

TREATY STANDARDS AND DEVELOPMENT

The issue of Treaty of Waitangi development rights has been raised before us in this inquiry. This reflects the significance of the issue for those iwi and hapu of the Central North Island inquiry region that had retained significant properties and taonga by the late nineteenth century and wished to utilise them to take advantage of new economic opportunities. They have raised a number of generic issues before this Tribunal, based on a claimed development right relating both to their own properties and to wider economic opportunities. Both the claimants and the Crown have referred us to previous Tribunal reports and court findings relevant to this Treaty right of development, which examine whether such a right exists (and, if so, to what extent) and what, if any, obligations are attached for the Crown. They asked us to consider how these findings might be applied in our inquiry region. In particular, the Crown requested some practical delineation of any such right for its guidance in the future. Our starting point, therefore, is a consideration of thinking on this issue to date, before we move on to consider how it might be applied to our region.

A TREATY RIGHT OF DEVELOPMENT?

The claimants' case

The claimants submitted to us that a Treaty right of development is now well-established by the Tribunal and the courts. This right exists at a number of levels. At its most basic, it is part of the property rights guaranteed to Maori

for their various properties (including their taonga). This guarantee includes the right of Maori to develop their properties as they choose, including the application of new technologies and knowledge not known to them in 1840. The properties and taonga are those specified in the Treaty texts, as well as those which the Tribunal has subsequently found to be taonga.

Claimants submitted that in this inquiry region, in particular, natural resources have been vital for development purposes. The guarantee of tino rangatiratanga meant that they were part of the properties guaranteed by the Treaty. The well-established Crown duties of active protection of these properties and taonga, and active protection of tino rangatiratanga over them, also apply to the Treaty development right inherent in them. In this instance, active protection of tino rangatiratanga involves the Crown's facilitation of Maori control over development according to their preferences and custom.

Claimants submitted that the Treaty development right entails more than simply a right to develop their properties. They based this submission on the principles of partnership, active protection, and reciprocity, and on the expectation that Maori should be able to participate in new opportunities and share in their benefits. In the claimants' view, this extends to resources and modern economic enterprises not known or necessarily foreseen in 1840. Further, the Treaty right of development involves a more general right of development as a people, including social, cultural, political, and economic development. As with the development of properties and taonga, the Treaty

guarantees Maori autonomy – the right to develop as they choose – and tino rangatiratanga over these other kinds of development.

Claimants agreed that it is not easy to assess how the Crown fulfilled its obligations to protect a Treaty right of development in the varying circumstances of the nineteenth and twentieth centuries. Any such assessment requires a balancing of interests and a consideration of what was reasonable at the time. However, the property rights guaranteed by the Treaty, including the development right inherent in them, cannot be balanced out of existence. The Treaty right of development and the Treaty's guarantee of tino rangatiratanga must also give iwi and hapu the right to control and participate in the development of their properties and taonga, and of themselves as a people.

The Crown's case

The Crown accepts that a Treaty right of development for properties and taonga is guaranteed in the Treaty and that this includes a right to utilise them using new technologies and knowledge. However, this right is no more than the general right available to any property owner, and it does not impose a positive obligation on the Crown. The Crown submitted that the Treaty right of development is often expressed in broad and aspirational ways and that it requires more practical guidance as to the extent of the right so it can carry out its Treaty obligations. The Crown proposed that we follow the view of the Court of Appeal in *Te Runanganui o Te Ika Whenua Inc v Attorney-General* in this respect, and the minority opinion in the Waitangi Tribunal's *Radio Spectrum Final Report*. In the Crown's view, these decisions show that any Treaty development right is limited to aboriginal or customary rights and usages as they existed or could be reasonably foreseen when the Treaty was signed in 1840, and to the application of new technologies and knowledge to those rights and usages.

The Crown also submitted that the Treaty right of development must be balanced with other Treaty rights and with the rights and interests of all New Zealanders. In doing so, a 'minimal infringement' of Maori rights and interests (including a development right) is not always reasonable in the circumstances. The Crown agreed that the Treaty requires Maori interests to be given significant weight and protection, but it also asked us to fairly articulate a process of balancing interests that it could use to meet its obligations to Maori and to other citizens.

Key question

The claimants and the Crown agree that there is a Maori Treaty development right. However, parties before us raised the question of how this right might be best expressed or delineated for practical application in our inquiry region. Given the importance of the development issues submitted to us, we have identified the following question for consideration:

WHAT IS THE EXTENT OF THE TREATY RIGHT OF DEVELOPMENT AND WHAT CROWN DUTY, IF ANY, ATTACHES TO THIS?

In addressing this question, we will first outline the claimant and Crown submissions in more detail, and then present our analysis under the following topics:

- a. the right of Maori to develop their properties and taonga, and the principle of mutual benefit from settlement;
- b. the nature and extent of the right to develop properties and taonga;
- c. the interface between kawanatanga and tino rangatiratanga in respect of development;
- d. the Treaty right of development in the changing circumstances of the mid-to-late twentieth century; and
- e. applying the Treaty right of development in current circumstances.

DELINEATING A TREATY RIGHT OF DEVELOPMENT

KEY QUESTION: WHAT IS THE EXTENT OF THE TREATY RIGHT OF DEVELOPMENT AND WHAT CROWN DUTY, IF ANY, ATTACHES TO THIS?

The claimants' case

Claimants submitted to us that a Maori right to development is a well-accepted concept, recognised within the jurisprudence of the New Zealand courts. Internationally, human rights law accepts that there is an inalienable right of all human beings and peoples to participate in and enjoy economic, social, cultural, and political development.¹

Claimants further submitted that the Maori Treaty right of development is now long established through both the Tribunal and the courts.² They submitted that this Treaty right is fundamentally based on guarantees to Maori of their properties and taonga, and of their tino rangatiratanga over these. The Treaty guarantee of full rights in properties and taonga includes a right to develop and profit from them.³ Claimants submitted that this Treaty development right extends not only to land, but to all resources or taonga that Maori have not willingly and deliberately alienated. This is particularly important in the Central North Island, where non-land resources have always held considerable value for possible development purposes. They include rivers and waterways (and the water resource within them), the geothermal resource, and indigenous forests. The proprietary rights in these resources include the rights to develop them and to exercise rangatiratanga over that development.⁴

In the claimants' submission, it is also well established that the Treaty right of development is not frozen in time at 1840. It includes the right to use new technologies, or to use taonga in new and unforeseen ways.⁵ The right of development, therefore, is not limited to customary rights and usages as exercised at 1840. In that respect, the claimants submitted that it is selective to rely on the Court of

Appeal's findings in *Te Runanganui o Te Ika Whenua Inc v Attorney-General* without considering them in their full context and in light of the subsequent position and findings of the Te Ika Whenua Rivers Tribunal.⁶ The claimants reject any attempts to limit what a Treaty development right means, and they reject any categorisation of this right as aspirational only.⁷

The claimants also submitted that the well-established duty of active Crown protection of lands and resources extends to the active protection of the right to develop them. Further, the Crown's duty to actively protect Maori in the retention of sufficient land and resources is closely linked to a right of development in two ways: first, because without that sufficiency there is nothing to develop, and secondly, as the Ngai Tahu Tribunal and others have found, because the Crown was required under the Treaty to ensure that Maori retained a sufficient base not just to survive but to prosper in the new settler economy. The claimants argued that economic development was the necessary prerequisite for fulfilling Lord Normanby's 1839 instructions to the first Governor, William Hobson, and also the Treaty principle of mutual benefit.⁸ Maori were thus entitled to retain sufficient land and resources to prosper and develop as a people.

The claimants submitted that the Crown's duty of active protection extends to positive assistance to Maori in some circumstances.⁹ This duty of positive assistance may require some consideration and priority to be given to Maori so that they can participate in development opportunities. One example is a grant of a temporary monopoly in an important industry for Maori, such as tourism, as was found appropriate by the Court of Appeal in *Ngai Tahu Maori Trust Board v Director-General of Conservation*.¹⁰

The claimants also submitted that there is a strong link between development and Maori autonomy. In guaranteeing tino rangatiratanga, the Treaty also necessarily conveys a right of development, for without that development no true autonomy as provided for by the Treaty can exist. Autonomy has been recognised by the Taranaki Tribunal

as pivotal to the Treaty and the concept of partnership inherent in it.¹¹

Claimants submitted that the general right Maori have of development as a people has been recognised in a number of recent Tribunal reports. These include the *Mohaka ki Ahuriri Report*, which recognised that Maori had a general right to participate fully in the developing colonial society and economy.¹² Claimants also referred us to the three levels of a Treaty right of development that were put to the Radio Spectrum inquiry and which that Tribunal accepted in its majority final report. These were:

- ▶ the right to develop resources to which Maori had customary uses prior to the Treaty (development of the resource);
- ▶ the right under the partnership principle to the development of resources not known in 1840 (development of the Treaty); and
- ▶ the right of Maori to develop their culture, language, and social and economic status using whatever means are available (development of Maori as a people).¹³

The claimants also referred us to the majority finding in the *Radio Spectrum Final Report* that:

Maori expected and were entitled to develop their properties and themselves and to have a fair and equitable share in Crown-created property rights, including those made available by scientific and technical developments . . .¹⁴

The claimants submitted that their right of development as a people is further informed by trends in international thinking and law. We were referred to article 1 of the United Nations Declaration on the Right to Development, adopted by the General Assembly in 1986 and supported by New Zealand, which refers to the inalienable human right of every person and all peoples to participate in, contribute to, and enjoy economic, social, cultural, and political development. Similarly, the draft United Nations Declaration on the Rights of Indigenous Peoples includes a statement that the right of self-determination includes a right to develop resources, and also a right of compensation where

indigenous peoples have been deprived of their means of subsistence and development. The claimants submitted that the established Treaty principles are not inconsistent with this draft.¹⁵

The claimants also submitted that while the nature of the right of development has often been stated at a general level, that does not make it little more than an ‘aspiration’. It was fundamental to Maori expectations of the Treaty, and to the guarantees in the Treaty, that Maori would be able to share in and benefit from colonisation.

