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PRINCIPLES, CONVENTIONS AND PRACTICE FOR THE PUBLIC SERVICE

NOTES ON PRINCIPLES OF THE TREATY FOR WORKSHOP IV ON 'THE PUBLIC SERVICE AND MATTERS OF INTEREST TO MAORI', 25 MARCH 1993

These notes consider

that a shopping list approach to formulating Treaty principles is unhelpful;

there is one overarching principle, all else being merely illustrative of its application; and

that future development of Treaty principles should properly follow the direction in (2).

Past discussion of Treaty principles has muddied the water in developing a treaty law. The statutory direction to consider treaty 'principles' is no more than an aid to the interpretation of an imprecise political document. Effectively the direction implies that no narrow view can be taken. There is an analogy in some biblical messages. God's commandment not to covet one neighbour's ass is not just about neighbours and asses; the primary element is the sanction against coveting the property of others.

The reference to Treaty principles indicates no more than that a similar approach is needed to the Treaty. The guarantee of rangatiratanga in the Maori treaty text for example, is not about propping up an hierarchy of rangatira which a literal interpretation implies. It is about the maintenance of those things important to the status and dignity of Maori - their culture, society, the resources necessary for their economic potential and their language, for example. (The Maori language case should really have been founded on that principle and not upon a construction of the word 'taonga'.)

The use of the word 'principles' however has caused some to produce a shopping list of them. This is not always helpful. It leads to an inference that the Treaty is being re-written, it distracts attention from the Treaty itself, and matters not yet on the list may fail to be considered.

In reality the emergent principles have not come from the Treaty alone but also from the factual matrix of the Treaty's execution and performance. They derive from the common law rule that treaties within indigeneous peoples are to be read in the context of known objectives and purposes; and are directed not just to interpretation but application. The position was recently restated by the President of the Court of Appeal in these terms:

> ... the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other.

That is the key principle that unlocks everything else. This implicit doctrine of constructive trust is a matter of high constitutional import. It is pivotal in determining how chief executives should decide appropriate action or advice where a duty to consider the Treaty or its principles applies.

Effectively it compels consideration of whether there is or could be a Maori interest in the particular case and if so, the steps necessary to protect or advance that interest.

It needs to be added that there are few duties so onerous as those described as fiduciary, and that no mere lip-service or pretence will be deemed a lawful discharge of fiduciary responsibilities in a court of law.

Some 'principles' on the shopping list that developed merely illustrate the practical application of the main principle. They are:

that the duty to safeguard Maori interests is not merely passive but requires active protection (consider language);

there is a duty to provide redress for past breaches (consider asset sales); and

there is a duty to make informed decisions following adequate inquiry, with consultation being necessary in most cases.

Other principles amplify the responsibilities arising from the partnership.

> The principle of mutual benefit flows from the overall purpose of the Treaty to enable joint occupation of the country to common advantage. The presumption is that Maori were to benefit from the development about them and should continue to do so. They have an interest in such things as health, education, housing, broadcasting or industrialisation that is distinct from the general public interest.
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> It was expected Maori would retain a sufficient share of resources for their own industry; resource recovery is necessary where fair shares have been denied.

The commitments of one partner to the other are on-going.

Separate identity is recognised in the principle of tribal self-regulation (self-government). This includes the right of a tribe to regulate the access of its members to its resources and to define its own membership.

These principles, which regard Maori as having full proprietary interests, an interest in total community development, a proprietary interest in resource development and which stress an ongoing relationship, distinguishes New Zealand treaty law from the doctrine of aboriginal title. Government talk of full and final settlements and the extinguishment of claims can also relate only to past claims. In terms of the Treaty the on-going protective promises to Maori cannot be extinguished.

The basis for the protection of Maori is also different from that due to other racial, cultural or special interest groups in terms of the International Covenant on Civil and Political Rights or the Bill of Rights Act 1990. The legal difference is that Maori are not just a racial or cultural minority but a constitutional entity.

The broad approach of the Court of Appeal that the treaty created an enduring relationship of a fiduciary nature remains however the grundnorm of New Zealand's treaty jurisprudence. It aligns New Zealand with the developing Canadian constitutional theory. It must not be lost sight of in the shopping list mentality, and hopefully future discussion of treaty principles will see the shopping list as merely the practical application of the treaty's terms within the trustee-partnership context.

For chief executives the message would appear to be that they should make a full and honest inquiry of the steps needed to protect, enhance or provide for any Maori interest in any matter where Treaty principles must be brought into account.

FURTHER NOTE ON CROWN PRINCIPLES

The Crown principles do not constitute a finite statement of Treaty principles but simply a statement of the principles on which the Crown proposed to act at that time in making decisions on Treaty related matters or recommendations of the Waitangi Tribunal. They are:

1. The Kawanatanga Principle: that the Crown has the right to govern and make laws but subject to the promise to accord Maori interests an appropriate priority.

2. The Rangatiratanga Principle or the principle of self-management, which is seen as involving the preservation of the resource base, restoration of iwi self-management and the active protection of material and cultural taonga.

3. The principle of equity that all are equal before the law. This is said to be based on Article 3 but it may not constitute a full analysis of that article. The need for special measures to enable Maori to obtain de facto equality are recognised.

4. The principle of co-operation, that there must be commitment to achieving or respecting common national goals. This is seen to require consultation.

5. The principle of redress whereby the Crown acknowledges responsibility to provide a process for the resolution of grievances.

The Crown's principles are probably best forgotten. The Tribunal and in some cases the courts have specific legislative authority to determine the appropriate Crown action and the Crown's principles may be seen as an executive pre-emption of a function that Parliament has already legislated for.

PRINCIPLES, CONVENTIONS AND PRACTICE IN PUBLIC SERVICE

Notes on application of Treaty of Waitangi

Government policy on the recognition of the principles of the Treaty of Waitangi may be sourced to

the policy document, Te Urupara Rangapu (1988);

principles for Crown action on the Treaty of Waitangi (1989);

cabinet directives to vet draft legislation against the principles of the Treaty (1991) and Government notes that chief executives will be held accountable for their responsiveness to Maori people and communities;

the judgments of the courts on the principles of the Treaty;

the adoption of certain Tribunal recommendations;

legislative provisions for the principles of the Treaty (especially in the disposal of Crown assets);

with regard to the Public Service generally, the State Sector Act 1988;

the establishment of the Ministry of Maori Affairs to ensure that Maori perspectives are brought to bare in all areas of public policy, and the responsibilities of each state agency to ensure that the Maori perspective is taken into account in policy development in all areas.

Government objectives in Te Urupara Rangapu are:

to honour the principles of the Treaty;

to eliminate gaps in social and economic development;

to provide opportunities for Maori to develop economic activities;

to remedy past Treaty breaches;

to provide for Maori language and culture in developing a unique New Zealand identify;

to provide opportunities for Maori to participate in decision making;

to encourage Maori participation in the political system.

The thrust of Te Urupara Rangapu was to restore the operational base of iwi, with Government agencies to actively seek opportunities for working with iwi for contracts or agreements.

"Good employer" in terms of the State Sector Act requires recognition of:

the aims and aspirations of Maori (and thus the Treaty of Waitangi by implication?);

the employment requirements of Maori;

the need for greater Maori involvement in the Public Service.

The need to recognise Maori cultural values and beliefs when delivering services or formulating policy is also implicit.