but to achieve that in Treaty terms, the Crown had not merely to protect those natural

103. *Muriwhenua Fishing Report*, p 187

104. *Mangonui Sewerage Report*, p 47

105. *Ngawha Geothermal Resource Report*, p 101

106. *Mangonui Sewerage Report*, p 47. The report goes on to list the detail developing the scope and nature of that right (pp 47–48).

107. *Orakei Report*, pp 143–144

108. *Ibid*, p 147

resources Maori might wish to retain, but to assure the retention of a sufficient share from which they would survive and profit, and a facility to fully exploit them.¹⁰⁹

In the *Te Roroa Report*, a similar view was expressed that the Treaty is essentially a contract or reciprocal arrangement between the Crown and Maori, a ratification of the terms and conditions on which Europeans were allowed to settle in the country whereby the Queen was to establish government and the chiefs, the hapu, and all people were guaranteed their tino rangatiratanga. It involves continuing obligations to give, receive, and return.¹¹⁰ Also, the *Ngai Tahu Ancillary Claims Report 1995* advised that the restoration of tribal estate demands acknowledgement of the fact that Ngai Tahu were, at the time of the report, all but landless (in breach of the principles of the Treaty of Waitangi).¹¹¹ The Tribunal recalled the words of Chief Judge Durie that fundamental to the Treaty was the expectation 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.¹¹²

APP.3.10 The principle of options

In the *Muriwhenua Fishing Report*, the principle of options between Maori, Pakeha, and biculturalism was first raised. The report noted that the Treaty envisaged the protection of tribal authority, culture, and customs, and also conferred on individual Maori the same rights and privileges as British subjects. Therefore, the Treaty provided an option for Maori 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. Most importantly, as options, it was not intended that the partner's choices on these matters could be forced.¹¹³

APP.4 GOVERNMENT STATEMENTS OF PRINCIPLES OF THE TREATY

In 1989, the Labour Government announced the principles by which it would act when dealing with issues arising from the Treaty of Waitangi. These principles were:

(a) *The principle of government or the kawanatanga principle:* Article 1 gives expression to the right of the Crown to make laws and its obligation to govern in accordance with constitutional process. This sovereignty is qualified by the promise to accord the Maori interests specified in article 2 an appropriate priority. This principle describes the balance between articles 1 and 2: the exchange of sovereignty by the Maori people for the protection of the Crown.

It was emphasised in the context of this principle that 'the Government has the right to govern and make laws'.

109. *Muriwhenua Fishing Report*, p 194

110. *Te Roroa Report*, p 30

111. Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report 1995*, Wellington, Brooker's Ltd, 1995, p 370

112. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed, Wellington, Government Printing Office, 1989, (the *Waiheke Claim Report*), pp 36–37

113. *Muriwhenua Fishing Report*, p 195

(b) *The principle of self-management (the rangatiratanga principle)*: Article 2 guarantees to iwi Maori the control and enjoyment of those resources and taonga that it is their wish to retain. The preservation of a resource base, restoration of iwi self-management, and the active protection of taonga, both material and cultural, are necessary elements of the Crown's policy of recognising rangatiratanga.

The Government also recognised the Court of Appeal's description of active protection, but identified the key concept of this principle as a right for iwi to organise as iwi and, under the law, to control the resources they own.

(c) *The principle of equality*: Article 3 constitutes a guarantee of legal equality between Maori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality, although human rights accepted under international law are also incorporated. Article 3 has an important social significance in the implicit assurance that social rights would be enjoyed equally by Maori with all New Zealand citizens of whatever origin. Special measures to attain that equal enjoyment of social benefits are allowed by international law.

(d) *The principle of reasonable cooperation*: The Treaty is regarded by the Crown as establishing a fair basis for two peoples in one country. Duality and unity are both significant. Duality implies distinctive cultural development while unity implies common purpose and community. The relationship between community and distinctive development is governed by the requirement of cooperation, which is an obligation placed on both parties by the Treaty. Reasonable cooperation can only take place if there consultation on major issues of common concern and if good faith, balance, and common sense are shown on all sides. The outcome of reasonable cooperation will be partnership.

(e) *The principle of redress*: The Crown accepts a responsibility to provide a process for the resolution of grievances arising from the Treaty. This process may involve courts, the Waitangi Tribunal, or direct negotiation. The provision of redress, where entitlement is established, must take account of its practical impact and of the need to avoid the creation of fresh injustice. If the Crown demonstrates commitment to this process of redress, it will expect reconciliation to result.