chapter |

11.

Te Tiriti o Waitangi

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Key issues:

- The Commission and the Treaty
- Crown responsibilities under the Treaty
- Consultation with Maori
- Changes to statute.

Introduction

1. A significant element of the Commission's processes was the consultation with Maori, described in detail in appendix 1, section 3.6 (Maori Consultation: the process). This chapter is not about the Maori response, which is recorded throughout the Report, notably in appendix 3, section 4 (Analysis of the Maori Consultation). The present chapter deals with the impact of the Treaty on present and future uses of genetic modification in this country. It also addresses the manner in which Maori and Treaty issues are dealt with in the Hazardous Substances and New Organisms Act 1996 (HSNO).

2. The Treaty of Waitangi is an agreement signed initially[1] on 6 February 1840 at Waitangi, in the Bay of Islands, by representatives of the British Crown and of Maori. Under the Treaty, Maori agreed to give the Crown rights to govern and promote British settlement, and the Crown guaranteed Maori protection of their interests, and full citizenship rights.[2]

3. The importance of the Treaty as a founding document in New Zealand history has been recognised from the beginning, particularly in the Maori community.[3] However, as a matter of law and enforcement in the courts, it came to prominence in the latter half of last century. The courts have described the Treaty relationship as a partnership,[4] and a jurisprudence of formulating "principles of the Treaty" has evolved. These principles have emerged from decisions of the Waitangi Tribunal (a standing commission of inquiry charged with investigating

breaches of the Treaty), from the courts, and, on occasion, from government publications.[5] Agreement on what the principles are, and the precise form in which they should be stated, is still developing.

4. However, two fundamental principles were referred to in many of the submissions we received on this matter. For this reason, they are noted here as Treaty principles particularly relevant to the debate on genetic modification. They are:

- *active protection*: the Crown has a duty of active protection of Maori interests
- *cooperation*: the Treaty requires each party to act reasonably and in good faith towards the other; this requires the Crown to consult with Maori so as to make informed decisions about matters of significance.

The Treaty and the Commission

5. It became clear that some submitters saw the Commission itself, and its processes, as in breach of the Treaty of Waitangi. They referred to matters that preceded the establishment of the Commission, and on which we are therefore unable to comment, for instance lack of consultation with Maori about the terms of reference, and about who should be appointed as Commissioners.[6] Others focused on matters outside the Warrant, such as a perceived obligation to "implement" the Treaty and effect constitutional change before examining any questions of genetic modification.[7]

6. Some submitters referred to the need to acknowledge rangatiratanga, particularly over Maori resources.[8] Another submitter criticised the legislation governing the Commission (the Commissions of Inquiry Act 1908) as in breach of the Treaty because its provisions were seen as not permitting full and active consultation with Maori.[9] It is beyond our brief to comment specifically on these points.

7. Criticism of the Commission's processes was based on the propositions that the Commission was an agent of the Crown and, as such, obligated to take reasonable steps to consult with Maori, in terms of Treaty principles, so as to inform itself sufficiently. As to the first, legal advice from the Crown Law Office was that the Commission was not an "agent" of the Crown. The test of Crown agency has two parts:

- whether the functions of a body properly belong within the province of government, and
- the nature and degree of the control that Ministers and other central government agencies exercise over the body.[10]

8. Crown Law advised that, while the first part was satisfied, the second and more important test was not. From the terms of the Warrant and the manner of the Commission's appointment (ie by the Governor-General in Council) it is clear that the Commission was expected to carry out its work and reach its conclusions independently of government, which is how, in fact, we have operated. The Commission's independence, in the Crown Law Office's opinion, precluded it from being an "agent" of the Crown.

9. However, even were the legal position otherwise, the Commission is confident that it more than fulfilled the requirements of reasonable consultation for the purpose of informing itself before preparing this Report. As previously indicated, the way in which we set out to do this is recorded in appendix 1, section 3. With the help of views obtained at an initial scoping hui, the Commission arranged an extensive programme of information workshops and hui. Maori also participated in public meetings, formal hearings and the public submissions process. Nevertheless, concerns were voiced that the time frame imposed by the Commission's tight reporting requirements would impair the consultation process because of absence of sufficient information and knowledge about the issues, and the lack of time to consider and respond to them.