The claimants accept that the partnership principle does require some balancing of interests. However, especially where property rights are concerned, more than a simple balancing is required. Property rights and the development interests inherent in them need to be taken proper account of.¹⁶ The national interest, for example, does not give the Crown an unfettered right to exercise its kawana-tanga powers. Policies or actions that will have a major impact on resources and properties, and on the development rights attached to them, require consultation and agreement.¹⁷

It was also submitted to us that in this inquiry the Crown has focused too narrowly on issues of development of Maori land and resources, rather than looking at the wider issue of the development of Maori as a people according to their preferences and needs. It was submitted that iwi and hapu of this region have not been totally reliant on Crown intervention and assistance in order to develop, as the Crown assumed. In fact, from an early period, they have utilised new knowledge and technologies to develop in areas such as tourism. The Treaty development right requires the Crown to facilitate such development in ways chosen by iwi and hapu according to their preferences. This is not the same thing as heavy-handed, paternalistic intervention, where the Crown decides what is good for Maori or assists with developing Maori properties and resources without regard to Maori communities, their participation, or their right to make decisions about the nature and direction in which their communities develop.¹⁸

In terms of the Crown's duty to actively assist with Maori development, the claimants argued that we should give weight to the farm development schemes of the 1930s, which show conclusively that the Crown had accepted such a duty by at least that time. For the late nineteenth and early twentieth centuries, claimants relied on the evidence of the Crown's historian, Donald Loveridge, that governments provided active assistance to settlers while refusing to provide Maori with equivalent access to credit, training, and assistance, even though the need to do so was clearly articulated at the time. They also failed to help Maori overcome barriers to development that were unique to them and imposed by the Crown's own title system, even though this was also suggested at the time. These things were not only evident with 'hindsight', Dr Loveridge concluded. The claimants argued that the Crown had obligations to provide Maori with equal access to the opportunities that it actively provided for other sectors of the community, assist Maori to overcome unfair barriers to development, and provide such other assistance as was appropriate in particular circumstances. These were concrete ways in which the Crown could help fulfil the Treaty promise of development for Maori.¹⁹

The Crown's case

The Crown submitted to us that the Tribunal has found that the Treaty entitled Maori to develop their property and themselves, and that this includes development made possible by scientific and technological change. The Crown agrees that the Treaty does not require a static notion of the expression of Maori property rights.²⁰ The Crown submitted, however, that while Treaty development rights are often broadly defined, any right of development must also co-exist with other rights and other principles of the Treaty. As such, the notion of a right of development must be reasonable and compatible with a balancing of interests.²¹

Crown counsel invited us to provide 'practical guidance to the Crown as to the way in which government should behave in order to meet Treaty principles', arguing that

'some delineation of the extent of the right [of development] may be necessary'.²² The Crown submitted to us that in any such delineation the view of the Court of Appeal in *Te Runanganui o Te Ika Whenua Inc v Attorney-General* was correct. The president of the court, Lord Cooke, stated that:

however liberally Maori customary title and Treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power.

The Treaty of Waitangi is to be construed as a living instrument, but even so it could not sensibly be regarded today as meant to safeguard rights to generate electricity.²³

The Crown also relied on the minority opinion in the Tribunal's Radio Spectrum inquiry, that the right to development was not a 'generalised concept'. It 'could only apply to an existing right and did not extend to a right to develop resources not used in a traditional manner at 1840'.²⁴

The Crown noted that some claimants have framed the right of development as 'something more than an affirmation of the general right of Maori to develop their property rights and express them in modern terms'. Counsel submitted that this approach assumes that the right of development carries a positive obligation on the Crown to assist that development, and sought clarification of the basis for characterising the right in this way.

The Crown submitted that any positive obligation to assist Maori needs to be balanced in light of other Treaty interests and the interests of other New Zealanders. It should be subject to the criteria of reasonableness identified by the Privy Council in the *Broadcasting Assets* case. An assessment of such a right of development would require a careful assessment of the State's capacity at the time and the economic implications of such assistance. The Treaty does not endorse a particular economic approach or attitude to market forces. Different economic policies can be consistent with the Treaty, and macro-economic

decisions are properly the realm of ministers responsible to the elected Parliament.²⁵

The Crown characterised the Mohaki ki Ahuriri Tribunal's comment that a 'right to develop' entitled Maori to fully participate in the developing colonial society and economy as an 'aspirational right'. The Crown submitted that an aspiration that Maori might fully participate does not necessarily require Crown intervention in, for example, a tourism market, nor in any other particular resource or industry. The steps the Crown has to take to fulfil its overarching obligation of good faith and active protection will depend on the circumstances, taking into account the Government's broader obligations. The Crown reminded us that there may well be circumstances in which Maori resources and development have been adversely affected by economic changes and events beyond the Crown's control. This needs to be borne in mind in any Tribunal analysis.²⁶

The Crown submitted that article 1 of the United Nations Declaration on the Right to Development, referred to by claimants, does not create any legal obligation for the Crown, even if the New Zealand Government has supported resolutions in its favour. Therefore, its persuasive weight must be limited. The article is highly aspirational, and as such it requires a balancing between the relative rights of all peoples to participate in and contribute to particular elements of development. General references to such non-binding international resolutions do not provide practical guidance about how to apply Treaty principles to specific acts or omissions of the Crown. The Crown submitted that the situation is similar with the non-binding draft United Nations Declaration on the Rights of Indigenous Peoples. It is a general aspirational statement of international law, which, while 'not inconsistent' with Treaty principles, does not contribute to a detailed framework by which the Crown can assess, and be assessed in relation to, those principles.²⁷

The Crown also questioned whether a requirement for minimal infringement of Maori rights or interests is necessarily always compatible with the reasonable steps the Crown might need to take in particular circumstances and

its obligation to balance a number of interests. The Crown accepts that the Treaty requires Maori interests to be given significant weight and protection, but asked us to fairly articulate a process of balancing interests that it might use to meet its obligations to Maori and other citizens.²⁸

Tribunal analysis

To assist with the analysis of this complex issue, we start by summarising our understanding of the five key components of the Treaty right of development, which will be set out in this chapter:

- ▶ the right as property owners for Maori to develop their properties in accordance with new technology and uses, and a right to equal access to opportunities to develop them;
- ▶ the right of Maori to develop resources in which they have a proprietary interest under Maori custom, even where the nature of that property right is not necessarily recognised, or has no equivalent, in British law;
- ▶ the right of Maori to retain a sufficient land and resource base to develop in the post-1840 economy, and of their communities to decide how and when that base is to be developed;
- ▶ the opportunity for Maori to participate in the development of Crown-owned or Crown-controlled property or resources in their rohe, and to do so at all levels (including as entrepreneurs); and
- ▶ the right of Maori to develop as a people, in cultural, social, economic, and political senses.

Because of the importance of the Treaty right of development to the claims before us, we begin with a survey of the way in which that right has been considered and explained to date. We start with a brief summary of the point broadly agreed between the Crown, the claimants, previous Tribunals, and the courts: that Maori have a Treaty right to develop their properties and taonga. As argued to date, this has been characterised as part of the 'full rights' guaranteed in the 'ownership' of properties and taonga. There has also been broad acceptance by the Tribunal and the

courts that the Crown's obligation of active protection applies to the development right inherent in these properties and taonga.

We then go on to consider how and to what extent a Treaty development right might extend to modern circumstances and enterprises, and to Maori people as iwi and hapu communities. In doing so, we also consider the kinds of Crown obligation that might attach to any such extension of the development right.

(a) Two agreed aspects of development: the right of Maori to develop their properties and taonga; and the principle of mutual benefit from settlement

We note that, in our inquiry, all parties before us have accepted some form of development right arising from the Treaty guarantees. At its most fundamental, this right of development is recognised as inherent to the property guarantees of the Treaty, because a right of development is part of the full rights of property ownership. Also, the Crown and claimants agree that there was and is a Treaty right to participate in the development opportunities, and share in the benefits, that were expected to result from British colonisation. The Crown, however, characterises this right as 'aspirational' and cautions that the steps it has to take to meet it must be assessed in light of what is reasonable at the time and its need to balance other interests.²⁹ Nonetheless, the Crown accepts these two aspects of a Treaty right of development.

As the Treaty consists of two texts, it is now well established that underlying principles inform its interpretation and understanding. These principles help to clarify and confirm the Treaty right of development. In particular, the Tribunal and the courts have discussed the development right in terms of the generally agreed principles of active protection, partnership, mutual benefit, and reciprocity (which we discuss below).



An instance of resource-based development. Maori had long used flax for traditional purposes. With the arrival of Pakeha traders, there came a demand for prepared flax to supply the rope-making industry. To meet this new market opportunity, a number of Maori communities switched to producing milled flax in commercial quantities.

The general acceptance by the Tribunal and the courts of a Treaty right of development is based on the strong emphasis, in the wording of both texts of the Treaty, on guarantees for the properties and taonga retained by Maori. In article 2 of the English version, Maori are guaranteed exclusive possession of their lands, forests, fisheries, and such 'other properties' as they own individually or collectively, unless they choose to alienate them to the Crown. In the Maori version, iwi, hapu, and rangatira are guaranteed tino rangatiratanga (full authority) over their kainga (villages), whenua (lands), and taonga katoa (all their valued possessions or treasures, whether tangible or intangible). Further, their 'just Rights and Property' are recognised in the preamble to the Treaty, and 'royal protection' is promised in article 3. In the view of Tribunals such as the Whanganui River and Te Ika Whenua Rivers Tribunals, these rights were – at the very least – rights of property ownership, even for taonga where British law did not recognise a property right. Part of enjoying full property rights is the right that owners have to develop their properties as they choose. The properties specifically referred to in the English version of the Treaty are lands,

forests, and fisheries.³⁰ Further, all taonga are guaranteed by the Maori version of article 2. A number of Tribunals have helped to ascertain, after careful inquiry, what might be considered taonga. It includes the Maori language and culture, particular tribal rivers, and geothermal resources. Developable 'property', therefore, has been defined, among other things, as what Maori actually possessed and not what British law of the time said could be owned.³¹

The Treaty guarantee of full rights in these properties and taonga, and of tino rangatiratanga over them, included a right to develop them if Maori so chose. This must be set, in the first instance, in its nineteenth-century context. Landed property owners in Britain were leading the way in entrepreneurial commerce and business. Settlement and colonisation were expected to be based on property and the ability to participate in development opportunities based on ownership or leasing of property. Indeed, not only was the development of New Zealand for farming expected, it was required by the governments of the day. A cursory examination of parliamentary debates reveals constant fulminations against British speculators, who bought up property and failed to use it, and against Maori, who were regularly told that their land must be developed for the good of the colony. This was the era of progress and projected prosperity, in which the Crown took an active role in the development of land and other resources (as we will see in chapters 14 to 16). There was not only a nineteenth-century right to develop one's property, therefore, but a belief that one must so develop that property, or lose it to those who would.

At the same time, it was recognised that, for Maori, retaining sufficient of the properties and taonga guaranteed by the Treaty was critically important if they were to participate successfully in the new society that was being created. Just as British settlers were entrepreneurs, evidence was presented in our inquiry that Central North Island Maori (among others) also took advantage of the commercial opportunities of early settlement. The trading economy of the pre-1860s period was addressed by a

number of witnesses. The scene was set, it seemed, for the mutual prosperity of both peoples.³²

It has been well established, however, that the British Crown saw risks for Maori. It publicly accepted that by entering into a Treaty and establishing a new relationship it had an obligation to protect Maori while also actively promoting European colonisation. Maori were not to suffer in the way that other indigenous peoples had done from the impacts of colonisation and settlement. Acknowledgement of the need to offer such positive protection was, in fact, one of the reasons the British Crown gave for intervening in New Zealand. Positive protections offered by the Crown at this time included the provision of necessary laws and institutions for controlling British settlers and thus preventing Maori suffering 'calamity' from them. Governor Hobson was instructed to ensure that the Crown controlled the transfer of any property from Maori for settlement. This was conceived, at least in part, as a measure for the protection of Maori.³³ As was noted in the now famous *Lands* case, it placed the Crown as a buffer, or intermediary, between settlers and those Maori who wished to sell.³⁴

Hobson was also instructed that when the Crown's agents purchased Maori land they were not to allow Maori to enter unfair contracts or sell land they required for their own needs. An official protector was to monitor and ensure this. At the same time, Maori would sell some land cheaply to the Crown (which it would resell at a profit), so that they, too, would benefit from the arrival of settlers, the investment of capital, and the rise in property values.³⁵ These policies helped to establish the principle that the Crown had a duty of active protection of Maori, to ensure that they retained sufficient properties to profit from settlement and were able to participate in future opportunities.

