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# *The Treaty of Waitangi as it Applies to Reserves Administration*

## **Why the Treaty Applies**

The Reserves Act 1977 is one of the Acts contained in the First Schedule to the Conservation Act 1987. S.4 of the Conservation Act requires that the Act should be interpreted and administered as to give effect to the principles of the Treaty of Waitangi. The Court of Appeal in *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 held that the obligation in s.4 applied to each of the Acts in the First Schedule insofar as it was not inconsistent with the specific Act.

## **Treaty Obligation**

Administering bodies under the Reserves Act derive their authority over reserves from the Reserves Act. Accordingly, in performing functions and duties under the Reserves Act, the administering body has a duty similar to the Crown's to interpret and administer the Reserves Act to give effect to the principles of the Treaty of Waitangi. It is important to note that the obligation relates to the principles of the Treaty (see below) rather than to its Articles.

As the obligation relates to the administration of the Act, all reserves administered under the Reserves Act – whether they derive from the Crown or otherwise – are subject to the s.4 of the Conservation Act obligation.

## **Principles of the Treaty**

The Waitangi Tribunal and Courts have identified a number of principles. The first three principles are based on Articles I, II, and III of the Treaty:

(i) *Government (Kawanatanga)*

The authority to make laws for good order and security of the country subject to any duty imposed on the Crown by its responsibilities and obligations to Maori preserved under the Treaty.

(ii) (a) *Iwi Authority and Control over Taonga (Tino Rangatiratanga)*

(b) *Exclusive and Undisturbed Possession (Mana Maori)*



These two concepts reflect the Maori and English versions of the Treaty. The former is understood to mean the right of Maori to exercise full iwi authority and control over their lands, resources and taonga; the English version refers to the right of Maori to exclusive and undisturbed possession of their lands, forests and fisheries.

(iii) *Equality and Privileges of Citizenship (Oritetanga)*

The Courts and Waitangi Tribunal have also identified the following principles:

(iv) *Partnership and Relationships (Whakawhanaungatanga)*

Because the Treaty provides for a relationship described as “akin to partnership” between Maori and the Crown, this principle requires the parties to act towards each other reasonably and with utmost good faith in accordance with Treaty obligations.

(v) *Guardianship/Custodianship/Stewardship (Kaitiakitanga)*

The right of Maori to undertake their duty of tiakitanga over their own land, resources and taonga.

(vi) *Active Protection (Tautiaki Ngangahau)*

The Crown’s duty is to ensure active protection of taonga for as long as Maori wish.

(vii) *Duty to be Informed (He Here Kia Mohio)*

The duty to make informed decisions through consultation.

(viii) *Redress of Treaty Claims and Avoid Future Breaches (Whakatika i Te Mea He)*

The duty to remedy past breaches of the Treaty and to prevent further breaches.

### **Obligation to Consult with Maori**

The Council must consult with and have regard to the views of iwi or hapu before undertaking action and making decisions about reserves for which it is the administering body.

In some cases the Council may be able to make an informed decision without consultation. It should ensure that it gives proper consideration to all relevant information within the Council’s possession. Care is also needed in identifying whether there are gaps in information. If so, it should consider whether it could arrive at a better decision by undertaking consultation first.

Maori have the same rights to object or make submissions on a proposal under the Act as any other members of the public. This does not, however, substitute for consulting with iwi or hapu about a proposal.

#### ***Nature of Consultation***

Consultation is not a mere informing, but a meaningful discussion between parties. The party consulting must ensure that the party consulted has all the relevant information. The Council must be prepared to listen to the party being consulted and, if necessary, change its views.

Consultation is not a negotiation, nor does it necessarily imply that the Council has to accept the views of the iwi or hapu.

#### **Dual Considerations**

In meeting its responsibilities under the principles of the Treaty of Waitangi, the Council cannot undertake actions or make decisions which are contrary to the purposes of the Reserves Act (see Chapter 3 “Interrelationship Between the Reserves Act and Other Statutes”).

The Council also cannot do anything contrary to the primary and secondary purposes for which the reserve in question is classified.

As far as possible, however, both s.4 Conservation Act and Reserves Act requirements should be accommodated.

#### ***Dual Responsibility***

The Minister of Conservation, and the Council as the reserve administering body, both have obligations under s.4 Conservation Act.

The dual responsibility is especially relevant in cases where, under the Act, the Council is seeking a consent, approval or other action by the Minister. The Council must fulfil its Treaty obligation and satisfy the Minister that it has done so.

The Minister may, however, have additional Treaty responsibilities because of the special relationship between the Crown and its Treaty partner. Those responsibilities pass to the Council or other delegatee where a power is being exercised under delegated authority from the Minister (see Chapter 2).

#### ***Treaty Claim Settlement***

Legislation giving effect to the settlement of claims under the Treaty of Waitangi Act 1975 may impact on the administration of land held under the Reserves Act within tribal areas.

Two examples are given below.



#### Waikato Raupatu Claims Settlement Act 1995

Under s.11 of this Act a right is given to the Tainui trust to acquire “residual Crown land” which is available for disposal, except in certain circumstances.

This provision will effect the sale of revoked reserves vested in the Crown or derived from the Crown (see Chapter 9) and the use of reserves (vested in or derived from the Crown) in exchanges within the Waikato claim area.

As the power of **sale** of these reserves rests with the Crown this will not affect Councils directly. It will, however, need to be taken into account in formulating Council **exchange** proposals on vested reserves that are derived from the Crown.<sup>1</sup>

In effect it means that the area of reserve proposed to be exchanged must first be offered to the Tainui Trust in exchange for any other land held by the Tainui Trust which is suitable for the purposes of a reserve of the same classification.

#### Ngai Tahu Claims Settlement Act 1998

Under Part 9 of this Act, Te Runanga o Ngai Tahu is given a right of first refusal on the disposal of “relevant land” within its takiwa (tribal area).

The following lands are covered by the above phrase if they were, on commencement of the Act (1.10.98):

- vested in the Crown or held by the Crown under any Act
- vested in an administering body under s.26 or s.26A Reserves Act
- vested under any other Act to hold and administer as a reserve under the Reserves Act (if the land would revert to the Crown if its status as reserve were subsequently revoked).

The vesting of land under s.26 or s.26A Reserves Act (see Chapter 10) does not itself constitute a “disposal” for the purposes of the Ngai Tahu Claims Settlement Act.

“Disposal” includes:

- transfer of an estate in fee-simple
- grant of a lease if the terms (including rights of renewals or extensions, whether in the lease or granted separately) is or could be, for 50 years or longer.

As the power of sale of “relevant land” rests with the Crown, a disposal by way of sale will not directly affect Councils. Councils are however, required to give a right of first refusal to any lease of relevant land which constitutes a “disposal” (as defined above) – see Chapters 7 and 9.



**1** Legal advice indicates that exchanges of Crown or Crown-derived reserves are included in the disposal of “residual Crown land”.

The right of first refusal does not apply to “relevant land” disposed of by way of exchange under s.15 Reserves Act. The administering body (if the reserve to be exchanged is not vested in the Crown) must, however, give notice in accordance with s.51 Ngai Tahu Claims Settlement Act, not later than 10 working days before the disposal of the land.