10. In part, the workshop programme was a response to these concerns, which the Commission heard less frequently as the consultation proceeded. The Commission wishes to add that, in the initial stages of the inquiry, it heard similar concerns at public meetings; again, they were voiced less often as the nature and extent of the Commission's consultation process became apparent.

Crown responsibilities under the Treaty

11. The Warrant sought views on the Crown's responsibilities in relation to genetic modification under the Treaty. There has been some divergence in submissions about what this part of the Warrant might mean:

- that Maori views have "no primacy" resulting from the Treaty, but that Maori had established a "community of interest", which required their views to be taken into account along with others[11]
- that the Crown's obligations in this area were unclear[12]
- that it was premature to address this matter while such cases as the WAI262 claim to the Waitangi Tribunal, or the appeal to the High Court (the *Bleakley* case[13]), were still outstanding.[14] Regardless of that, however, we are required to report on Treaty obligations. So far as the *Bleakley* case is

concerned, in fact the High Court decision became available before the Commission completed its work and has been taken into account.

12. There were written and oral comments, in both Maori and non-Maori submissions, that the Treaty is a relevant or essential consideration.[15] For the Maori Congress [IP103] it was, in fact, the starting point for consideration. As far as the obligations arising from the Treaty are concerned, there has been a measure of consistency in submissions from Maori and non-Maori sources. Both have referred to the duty or responsibility for active protection of Maori interests, and the duty or responsibility to consult.[16] Reference has also been made to duties of equity and redress, acting in good faith, reasonableness and cooperation.[17] As one submitter has put it:

> … the Crown's responsibilities under the Treaty of Waitangi mean relating issues about GM back to the principles of partnership, protection and participation …[18]

13. Other submissions have referred to what could be called an economic element in applying the Treaty. For some, a perceived lack of clarity about the principles means that a pragmatic approach is needed, calling for Crown action on behalf of all New Zealanders to help secure national benefits through genetic modification.[19] But there has also been comment that:

> The Treaty of Waitangi requires the Crown to promote the well-being and economic prosperity of all New Zealand's peoples. A strategy in which the Crown approves and encourages the responsible research, development and application of genetic modification in New Zealand is consistent with this requirement. The desire of Maori to place genetic modification technologies under fair scrutiny should be supported.[20]

14. As noted, certain points emerge as particularly relevant to our inquiry, namely the principles of consultation, active protection of Maori interests, and of partnership. In addition, there is the pervasive principle that the Treaty calls for reasonableness and cooperation.[21] The obligation to consult requires reasonable steps to be taken to consult. The principle of partnership requires the Treaty partners to cooperate to make the partnership work.[22]

15. We consider that the responsibilities to consult and to actively protect Maori interests are closely linked: consultation is needed, for instance, to identify the relevant interests and how best to protect them. We therefore discuss aspects of the process of consultation briefly here. Discussion of the cultural concepts underpinning the Maori approach to consultation is contained in chapter 3 (Cultural, ethical and spiritual issues).

Consultation

Consultation requirements

16. Crown consultation with the Maori Treaty partner is a fundamental part of any process for dealing with questions of genetic modification. Over a decade ago, the Court of Appeal stated:

> We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues.[23]

17. We have looked at what such consultation might involve. As a matter of law, the Courts have indicated that,[24] in general, consultation means:

- providing information
- providing an opportunity to comment on a proposal
- that the decision-maker maintains an open mind in order properly to consider the views expressed.

18. We note that the importance of consultation between the Treaty partners was raised at public meetings, and at every hui in our consultation process, for instance by Sir John Turei (Tuhoe) at Orakei Marae.

19. We were reminded at our formal hearings that consultation is not the same as agreement, or even negotiation.

20. The responsibility to consult is not unlimited. In 1987 the Court of Appeal said:

> ... the notion of an absolute open-ended and formless duty to consult is incapable of practical fufilment and cannot be regarded as implicit in the Treaty. I think the better view is that 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 that it has had proper regard to the impact of the principles of the Treaty.[25]

21. The amount of consultation required to meet this test will vary.[26]

Practical difficulties

22. We have heard about the difficulties of applying these principles in practice. For instance, applicants to the Environmental Risk Management Authority (ERMA) who have been advised to consult with Maori about their proposals have spoken of their difficulty in knowing whom to consult. Cost has also been a concern.[27]

