

CHAPTER 4

THE TREATY AND TREATY PRINCIPLES

4.1 INTRODUCTION

In this chapter, we record the arrival of Captain Hobson in New Zealand to take up his duties as the first Governor of New Zealand. Within 10 days of his arrival, he had overseen the drafting of the Treaty of Waitangi and its signing by numerous leading chiefs in the north. In due course, as we relate, an appreciable number of Maori in Wellington subscribed to the Treaty.

Our account of these highly significant events is followed by a discussion of the principles of the Treaty which are relevant to the various claims by Maori in relation to our inquiry area.

4.2 THE ARRIVAL OF HOBSON IN NEW ZEALAND

As discussed in the previous chapter, the British Government, responding in large part to the colonising activities of the New Zealand Company, dispatched Captain William Hobson to New Zealand in 1839, with instructions to negotiate for the cession of sovereignty by Maori to the Crown. When Hobson arrived in New Zealand on 29 January 1840, he had with him three proclamations, all dated 14 January, issued by Governor Gipps of New South Wales. The first extended Gipps's jurisdiction as Governor over such territory in New Zealand as might be acquired in sovereignty by Queen Victoria. The second declared that he had administered the oaths of office to Hobson as Lieutenant-Governor over such territory in New Zealand as might be so acquired. The third announced that, pursuant to instructions of Lord Normanby dated 14 August 1839, the Queen would 'not acknowledge as valid any title to land which either has been or shall be hereafter acquired' in New Zealand 'which is not either derived from or confirmed by a [Crown] grant'. But care was to be taken to dispel any apprehension that owners of any land acquired on equitable conditions would be dispossessed; such acquisitions would be investigated by commissioners to be appointed by Governor Gipps.¹ The third proclamation acted as a public warning against further speculation in New Zealand land and was intended to prohibit Europeans from buying land directly from

1. BPP, vol 3, pp 38–39

Maori. Where such transactions had already taken place, they would be investigated by land commissioners.

The day after his arrival, Hobson made public the three proclamations.

4.2.1 The Treaty of Waitangi is signed

Hobson then went about seeking Maori consent to cede their sovereignty to the Crown by means of a treaty, the Treaty of Waitangi, drafted after his arrival in New Zealand. He lost no time in securing the signing of the Treaty by 45 chiefs at Waitangi on 6 February, some nine days after his arrival, then obtained more than 56 signatures at Hokianga on 12 February. This success persuaded him to seek the cession of the whole of New Zealand.²

On 1 March 1840, Hobson suffered a stroke and partial paralysis, and on hearing the news Gipps sent Major Thomas Bunbury to be the military commander in New Zealand, with powers to act for Hobson if necessary. Bunbury brought with him 90 troops. In a confidential note to Hobson, Gipps explained that he hoped to see the New Zealand Company settlers at Port Nicholson quickly brought under the Government, but that the annexation of the South Island was an even more urgent matter.³

Although Hobson recovered quite rapidly, he was not well enough to continue the negotiations with Maori himself. As a consequence, he issued facsimiles of the Treaty to various missionaries and military officers. By June 1840, these emissaries had covered substantial areas of the North Island. The missionary Henry Williams, who had been responsible for translating the Treaty into Maori, brought the Treaty to the Cook Strait region.⁴

4.2.2 The signing of the Treaty in Wellington

Williams reported to Hobson that, on his arrival in Port Nicholson, he ‘experienced some opposition, from the influence of Europeans at that place’, and it took 10 days before the local chiefs ‘unanimously’ signed the Treaty.⁵ On 29 April 1840, the Treaty was signed at Port Nicholson by 34 Maori, including one woman, Kahe Te Rau o te Rangi of Ngati Toa. Among the signatories were at least six of the chiefs who had marked the Port Nicholson deed, including Te Puni, Te Wharepouri, and Taringa Kuri.⁶ The Treaty was also signed at other nearby locations, including Queen Charlotte Sound, Waikanae, and Kapiti Island. Hobson attached particular importance to obtaining Te Rauparaha’s signature, having been

2. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland: Auckland University Press, 1977), p 159

3. Ibid

4. Ibid, p 160; Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987), ch 4

5. Henry Williams to Hobson, 11 June 1840, BPP, vol 3, p 227

6. The Port Nicholson signatories can be found in *Facsimiles of the Declaration of Independence and the Treaty of Waitangi* (Wellington: Government Printer, 1976). See also Miria Simpson, *Nga Tohu o te Tiriti: Making a Mark* (Wellington: National Library of New Zealand, 1990), pp 82–87.

