WYNNWILLIAMS

MEMORANDUM

Date: 12 November 2020

To: Tom de Pelsemaeker

From: Philip Maw

PRINCIPLES OF THE TREATY OF WAITANGI

1. You have asked us to provide advice setting out the principles of the Treaty of Waitangi, and how the Court has previously applied those principles in a planning context.

Executive summary

2. The Resource Management Act (**RMA**), like a range of contemporary legislation, specifically incorporates the principles of the Treaty of Waitangi (**Treaty**). Those "principles" have not been defined by any Act of Parliament. However, the Courts and the Waitangi Tribunal have identified a number of principles on a case-by-case basis. In cases under other legislation, the Courts have identified the following principles of the Treaty:[1]

   a. The two parties to the Treaty entered into a partnership, and therefore must act reasonably and honourably towards each other and in utmost good faith.

   b. The Crown must make informed decisions (which will often require consultation).

   c. The Crown must not unreasonably impede its capacity to provide redress for proven grievances.

   d. The Crown must actively protect Māori interests.

3. Section 8 of the RMA requires local authorities to "take into account" the principles of the Treaty when exercising powers and functions under the RMA in relation to the use, development and protection of natural and physical resources. The obligation to "take into account" is a requirement to weigh the principles of the Treaty with all other matters being considered and, in coming to a decision, effect a balance between the principles and all other matters.[2] However, the principles do not necessarily prevail over the other matters that local authorities must "recognise and provide for"[3] or "have regard to"[4] under the RMA.[5]

4. Although the application of section 8 is fact-specific, the Courts have identified specific obligations for local authorities to:

   a. enable active participation of Māori when dealing with resources of known or likely value to Māori;

   b. engage with tangata whenua in good faith;

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1 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (***Lands* (CA)**) and *New Zealand Maori Council v Attorney General* [1992] 2 NZLR 576 (CA).

2 *Freda Pene Reweti Whanau Trust v Auckland Regional Council* HC CIV-2005-404-356.

3 RMA, s 6.

4 RMA, s 7.

5 *Freda Pene Reweti Whanau Trust v Auckland Regional Council* HC CIV-2005-404-356.

c. seek mutual reciprocity and benefit, where possible;

d. endeavour to protect resources of importance to Māori from adverse effects; and

e. take positive action to protect tangata whenua interests, which will at times oblige councils to initiate, facilitate, and monitor consultation.

5. A detailed analysis of the principles of the Treaty and their application under section 8 of the RMA follows.

Status of the Treaty

6. The Government recognises the Treaty as the basis for constitutional government in this country and the foundation for the relationship between Māori and the Crown.[6]

7. The orthodox position is that, unless given force of law by an Act of Parliament, the Treaty duties do not give rise to legal obligations on the Crown.[7] Notwithstanding this, the Treaty is a document of considerable moral force based on the honour of the Crown, and the Courts have moved towards recognition of the Treaty as a relevant consideration in administrative law.[8]

8. The Treaty does not limit the law-making capacity of Parliament, but imposes moral obligations on the Crown:[9]

> 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.

9. However, Parliament can impose a legal obligation on the executive to act in accordance with the Treaty by including a section in the relevant legislation that refers to the Treaty (i.e. 'Treaty clauses').[10]

The Treaty and the Resource Management Act 1991

10. At a very general level, some 'Treaty clauses' direct more substantive outcomes (by directing that the principles of the Treaty are "given effect to") and others are intended to impose what are essentially process obligations (typically by requiring those exercising powers under the legislation to "have regard to" or "take into account" Treaty principles).[11]

11. Section 8 of the Resource Management Act 1991 (**RMA**) requires:[12]

> 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).
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> (our emphasis)

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6 Te Puni Kōkiri *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* (Te Puni Kōkiri, Wellington, 2001) at 16; Department of the Prime Minister and Cabinet *Cabinet Manual* (Cabinet Office, Wellington, 2017) at 2.

7 *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 at 324; Te Puni Kōkiri, above n 6, at 15 and at 17 citing Burrows *Statute Law in New Zealand* (1999) pp 300-301.