23. On the other hand, there are Maori concerns that consultation is often carried out too late, is too brief and that, on occasion, isolated individuals have been expected to respond on behalf of one or more hapu or iwi, or sometimes on a national basis. Dr Mere Roberts, of Nga Kaihautu Tikanga Taiao, an advisory committee of ERMA, spoke of the "almost impossible task" of speaking on behalf of Maori given current time and resource constraints, and was also concerned about the pressures and difficulties of "the solitary Maori on an IBSC".[28] Other submissions stressed the importance of acknowledging Maori scientific knowledge, and the need to avoid regarding Maori views solely as a "cultural" response to consultation.[29] Moana Jackson spoke of the perception that:

> … the views of our people are at best a cultural clip-on, and at worst irrelevant to the "real" scientific, ethical, and intellectual issues that need to be resolved. Our people are being silenced even as they are overwhelmed with cultural sensitivity or embraced in Treaty partnership.[30]

24. It is outside our brief to comment in a general way on consultation processes with Maori. However, in this chapter, and also in chapter 6 (Research), we comment on aspects of consultation with Maori specifically in the context of genetic modification issues.

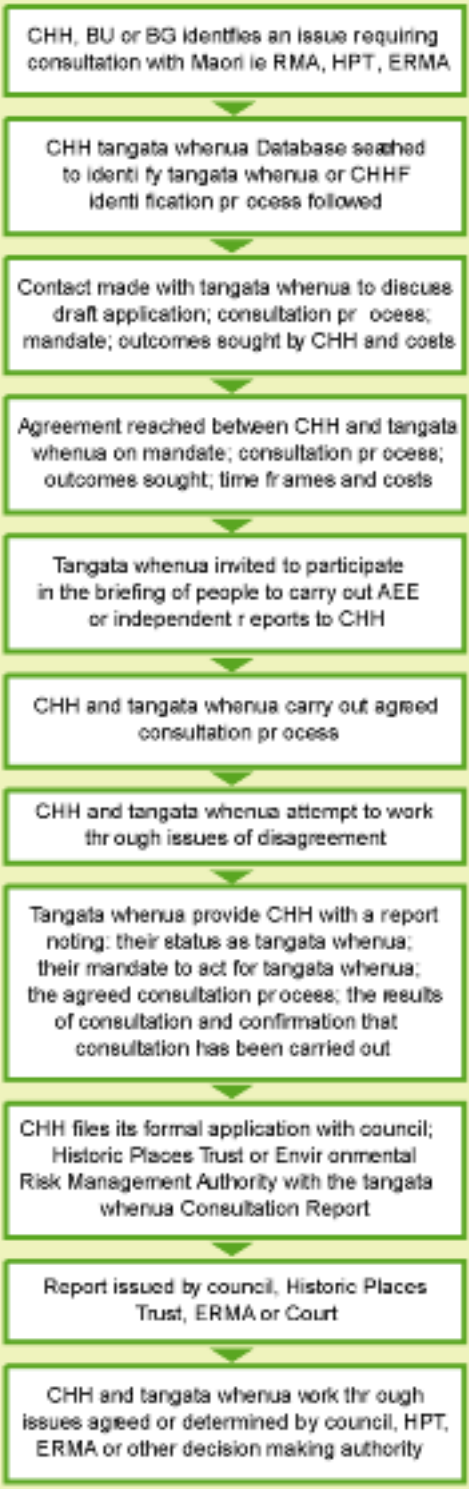
Successful consultation

25. We heard of successful consultation processes. An outline of the process used by Carter Holt Harvey is contained in the diagram overleaf, which was attached to the company's submission [IP17].[31] The key elements of the process are that:

- tangata whenua are identified with the assistance, where possible, of the consent authority, eg ERMA
- a consultation process is agreed with the tangata whenua including outcomes, time frames and costs
- consultation is carried out before an application is lodged with the consent authority
- where there is an "ongoing relationship" a memorandum of understanding is developed with the tangata whenua group.

26. The importance of consulting the group or groups with manawhenua over a relevant area is apparent from the background to the *Bleakley* case referred to in paragraphs 34 to 41. A valid mandate cannot be obtained from those who have no direct responsibility for the area in question. We have discussed this issue in chapter 6 (Research).