told that he exercised ‘absolute authority over all the southern parts of this island’. He therefore believed that Te Rauparaha’s adherence would ‘secure to Her Majesty the undisputed right of sovereignty over all the southern districts’.⁷ In fact, Te Rauparaha signed the Treaty twice, once at Otaki and a second time (at the insistence of Major Bunbury) on board HMS *Herald* off Mana Island, where Te Rangihaeata also signed.⁸

4.3 ALLEGATIONS OF TREATY BREACHES

The various claimants in this inquiry have made lengthy and detailed allegations of numerous Treaty breaches by the Crown. Almost all the allegations of Treaty breaches have been denied by the Crown in detailed closing submissions. We consider the main grounds advanced by the claimants and the Crown’s responses in ensuing chapters, but before doing so it is desirable that we should record the Treaty principles which relate to the wide range of matters in issue in this inquiry. In doing so, we have had regard to the submissions of all the parties to the inquiry on the Treaty principles applicable to the matters in issue in the various claims. There is substantial agreement among the various claimants as to the relevant principles, but differing emphasis may be given to some of them, given the circumstances of particular claims.

4.3.1 Tribunal jurisdiction

If the Tribunal finds that any claim submitted to it under section 6 of the Treaty of Waitangi Act 1975 is well founded, it may recommend that the Crown take remedial action. But, before it can find a claim to be well founded, the Tribunal must be satisfied that:

- ▶ the claimant has established a claim falling within one or more of the matters referred to in section 6(1) of the Act;
- ▶ the claimant has been or is likely to be prejudicially affected by any such matters; and
- ▶ any such matters were or are inconsistent with the principles of the Treaty of Waitangi.

All three elements must be established before the Tribunal can find a claim to be well founded.

4.3.2 Previous Tribunal reports

There has been considerable discussion of Treaty principles by the Tribunal in earlier reports, not all of which are necessarily applicable to any one particular claim. Some of the expositions by the Tribunal on Treaty principles were noted in its 1997 *Muriwhenua Land*

7. Hobson to Bunbury, 25 April 1840, BPP, vol 3, p 140

8. Simpson, pp 77, 98

Report.⁹ However, one leading principle has emerged as being applicable to many claims, including those now before us.

4.4 APPLICABLE TREATY PRINCIPLES

4.4.1 Cession of sovereignty in exchange for protection of rangatiratanga

The leading Treaty principle to which we have just referred is that Maori ceded sovereignty to the Crown in exchange for the protection by the Crown of Maori rangatiratanga. The Tribunal has stressed that this principle is ‘fundamental to the compact or accord embodied in the Treaty and is of paramount importance’.¹⁰ It is seen as overarching and far-reaching because of its direct derivation from the provisions of articles 1 and 2 of the Treaty. It embraces several concepts, sometimes characterised as principles, but better seen as inherent in or integral to the basic principle. In the context of this inquiry, we refer to the obligation of the Crown:

- ▶ actively to protect Maori Treaty rights;
- ▶ to ensure a fair process in determining such rights;
- ▶ to consult with Maori; and
- ▶ to afford redress for past breaches.

Implicit in this overriding principle is ‘the notion of reciprocity – the exchange of the right to govern for the right of Maori to retain their full tribal authority and control [tino rangatiratanga] over their lands, forests, fisheries and other valuable possessions [taonga] for so long as they wished to retain them’. Cession of sovereignty to the Crown by Maori was qualified by their retention of tino rangatiratanga.¹¹

Article 2 of the Treaty confirms and guarantees rangatiratanga, and this necessarily qualifies or limits the Crown’s authority to govern. In exercising its powers, the Crown must guarantee Maori rangatiratanga in terms of article 2.¹² This Treaty constraint on the powers of the Crown was reinforced by the Tribunal in its *Taranaki Report*, in which it held that, in terms of the Treaty, ‘from the day it was proclaimed, sovereignty was constrained in New Zealand by the need to respect Maori authority (or “tino rangatiratanga”, to use the Treaty’s term)’.¹³

9. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 388, refers to the detailed discussion of the status of the Treaty, the Crown and Maori perspectives on the Treaty’s provisions, the surrounding circumstances of the Treaty, and the related principles in Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 215–247. See also the Tribunal’s *Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), pp 267–274; *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), pp 99–102; *Te Whanganui-a-Orutu Report 1995* (Wellington: Brooker’s Ltd, 1995), pp 201–203; *The Turangi Township Report 1995* (Wellington: Brooker’s Ltd, 1995), pp 284–289.

10. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, pp 269–270

11. *Ibid*, p 269

12. *Ibid*

13. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 20

4.4.2 The Crown obligation actively to protect Maori Treaty rights

In addition to the guarantee of Maori rangatiratanga in article 2 of the Treaty, the preamble expresses the Queen's anxiety to protect the just rights and property of Maori. Article 3 extends the Queen's royal protection to, and bestows all the rights and privileges of British subjects on, the Maori people. In its various reports, the Tribunal has consistently stressed the duty imposed on the Crown under the Treaty actively to protect Maori interests. The Tribunal's views have been endorsed by the Court of Appeal; in particular, by the then president, Sir Robin Cooke, in the following passage:

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. There are passages in the Waitangi Tribunal's *Te Atiawa*, *Manukau* and *Te Reo Maori* reports which support that proposition and are undoubtedly well-founded.¹⁴

Under article 2, Maori yielded to the Crown the exclusive right of pre-emption over such lands as the owners were disposed to sell. In the *Ngai Tahu Report 1991*, the Tribunal found that, in exercising its right of pre-emption, the Crown was obliged to protect Maori interests in various ways. First, it should acquire only such land as Maori were prepared to sell. To be satisfied that the land was being sold with the owners' consent, it was necessary to ascertain who the owners were. The Tribunal noted that particular rights in land and resources could be specific to particular groups, families, or even individuals.¹⁵ The Tribunal then emphasised that, notwithstanding all this:

the tribe retained control over alienation of resources through senior rangatira. Crown agents seeking to purchase land from Ngai Tahu would be expected to negotiate with the tribe through these principal chiefs. They had the power of veto and without their consent the sale was not valid. However, the rangatira as trustees for their people and their resources could only approve a sale if the necessary consensus was in place. The traditional way of ensuring this then, and now, would be to debate the purchase on the marae in the presence of those who had rights in the land, both those living and those passed on. This would represent a meaningful exercise of rangatiratanga.¹⁶

The Tribunal noted that, while in the early years it might not have been possible to have the boundaries of a proposed purchase fixed by survey, it was implicit in the notion of consent that the Maori owners knew with reasonable certainty the area of land that they were being asked to sell. The Tribunal considered that the onus unquestionably lay on the Crown to ensure this – the duty of active protection required no less. The Tribunal stressed that:

14. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 (CA)

15. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 2, pp 240–241

16. *Ibid*, p 241

Equally important was the requirement that land which a tribe wished to retain, whether by express exclusion from a proposed sale or by way of reserves out of land agreed to be sold, should be sufficiently identified. And . . . it must also be adequate for both the present and reasonably foreseeable future needs of the tribe.¹⁷

As we have seen, the Crown appointed a commission to investigate the validity of the 1839 Port Nicholson deed of purchase. Later, when serious doubts arose as to the validity of that purchase, the Crown agreed to waive its right of pre-emption in favour of the New Zealand Company. In so doing, however, it remained under a duty to ensure that Maori were protected to the same extent as they should have been had the Crown been negotiating directly with them. In short, the Crown could not, consistently with its Treaty obligations, waive or avoid its responsibilities to ensure that Maori were amply protected.

The Crown appointed a protector of aborigines, and a heavy onus lay on the protector to ensure that the Crown's Treaty responsibilities were met. In the performance of his duties, the protector was required to respect the rangatiratanga and autonomy of Maori and their standing as a Treaty partner. This entitled Maori to be treated as equals and obliged the protector to inform them fully of any proposals relating to their land and its possible disposition. Above all, the protector was to ensure that Maori understood the implications of any such proposals and the consequences of their agreeing to them. Should the procedures adopted by the Crown or its agents be such as to place Maori at a disadvantage and render it difficult, if not impossible, for them to exercise their free, informed, and independent judgement, it would be the duty of the protector to ensure that Maori withdrew from the proceedings or negotiations. To enable him adequately to protect Maori, the protector had to be free to act independently of the Crown.