8 Te Puni Kōkiri, above n 6, at 16.

9 *Lands* (CA) per Somers J at 691.

10 Te Puni Kōkiri, above n 6, at 17.

11 Te Puni Kōkiri, above n 6, at 21.

12 RMA, s 8.

12. Case law on section 8 is complex and generally fact specific, however in the context of the RMA, the principles of the Treaty have been summarised as recognising the relationship of tangata whenua with natural and physical resources and encouraging active participation of, and consultation with, tangata whenua in resource management decision-making.[13]

13. A local authority's duty under section 8 is to "take into account" the principles of the Treaty when exercising powers and functions under the RMA in relation to the use, development and protection of natural and physical resources. The obligation to "take into account" is a requirement to weigh the principles of the Treaty with all other matters being considered and, in coming to a decision, effect a balance between the principles and all other matters.[14] In other words, section 8 requires a local authority to turn its mind to the principles of the Treaty when exercising its functions and powers. However, the principles do not necessarily prevail over the other matters that local authorities must "recognise and provide for"[15] or "have regard to"[16] under the RMA.[17]

14. In the *Ngāwhā Geothermal Resources Report (1993)*, the Waitangi Tribunal considered the meaning of section 8 of the RMA, noting 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:[18]

> 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 (to which "particular regard" must be given under s7). The role or significance of Treaty principles in the decision-making process under the Act is a comparatively modest one.
>
> 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.

15. The weight to be given to Treaty considerations is a decision left to those exercising the procedural functions.[19] According to the New Zealand Solicitor General:[20]

> A Court would not ordinarily interfere with a decision made in circumstances involving a clause like [section 8 of the RMA], 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 decisionmaker 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.

16. Despite the above, the obligation under section 8 is not simply a "check box" exercise. In *McGuire v Hastings District Council*, the Privy Council found that

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13 *Winston Aggregates Ltd v Franklin District Council* EnvC A080/02.

14 *Freda Pene Reweti Whanau Trust v Auckland Regional Council* HC CIV-2005-404-356.

15 RMA, s 6.

16 RMA, s 7.

17 *Freda Pene Reweti Whanau Trust v Auckland Regional Council* HC CIV-2005-404-356.

18 Waitangi Tribunal *Ngāwhā Geothermal Resources Report (1993)* at p 145.

19 Te Puni Kōkiri, above n 6, at 22.

20 *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.

sections 6, 7 and 8 of the RMA provide strong directions in relation to Māori interests, which are to be borne in mind at every stage of the planning process.[21] In *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, the Supreme Court found that:[22]

> …the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision makers must always have in mind…

17. We note that while the Crown has given local authorities powers under the RMA to manage natural and physical resources, local authorities are not themselves parties to the Treaty of Waitangi. A local authority's obligation to take into account the principles of the Treaty must be considered in that context.[23] Section 8 does not impose the Crown's obligations under the Treaty on local authorities, nor does it empower local authorities to consider whether the Crown is in breach of its Treaty obligations or what redress may be appropriate.[24]

18. The Charter sets out the principles of the Treaty considered relevant in the context of the Charter.[25] The principles included in the Charter are consistent with those set out in this Memorandum.

19. In addition to the Charter of Understanding, the Council is a party to a number of agreements with iwi. These include: Memorandum of Understanding and Protocol between Otago Regional Council, Te Rūnanga of Ngāi Tahu and Kāi Tahu ki Otago for Effective Consultation and Liaison (which promotes and facilitates effective consultation and liaison between the parties), the Partnership Protocol between the Council and Papatipu Rūnanga ki Otago (which establishes an enduring partnership between the parties, is intended to meet any consultation obligations, and maintains the Protocol as an expression of Treaty partnership), and the Governance Charter Te Rōpū Taiao Otago (which formalises the relationship between the parties and provides an efficient way to foster and grow their relationship). These documents all reflect elements of the Treaty principles.