The Muriwhenua Fishing Tribunal commented that Lord Normanby's instructions to Hobson could be described as reflecting the principle that:

nothing would impair the tribal interest in maintaining personal livelihoods, communities, a way of life, and full economic opportunities. It was subject to the overriding principle of

protecting Maori properties. It was even more important that settlement would not in itself be the excuse to relieve Maori of that which they wished to keep.³⁶

As early as 1840, it was understood in Britain that it was:

the fundamental right of aboriginal people, following the settlement of their country, to retain what they wish of their properties and industries important to them, to be encouraged to develop them as they should desire, and not to be dispossessed or restricted in the full enjoyment of them without a beneficial agreement.³⁷

Maori would also benefit, as the Hauraki Tribunal observed, from the rise in the value of the properties that they retained. As noted above, this assumed that Maori would alienate some areas of land for settlement and that the land they retained, now interspersed with that of the settlers, would gain added value for the future benefit of their communities. They would share in the general prosperity.³⁸

These ideas were not confined to the Crown colony period. As we saw in part II of this report, many officials and ministers of the Crown proclaimed their public belief that Maori would and should prosper from the development of the colony. To take but one example, the Secretary of State for the Colonies, the Earl of Derby, wrote to the Governor of New Zealand in 1885:

Although, therefore, Her Majesty's Government cannot undertake to give you specific instructions as to the applicability at the present time of any particular stipulations of a Treaty which it no longer rests with them to carry into effect, they are confident, as I request that you will intimate to your Ministers, that the Government of New Zealand will not fail to protect and to promote the welfare of the Natives by just administration of the law and by a generous consideration of all their reasonable representations. I cannot doubt that means will be found of maintaining to a sufficient extent the rights and institutions of the Maoris, without injury to those

other great interests which have grown up in the land, and of securing to them a fair share of that prosperity which has of necessity affected in many ways the conditions of their existence.³⁹

The Hauraki Tribunal also found that British politicians and officials recognised, from the very outset of the colony, that specific efforts were required from the Crown not just to grant Maori formal legal equality with settlers (as is implied in article 3 of the Treaty), but also to help them become 'equal in the field' with settlers.⁴⁰ This requirement of active protection was essential for properties and taonga guaranteed in article 2 and also encompassed the development interest inherent in them. In our view, this is a key point. From the beginning of the colony, it was known that Maori would only share in the anticipated benefits of settlement if they were able to participate equally with settlers in development opportunities. Based on instructions to the colony's Governors, the Tribunal concluded that the New Zealand Government was supposed to assist Maori to 'become "equal in the field" with settlers, by appropriate management of reserved lands, education and training, and a share in the machinery of state'.⁴¹

As Dr Loveridge noted in our inquiry, the Government's early attempts at assistance to Maori included overcoming their lack of capital by helping them to acquire mills, ships, and the other expensive assets needed to participate in the trading economy of the day. This active assistance tailed off from the 1870s, however, just as the development of land for pastoral farming began to be seen as the key opportunity for both Maori and settlers. In Dr Loveridge's view, this was a vital factor in explaining why Maori had not been able to develop their lands for farming by the end of the Liberal period.⁴²

The claimants relied on the following statements from Dr Loveridge, which appear to us to be apposite:

during the 1890s and early 1900s there were repeated appeals from informed Maori and European observers for the governments of the day to support agricultural education for Maori,

and to provide prospective Maori farmers with better access to State-supported credit. Although – once again – this subject has not received the attention from historians which it deserves, it would appear that relatively little was done. It is difficult to avoid the conclusion that the country in general, and Maori in particular would have been much better off in the long run if the funds employed for the continuing Crown purchase of Maori lands in the early 20th century had been devoted instead to this kind of investment . . .⁴³

Under cross-examination by Richard Boast, Dr Loveridge elaborated on this point:

the argument that is being made quite strongly in the '90s and early 20th century, before the First World War, is that we need to take all the programmes we've got for assisting European settlers, well, for settlers, and enable Maori, despite all the problems with tenure and title, enable them to benefit from those as well. So, what I'm saying is there was a strong movement at the time. This isn't hindsight, and it just never went anywhere, unfortunately.⁴⁴

We will explore this issue in depth in chapter 14. Here, we note Dr Loveridge's evidence that development assistance was provided to Maori up until the 1870s, and that it was certainly contemplated after that time and up until the development schemes of the 1930s. The evidence in the reports of Terry Hearn, Tony Walzl, and others, and in the tangata whenua evidence, shows that after the 1930s it became a constant (if muted) theme within the consideration of governments.⁴⁵ There is nothing presentist, therefore, in the claimants' argument (advanced by Lennie Johns, for Ngati Tutemohuta, and by many others) that the Crown could and should have been assisting Maori, at least to the extent that it assisted settlers, and assisting them in particular to overcome barriers of tenure and title that it had itself created.⁴⁶ There is no hindsight needed for this, as Dr Loveridge stated under cross-examination. We make a particular note of this point, because, while the Crown accepts that Maori had a Treaty right to develop properties and benefit from settlement, it queries whether it had, or

has, any obligation to provide active assistance for them to do so.

We note also the view of previous Tribunals that the ability to participate fully in economic development opportunities requires more than just the possession of properties and taonga. In particular, appropriate experience, skills, and knowledge, the ability to accumulate funds or access loan finance, and suitable recognised forms of management and title for property have been identified as important factors. Historians have noted that on occasions Maori, like other indigenous peoples, faced considerable challenges in participating equally in development opportunities.⁴⁷ This meant that the Crown's duty of active protection extended not just to ensuring that Maori retained sufficient properties and taonga to participate in opportunities, but also to ensuring that Maori were facilitated or assisted to do so. The *Mohaka ki Ahuriri Report* commented that without this active protection even Maori who retained land might well end up little better off than if they had been unable to retain any land at all.⁴⁸

This stance is very firmly based on the idea of present and future benefits, and protections that took account of this. The Court of Appeal, in its judgment on the *Lands* case, confirmed that:

the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable . . .⁴⁹

Using lands and waters to the 'fullest extent' includes the right to develop them. The *Mohaka ki Ahuriri Report* commented that active protection of a sufficiency of land for present and future needs requires consideration of what might be needed for development. It acknowledged that determining sufficiency is not easy. A number of relevant factors (and the circumstances of the time) have to be taken into account. Nevertheless, it confirmed a 'development right inherent in the Treaty' that requires the Crown to do more than just protect a subsistence lifestyle.⁵⁰

Also important are the Treaty principles of partnership and mutual benefit, particularly that the overall intent

of the Treaty was (and is) to enable both peoples to live together, to participate in creating a better life for themselves and their communities, and to share in the expected benefits from settlement. Participation in new opportunities and sharing in the benefits of settlement relied to a large extent on Maori being able to utilise some of their properties and taonga for economic development. This participation would, in turn, help to facilitate other forms of community and individual development and well-being, so long as Maori were able to make their decisions in accordance with their preferences and custom.

The *Report on the Muriwhenua Fishing Claim* found that the basic object of the Treaty was to enable two peoples to live in one country and establish a better life for themselves. In doing so, the Treaty provided ‘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 a partnership.’⁵¹ The *Report on the Mangonui Sewerage Claim* similarly found that the Treaty made a place ‘for two people of vastly different cultures, to their mutual advantage, and where the rights, values and needs of neither would be necessarily subsumed.’⁵² In the final report of the Radio Spectrum Tribunal, the majority opinion found that the principle of mutual benefit assumes that Maori will be able to participate in development opportunities at all levels – as owners and managers, as well as consumers.⁵³ Thus, the Tribunal linked development to the tino rangatiratanga (exercising authority in development opportunities and enterprises) – as well as the properties – retained by Maori.

The Court of Appeal, in the *Lands* case, unanimously found that the Treaty signified a partnership between Pakeha and Maori, requiring each to act towards the other reasonably and with the utmost good faith.⁵⁴ The Treaty also fundamentally signified a partnership or compact that was the foundation of an enduring relationship, enabling both peoples to participate and prosper in the new society being created.⁵⁵ We note the view of Justice Somers that the principles of the Treaty remain the same today as they were in 1840: ‘what has changed are the circumstances to

which those principles are to apply’. When the Treaty was made, ‘all lay in the future’ and the expectation was that the Treaty would be honoured.⁵⁶ The Treaty’s creation of an enduring relationship, based on a positive duty to act in good faith, fairly, reasonably, and honourably, has been reaffirmed by the Court of Appeal in a number of subsequent decisions, including *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* and *Ngai Tahu Maori Trust Board v Director-General of Conservation*.⁵⁷

Previous courts and Tribunals have also noted the Treaty principle of reciprocity, derived directly from articles 1 and 2 of the Treaty. This recognises that the cession of sovereignty or kawanatanga in article 1 was conditional upon the continuing guarantee of tino rangatiratanga in article 2. Any exercise of kawanatanga is, therefore, limited by a duty to respect and give effect to Maori tino rangatiratanga over their properties and taonga. This principle further clarifies our understanding of what is involved in the Treaty right of development. The central notion of this ‘essential bargain’ – the exchange of the right to govern for the right of Maori to retain authority and control over their properties and taonga – underpins the right of Maori to retain significant control over the development of those properties and taonga.⁵⁸ It is for Maori to set the goals and objectives for development according to their preferences and customs, and to meet the needs and well-being of their communities.

The Crown, however, is troubled by the characterisation of the principle of mutual benefit – and the expectation that Maori would prosper from settlement, and should have been assisted to do so – as a ‘right’. In the Crown’s view, this is something so broad that it can only be termed an aspiration; it is not a concrete right with set outcomes for which governments can be held to account if they do not deliver them. Also, as we have noted, the Crown disputes that it had a duty to provide active assistance for Maori economic development.

First, we note the view of other Tribunals that the Crown was in fact required to provide active assistance to Maori economic development in the nineteenth century.

Secondly, in our own inquiry the evidence shows that it did so – however haphazardly – until the 1870s. Even after that, the Crown did not necessarily forget the obligations that it had undertaken from 1840. As we discussed in part II, ministers such as Ballance in the 1880s and Seddon in the 1890s promised Maori that the Government would assist them to achieve prosperity. What else were Rotorua Maori to think, when Ballance told them at Whakarewarewa that:

it is the earnest desire of the Government to promote the prosperity of the Maori people. Our policy is not one of force and repression to be applied to the loyal Natives of New Zealand, but of friendly discussion and assistance to enable them to work out their own destiny in a way that will secure the permanent prosperity and happiness of the race.⁵⁹

Public rhetoric is one thing; actual delivery is another. Vincent O'Malley's evidence, for example, shows that the Government wanted to encourage the development of a silk industry in the 1880s. The Education Department sent mulberry plants to native schools and asked teachers to encourage Maori to cultivate the plants for silk worms if conditions were suitable.⁶⁰ In chapter 14, we will explore Gary Hawke's evidence on the question of what were considered appropriate roles for the State at the time. But the fact that this kind of initiative was even conceivable or possible sets a standard for the Crown in the nineteenth century, no matter how well or how poorly it was executed. Governments could and should have provided active assistance for Maori economic development (at least to the extent that they did for settlers) and provided the means to deliver on the Treaty bargain of mutual prosperity from settlement. As discussed above, we are persuaded by the evidence of the Crown's historian, Dr Loveridge. Had governments continued their pre-1870s economic assistance to Maori, or had they even provided Maori 'with the same level of assistance for agricultural development as was being provided to European settlers,'⁶¹ then Central North Island Maori would not have fallen behind their settler compatriots by the turn of the century.

