

## Chapter 5

# Treaty Principles

### 5.1 Introduction

5.1.1 If the tribunal finds that any claim submitted to it under s6 of the Treaty of Waitangi Act 1975 is well-founded it may recommend remedial action by the Crown. 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 s6(1) of the Act,
- that the claimant has been or is likely to be prejudicially affected by any such matters, and
- that any such matters were or are inconsistent with the principles of the Treaty.

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

In previous reports the tribunal has formulated various Treaty principles which it considered applicable to the particular claims under consideration. The Court of Appeal, notably in the *New Zealand Maori Council* case already referred to (3.14.5) has also formulated certain Treaty principles. Not all principles are relevant to any given claim. In the present case we believe two leading principles are applicable to the claims in respect of the Ngawha geothermal resource. We consider each in turn.

***The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga***

5.1.2 In the *Ngai Tahu Sea Fisheries Report 1992* the tribunal saw this principle as fundamental to the compact or accord embodied in the Treaty and as of paramount importance. It was described as over-arching and far-reaching being derived directly from the provisions of articles 1 and 2 of the Treaty. Included in it are several concepts which have earlier been characterised as principles but which we believe are better seen as inherent in or integral to this basic principle. Specifically we refer, in the context of the present claim, to:

- the Crown obligation actively to protect Maori Treaty rights
- the tribal rights of self-regulation

## *Ngawha Geothermal Resource*

- the rights of redress for past breaches
- the duty to consult

The Ngai Tahu sea fisheries tribunal elaborated as follows:

Implicit in this 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 over their lands, forests, fisheries and other valuable possessions for so long as they wished to retain them. It is clear that cession of sovereignty to the Crown by Maori was conditional. It was qualified by the retention of tino rangatiratanga. It should be noted that rangatiratanga embraced protection not only of Maori land but of much more, including fisheries.

Rangatiratanga was confirmed and guaranteed by the Queen in article 2. This necessarily qualifies or limits the authority of the Crown to govern. In exercising sovereignty it must respect, indeed guarantee, Maori rangatiratanga - mana Maori -in terms of Article 2.

The Crown in obtaining the cession of sovereignty under the Treaty therefore obtained it subject to important limitations upon its exercise. In short, the right to govern which it acquired was a qualified right.<sup>1</sup>

### ***Crown duty of active protection***

5.1.3 The duty of active protection applies to all the interests guaranteed to Maori under article 2 of the Treaty. While not confined to natural and cultural resources, these interests are of primary importance. There are several important elements including the need to ensure:

- that Maori are not unnecessarily inhibited by legislative or administrative constraints from using their resources according to their cultural preferences
- that Maori are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued use or enjoyment of their resources whether in spiritual or physical terms
- that the degree of protection to be given to Maori resources will depend upon the nature and value of the resource. In the case of a very highly valued rare and irreplaceable taonga of great spiritual and physical importance to Maori, the Crown is under an obligation to ensure its protection (save in very exceptional circumstances) for so long as Maori wish it to be so protected. The Ngawha geothermal springs fall into this category. The value attached to such a taonga is essentially a matter for Maori 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.

***Tribal right of self-regulation***

5.1.4 The tribal right of self-regulation or self-management is an inherent element of tino rangatiratanga. The tribunal in the *Motonui-Waitara Report 1983* put it this way:

"Rangatiratanga" and "mana" are inextricably related words. Rangatiratanga denotes the mana not only to possess what is yours, but to control and manage it in accordance with your own preferences.

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.<sup>2</sup>

In discussing this concept the tribunal in the *Muriwhenua Fishing Report 1988* said:

In any event on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga therefore refers not to a separate sovereignty but to tribal self-management on lines similar to what we understand by local government.<sup>3</sup>

By way of elaboration, the Muriwhenua tribunal emphasised (among other matters) that:

- the Treaty guaranteed tribal control of Maori matters, including the right to regulate access of tribal members and others to tribal resources.
- the cession of sovereignty or kawanatanga enabled the Crown to make laws for conservation control and resource protection, being in everyone's interests. These laws may need to apply to all alike. But this right is to be exercised in the light of article 2 and should not diminish the principles of article 2 or the authority of the tribes to exercise control. In short, sovereignty is said to be limited by the right reserved in article 2.<sup>4</sup>

***Crown duty to redress past breaches***

5.1.5 If failure by the Crown to protect the rangatiratanga of a tribe or hapu results in detriment to Maori there is an obligation on the Crown to make redress. This was recognised by Mr Justice Somers in the *New Zealand Maori Council* case.<sup>5</sup>

***Duty to consult***

5.1.6 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 hapu over their taonga, it is essential that full discussion take place with Maori. The Crown obligation actively to protect Maori Treaty rights cannot be fulfilled in the absence of a full appreciation of

the nature of the taonga including its spiritual and cultural dimensions. This can only be gained from those having rangatiratanga over the taonga.

We turn now to the second Treaty principle applicable to this claim.

## 5.2 **The Principle of Partnership**

This principle was firmly established by the Court of Appeal in the *New Zealand Maori Council* case where it was authoritatively laid down that the Treaty signifies a partnership and requires the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith.

The basis for the concept of the partnership was stated by the Muriwhenua tribunal:

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 so doing 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 partnership.<sup>6</sup>

While the needs of both cultures must be provided for and compromise may be necessary in some cases to achieve this objective, the Treaty guarantee of rangatiratanga requires a high priority for Maori interests when proposed works may impact on Maori taonga.<sup>7</sup>

### **References**

1. "The Ngai Tahu Sea Fisheries Report 1992" (Wai 27) 5 WTR (Wellington) p 269
2. *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6)(*The Motunui-Waitara Report*)(Wellington, 1983) p 51
3. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22)(*Muriwhenua Fishing Report*)(Wellington, 1988) p 187
4. Above n 3 pp 230-232
5. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 693
6. Above n 3 p 192
7. See *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim* (Wai 17)(*Mangonui Sewerage Report*)(Wellington, 1988) p 60