Specific obligations under section 8

20. The Courts have identified that the requirement in section 8 for local authorities to "take into account" Treaty principles manifests itself in a number of specific obligations. These include:

    a. An obligation for consent authorities to enable active participation of Māori when dealing with a resource of known or likely value to Māori.[26] This may require management of resources and other taonga according to Māori cultural preferences, without giving Māori a right of exclusionary veto. In the planning context, when undertaking consultation with tangata whenua as required under Schedule 1 of the RMA, active participation by Māori should be encouraged.

    b. An obligation to deal with tangata whenua in good faith.[27] While the Courts have not expressly recognised the principle of partnership in the context of the RMA, they have upheld the importance of dealing with tangata whenua in

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21 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).

22 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [88].

23 *Hanton v Auckland City Council* [1994] NZRMA 289 (PT).

24 *Minhinnick v Minister of Corrections* EnvC A43/04.

25 The Charter of Understanding, above n **Error! Bookmark not defined.**, at 1.5-1.6.

26 See for example *Mason-Riseborough v Matamata-Piako District Council* (1997) 4 ELRNZ 31.

27 See for example *Te Pairi v Gisborne District Council* EnvC W093/04.

good faith. When engaging with tangata whenua, local authorities must act in good faith by, *inter alia*, endeavouring to understand tangata whenua perspectives and give genuine consideration to managing resources in accordance with Māori cultural preferences. Note that both parties are to act reasonably and in good faith, with the actions of parties reflecting an underlying fairness.

c. The Courts have acknowledged that reciprocity and mutual benefit, although perhaps desirable, cannot be elevated to ensure a particular course of action must be chosen in order to satisfy section 8.[28]

d. An obligation to endeavour to protect resources of significance to Māori from adverse effects.[29] However, if tangible effects on a resource are avoided, the protection of intangible adverse effects on tangata whenua do not need to be given overriding weight where there are no discernible physical effects on the resource.

e. The principle of active protection requires positive action, which will at times oblige councils to initiate, facilitate, and monitor the consultation process.[30]

Principles of the Treaty

21. Given the differences between the Māori and English texts, and the need to apply the Treaty to contemporary circumstances, Parliament refers to the principles of the Treaty in legislation, rather than the texts of the Treaty. The principles of the Treaty, as interpreted by the Courts and the Waitangi Tribunal, are derived from the spirit, intent, circumstances and terms of the Treaty.[31] They are the underlying mutual obligations and responsibilities which the Treaty placed on the parties, and reflect the intention of the Treaty as a whole.[32] These principles are not set in stone. As President Cooke has said: "The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change".[33]

22. Accordingly, the Courts consider the principles when interpreting legislative references to the Treaty. However, the Waitangi Tribunal has a more general jurisdiction: to "determine the meaning and effect of the Treaty as embodied in the 2 texts"[34] when considering whether the Crown has acted in a manner "inconsistent with the principles of the Treaty".[35]

23. We note that, while the opinions of the Waitangi Tribunal are considered by the Court of Appeal to be of "great value" to the Court,[36] and are often given considerable weight in its judgments, Courts are nonetheless not obliged to give effect to Tribunal

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28 *Waikanae Christian Holiday Park v Kapiti Coast District Council* Wellington CIV-2003-485-1764, 27 October 2004 (HC).

29 See for example *Mahuta v Waikato Regional Council* EnvC A091/98.

30 *Sea-Tow Ltd v Auckland Regional Council* [1994] NZRMA 204 (PT).

31 Te Puni Kōkiri, above n 6, at 74.

32 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (***Broadcasting Assets* (PC)**) per Lord Woolf at 513.

33 *Te Rūnanga o Muriwhenua v Attorney-General* (CA) [1990] per Cooke P at 656.

34 Treaty of Waitangi Act 1975, s 5.

35 Treaty of Waitangi Act 1975, s 6.

36 *Lands* (CA), per Cooke P at 661

findings.[37] The recommendations of the Tribunal have no force in law unless accepted and acted on by a Court:[38]

> 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.

24. The principles of the Treaty, as recognised by the Courts and the Waitangi Tribunal, are set out below.

The principle of partnership

25. The Court of Appeal has referred to the Treaty relationship as "akin to a partnership" and emphasises a duty on the parties to act reasonably, honourably, and in good faith. The Waitangi Tribunal concurs with the duty to act reasonably, honourably, and in good faith, however it derives these duties from the principle of reciprocity and the principle of mutual benefit.