None of this means that the Crown had to guarantee economic success for Maori in any or all of their ventures. We return to that point below. Here, we note that the mutual benefit implicit in the Treaty was deliverable. The generation of wealth in this country from (often former) Maori land and taonga is indisputable. New Zealand has prospered; so too should the Maori people have prospered. In our view, the right of development is in part a right to have shared in that prosperity. The Government was required to provide equality of access to development opportunities. In practical terms, as we will see in chapters 14 to 16, this meant providing the same level and quality of assistance to Maori that it provided to settlers and, where its own actions had created barriers to Maori development, appropriate assistance to overcome those barriers.

(b) The nature and extent of the right to develop properties and taonga

The Radio Spectrum Tribunal, in its majority final report, explained that a Treaty development right for properties and taonga includes a right to profit from uses unknown in 1840 and to develop them using new technologies. This has been widely accepted for the properties specified in the English version of the Treaty (lands, forests, and fisheries). There has been less agreement, however, about the 'other properties' mentioned but not specified in article 2, and some dispute about what is or is not a taonga. The Crown has accepted, for example, that there is a development right for intangible taonga, such as language and culture.⁶² The Waitangi Tribunal has made findings in other inquiries, as it is required to do, about further taonga guaranteed by the Treaty. For our purposes, it is important to note that things which cannot necessarily be owned under British law, such as water or geothermal energy, were nonetheless taonga in the exclusive possession of Maori in 1840. In the view of the Tribunal, the closest British equivalent is that such taonga were in fact property and therefore Maori had a right under the Treaty to develop and profit from them. We will give specific instances in this section.

In the *Radio Spectrum Final Report*, the Tribunal argued that where there was doubt over what was included as taonga or 'other properties' the Crown's obligations were to find out what Maori considered to be taonga and then to protect such taonga. Further, pre-emption applied to non-land resources as well as land. The Crown could not simply acquire Maori taonga by claiming ownership under the common law or, where the common law did not suffice, legislating to acquire it by such laws as the Petroleum Act 1937. In the Tribunal's view, such:

encroachments on properties undefined in the Treaty not only used the Crown's right of kawanatanga to overcome Maori rangatiratanga but defied the Crown's fiduciary obligation under the Treaty to protect Maori 'just Rights and Property'.⁶³

Those properties and taonga that are particularly relevant to our inquiry region include natural resources such as indigenous forests, waterways (including rivers and lakes and the water resource in them), and the geothermal resource. Intangible taonga of great value to Central North Island Maori include their language and culture, as we heard from many witnesses.⁶⁴ Where the Tribunal has identified 'other properties' or taonga not specifically identified in the Treaty texts, the Treaty's guarantees have been found to include a right of development. The Whanganui River Tribunal found that Atihaunui rights in their river included a development right. This development right included a right to control access and rights to water within the river, which was a 'valuable, tradeable commodity'. That Tribunal also found that the 'just rights and property' in the river must have included a right to license others to use the river water. In the words of the Tribunal: 'The right to develop and exploit a water resource is conceptually no different from a right to develop and exploit the resources on dry land.'⁶⁵

The *Te Ika Whenua Rivers Report* found that, under the Treaty, Te Ika Whenua peoples were entitled to full, exclusive, and undisturbed possession of their properties and taonga, and that these included their rivers. As part of this, they were entitled to the full use of those assets

and the right to develop them to their full extent. When they were developed by the Crown, the Tribunal's view was that Maori had to be paid for the use of their proprietary interest.⁶⁶

The *Report on the Te Reo Maori Claim* found a development interest with regard to te reo as a taonga protected by the Treaty. That Tribunal found that it was consistent with the protection of this taonga and the principles of the Treaty that the Maori language and matters of Maori interest should have a secure place in broadcasting. Any statutory impediment to this had to be questioned, as 'in its widest sense the Treaty promotes a partnership in the development of the country and a sharing of all resources.'⁶⁷ The majority *Radio Spectrum Final Report* found that the entire electromagnetic field, and therefore the radio spectrum part of it, was a taonga for Maori. Therefore, there was a right to develop this based on new technology, including the technology that made use of the radio spectrum possible.⁶⁸ The Crown's kawanatanga right to manage the resource was not questioned, but its exclusive right to profit from it was certainly challenged. The *Preliminary Te Arawa Geothermal Report* identified geothermal taonga and an inherent right of development in them.⁶⁹

Tangible and intangible taonga and properties, therefore, can have a right of development attached to them. Are there limits to that right?

One layer of the development right – that Maori citizens have the right to develop or profit from the development of their property – depends, of course, on their having retained a proprietary interest. The Treaty of Waitangi, and the changes expected and anticipated as a result of it, may have changed the full and exclusive nature of customary rights in some taonga.

When the Ika Whenua peoples shared their rivers with settlers, for example, this sharing did not mean that all their development rights were lost, and the Crown still had to have regard to this in considering future development options. The *Te Ika Whenua Rivers Report* found that the ability of tangata whenua to exercise their Treaty development right today depends on present-day circumstances,

not on the position in 1840. That Tribunal found that the tangata whenua had shared the use of their rivers, in reasonable fulfilment of their Treaty obligations, and that this had resulted in the loss of an exclusive development right in the rivers. Nevertheless, they still had a residual property right that had to be taken into account by the Crown when considering any development options.⁷⁰ The *Report on the Manukau Claim* also noted that as a result of the Treaty a Pakeha interest in the harbour had to be recognised, and therefore the tangata whenua interest was no longer exclusive. However, the tangata whenua interest was still important and was not merely the interest of a minority section of the public, or limited to particular fishing grounds, and this also had to be recognised.⁷¹

Is the development right limited to customary rights, knowledge, and technology as at 1840? The Tribunal and the courts have generally agreed that the answer to this question is 'no'. The principles of active protection and partnership, assuming a future for both peoples and a sharing in future benefit, mean that development cannot be limited to the technology and knowledge of the parties in 1840. As the Court of Appeal explained in the *Lands* case, the Treaty is a living document and is capable of application to future changes, including the application of knowledge and technology that may not have been anticipated or foreseen in 1840.⁷² A number of Tribunal reports have taken a similar view. The *Report on the Motunui–Waitara Claim* commented that the Treaty is:

not intended to merely fossilise a status quo but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.⁷³

The *Muriwhenua Fishing Report* also warned against relying on the literal terms of the Treaty. Instead, the Treaty was to be construed by taking into account the twin objectives of securing settlement and protecting Maori interests, for the mutual benefit of both parties.⁷⁴

In terms of fisheries, the *Muriwhenua Fishing Report* found that, as the Treaty was meant to offer a better life for both parties, it also provided a right for iwi and hapu to develop and expand their resources, using modern technologies as well as those known at the time the Treaty was signed. In the words of that Tribunal, 'a rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty.'⁷⁵ In the case of development opportunities for fisheries, the Tribunal found that access to new technology and markets was part of the quid pro quo of settlement:

The Treaty offered a better life for both parties... Maori no longer fish from canoes but nor do non-Maori use wooden sailing boats... Both had the right to acquire new gear, to adopt technologies developed in other countries and to learn from each other.⁷⁶

This meant that the Treaty 'imposed not the slightest shadow of impediment on the use and development of those resources that Maori chose to keep'.⁷⁷

The Ngai Tahu Sea Fisheries Tribunal found the same right for Maori to develop their property and themselves, including developments made possible by scientific and technological developments.⁷⁸ In that inquiry, the Crown accepted a right of development with regard to Maori fishing, including a commercial element and the right to employ new techniques, knowledge, and equipment for commercial purposes.⁷⁹

The *Preliminary Te Arawa Geothermal Report* found that geothermal resources can be a taonga and that Treaty guarantees for these taonga include a development right. This right extends to the application of knowledge and technology that could not have been foreseen or predicted in 1840: 'the generation of electricity from geothermal energy is surely a good example.'⁸⁰ We note, however, that at the time that Tribunal was reporting the Crown had actually given up its exclusive right to generate electricity, and the Maori concerned still had a property right in some of the surface features. The *Petroleum Report* also confirmed a Treaty

development right, including a right to ‘exploit a resource not extensively used in traditional times for new purposes not contemplated in those times.’⁸¹

For Maori property owners, therefore, and for Maori who have tino rangatiratanga over taonga, the right to develop and profit from property and taonga cannot be confined to customary uses or knowledge as at 1840. This does not mean, however, that it is not a uniquely Maori right. Tribunals have consistently found that the right of development encompassed a tribal as well as an individual development right. This is based on the guarantee of tino rangatiratanga in the Treaty and on principles of partnership, mutual benefit, and reciprocity. The Muriwhenua Fishing Tribunal commented that the ‘settlement profit’ that Maori expected to gain from European settlement derived from tribal access to new technologies and markets, from opportunities for Maori to adopt Western ways, and from a combination of both. The Treaty provided for all options, with Maori having the choice to develop along customary lines from a traditional base, to assimilate in a new way, or to walk in two worlds. However, this choice could not be forced, and in the circumstances of the time a tribal right was clearly in the minds of both Treaty partners, with Maori seeking and gaining recognition of protection at a tribal level. Lord Normanby’s instructions to Hobson provided that each tribe should retain sufficient land for their needs.⁸²

The *Muriwhenua Fishing Report* noted that the guarantee of tino rangatiratanga was crucial, ‘because without it the tribal base is threatened socially, culturally, economically, and spiritually’ and that ‘the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources.’⁸³ The *Ngai Tahu Sea Fisheries Report* similarly found that a tribal right of self-regulation or self-management is an inherent element of tino rangatiratanga.⁸⁴

In part II of this report, we explained how Maori autonomy and authority was central to the Treaty and to the rights of Central North Island Maori. This guarantee of rangatiratanga, or Maori autonomy, has been found to extend to

Maori control of the exercise of their right of development, including their right to develop on a tribal basis if they so choose. The *Report on the Orakei Claim* found that:

rangatiratanga denotes the mana not only to possess what one owns but, and we emphasise this, to manage and control it in accordance with the preferences of the owner.⁸⁵

The *Mohaka ki Ahuriri Report* confirmed that the Maori text of article 2, in guaranteeing tino rangatiratanga over land and other properties, provided for ‘more than mere possession of those properties’. It provided for chiefly control and management of those properties, with kawana-tanga or governance being tempered by respect for chiefly rangatiratanga.⁸⁶

Recent Tribunal inquiries have also considered tino rangatiratanga outside the traditional tribal context, and have noted that the guarantee still provides for Maori to exercise control of their own tikanga and development. In its *Te Whanau o Waipareira Report*, the Tribunal commented that in the urban context rangatiratanga provides for Maori:

control of their own tikanga, including their social and political institutions and processes, and, to the extent practicable and reasonable, they should fix their own policy and manage their own programmes.⁸⁷

(c) *The interface between kawatanga and tino rangatiratanga in respect of development*

The Tribunal and the courts have considered the matter of the balance between the Crown’s right to govern and its reciprocal obligation to recognise and protect rangatiratanga in terms of the right to development. They have agreed that achieving this balance is not an easy matter. Given that it has to be achieved in circumstances that are subject to change and cannot always be foreseen, it fundamentally requires the application of the Treaty principles of partnership and good faith. The courts have consistently found that the Crown’s right to govern should not be

unreasonably shackled, and that it is required to act in the national interest and for the benefit of all New Zealanders. However, these obligations also need to be considered in the context of Treaty guarantees, and this requires good faith and reasonableness. The *Lands* case recognised that the test of reasonableness is necessarily a broad one and has to be applied in a realistic way, and that the parties owe each other cooperation.⁸⁸

The Ngai Tahu Sea Fisheries and Muriwhenua Fishing Tribunals, for example, accepted a Crown right to legislate to protect the sea fishery resource in the national interest, but warned that this exercise still had to take account of Maori interests in the resource. The Ngai Tahu Sea Fisheries Tribunal commented that:

The Crown in the exercise of its powers of governance in the national interest clearly has a right, if not a duty, to make laws for the conservation and protection of valuable resources. . . . But such power should be exercised with due regard to the interests of the owners of such resources. . . .⁸⁹

The Tribunal found that this required the Crown to consult with Maori on proposed fishery conservation measures and to ensure Maori interests were not adversely affected, 'except to the extent necessary to conserve or protect the resource'.

