

# Maori Electoral Option Report

## 3 - Treaty Principles

### 3.1 - Introduction

Chapter 3  
Treaty Principles

#### 3.1 Introduction

This claim is concerned with the Maori right of political representation in Parliament and with its effective exercise by Maori. Such representation is a fundamental right of New Zealand citizens and is of the highest constitutional importance. The history of Maori political representation has been briefly sketched in the preceding chapter.

Under the present electoral law Maori electors have a choice as to whether they wish to be registered on the Maori electoral roll or the General roll. The significance of this choice is heightened by the fact that the former method of determining the outcome of an election was based on the FPP system; it is now determined by MMP. Whereas under the former law, Maori registered on the Maori electoral roll could be represented by only four members of Parliament, under MMP it is possible they could elect up to 12 and possibly more representatives. As a consequence, their influence in the deliberations of the House and, indeed, in the formation and composition of the Government, could be greatly enhanced.

The Maori seats have come to be regarded by many Maori as the principal expression of their constitutional position in New Zealand. They have been seen by Maori as an exercise, be it a limited one, of their tino rangatiratanga guaranteed to them under the Treaty of Waitangi. The prospect of increased political representation under MMP is viewed as an overdue and valuable enhancement of their rangatiratanga.

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### 3.2 - The Recent Privy Council Decision

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In a recent decision *New Zealand Maori Council v Attorney General* (unreported PC 14/93, 13 December 1993) (Broadcasting Assets) the Privy Council noted (p.3) that the "Treaty records an agreement executed by the Crown and Maori, which over 150 years later is of the greatest constitutional importance to New Zealand". In a later passage their Lordships, in discussing the principles of the Treaty, said (p.5) Both the 1975 Act and the State-Owned Enterprises Act refer to the "principles" of the Treaty. In their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty). With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms.

The tribunal in earlier reports has expressed similar views. Thus in the *Ngai Tahu Report* (1991, Vol. 2, 222-223) it noted that claims: fall to be assessed against the "principles of the Treaty" not just the literal terms (s 6). We are not confined to the strict legalities. There are good reasons for this. The Treaty itself is a remarkably brief, almost spare, document. It was not intended merely to regulate relations at the time of signing by the Crown and the Maori, but rather to operate in the indefinite future when, as the parties contemplated, the new nation would grow and develop. As we have said elsewhere (*Orakei Report* [1987], 137), the broad and general nature of its language indicates that it was not intended as a finite contract but rather as a blueprint for the future. As Sir Robin Cooke has said, "What matters is the spirit".

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### 3.3 - Article 3 of the Treaty

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The claimants rely primarily on article 3 of the Treaty, the effect of which they claim is to grant full citizenship rights, including those of political representation. Article 3 states:

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

Counsel for the claimants rightly observe that the rights and privileges of British subjects in 1840 were somewhat limited for most people in the context of citizenship. Moreover they were not the same for all citizens. As we have noted in the previous chapter, the franchise for the House of Representatives was granted to all males over 21 with freehold or leasehold estates of specific value in the New Zealand Constitution Act 1852. This provision did not exclude Maori males who owned the specified freehold or leasehold interest in land. But, since almost all Maori property was held communally, few were able to vote. Maori and Pakeha females alike were also disenfranchised. Clearly, all British subjects were not treated equally in terms of the right to vote. As is well known women in New Zealand in 1893 were the first British subjects to acquire the right to vote. In the case of Maori almost all remained disenfranchised until the passage of the Maori Representation Act 1867, which provided for the election of four members of the House of Representatives to represent the Maori race, one each from four electorates. Maori of 21 years and upwards including half-castes were eligible to vote. Thus was enacted a separate form of representation for Maori which has persisted to the present day. The fact that it is, and has been since 1867, different from that of Pakeha representation, does not mean that it is not embraced by article 3 of the Treaty. On the contrary, the extension to Maori under article 3 of all the rights and privileges of British subjects must necessarily include the rights of political representation conferred from time to time on Maori by the New Zealand legislature. While article 3 speaks of British subjects it necessarily extends to all Maori who are New Zealand citizens and eligible to vote. It is difficult to imagine a more important or fundamental right of a citizen in a democratic state than that of political representation. This right is clearly included in the protection extended by the Crown to Maori under article 3. It is presently found in the Electoral Act 1993 which enables Maori to choose whether to enrol on the Maori roll or the General roll for elections now to be conducted on the basis of MMP.

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### 3.4 - Privy Council Discussion of Treaty Principles

#### 3.4 Privy Council Discussion of Treaty Principles

In submissions to the tribunal both counsel for the claimants and for the Crown invoked and relied on certain parts of the following passage in the judgment of the Privy Council in the recent Broadcasting Assets case. This passage follows immediately after the earlier cited passage in which their Lordships discuss the principles which underlie the Treaty:

Foremost among those "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. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual co-operation 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. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example, in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility .

Counsel for the claimants submitted on the basis of the foregoing passage that the nature of the Crown's Treaty obligation to protect the citizenship rights of Maori amounts to a guarantee by the Crown, but that such obligation is not absolute and unqualified. While their Lordship's comments were perhaps directed principally at the article 2 provisions they would appear to apply equally to article 3, as the Crown undertaking to protect and preserve Maori property (including the Maori language) as part of taonga was in return for the Crown being recognised as the legitimate government of the whole nation by Maori. In article 3 the Queen, in consideration of the concessions made to the Crown in articles 1 and 2, extends to Maori her royal protection and imparts to them all the rights and privileges of British subjects. The Crown's obligation to protect those rights, which today include the Maori rights to

political representation in the Electoral Act 1993, is readily apparent. That there is such a duty on the Crown was conceded by Crown counsel who submitted, after citing the foregoing passage from the Privy Council judgment, that the Crown's obligation to protect Maori citizenship rights and rights to equality is similarly not an unqualified one. He contended that the obligation rests on the Crown to take such steps as are reasonable having regard to, for example, economic and social circumstances. We will return to this contention later in Chapter 4 of this Report.

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### 3.5 - Principles Articulated by the Privy Council

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In the passage cited from the judgment of the Privy Council in 3.4 their Lordships have articulated two Treaty principles. The first is the obligation of the Crown to protect rights conferred on Maori under the Treaty. The second is that the relationship between Maori and the Crown envisaged by the Treaty should be founded on reasonableness, mutual co-operation and trust. This relationship was expressed by the Court of Appeal as arising from the partnership which the Treaty signified. In summing up the findings of the Court of Appeal in the New Zealand Maori Council case, Sir Robin Cooke noted that, approaching the case independently, all members of the Court had agreed that:

... the principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith<sup>2</sup>.

The tribunal has referred frequently to the Treaty principle which requires the Crown actively to protect Maori Treaty rights. One example from the Manukau Report (1985) will suffice:

The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them. The possessory guarantees of the second article must be read in conjunction with the Preamble (where the Crown is "anxious to protect" the tribes against the envisaged exigencies of emigration) and the Third Article where a "royal protection" is conferred. It follows that the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights.<sup>3</sup>

There can be no doubt that the obligation on the Crown actively to protect Maori Treaty rights extends to the rights protected under article 3 and in particular to the right of Maori political representation, which is one of the most important rights, if not the most important included in this article.

In the same way the tribunal has on various occasions applied the partnership principle enunciated by the Court of Appeal in the New Zealand Maori Council case.<sup>4</sup> It is clearly applicable in the present case.

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### 3.6 - The Treaty Guarantee of Maori Rangatiratanga

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In addition to relying on the provisions of article 3 and the obligations of the Crown as enunciated by the Privy Council in the Broadcasting Assets case, counsel for the claimants also invoked the Crown guarantee to Maori under the Treaty of their tino rangatiratanga more particularly stemming from the Maori text of the Treaty. It was claimed that rangatiratanga embraces the right of self-determination which, in the context of this claim, means the form and nature of political representation which gives Maori the maximum control over their political representation that is consistent with the provisions of the Electoral Act 1993. The Maori seats, it was submitted, represent the closest form of political self-determination currently available to Maori. Therefore, it is claimed, the Crown is under an obligation to ensure all is done to enable Maori to achieve the maximum number of Maori seats through the exercise of the imminent Maori electoral option. Counsel for the claimants recognised that the Crown's obligation is not absolute and unqualified but, in the words of the Privy Council (p.5), it must be "reasonable in the prevailing circumstances".

This claim, which appears to be based on article 2 of the Treaty, was raised for the first time by claimants' counsel in her closing address after Crown counsel had completed his submissions. It raises issues of some complexity which require fuller amplification and full discussion by both counsel for claimants and the Crown before the tribunal could form a concluded opinion on the matter.

It may for instance also be arguable that the provisions in the Electoral Act 1993 greatly enhancing the extent of political representation of Maori in Parliament and, hence, the rangatiratanga of Maori, constitute a taonga in terms of article 2 of the Treaty and are entitled to Crown protection on that account also. But this possibility was not raised before us and we accordingly express no opinion on it.

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### 3.7 - International Covenants and Conventions

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Counsel for the claimants in her opening submission drew to the notice of the tribunal various international covenants and conventions concerned with human rights, civil and political rights and racial discrimination. She also emphasised the draft United Nations Declaration on the Rights of Indigenous Peoples which is concerned with the autonomy and right to self-government of indigenous peoples. In an affidavit filed in evidence Sir Paul Reeves refers to the growing relevance and importance of this development. However, it remains to be seen what final form the draft declaration ultimately takes. As Crown counsel pointed out it is, at present, a draft document only.

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### 3.8 - Findings on Treaty Principles

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The tribunal finds that the Crown is under a Treaty obligation actively to protect Maori citizenship rights and, in particular, existing Maori rights to political representation conferred under the Electoral Act 1993. This duty of protection arises from the Treaty generally and in particular from the provisions of article 3.

The tribunal further finds that the partnership relationship the Treaty envisages should be founded on reasonableness, mutual co-operation and trust. The Crown in carrying out its obligations is not required, in protecting Maori citizenship rights to political representation, to go beyond taking such action as is reasonable in the prevailing circumstances.

#### References

1. Report of the Royal Commission on the Electoral System, Government Printer, 1986, para 3.99.
2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, (CA) 667.
3. *Manukau Report* (1985), 70. For other examples see for instance *Orakei Report* (1987), 191; *Te Reo Maori Report* (1986), 21; *Ngai Tahu Report* (1991), Vol. 2, 240.
4. See for instance *Muriwhenua Fishing Report* (1988), 192; *Ngai Tahu Report* (1991), Vol. 2. 242-3.

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