Best Practice Consultation Process as used by CHH and tangata whenua



Key Principles:

1. Both parties act with utmost good faith;
2. Tangata whenua confirm their mandate;
3. Tangata whenua define the appropriate consultation process and reach agreement with CHH;
4. CHH meets reasonable costs based on both internal and external benchmarks;
5. CHH provides all information that it will r ely on during a formal application process;
6. Consultation is carried out before a formal application is lodged;
7. CHH attempts to resolve any areas of disagreement;
8. Tangata whenua confirm consultation has been carried out;
9. Unresolved issues are referred to the decision making authority for resolution.
10. A Memorandum of Understanding will be considered if there is more than one application, or there is a need for ongoing contact with tangata whenua.

Key:

AEE - Assessment of environmental effects
BG - Business group
BU - Business unit
CHH - Carter Holt Harvey
CHHF - Carter Holt Harvey Forests
ERMA - Environmental Risk Management Authority
HPT - Historic Places Trust
RMA - Resource Management Act

27. Equally, jointly building an adequate and agreed time frame for the consultation and discussing costs before they are incurred, together with consultation before a decision is made on an application or other project, are likely to be vital steps in a successful process. The significance of this last step was referred to by the Parliamentary Commissioner for the Environment [IP70] when he noted that in his experience, for many iwi and hapu, consultation is seen as "a reaction to someone else's initiative" rather than "full and equal involvement from the outset in considering the options and determining the kaupapa".[32]

28. Attention to devising a jointly acceptable consultation process may be time-consuming initially, but, if done well, can result in direct responses in later cases as both trust and a knowledge base in each party is established. A memorandum of understanding is one way to formalise this. We were impressed by the example provided by Carter Holt Harvey.

29. There will be other examples of successful consultation by the Treaty partners, and certainly there are publications from the public sector with suggestions of how to approach consultation.[33] We think the time has passed when parties could credibly say that they do not know how to undertake appropriate consultation, or where to begin.

30. We envisage that Toi te Taiao : the Bioethics Council (for further details, see chapter 14: The biotechnology century) will have a role in drawing up a framework of principles for both Treaty partners. This framework may cover consultation to bring the elements of "best practice" together in one place. In addition, we envisage that Nga Kaihautu Tikanga Taiao, the Maori advisory body of ERMA, will continue to look at specific applications made to that body, and that local iwi will be consulted both through IBSCs or their equivalent, and directly where any proposals affect their locality.

Giving statutory effect to the principles of the Treaty

31. So far as relevant, sections 5, 6 and 8 of HSNO provide:

> 5. **Principles relevant to purpose of Act** – All persons exercising functions, powers, and duties under this Act shall, to achieve the purpose of this Act, recognise and provide for the following principles:
>
> (a) …
>
> (b) the maintenance and enhancement of the capacity of people and communities to provide for their own economic, social and cultural wellbeing and for the reasonably foreseeable needs of future generations.

> 6. **Matters relevant to purpose of Act** – All persons exercising functions, powers, and duties under this Act shall, to achieve the purpose of this Act, take into account the following matters:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, valued flora and fauna, and other taonga: ...
>
> 8. **Treaty of Waitangi** – All persons exercising powers and functions under this Act shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

32. The Commission heard submissions regarding the expression "shall take into account", for example from Te Runanga o Ngai Tahu [IP41], which in its written submission said:

> ... there needs to be a thorough review of HSNO in relation (to) provision for tangata whenua. The minimum provision in relation to iwi concerns values should be to "recognise and provide for".[34]

33. Although this submission described "recognise and provide for" as the minimum acceptable formula, reference to cognate statutory provisions and case law shows that this would provide maximum protection. Further, discussion with Ngai Tahu representatives during their oral presentation failed to identify any intermediate position between "take into account" and "recognise and provide for" (or wording to similar effect).

34. In the *Bleakley* case, the High Court discussed the meaning of the statutory expressions in the sections set out above, and the distinctions between them. Justice McGechan said:

> There is a deliberate legislative contrast between s.5 "recognise and provide for" and s.6 "take into account". When Parliament intended that actual provision be made for a factor, Parliament said so. One does not "provide for" a factor by considering and then discarding it. In that light, the obligation "to take into account" in s6 was not intended to be higher than an obligation to consider the factor concerned in the course of making a decision – to weigh it up along with other factors – with the ability to give it considerable, moderate, little, or no weight at all as in the end in all the circumstances seemed appropriate.[35]

35. Although written with reference to sections 5 and 6, this reasoning must apply equally to section 8, dealing with the principles of the Treaty. In this context, the wording "take into account" is a commonly used statutory formula, found also in section 8 of the Resource Management Act 1991. Sometimes, a stronger form of words has been used, the State-Owned

Enterprises Act 1986, for example, stating in section 9:

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

while section 4 of the Conservation Act 1987 provides:

> The Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

36. Although semantically submitters may have been correct in saying that the last example is merely the State-Owned Enterprises Act formula stated affirmatively, it appears to represent the high-water mark of statutory recognition of Treaty principles to date.