The *Turangi Township Report* confirmed the Crown's right to legislate for conservation of a resource, commenting that to do so also protects Maori resources and is therefore compatible with article 2. However, the Tribunal found that, where the Crown considers appropriating a resource or property in which Maori interests are protected by the Treaty, there is a critical difference between the control or management of a resource, on the one hand, and the expropriation of property rights on the other. The Tribunal found that appropriation can only be justified in exceptional circumstances in the national interest.⁹⁰ Where such an infringement of rights is necessary in exceptional circumstances, appropriate redress is required.

This approach has been confirmed in a number of Tribunal reports. The *Te Ika Whenua Rivers Report*, for example, found that when the Crown exercised its legitimate kawanatanga rights to develop hydro generation on rivers in the public interest, it nevertheless failed in its Treaty obligations to protect the development interest of Te Ika Whenua peoples in their rivers. It failed to consider and compensate the tribes for their proprietary interests in the rivers (which included a right to develop or profit from the resource). The Tribunal found that if kawanatanga rights are to be exercised, then such exercise should be fair and made with proper consultation. If property rights are affected, 'then full compensation should be paid'.⁹¹ The Tribunal found that it was likely any compensation negotiations today would have to consider compensation for past use, compensation for loss of rights or loss of the ability to share as a partner in power production, and payment for the future use of the proprietary interest of Te Ika Whenua in their rivers.⁹²

Similar examples of appropriation in our inquiry region, as we shall see in chapters 16, 18, and 20, include:

- ▶ the rights and authority of Taupo Maori over their lake and rivers, which were altered by the Native Land Amendment and Native Land Claims Adjustment Act 1926, vesting ownership of beds, banks, and the right to use the waters in the Crown; and
- ▶ the rights and authority of Rotorua, Taupo, and Kaingaroa Maori over their geothermal taonga, which were affected by the nationalisation of the resource in the Geothermal Energy Act 1953.

In terms of a balancing of interests, it has been established by the Tribunal and the courts that the legitimate kawanatanga role of the Crown to take action in the national interest, including conserving natural resources for the future good of all, does not mean that the Crown can thereby deny Maori Treaty interests or reduce them to matters of mere procedure or convenience. The Treaty guarantees (including the Treaty development right inherent in them) remain a constant obligation on the Crown and cannot be balanced out of existence. What it

is reasonable for the Crown to do, however, will change according to circumstances. The *Whanganui River Report* explained that:

Maori rangatiratanga is not therefore to be qualified by a balancing of interests. It is not conditional but was expressed to be protected, absolutely. It is rather that governance is qualified by the promise to protect and guarantee rangatiratanga for as long as Maori wish to retain it.⁹³

We make no further comment here. In chapter 17, we consider in more detail the question of how (and in what circumstances) the Crown is required to balance interests.

(d) The Treaty right of development in the changing circumstances of the mid-to-late twentieth century

In this section, we consider the right of development in the ‘modern’ circumstances of the mid-to-late twentieth century, when new knowledge and technology enabled the development of the energy and exotic forestry industries on properties owned or controlled by the Crown in the central North Island.

Background: From 1935, the Labour Government’s emphasis on article 3 rights, Maori employment, and Maori land development became recurring themes for the rest of the twentieth century. In 1938, for example, the *Evening Post* reported the view of the Prime Minister, Michael Savage, that:

The Government recognised that the welfare of the Maori was inextricably bound up with his land and that the development of the Maori people could best be achieved through effective land settlement. The Government was doing all it could to encourage and assist the Maori in whatever field he desired to apply his talents, but since it was through the land that a new form of Maori life was being created, it was in that field that the principal effort was being made.⁹⁴

The National Government of the 1950s continued Labour’s policy emphases in this respect. Its policy was to ‘develop the land and the Maori people’, and it sought to

achieve both objectives through extensive farm training.⁹⁵ The purpose of the Maori Affairs Act 1953, for example, was described by the Minister of Maori Affairs, Ernest Corbett, as ‘to help in the economic development of the Maori to equality with the Pakeha.’⁹⁶ His aim was to provide equality in employment, education and housing, and to:

assure for Maori settlers a good title to their farms, to assist them to develop the land, to teach them modern methods, and to establish farming as a way of life that can be regarded as economically and socially rewarding.⁹⁷

As we will see in chapter 14, land development alone was never going to support the growing Maori population of the Central North Island after the Second World War. Modern industrial development in the region encompassed two other major opportunities: the utilisation of waterways and geothermal fields for the generation of much of the nation’s power; and the planting of enormous areas of Crown (and other) land in exotic forests. New technology created opportunities for the massive expansion of these industries after the Second World War, and they generated wealth alongside continuing efforts to develop the lands of the volcanic plateau for farming.

Urbanisation was another feature of this era. Many Maori from the Central North Island migrated to towns within the region or to the major cities. What was required of the Crown, in Treaty terms, was the fulfilment of its ongoing obligation that rural communities retain and develop their land and resource base, such that they could prosper in a material, social, and cultural sense. They would then form a home base for those who had moved to the cities, maintaining a strong marae culture – a *turangawaewae* – for those who had left to relate to and return to.

In 1958, the Department of Maori Affairs noted:

In spite of the emphasis on urbanisation, the value of having prosperous and sound rural communities cannot be overlooked. . . . It remains as essential as ever to plan for the best utilisation of Maori-owned land and to continue steadily with

the development of idle portions, so as to strengthen the basis of Maori rural communities.⁹⁸

This kind of thinking was not out of step with what Maori required. As we noted in chapter 11, Joan Metge's 1964 study of urbanisation, *A New Maori Migration*, pointed out that ownership of land was valued because it gave urban Maori an attachment to 'home' and speaking rights on their marae. The process of urbanisation did not need to be traumatic or disintegrative for them, she argued, if a strong rural society allowed the maintenance of social and cultural relations between the towns and the home communities.⁹⁹ Increasingly, however, there was a disjunction between the Crown's policy of integration and the maintenance of rural links and turangawaewae (see chapter 11).

Throughout the 1960s and 1970s, governments continued to develop the natural resources of the Central North Island, alongside commitments to Maori land development and employment and social security, as the way to provide economic equality for Maori. Governments of this era were concerned that Maori were becoming an 'impoverished under-class', and saw integration and employment as the solution. Development for the Maori people as a distinct group, therefore, was still a priority for governments, but they remained focused on farm development and on providing jobs.

In introducing the Maori Affairs Act 1967, the Minister of Maori Affairs, Ralph Hanan, claimed that its purpose was to 'further the progress of the Maori people' by promoting agricultural development 'by the Maori people for the Maori people', and to 'release Maoris in many respects from the economic straitjacket that they have been in for many years'. The Government's goal was to 'help the Maori people to march forward as equal citizens'.¹⁰⁰ The National Government's premise was still that 'the development of Maori as a people was tied to the development of their land', alongside the provision of jobs and housing in the towns and cities.¹⁰¹ Although his policies were very differ-

ent, Labour's Maori Affairs Minister, Matiu Rata, noted in 1973 that his Government considered:

land as necessary not only for the social advancement of the Maori people, but also for their economic and cultural advancement... every encouragement should be given to the Maori people to develop their land.¹⁰²

In the Central North Island, however, forestry jobs took prominence in regional – and Maori – development.¹⁰³

It was not until the 1980s, with Labour's massive restructuring of the State sector, that tribal development, tribal autonomy, and Maori business (rather than a Maori workforce) became part of Government policy. This strand of Labour's thinking stood alongside the divestment of State assets and the privatisation of the valuable Central North Island industries that had hitherto employed Maori (among others) under State management and for State profit. At the same time, the return of Maori assets to Maori control became a theme. The commercial fisheries settlement of 1992, for example, stands in contrast to the exclusion of Maori from any share in the privatised electricity or forestry industries of the Central North Island region at that time.¹⁰⁴

Although their policies and approaches differed enormously, it appears, from the evidence available to us, that from the 1940s until the 1980s governments were broadly consistent in their belief that:

- ▶ Maori had a right to develop economically, socially, and (to an extent) culturally as a people;
- ▶ governments should assist (or sometimes direct) that development; and
- ▶ Maori land must be developed in the interests of both Maori and the nation.

Since the 1990s, the belief that the Government should direct Maori development has declined in relative terms, but assistance is still provided through Te Puni Kokiri and other agencies. In our inquiry, the Crown submitted that Maori did not have a Treaty right to assistance with development, but nonetheless claimed to be providing such assistance in tourism and other fields.¹⁰⁵ This brings us to

the question of what Treaty rights applied to development in the 'modern' era (the mid-to-late twentieth century), so that we may assess the Crown's actions in that respect in chapters 14 to 16. We turn now to examine how the courts and the Tribunal have characterised the development right for this period.

The Treaty right of development during the 'modern' period: As we have seen, there is general agreement that there is a right of development inherent in the rights guaranteed by the Treaty for properties and taonga, and a corresponding Crown duty of active protection of that right. There has been less agreement, however, over properties or taonga not specifically identified in the wording of the Treaty texts, and over some uses not reasonably foreseeable in 1840, and whether these arise from or have an associated right of development. As we have seen, the Crown and Maori agree that the Treaty protects and guarantees lands, forests, and fisheries, and enterprises that have developed from them, including the application of new technologies and knowledge. At the same time, after hearing evidence from Maori and the Crown, Tribunals have found that rivers and geothermal taonga (examples of particular importance for our inquiry) are or can be taonga guaranteed by the Treaty, and as such they are subject to full rights, including a right of development. This approach has been accepted to a limited degree by the courts, where te reo and culture, although not specified in the Treaty, have been accepted as taonga in which there is an inherent development right and a corresponding Crown obligation of active protection, including active protection of that development right.

As the Radio Spectrum Tribunal explained, the courts have tended to take a more limited approach in some cases where the property or use was not clearly linked to aboriginal rights and usages as at 1840. In such cases, they have tended to limit consideration of a more modern Treaty development right (that is, a right which can be applied to new technologies and knowledge) to what could be considered aboriginal rights and usages at 1840 or what could reasonably have been foreseen at that time. This has

similarly limited the Crown's duty of active protection in this regard.

In his minority report on the Radio Spectrum inquiry, Judge Savage took the view that the Treaty development right is actually 'a right to develop a right; for example, fisheries or te reo Maori'. In some respects, claims of a bare, general right to develop are more a matter for social conscience, social equity, politics, and article 3 of the Treaty, issues that were beyond the expertise of that Tribunal.¹⁰⁶ Any general 'principle' of development per se cannot exist independently of any other Treaty principle or right.¹⁰⁷ For resources not known about at 1840, his view was that Maori have the same rights as everyone else.

