

Maori Development Corporation Report

6 - Treaty Principles

6.1 - Introduction

Chapter 6

Treaty Principles

6.1 Introduction

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 remedial action by the Crown. Before it can find a claim to be well-founded, the tribunal must be satisfied of three things:

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

In previous reports the tribunal has discussed the issues arising in the interpretation of the English and Maori texts of the Treaty of Waitangi and made general observations about the broad intentions which underlie the Treaty's principles.¹ We do not intend to reiterate those matters.

The tribunal has also identified certain Treaty principles relevant to the claims into which it has inquired. Some are of a general nature and are readily transposable to novel claims. Others are more specific to the situation which was before the tribunal at the time and cast only a filtered light upon different circumstances.

In considering the present claims, the tribunal has been assisted by previously identified Treaty principles but has also found it necessary to seek more specific guidance in the Treaty itself and in the circumstances surrounding its acceptance. From our own analysis has emerged a Treaty principle of particular relevance to this claim. We identify that principle below and then summarise those previously identified Treaty principles which have also assisted our inquiry.

Maori Development Corporation Report

6 - Treaty Principles

6.2 - The Crown's Duty to Act Fairly and Impartially Towards Maori

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There is, in our view, a duty arising from the Treaty that the Crown act fairly and impartially towards Maori. This Treaty principle derives from the large concession made by Maori in 1840 of the gift of governance to the Crown, in return for which it is

reasonable to assume that Maori would receive good governance and laws and policies

that would be beneficial to them all. The guarantee of rangatiratanga then, with which the Crown responded, was a guarantee to all of the iwi, not to a selected number.

Implicit in this is a guarantee that the Crown would not, by its actions, allow one iwi an unfair advantage over another.

From the circumstances prevailing at 1840, Maori expectations of the solemn exchange

of promises made in the Treaty may be better understood. The arrival of Europeans had created tensions between Maori and Pakeha as well as between Maori themselves. Indeed, as between Maori, that is an understatement of the situation: the acquisition of muskets led to tribal warfare on a scale and of a type never before experienced.

The issue of inter-tribal rivalry was debated at Waitangi and had been discussed amongst Maori for several years previously. The missionaries had long endeavoured to

mediate between the tribes and, in explaining and promoting the Treaty, led Maori to believe that, on its acceptance, a new order would follow in which disputes would be settled and all tribes provided for fairly.

These assurances were influential and, at the debate at Waitangi, crucial. Many Maori there called upon Governor Hobson to "go" and to leave the country to the Maori. Hobson recorded that the speech of Tamati Waka Nene "turned aside" that feeling. After referring to the prevailing state of disorder, the chief said "O Governor! sit. I, Tamati Waka, say to thee, sit. Do not thou go away from us; remain for us, a father, a judge, a peacemaker".²

The onus of fairness and impartiality was thus created. Transported to modern times, the principle remains the same but is now to be applied in different circumstances. A critical feature of today's circumstances, however, is the continuing vitality of Maori tribal organisation and identification. From our own knowledge and experience we are able to confirm to the Crown a fact of which it is no doubt already aware: tribal

rivalry
remains healthy and dynamic.

The Court of Appeal has characterised the Crown's Treaty relationship to Maori as that of a fiduciary thereby setting a very high standard of performance for its Treaty obligations (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641). It is fundamental that a fiduciary must act fairly as between beneficiaries rather than allowing one of the group to be favoured. Whether or not the duty arises in a particular case, however, must depend on the circumstances. There may well be circumstances in which the Crown has good cause to promote the interests of one particular sector of the Maori community defined, for example, by need, gender, age or tribe, thereby positively discriminating between Maori groupings. However, where the Crown's purpose is to promote projects for the benefit of Maori generally, clearly it should act impartially and adopt fair procedures to achieve that end.

Waitangi Tribunal, Department of Justice, Wellington.

Maori Development Corporation Report

6 - Treaty Principles

6.3 - The "Principle of Reciprocity"

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In earlier reports the tribunal has identified, as deriving from articles 1 and 2 of the Treaty, an over-arching Treaty principle of paramount importance. Stated in full, it is that the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. By referring to this as the principle of reciprocity, we have sought to capture its basis in the solemn exchange that was agreed between Maori and the Crown. The tribunal has also already accepted that several vital concepts inhere in or are integral to that principle, namely:

- o the Crown obligation to actively protect Maori Treaty rights;
- o the tribal rights of self-regulation;
- o the rights of redress for past breaches; and
- o the duty to consult.

While elaborated in contexts removed from the present claims, we consider that the essence of the reciprocity principle and its inherent concepts may be readily transposed to the situation before us. Rather than repeat here the tribunal's earlier statements, a summary of extracts pertaining to the scope of this fundamental Treaty principle may be found in Appendix 6.

Waitangi Tribunal, Department of Justice, Wellington.

Maori Development Corporation Report

6 - Treaty Principles

6.4 - The Principle of Partnership

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This principle, established by the Court of Appeal and later elaborated by the tribunal, requires the Maori and Pakeha partners to the Treaty of Waitangi to act towards each other reasonably and with the utmost good faith. Again, we have found this principle instructive in the present context and have included judicial and tribunal statements about its requirements in appendix 6.

References

1. See for example Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22), (Waitangi Tribunal, Wellington 1988) pp 173-189 and Report of the Waitangi Tribunal on the Ngai Tahu Claim (Wai 27), (Brooker & Friend 1991), volume 2, pp 221-236
2. William Colenso, The Authentic and Genuine History of the signing of the Treaty of Waitangi, New Zealand, February 5 and 6 1840, (Wellington, George Didsbury, Government Printer 1890) p 27, cited by Bisson J in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 714

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