26. The principle of partnership has been regarded as an overarching tenet, from which other key principles have been derived,[39] such as the duty to act reasonably, honourably, and in good faith, the principle of mutual benefit, and the duty to make informed decisions.

27. Integral to the Tribunal's understanding of the principle of partnership 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, and the duty to make informed decisions.[40]

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

28. This duty is recognised by both the Courts and the Tribunal.

Duty according to the Courts

29. The Treaty established an enduring relationship of a fiduciary nature akin to a partnership, which imposes on the partners the duty to act reasonably, fairly, honourably, and in good faith towards the other.[41] The Court of Appeal has unanimously held that:[42]

> 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 ...

30. The Courts have drawn on the principles of good faith inherent in partnerships in civil law to aid in its interpretation of the Treaty principles.[43]

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37 *Lands* (CA), per Cooke P 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.

38 *Te Rūnanga o Muriwhenua v Attorney-General* (CA) [1990] per Cooke P at 651, 652.

39 Te Puni Kōkiri, above n 6, at 77.

40 Te Puni Kōkiri, above n 6, at 80.

41 Te Rūnanga o Wharekauri Rekohu v Attorney General [1993] 2 NZLR 301 (***Sealords* (CA)**) at 304.

42 *Lands* (CA) per Cooke P at 664; see also per Richardson J at 682, per Somers J at 692-693, and per Casey J at 702.

43 Te Puni Kōkiri, above n 6, at 78.

31. The Privy Council, agreeing with the Court of Appeal, considered that the relationship envisaged in the Treaty was one "founded on reasonableness, mutual cooperation, and trust". This requires the Crown in carrying out its Treaty obligations to take "such action as is reasonable in prevailing circumstances".[44] The "test is reasonableness, not perfection".[45]

32. The Court has emphasised the reciprocal nature of the Treaty obligations, requiring both partners to act reasonably and in good faith.[46]

Duty according to the Tribunal

33. 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. 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.[47]

The principle of reciprocity

34. This principle is recognised by the Tribunal, and therefore does not have any force in law unless accepted and acted on by a Court.

35. This principle is derived from Articles I and II of the Treaty, in that it is thought to capture the "essential bargain" or "solemn exchange" agreed to in the Treaty by Māori and the Crown. For the Tribunal, this exchange lies at the core of the concept of partnership.[48]

36. 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 Maori 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.[49]

The principle of mutual benefit

37. This principle is recognised by the Tribunal, and therefore does not have any force in law unless accepted and acted on by a Court.

38. The Tribunal considers the principle of mutual benefit or mutual advantage to be a cornerstone of the Treaty partnership. The principle requires that "the needs of both cultures must be provided for and compromise may be needed in some cases to achieve this objective".[50]

The duty to make informed decisions

39. This duty is recognised by both the Courts and the Tribunal.

Duty according to the Courts

40. The Courts have found that it is inherent in the Crown's obligations to act in good faith that it is obliged to make informed decisions on matters affecting the interests of

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44 *Broadcasting Assets* (PC) at 517.

45 *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (***Māori Electoral Option* (CA)**) at 411.

46 Te Puni Kōkiri, above n 6, at 80.

47 Te Puni Kōkiri, above n 6, at 84.

48 Te Puni Kōkiri, above n 6, at 81.

49 Te Puni Kōkiri, above n 6, at 81; Waitangi Tribunal *Māori Development Corporation Report* (1993) pp 33, 113 ff.

50 Te Puni Kōkiri, above n 6, at 82; Waitangi Tribunal *Ngāwhā Geothermal Resources Report* (1993) at p 137.

Māori. In some circumstances this will require consultation with Māori, depending on the importance of the issue.[51]

41. 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.[52] Justice Richardson stated that:[53]

> 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.

42. This does not extend to an absolute duty to consult,[54] however it is an obvious way for the Crown to demonstrate good faith as a Treaty partner.[55]

43. In some cases, the fulfilment of the obligation of good faith may require extensive consultation, and 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".[56]

44. The Courts have found that, where the Crown is to give effect to the principles of the Treaty under relevant legislation, consultation alone cannot satisfy its obligation to actively protect the interests of Māori.[57] Note that section 8 of the RMA does not require that the principles of the Treaty are given effect to, only that they are taken into account.