It is noteworthy that a principal reason for the British Government's dispatching of Captain Hobson to negotiate a treaty of cession with Maori was the presence in New Zealand of some 2000 British subjects and the likelihood of substantial numbers of New Zealand Company settlers joining them. The urgent need to protect Maori against the possible adverse consequences of this incursion was accepted by the British Government, and the Treaty was the outcome.

4.4.3 The Crown obligation to ensure a fair process in determining Maori Treaty rights

In its *Muriwhenua Land Report*, the Tribunal discussed four Treaty principles as being important in that inquiry; namely, 'protection, honourable conduct, fair process and recognition, though all may be seen as covered by the first'.¹⁸ In effect, the Tribunal considered the last three were subsumed by the major Treaty principle of protection.

17. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 2, p 241

18. Waitangi Tribunal, *Muriwhenua Land Report*, p 388

In amplifying the basis for the principle of fair process, the Tribunal noted that the Treaty had promised ‘the necessary laws and institutions’; that Lord Normanby had insisted on the appointment of a protector of aborigines; and that Hobson had promised Maori, following their complaints prior to the signing of the Treaty, that pre-Treaty transactions would be inquired into and lands unjustly held would be returned. The principle of fair process, as defined by the Muriwhenua Tribunal, is ‘that the Government should be accountable for its actions in relation to Maori, that State policy affecting Maori should be subject to independent audit, and that Maori complaints should be fully inquired into by an independent agency’.¹⁹

4.4.4 The duty to consult

The Ngai Tahu Tribunal noted that the question of whether the Crown had a duty under the Treaty to consult with Maori was considered by the Court of Appeal in *New Zealand Maori Council v Attorney-General*.²⁰ After citing a lengthy passage from the judgment of Sir Ivor Richardson in that case, the Tribunal stated:

It follows from Sir Ivor Richardson’s discussion that in some areas more than others consultation by the Crown will be highly desirable, if not essential, if legitimate Treaty interests of Maori are to be protected. Negotiation by the Crown for the purchase of Maori land clearly requires full consultation. On matters which might impinge on a tribe’s rangatira-tanga consultation will be necessary. Environmental matters, especially as they may affect Maori access to traditional food resources – mahinga kai – also require consultation with the Maori people concerned.²¹

4.4.5 The duty to afford redress for past breaches

In the *New Zealand Maori Council* case, Justice Somers recognised as a Treaty principle the Maori right of redress where the Crown is found to have breached the Treaty:

The obligation of the parties to the Treaty to comply with its terms is implicit, just as is the obligation of parties to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle, and was in my view intended by Parliament to be embraced by the terms it used in s9 [of the State-Owned Enterprises Act 1986]. As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other – a fair and reasonable recognition of, and recompense for,

19. Ibid, p 390

20. *New Zealand Maori Council v Attorney-General*

21. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 2, p 245

4.4.6

the wrong that has occurred. That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal.²²

Sir Robin Cooke also accepted that the Crown should grant at least some form of redress if the Waitangi Tribunal found merit in a claim and recommended redress. He thought that withholding of redress by the Crown would be justified ‘only in very special circumstances, if ever’.²³

4.4.6 The principle of partnership

The principle that the Treaty signifies a partnership and requires the Crown and Maori partners to act towards each other reasonably and with the utmost good faith is a leading Treaty principle. It derives its authority from the Court of Appeal decision in the *New Zealand Maori Council* case.²⁴ Justice Casey saw the concept as underlying all the Crown’s Treaty relationships.²⁵ Sir Ivor Richardson, who referred to the Treaty as a ‘compact’, commented:

Where the focus is on the role of the Crown and the conduct of the Government that emphasis on the honour of the Crown is important. It captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners. In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the State-Owned Enterprises Act, there is every reason for attributing to both partners that obligation to deal with each other and with their treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions. No less than under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi. In the same way too honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion.²⁶

The reciprocal nature of the obligation to act reasonably and in the utmost good faith was also emphasised by Sir Robin Cooke, who said that, for their part, Maori had ‘undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation’.²⁷

22. *New Zealand Maori Council v Attorney-General*, p 693

23. *Ibid*, pp 664–665

24. *Ibid*, p 642

25. *Ibid*, p 703

26. *Ibid*, p 682

27. *Ibid*, p 664

In subsequent chapters, we will, where appropriate, apply these principles in deciding whether and to what extent the Crown has acted in accordance with them in relation to the claims of the various parties.