Nonetheless, Judge Savage's minority opinion confirmed that Maori had a Treaty right to develop resources in respect of which they had customary rights and usages prior to the Treaty. The judge considered, however, that while 'it is beyond argument that economic development was a high motivator for Maori in entering the Treaty', the Treaty does not 'make promises of economic outcomes' and it cannot be read as a promise of economic outcomes down through the generations. Even so, he agreed that Maori have a general Treaty right to develop as a people, including to develop their culture, language, and social and economic status, using whatever means are available to them. In some circumstances, such as with culture and language, the Crown has a positive duty to foster and assist development.¹⁰⁸

This view that a modern Treaty right of development might need to be limited by links to other rights has been raised in a number of Tribunal inquiries and court cases. It includes the issue of whether a modern development right must, under the Treaty, be derived from known aboriginal rights or usages as at 1840 when it was signed. This issue has also been raised by parties before us for our consideration, particularly in the context of the Treaty development claims taken by the Te Ika Whenua peoples for their rivers. One of the Ika Whenua rivers, the Rangitaiki, forms part of the eastern boundary of our Central North Island inquiry region.

We have already explained a number of cases where the courts have previously agreed that Treaty principles and expectations are important factors in considering obligations of the Crown, including those involving development issues. This is in addition to, and a further means of clarifying the meaning of, the Treaty texts and what might have been understood and expected from 1840. The courts agree that the Treaty must be regarded as a living document capable of being applied in new and unforeseen circumstances.

Following the passing of the Energy Companies Act 1992, Te Ika Whenua peoples pursued urgent claims about their authority and development rights in the Rangitaiki, Wheao, and Whirinaki Rivers, both through the Tribunal and through the courts. This legislation provided that local electricity companies (as owners of the assets) could transfer the assets in hydro schemes and the water rights associated with them (including hydro dams located on Te Ika Whenua rivers) to third parties.¹⁰⁹ The Tribunal held an urgent inquiry and issued an interim report, *Te Ika Whenua – Energy Assets Report*, recommending that the Wheao and Aniwhenua power schemes and associated water rights should be retained in their present ownership, or held by the Crown, until the substantive claim to Te Ika Whenua rivers was heard. Te Ika Whenua claimants then took court action, seeking to prevent any proposed transfer. Part of their case was based on their claim to the rivers and the preservation of their rights by section 354 of the Resource Management Act 1991. Interim relief was declined by the High Court and the matter was appealed.

Having heard this case, the Court of Appeal explained that in spite of ‘very elaborate argument’ it was actually declining the appeal on one quite short ground. This was because there was no realistic prospect that the Crown would vest complete or partial ownership of the hydro dams in the tangata whenua. Any Maori claims, therefore, to remedies other than the ownership of the dams would not be affected by the proposed transfer of the dams’ ownership.¹¹⁰ Part of that judgment has been widely cited

(the Crown did so in this inquiry). This was the Court of Appeal’s view that:

however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840.¹¹¹

The court explained that no authority from any jurisdiction had been cited to it to suggest that aboriginal rights extended to the right to generate electricity. The appellants had not argued that way; nor had they contended that the dams themselves were taonga.¹¹² The court went on to state that:

neither under the common law doctrine of aboriginal title, nor under the Treaty of Waitangi, nor under any New Zealand statute have Maori, as distinct from other members of the general New Zealand community, had preserved or assured to them any right to generate electricity by the use of water power...¹¹³

The court explained that while it had to make its judgment on the quite narrow ground of the likely impact of proposed transfer of ownership of the dams, the way was still open for Te Ika Whenua peoples to seek a remedy with the Waitangi Tribunal. It commented that:

if any claims to compensation or interference with Maori customary or fiduciary or treaty rights to land or water can be mounted, they will not be diminished or prejudiced in any real sense by such transfers...¹¹⁴

With regard to eels in the rivers, the court found that if control had been assumed without consent there might well have been breaches of the Treaty of Waitangi, as the Crown acknowledged. But, as to the two dams, non-Maori control had been an accomplished fact for a decade and more. The clock could not be put back; ‘the Maori remedy lies in the Waitangi Tribunal claim, or conceivably in Court action based for instance on Maori customary title

or fiduciary duty'. The court further stated that if the claimants had meritorious claims:

their most practicable remedy may well lie through the Waitangi Tribunal... the reason why the present appeal does not succeed is simply that rights to or in the dams themselves are not held by Maori, nor is there any substantial prospect of a change in that regard; yet Maori claims to remedies not extending to the ownership of the dams will not be affected by the proposed transfers...¹¹⁵

The matter was then taken to a further Tribunal inquiry. The Ika Whenua Rivers Tribunal stated:

We do not disagree with the comment of the Court of Appeal that Maori, as distinct from other members of the community, have not had preserved or assured, through customary title, any right to generate electricity by the use of water power. What we do say is that under the Treaty Maori were entitled to the full, exclusive, and undisturbed possession of their properties, which would include their rivers. As part of that exclusive possession, they were entitled to the full use of those assets and to develop them to their full extent. This right of development would surely include a right to generate electricity. The ability to exercise that right, however, depends on present-day circumstances, not on the position as at 1840.¹¹⁶

For the Tribunal, therefore, the key was the proprietary right that Maori retained in their rivers, and whether the Crown could use their taonga to generate electricity without consulting them and without paying for the use of that property. However, the Tribunal also found that the tangata whenua had shared the use of their rivers, as was expected of a reasonable Treaty partner. As a result of this and other matters, Maori no longer had the sole and exclusive right to generate hydroelectricity on their rivers. The Tribunal found, nevertheless, that although Te Ika Whenua had given up part of their interest by sharing the resource, they had still retained a residual proprietary interest that was subject to Treaty guarantees. The Crown was obliged to protect that interest and allow Te Ika Whenua the full

use and enjoyment of it, including their right of development of it. The Tribunal also found that this interest had to be taken into account, even if the Crown decided that, for matters of compelling national interest, it would develop the rivers for hydroelectricity purposes. In such a case, full compensation would need to be paid for the use of the remaining proprietary interest held by Te Ika Whenua people.

The Tribunal found that, in the circumstances of the 1970s, the Government's decision to take control of electricity generation on these rivers was a reasonable exercise of kawanatanga, so as to protect and develop the resource for the benefit of all New Zealand. However, where the Crown failed in its Treaty obligations at that time was in omitting to consult with Te Ika Whenua Maori and take account of their remaining interests in the rivers, and the importance of this to their economic and cultural well-being.¹¹⁷ The Tribunal found that if kawanatanga was to be exercised, then such exercise had to be fair and with proper consultation. If this involved infringing property rights, then full compensation had to be paid.

The Tribunal also found that if circumstances changed, as happened in the 1980s and 1990s with the transition from cooperative use to commercialisation of power production, the Crown was obliged to consider the continuing Te Ika Whenua interest in their rivers, including their remaining development interest. A move from cooperative power generation for the public benefit of all, to the privatisation of the industry where private profit was also possible, opened new opportunities for Te Ika Whenua in their rivers. The Crown, in fairness to its Treaty partner, was bound to take that into account.¹¹⁸ The Tribunal found that: 'It seems quite unacceptable that commercial profit can be made from Te Ika Whenua's interest in the rivers without any form of compensation or payment.'¹¹⁹

The Ika Whenua claim thus ranged over a series of twentieth-century circumstances of great relevance to our Central North Island inquiry. First, there was the initial legislation, from 1903 onwards, by which the Crown established its 'sole' right to use water for electricity. Secondly,

there was the decision to develop these particular rivers for that purpose in the late twentieth century. Thirdly, there was the policy decision that it was no longer necessary for the nation to be the sole owner or operator of power production and supply, and that private parties could acquire both the assets and the profits. In each of these circumstances, there were Treaty tests for the Crown to meet.

We note the Court of Appeal's view that a Maori right to generate electricity, over and above the right of any other citizen, is not guaranteed by the Treaty. The Ika Whenua Rivers Tribunal added that where Maori had a proprietary right in their rivers the Crown had to consult and to pay for any use of that taonga, including for the generation of electricity.¹²⁰ As Sir Apirana Ngata put it in the 1930s, the national interest might require a resource such as petroleum for fuel, but there was nothing that required the profits to go to the Crown instead of to Maori owners.¹²¹

We also note the Ika Whenua Tribunal's view that the policy change of the 1980s and 1990s created a new development opportunity for the tribes whose taonga had been used in the national interest and for profit. The facts in our inquiry are different from the Ika Whenua case in some respects, as we will see in chapter 16, but the broad findings of the court and Tribunal assist in setting the Treaty standards by which the actions of the Crown should be judged.

As well as its relevance to hydroelectric power issues in our region, the Tribunal's view is also pertinent to the privatisation of forestry assets in the 1980s and 1990s. As with the big power projects, exotic forestry came from an era in which the Crown actively sought the economic development of the Central North Island, its Maori land, and its Maori people. Mr Walzl's 'Maori and Forestry' report includes many references to statements to that effect by officials and ministers in the 1960s and 1970s, and to a form of partnership between the Forest Service and the local tribes (and others).¹²² In 1987, forestry lease arrangements were reviewed, and the resultant report stated:

Maoridom's stake in the forestry sector of New Zealand is now substantial and ways in which this investment in land and trees should be used as collateral to finance the peoples [sic] aspirations for economic development should be explored...¹²³

Of course, much forestry development involved jobs on former Maori land:

Despite it being seen by officials that these Ngati Whaoa people were living on Forest Service land in Forest Service buildings, the people themselves had a different viewpoint. As Peter Staite notes: 'The significance to me, is that they lived and they died there as their tupuna had.' The people continued to see this land as their land, as they were living on it. When Peter Staite's grandfather and grand-uncles went to Waiotapu to work in the forest they saw that they were working on their own lands. There was an unbroken chain of occupation. 'They never lost their mana to the land; their occupation was continuous.'¹²⁴

Inevitably, Maori who saw things this way felt that they had a special role and stake in exotic forestry development. The Crown could have given real effect to this in its restructuring during the 1980s. We will consider this point in chapter 16. Here, we note that there are a variety of connections between Maori and some properties or resources which have come under the ownership or control of the Crown. Where there is a strong whakapapa and spiritual connection, and where the land or resource may have been obtained in breach of the Treaty or to the detriment of its former owners, the Crown's obligation to provide Maori with a share in new opportunities arising from that land or resource is correspondingly greater.

(e) Applying the Treaty right of development in current circumstances

In this section, we consider the application of the Treaty right of development today. The Crown has asked for some guidance as to how Maori rights of development should now be delineated in practical terms. We begin with a

further case in the Court of Appeal, which has elaborated on the Treaty development right in modern circumstances. In 1995, shortly after it heard the Ika Whenua appeal, the court heard *Ngai Tahu Maori Trust Board v Director-General of Conservation*.¹²⁵ The case has been cited by claimants and the Crown in our inquiry.

In this case, the Court of Appeal was able to consider the wider context of Treaty expectations and principles because of the Conservation Act 1987, which requires the Director-General of Conservation to consider Treaty principles when administering the Act. This applies to regulations issued under the Act that allow permits for whale-watching enterprises.¹²⁶ The case arose when Ngai Tahu took legal action to try to prevent the director-general from issuing further permits for commercial whale-watching in the Kaikoura area. The High Court recognised that the director-general was exercising a legitimate aspect of kawanatanga under the Conservation Act in considering and issuing permits. It also acknowledged Ngai Tahu concerns about the proper exercise of his duty to consult, and granted a declaration that he ought to have consulted Ngai Tahu interests before granting a permit to a competitor. However, it dismissed the Ngai Tahu claim that, by virtue of the Treaty, they should have received protection for their commercial whale-watching business for a period of (say) five years from the commencement of their business. Ngai Tahu then appealed this decision.