45. The Court of Appeal held that:[58]

> s 8 [of the RMA] 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.

46. The Environment Court has confirmed that the duty to consult requires a decision maker be 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.[59] Further, it has rejected the proposition that the duty to consult under section 8 of the RMA "is no more than procedural or deliberative".[60]

47. Consultation does not need to result in consensus:[61]

> The council is not bound to consult [local hapū] 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

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51 Te Puni Kōkiri, above n 6, at 85.

52 Te Puni Kōkiri, above n 6, at 85.

53 *Lands* (CA) per Richardson J at 682.

54 *Lands* (CA) per Richardson J at 682-683, per Cooke P at 665.

55 *Lands* (CA) per Somers J at 693.

56 *Lands* (CA) per Richardson J at 683.

57 *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 per Cooke P at 560.

58 *Watercare Services v Minhinnick* [1998] 1 NZLR 294 (CA) at 307.

59 See *Quarantine Waste (NZ) Ltd v Waste Resources Ltd [1994] NZRMA 529 (HC)* at 542.

60 *Wellington Rugby Football Union Incorporated v Wellington City Council* W84/93, 30 September 1993 (PT) per Judge Kenderdine at 22-23.

61 *Ngāti Kahu v Tauranga District Council* [1994] NZRMA 481 (EnvC) at 510.

> 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.

Duty according to the Tribunal

48. The Tribunal also places emphasis on informed decision-making, particularly the value and utility of consultation.

49. The Tribunal considered in the *Muriwhenua Fishing Claim Report* (1988) 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.[62]

50. In the *Ngai Tahu Report* (1991) the Tribunal outlined areas where it considered consultation was required to uphold Treaty obligations. These include:[63]

> 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 impinge 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.

51. 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:[64]

> 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.

The principle of active protection

52. This duty is recognised by both the Courts and the Tribunal.

Principle according to the Courts

53. The Crown's duty of active protection is a central Treaty principle. The principle encompasses:[65]

> 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 emphasised the Crown's stated aims in the preamble of the Treaty and Article III.

54. The Court of Appeal in the *Lands* case accepted earlier Tribunal findings that the Crown had a positive duty to protect Māori property interests. It stated that:[66]

> … 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 pacticable.

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

63 Waitangi Tribunal *Ngāi Tahu Report* (1991) p 245.

64 Waitangi Tribunal *Ngāwhā Geothermal Resources Report* (1993) at p 101-102.

65 Te Puni Kōkiri, above n 6, at 93.

66 *Lands* (CA) per Cooke P at 664.

55. The Privy Council's *Broadcasting Assets* decision contains an important and detailed analysis of the scope of the Crown's duty of active protection under the Treaty. It 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 Privy Council linked the duty to actively protect Māori interests with the concept of reasonableness.[67] The Privy Council also 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.[68]

Principle according to the Tribunal

56. The Tribunal attributes the principle of protection to the fundamental exchange recorded in the Treaty – the cessation of sovereignty in return for the guarantee of tino rangatiratanga. The Tribunal's conception of the interests to be protected goes beyond property to include tribal authority, Māori cultural practices and Māori themselves, as individuals and groups.[69]

57. In the *Ngāwhā Geothermal Resources Report* (1993), the Tribunal analysed the component parts of the Crown's duty of protection:[70]

> 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:
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> - 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 used 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.

The principle of redress

58. This duty is recognised by both the Courts and the Tribunal.

59. 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

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67 *Broadcasting Assets* (PC) at 517.

68 *Broadcasting Assets* (PC) at 517.

69 Te Puni Kōkiri, above n 6, at 95.

70 Waitangi Tribunal *Ngāwhā Geothermal Resources Report* (1993) at p 100-102.

redress.[71] The Waitangi Tribunal also accepts that the Crown has this obligation, and considers it arises from its duty to act reasonably and in good faith as a Treaty partner.[72]

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71 Te Puni Kōkiri, above n 6, at 100.

72 Te Puni Kōkiri, above n 6, at 103.