37. In addressing the submissions seeking a stronger formula, a distinction needs to be drawn between section 8 considerations, and those dealt with in sections 5 and 6.

38. As noted, section 5(b) requires the Authority to "recognise and provide for", among other things, the maintenance of the capacity of communities to provide for their economic, social and cultural wellbeing. Understandably, section 5(b) did not feature prominently in the judgments in the *Bleakley* case. It is not specific in its applicability to Maori or any ethnic group.

39. Regarding section 6, the High Court in *Bleakley* accepted that, in general, references to taonga would include intangible spiritual and cultural aspects, both as related to tangible taonga, and in their own right.[36] In relation, specifically, to the use of the term in section 6(d), Justice McGechan said the issue was not so simple. The concept had been transplanted from the Resource Management Act, with its emphasis on physical considerations rather than the need to consider intangible and spiritual beliefs in their own right. However, in accordance with usual concepts, and consistently with the Treaty, the Judge was satisfied that the reference to "other taonga" was meant to include intangible cultural and spiritual taonga. Justice Goddard reasoned that the addition of the words "and their culture and traditions" to "Maori" was designed deliberately to underscore the special nature of the relationship of Maori ("as opposed to any other group") with the relevant matters listed in the subsection. However, like Justice McGechan, she made it clear that the matters to be taken into account under section 6(d) were not amenable to classification as purely physical entities: "some are essentially spiritual; some are also intangible; all have intrinsic value to Maori".

40. In the result, the High Court interpreted section 6(d) as requiring those to whom the section is directed to take into account, not only the relationship of Maori to their ancestral lands, sites and other taonga of a tangible kind, but also

Maori cultural and spiritual values not specifically linked to physical or tangible features.

41. From the *Bleakley* judgments it is clear that, given the facts of the case, had the Authority accepted the evidence about particular spiritual and cultural values of an intangible kind, and decided to give effect to them, the only available outcome would have been to decline the application, regardless of whatever merit it might have had, such as research or health benefits. It follows that, had section 6 required the Authority to "give effect" to Maori spiritual and intangible values, and had the application been found to be in conflict with them, then, regardless of merit in other respects, the Authority would have been bound to decline the application.

42. We are unable to recommend that section 6 should be amended so as to afford even stronger protection for Maori values. It would be contrary to the spirit and the principles of the Treaty were the spiritual and cultural values of either Treaty partner given pre-emptive standing. In our view, the appropriate framework for the consideration of applications under HSNO is that the spiritual and cultural values of all New Zealanders ought to be taken into account, as envisaged by section 5.

Incorporating reference to the Treaty in legislation

43. The manner in which reference to the Treaty of Waitangi ought to be incorporated raises different issues. Legislation has given steadily increasing significance to the concept of the principles of the Treaty during the quarter century that has elapsed since enactment of the Treaty of Waitangi Act 1975. As indicated earlier in this chapter, definition of what constitutes the principles continues to evolve, mainly through pronouncements of the courts and the Waitangi Tribunal, and academic discussion. As stated, a number are regarded as well settled. We do not see why legislation seeking to incorporate such fundamental concepts need be half-hearted or ambiguous. In our view the principles should be incorporated in plain terms, and not left in the potentially token state of being "taken into account". We would favour amendment of section 8 so that, on the precedent of the Conservation Act, it is clear that effect is to be given to the principles of the Treaty. We note the High Court has said that, since the Treaty was designed to have general application, such general application "must colour all matters to which it has relevance",[37] so it may be that what we are proposing goes no further than what, in many cases, would be regarded as the appropriate legal interpretation.

Recommendation 11.1

that section 8 of the Hazardous Substances and New Organisms Act 1996 be amended to provide that effect is to be given to the principles of the Treaty of Waitangi.