The Court of Appeal commented that commercial whale-watching was a recent enterprise, founded on the modern tourist trade. It was distinct from anything envisaged in (or any rights exercised prior to) the Treaty. It had very little, therefore, to do with what might be considered to be aboriginal rights at 1840. The court also commented that, as an enterprise, it was hardly likely to have been foreseen in 1840. The court commented: 'however liberally Maori customary title and treaty rights might be construed, tourism and whale-watching are remote from anything in fact contemplated by the original parties to the treaty'.¹²⁷ This was similar to what had been found with regard to aboriginal rights in *Te Runanganui o Te Ika Whenua Inc v Attorney-General*.

The court also found that the commercial whale-watching business could not be construed as a taonga or a fishery property right as contemplated by the Treaty. Nevertheless, the court found that in applying Treaty principles and expectations, this enterprise could be regarded as so intimately linked to taonga and fishery rights 'that a reasonable treaty partner would recognise that treaty principles are relevant'.¹²⁸ The Treaty principle of active protection of Maori interests had to be considered. The court confirmed, as it had in earlier cases, that in the wider context of considering a Treaty development right, the Treaty principles were not to be approached narrowly.

In assessing all these factors, the court found that it was relevant that the commercial use or exploitation of coastal waters for viewing whales had some similarity to fishing or shore whaling. Commercial whale-watching, although neither a taonga nor the subject of tino rangatiratanga, was nevertheless 'analogous' to them. It was additionally significant and 'a further analogy', that, 'historically, guiding visitors to see the natural resources of the country has been a natural role of the indigenous people'. In addition, the Ngai Tahu commercial whale-watching activities were essentially tribal rather than those of a few individual Maori. Ngai Tahu also had a special interest in the enterprise, having been pioneers of the whale-watching industry off Kaikoura. They had taken the initiative to find capital for, and devote energy to, this use of the waters.¹²⁹

In taking all these factors into account, the court found that while the legislation required priority to be given to the conservation objective for whales, and consideration to be given to the standard of service being offered, nevertheless a 'residual factor of weight' had to be the 'special interests that Ngai Tahu have developed in the use of these coastal waters'. The court found that 'a period of complete protection sufficient to justify the development expenditure incurred by Ngai Tahu may be part-and-parcel of this'.¹³⁰ For these reasons, the court found that while it could not accept the entire Ngai Tahu case, they were still entitled to succeed in their appeal to a limited extent.¹³¹

The court also found that some of the Crown's arguments in the case had been extreme and unacceptable. The Crown had accepted the relevance of Treaty principles, given their incorporation into legislation, but had argued that this meant no more than a duty to consult Ngai Tahu, and that the consultation had had no bearing on the ultimate decision about a new permit. The court found there was 'an absence and even a repudiation' of any notion that Ngai Tahu's representations could materially affect the ultimate decision concerning the permit.¹³² The court found that a reasonable Treaty partner could not reduce consideration of Ngai Tahu interests to 'mere matters of procedure' or 'an empty obligation to consult.'¹³³ Iwi had to be considered as Treaty partners in administering the Act and Ngai Tahu were entitled to a 'reasonable degree of preference' in considering permits.¹³⁴

In this case, the Court of Appeal confirmed that consideration of a Treaty development right did not have to be limited to 1840, or even to those properties and taonga specifically mentioned at 1840, or to foreseeable uses of them. The court was willing to consider Treaty development rights, and Crown obligations to protect these, in modern enterprises that appeared particularly suitable to the development expectations of Ngai Tahu. Relevant factors included that the enterprise was located off the Kaikoura coast within the rohe of Ngai Tahu, and that the enterprise was at least 'analogous' to traditional practices and rights of Ngai Tahu. These included the tribe's development of its coastal resources, the indigenous practice of guiding visitors to see natural resources in their rohe, and their fishing history. In addition, the right was stronger because a tribal development initiative was involved, where the iwi had committed resources and energy to the enterprise, and where it had been a pioneer or significantly involved in the new industry. As a result of all these factors, an extension of the Treaty right of development in modern circumstances was reasonable, as was Crown protection of it. This included 'a reasonable degree of preference', such as an agreement to grant an operating monopoly for a set period to give the iwi the opportunity to further establish itself in the enterprise.

The Court of Appeal commented that this combination of factors might well be unique, and therefore of limited precedent value. After considering the facts of our inquiry, we consider that similar combinations of circumstances have occurred in the Central North Island region, as we will discuss in chapters 15 and 16, especially with regard to forestry and tourism. The application of a Treaty development right to modern enterprises is therefore relevant to our consideration of development opportunities. The parallel between modern tourism ventures and customary practices in the Central North Island is even stronger than that in the whale-watch case. In our inquiry region, the evidence of Maria Tini, Cybele Locke, Professor Boast, and many others demonstrates a practice of guiding foreign visitors to see the natural wonders of the region (and profiting therefrom) that is unbroken from 1840 to the present day. It has, of course, changed and developed with the times.¹³⁵

The right to profit from touring visitors and to develop tourism was confined to Maori before the signing of the Treaty in 1840, but it is now shared with others. On one level, it is related to the right to develop properties, because the relevant natural features were possessed exclusively by Maori in 1840. Some of those taonga have been alienated with consent, others have been expropriated or acquired in breach of the Treaty, and yet others remain in Maori ownership. Where tourism depends on ownership of and access to such resources, the Crown's Treaty obligations include:

- ▶ ensuring that Maori retain a sufficient land and resource base for development (we note that geothermal taonga were seen by everyone as vital in this respect, from at least the time of the Fenton Agreement in 1880 and the Thermal Springs Districts Act 1881); and
- ▶ providing equal access to development opportunities on this type of property.

The modern development right in tourism, however, goes beyond the development of properties or the development of tribes from a sufficient resource base. Treaty



An early postcard showing tourists at Tikitere. Its caption reads: 'The native guide explaining the wonderful boiling mud - cauldrons - known as Hells gate'.

principles must be applied to the Crown's decisions about the tourism industry:

- ▶ where Maori are exercising a customary right or, as with tourism in the Central North Island, the legitimate outgrowth or development of one;
- ▶ where it is something analogous to a customary right or practice;
- ▶ where it is in their rohe;
- ▶ where it involves their taonga;
- ▶ where they have been pioneers or have had a long history of involvement; and
- ▶ where it is a tribal initiative.

In our view, this delineation of the modern right should assist the Crown in future in the Central North Island, whenever there are opportunities in Crown-owned or Crown-controlled resources. Modern tourism ventures, profits from the generation of electricity, and exotic forestry are all obvious examples of where it applies (see chapters 15 and 16).

A modern development right includes the opportunity for Maori to participate in new development opportunities involving Crown-owned or controlled resources, so long as at least some of the above criteria are met. Where it owns or controls resources itself, the Crown's obligation to actively protect that right is to give full effect to it. This

may include, as it did in *Ngai Tahu Maori Trust Board v Director-General of Conservation*, positive assistance by means of a temporary monopoly. It must also include opportunities for the exercise of tino rangatiratanga. It is not enough, in other words, for Maori to benefit as workers on a project in their rohe – they must have an appropriate involvement at all levels of the operation.

Even more importantly, the Crown should consider its obligations to Maori groups in terms of the principle of mutual benefit, and whether those groups have yet obtained the benefits anticipated in the Treaty. Even if Maori do not have a 'right' in a resource, the Crown should, by the reasoning of the minority report of the Radio Spectrum Tribunal, consider whether the resource is a development opportunity through which it could assist Maori, their culture, their language, and their future as a people.¹³⁶

This brings us from modern industries which profit from taonga such as land, lakes, and geothermal energy, to new or recently-discovered resources. A number of Tribunals have found that in cases where resources were not known in 1840, or were not used traditionally, neither Treaty partner can claim monopoly rights in a new resource. This arises from the well-established principle that the Treaty is not to be fossilised at 1840, but interpreted to meet new and changing circumstances in light of the overarching Treaty

principles of partnership, good faith, and mutual benefit. In the case of the electromagnetic spectrum, for example, this meant that the Maori interest in the newly-discovered spectrum was greater than that of the general public. The spectrum could also be regarded as a taonga shared by the tribes and all mankind. Neither Treaty partner could claim monopoly rights.¹³⁷ These rights included a development right, and this was especially important where other factors combined, such as the close links between use of the spectrum and taonga such as language and culture.

This view was put by the Radio Frequencies Tribunal in 1990 and confirmed by the Radio Spectrum Tribunal in 1999. Both panels confirmed that the Crown was entitled to use its kawanatanga authority to manage the spectrum in the public interest, for example to regulate the use of frequencies to international standards. However, it could not sell management rights without consideration of Maori interests.¹³⁸ As noted, the minority opinion in the Radio Spectrum inquiry rejected this aspect of a Treaty development right, although it accepted that there was a right to develop properties and a right to develop as a people.

In addition to the Crown's obligation to provide the means of fulfilling the principle of mutual benefit, the principle of redressing past Treaty breaches is also relevant. Where there is a need to redress past breaches, active development assistance from the Crown may form part of an appropriate remedy. The *Maori Development Corporation Report* found in 1993, for example, that the Government's initiative in establishing the corporation in 1987 was consistent with the Treaty, in that it was a recognition of the need for positive economic assistance for Maori and provided this assistance in the form of development banking services. This was seen as consistent with the Crown's duty of active protection inherent in the Treaty. Where Maori have lost properties and taonga and, as a result, have been unable to participate in the national economy, and where the disparity between the rate of economic progress of Maori compared with other New Zealanders can be attributed in some measure to breaches of the Treaty, then the

Crown's promotion of Maori business is part of honouring its Treaty obligations.¹³⁹

As noted, the Radio Frequencies Tribunal found that the radio spectrum is so intimately tied up with the use, protection, and development of the taonga of Maori language and culture that Maori must be given greater rights of access to this spectrum and its management than the general public. That Tribunal also noted evidence of a 'development gap' between Maori and non-Maori as a result of the long-term negative impacts of colonisation and loss of Maori resources. This was a factor to be taken into account in the development of Maori broadcasting. An equitable share of the spectrum could help correct the imbalance.¹⁴⁰

Redress and the ability to provide it were also factors for the *Radio Spectrum Final Report* in 1999. There, the Tribunal found that the Crown could not decide to privatise the use of the spectrum and sell it off for commercial purposes without reasonably consulting its Treaty partner, especially as to the implications of this for Maori interests.¹⁴¹ The report noted that:

the Crown was entitled to use its kawanatanga authority to manage the spectrum in the public interest... However, it was not entitled to sell management rights without consideration of Maori rangatiratanga rights.¹⁴²

This would include whether, under the principle of active protection, the Crown might need to consider the impact on its ability to assist Maori to overcome damage caused by past Treaty breaches. Further, and as part of the general principle of development, the Crown was required to consider whether the rights proposed for sale might be useful in addressing Maori social and economic disparities. As noted, the minority opinion in the Radio Spectrum inquiry also accepted the Treaty right of Maori to develop as a people and a positive Crown duty to assist in fostering and developing the taonga of Maori culture and language.¹⁴³

For the assistance of the parties in delineating the contemporary right, therefore, we conclude that the modern Treaty right of development extends to enterprises in

which a reasonable Treaty partner would find that iwi and hapu have a development interest. This carries with it an obligation of Crown protection which may in some cases extend to an obligation of positive assistance. In our view, this is not the same as guaranteeing a successful economic outcome from any enterprise, but rather the obligation is to facilitate participation in the enterprise, if necessary with positive assistance. We accept that this does not impose on the Crown a Treaty obligation in respect of every modern enterprise involving land or resources it owns or regulates. Rather, the obligation exists where a combination of factors makes it reasonable. It is not for us to prescribe an exhaustive list of these, because the Treaty relationship anticipates that both partners will address new circumstances as they see best, based on principles of good faith, reasonableness, and mutual benefit.

We can, however, point to the factors that have been identified as important. These include, of course, whether the modern enterprise utilises properties and taonga of the community concerned. That is a key factor. In one sense, it is immaterial whether exact aboriginal rights or usages existed as at 1840 or could have been in reasonable contemplation then, so long as the modern enterprise is in some way 'analogous' to them. If other factors are considered more relevant by the Crown and Maori, then not even an analogy may be necessary.

Such other important factors include whether the enterprise is located in traditionally important areas or resources of the rohe, whether the enterprise involves a tribal initiative, and whether iwi and hapu have been significantly involved in this kind of enterprise, such as for lengthy periods or as pioneers. Also, if the enterprise may contribute to the remedying of past Treaty breaches, or is important for overcoming the vulnerable state of a taonga, then such factors should also weigh with the Crown. This, of course, requires reasonable consultation with the community over what is needed and preferred, both in terms of the enterprise and in terms of their participation in it.

The claimants have not mentioned any resources unknown at 1840 in our inquiry. Should such be discovered in the future, we note that the Tribunal (including the minority Radio Spectrum opinion) has recognised that a Treaty development right extends to Maori as a people to develop their culture, language, and social and economic status using whatever means are available. This is especially important for modern enterprises in circumstances where economic disparity, historical disadvantage, or unfair barriers to participation in development opportunities have been identified. It is also of relevance where the enterprise, as with the link between the radio spectrum and Maori broadcasting, may enable vulnerable taonga to be assisted, restored, or developed. The Crown's obligation of protection in this respect is again to enable participation, including positive assistance where necessary. Outcomes for specific enterprises cannot be guaranteed, nor is the Crown obliged to do so except in so far as it has to protect taonga in partnership with their kaitiaki or guardians.

The above conclusion refers to the modern Treaty development right in terms of Crown-owned or Crown-managed resources. But there is another aspect to this right. Maori are still entitled to develop and profit from the lands, resources, and taonga that they own. This has been accepted by the Crown, claimants, the courts, and the Tribunal. In our view, the principle of active protection requires the Crown to assist Maori today to develop their properties, where that is their wish. Such assistance should take the form of facilitating equal opportunities to develop, and in particular by removing obstacles to Maori development, such as title and governance problems, that have been created by past actions of the Crown (see part III of this report). It may, depending on circumstances, extend to other forms of positive assistance. Further, the Crown ought to consider and carry out the findings and recommendations of earlier Tribunals, and compensate Maori for its use of properties that they possessed under the Treaty and that have been developed and used without payment. In our inquiry region, this could include the use of their proprietary interest in waterways and

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geothermal taonga for the generation of electricity without compensation.

Moving away from a strict rights-based analysis of the question, we also reiterate our view that the Treaty created a new bargain for two peoples to live and prosper in this country. That required some change to exclusive customary rights over time, in order to allow for settlement and for the sharing of some resources in good faith and partnership. The expectation of new opportunities and shared benefits as a result of settlement means that a focus on aboriginal rights as they existed at 1840 cannot fairly be used to exclude Maori from new opportunities or from rights to participate in them. To do so would be to foreclose for Maori the opportunities they were promised and reasonably expected from the Treaty. Overall, the Crown is required to honour the Treaty principle of mutual benefit.

TRIBUNAL FINDINGS

In agreement with other Tribunals, we find that Central North Island Maori have the following Treaty rights:

- ▶ As property owners, Maori have a right to develop the properties and taonga guaranteed to them by the Treaty if they so choose and under their own authority (tino rangatiratanga).
 - ▶ They have a right to develop their properties and taonga by any means that they consider appropriate. This includes new uses or technologies that were unknown in 1840.
 - ▶ They have a right to retain a sufficient land and resource base to develop in the Western economy, in accordance with their preferences, and to be actively protected in the retention of such a base.
 - ▶ They have a right to share in the mutual benefits envisaged by the Treaty and promised repeatedly by ministers and officials.
- ▶ They have a right to develop as a people in terms of their culture, language, and socio-economic advancement.

In agreement with other Tribunals, we also find that the Treaty right of development extends to:

- ▶ intangible as well as tangible taonga;
- ▶ 'other properties' not necessarily specified in either of the Treaty texts; and
- ▶ the right of Maori property owners to develop or profit from resources in which they can be shown, on the facts, to have had a proprietary interest under Maori custom (and that this is so even where the nature of that property right is not recognised, or has no equivalent, in British law, and therefore encompasses rivers, lakes, and the water resource contained therein).

We further find that this right of development includes:

- ▶ equal access to development opportunities for the above properties and taonga, on a level playing field with other citizens;
- ▶ positive assistance from the Crown where appropriate in the circumstances, which may include assistance to overcome unfair barriers to development, some of them of the Crown's making; and
- ▶ the opportunity for Maori to participate in the development of Crown-owned (formerly Maori) or Crown-controlled property, resources, or industries in their rohe, and to participate at all levels.

In our view, the Crown was required to take reasonable steps in the circumstances of the times to meet these obligations. In doing so, it was obliged actively to protect Maori in their property and their development rights. This was more than an aspiration; it was part of the full property rights guaranteed by the Treaty and was fundamental to the expectation that Maori would use their properties to participate in the new opportunities, and share in the benefits, that were brought by the Treaty and by settlement. Further, this was a tribal right, as the Muriwhenua Fishing Tribunal found, and subject to the guarantee of

Maori autonomy (tino rangatiratanga). It was for the tribes to decide the nature and pace of their development, in partnership with the Crown. The ability of Maori to participate in development opportunities as they chose, and to meet the objectives they chose, was an important part of the Treaty development right.

At the same time, the development of both peoples was implicit in the Treaty and required the sharing of resources. The alienation of resources for that purpose had to be with the full, free, and informed consent of Maori, and proper compensation had to be made. Where the Crown found it necessary to develop Maori-owned resources itself in the national interest, its first obligation was to consult and to obtain consent to any required use or alienation. It was required to infringe tino rangatiratanga as minimally as possible and to pay compensation for the use of tribal taonga.

In some circumstances, the sharing of a resource by Maori as a reasonable Treaty partner may have lessened their exclusive customary interests, including their exclusive development interest. The Treaty guarantees, however, still apply to the remaining Maori interests in these taonga, including the remaining development interest. By the same token, the principles of partnership, mutual benefit, and reciprocity mean that the Treaty right of development cannot be confined rigidly to links with aboriginal rights and usages as at 1840. Maori expected and were promised the ability to participate in new opportunities and to develop themselves as a people. This includes participation in modern enterprises and opportunities not contemplated in 1840.

We accept that it was neither possible nor necessary for the Crown to guarantee Maori commercial success in ventures, with the exception that the Crown must protect Maori retention of taonga (where that is their wish) and their relationship with their ancestral lands and waters. The Crown's obligation was to enable participation, not to ensure success. On the broader question of ultimate outcomes for Central North Island Maori, however, we find

that the Crown was obliged to provide the conditions in which they could prosper and obtain the mutual benefit envisaged by the Treaty. While factors such as international markets are outside the Crown's control, it actively assisted other sectors of the community to economic success in the nineteenth and twentieth centuries. As we will see in our next chapter, the Crown's witness, Professor Hawke, accepts that governments set the parameters within which economic development and progress could take place. At a minimum, those parameters ought to have been fair to Maori as well as to other citizens. In Dr Loveridge's evidence for the Crown, they were not. We will explore the detail of the Crown's obligations in this respect in chapters 14 to 16.

At the Crown's request, we also offer our view of how the Treaty right of development applies in today's circumstances. In conjunction with the above findings, we further find that the Crown must apply the principles of the Treaty when development opportunities arise in respect of Crown-owned or Crown-regulated resources or industries. In our view, a reasonable Treaty partner would consult Maori and inform itself as to whether the Treaty right of development applies in any particular instance. Although we do not wish to be prescriptive, we note that Central North Island Maori may have a right to participate in development (at all levels) where some or all of the following factors apply:

- ▶ there is a customary right or a legitimate outgrowth or development of one;
- ▶ the development or activity is analogous to a customary right or practice;
- ▶ the development or activity is in their rohe;
- ▶ the development or activity involves their taonga (whether still in their legal ownership or not);
- ▶ they have had a long association or history of involvement in the development or activity;
- ▶ a tribal initiative is involved or contemplated;
- ▶ the development or activity may contribute to the redress of past Treaty breaches;

- ▶ the development or activity may assist their cultural, social, or economic development;
- ▶ the development or activity may assist in the preservation or development of a taonga in a vulnerable state.

In the following three chapters of this part of our report, we consider in detail whether the Crown met its Treaty obligations in respect of the development of farming, tourism, forestry, and power generation in the Central North Island region.

SUMMARY

Central North Island Maori have a Treaty right of development. It includes:

- ▶ the right as property owners to develop their properties in accordance with new technology and uses, and to equal access to opportunities to develop them;
- ▶ the right to develop or profit from resources in which they have (and retain) a proprietary interest under Maori custom, even where the nature of that property right is not necessarily recognised, or has no equivalent, in British law;
- ▶ the right to positive assistance, where appropriate to the circumstances, including assistance to overcome unfair barriers to participation in development (especially barriers created by the Crown);
- ▶ the right of Maori to retain a sufficient land and resource base to develop in the new economy, and of their communities to decide how and when that base would be developed;
- ▶ the opportunity, after considering the relevant criteria, for Maori to participate in the development of Crown-owned or Crown-controlled property or resources or industries in their rohe, and to participate at all levels (such criteria include the existence of a customary right or an analogy to a customary right, the use of tribal taonga, and the need to redress past breaches or fulfil the promise of mutual benefit); and
- ▶ the right of Maori to develop as a people, in cultural, social, economic, and political senses.

Notes

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3. For example Karen Feint, submissions in reply on behalf of Ngati Tuwharetoa, 1 November 2005 (paper 3.3.142), pp 39–40
4. For example Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), pp 110–112, 183, 244;

Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), p189

5. For example Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), p 245; Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), p 17

6. For example Annette Sykes and Jason Pou, submissions in reply on behalf of Ngati Makino and others, 31 October 2005 (paper 3.3.133), pp 16–17

7. For example *ibid*, pp 15–16

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17. Karen Feint, submissions in reply on behalf of Ngati Tuwharetoa, 1 November 2005 (paper 3.3.142), pp40–41
18. Annette Sykes and Jason Pou, submissions in reply on behalf of Ngati Makino and others, 31 October 2005 (paper 3.3.133), pp18–22
19. Karen Feint, submissions in reply on behalf of Ngati Tuwharetoa, 1 November 2005 (paper 3.3.142), pp11–16
20. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt1, p31
21. *Ibid*
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27. *Ibid*, pt1, pp33–34
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29. *Ibid*, pt1, p32
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57. *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at p 304; *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at p 561
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