Chapter 5 The Treaty of Waitangi, Treaty settlements, and Māori interests

The Treaty of Waitangi (the Treaty) has been described as “part of the fabric of New Zealand society” and is of vital constitutional importance. The development process of policy and legislation, as well as the final product, should show appropriate respect for the spirit and principles of the Treaty.

The Treaty requires that the Government and Māori act towards each other reasonably and in good faith—an approach akin to a partnership. Two important ways to achieve this are through informed decision making (which includes effective consultation by the Government) and through the active protection of Māori rights and interests under the Treaty by the Government.

The nature of the Treaty partnership between the Crown and Māori is evolving as increasing numbers of grievances are settled and the Treaty partners move into new post-settlement relationships. This means that the maintenance of the ongoing relationship between the parties to the settlement is a key part of any obligation to consult in this context and may require a different approach to consultation than in other contexts. Te Puni Kōkiri (TPK) has information on its [website](http://www.tpu.govt.nz) explaining how and why to engage with Māori as part of the policy process.

Due to its constitutional significance, in the absence of clear words to the contrary, the courts will presume that Parliament intends to legislate in a manner that is consistent with the principles of the Treaty and interpret legislation accordingly. The [Cabinet Manual](http://www.mined.govt.nz) requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, the Treaty.

Guidelines

5.1 Does the proposed legislation affect, or have the potential to affect, the rights or interests of Māori under the Treaty?

Māori interests that will be affected by the proposed legislation should be identified.

Legislation may affect the rights and interests of Māori if it impacts on the relationship between the Government and Māori, the durability of treaty settlements, or the possession, use, or ownership of land, waterways, forests, fisheries, taonga, and other resources. Taonga may include tribal heirlooms or weapons, and intangible treasures such as language, cultural practices, and traditions.

The Treaty is a living document. This refers to the common understanding that the intent and application of the Treaty will change as society and circumstances evolve, and that the interests of Māori to be protected under the Treaty are not only those that existed when the Treaty was signed. A Māori interest may arise in respect of the right to develop a resource that was either undiscovered or unexploited at the time the Treaty was signed. Interests might also be affected by the use of new technology, such as the ability of Māori to have access

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7 Cabinet Office [Cabinet Manual](http://www.mined.govt.nz) 2017 at 7.65(a).
to television and radio broadcasts to promote culture and language. A Māori interest may also arise in issues where Māori are disproportionately affected.

The Crown Law Office should be consulted early to assist the identification of interests that will be affected.

5.2 Does the proposed legislation impact Crown commitments made under any Treaty settlement?

New legislation must not be inconsistent with an existing Treaty settlement.

The Government negotiates and, on behalf of the Crown, is party to a number of Treaty of Waitangi settlements with iwi, hapū, collectives of iwi or hapū, and other groupings to provide redress for historical breaches of the Treaty or its principles by the Crown and to make provision for ongoing relationships between the parties.

Individual Treaty settlements are final, meaning the historical claims they settle and the settlement itself (with the exception of disputes over interpretation) may not be the subject of a further historical claim to the Waitangi Tribunal or the courts. The detail of each settlement is reflected in a Deed of Settlement that is given effect by legislation.

Thorough consultation must take place with the relevant post-settlement governance entity if new legislation has the potential to adversely impact an existing Treaty settlement, or damage the relationships between that entity and local or central government established through the Treaty settlement. The Office of Treaty Settlements (OTS) and the Post Settlement Commitments Unit (PSCU) should also be consulted in these circumstances. OTS is a unit within the Ministry of Justice responsible for negotiating Treaty settlements on behalf of the Government. PSCU was established to support the durability of Treaty settlements.

5.3 Does the legislation potentially affect rights and interests recognised at common law or practices governed by tikanga?

Any land, bodies of water, or other resources potentially subject to customary title (or rights), and that might be affected by proposed legislation, should be identified, as should any other potentially affected practices that are governed by tikanga.

The common law recognises Māori customary title (akin to a property right) and customary rights (which may include rights of use and access) in land and other natural features. Customary title and customary rights pre-date the Government’s acquisition of sovereignty.

Recognition of Māori customary title and customary rights at common law is not dependent on the Treaty. Express language (or at least clear and plain implication) is required to extinguish any subsisting Māori customary title or customary rights. A statement that Parliament intends to legislate inconsistently with the principles of the Treaty will therefore not be sufficient to extinguish customary title.

The courts will generally hold that, unless voluntarily surrendered, abandoned, or expressly extinguished in clear terms by legislation, customary title and customary rights will continue to have legal effect. Legislation that is intended to extinguish or apply to customary title and
customary rights will require clear and precise wording to that effect.

Extra care must be exercised when dealing with customary title or rights relating to riverbeds, lakes, and the foreshore and seabed as these often pose difficult legal issues.

Care should be taken where legislation may affect practices governed by tikanga. As a matter of practicality, such practices will likely be identified by the steps taken under 5.1.

5.4 Should Māori be consulted?

The Government must make informed decisions where legislation will affect, or have the potential to affect, the rights and interests of Māori.

Consultation is not required in all cases; however, it is one of the principal mechanisms through which the Government (via Ministers and government agencies) discharges its responsibility to make informed decisions to act in good faith towards Māori. A failure to effectively consult may be seen as a breach of the principles of the Treaty and harm the relationship between Māori and the Government.

A failure to consult may also result in Parliament passing legislation without appreciating fully the variety of views and interests that may be relevant. This may result in difficulties in applying and interpreting the legislation at a later date.

5.5 Who should be consulted?

Consultation must target Māori whose interests are particularly affected.

Government policies and legislation may affect different groups of Māori in different ways. It is therefore important to identify who might be specifically affected and ensure their views are sought and fully considered. As no one body speaks for all Māori on all matters, iwi, hapū, or other entities representing Māori groups that are specifically affected must be identified and consulted. For matters concerning particular regions, it may be appropriate to focus consultation on the groups which have customary interests in that area.

TPK, through its directory Te Kāhui Māngai, provides a comprehensive list of post-settlement groupings and areas of interest.8 If an iwi has not yet settled its historical claims, OTS will be able to advise on which groups have a mandated body recognised by the Crown for Treaty settlement purposes.

The CabGuide notes that departments should consider consulting TPK on proposals that may have implications for Māori as individuals, communities, or tribal groupings; and the Crown Law Office for constitutional issues, including Treaty issues.9

Also, the Ministry of Justice (through PSCU) is developing a central register of all settlement commitments. The Ministry should be consulted to determine whether proposals for legislation will affect treaty settlements.

8 Te Puni Kōkiri Te Kāhui Māngai (Directory of Iwi and Māori Organisations).
5.6 In the event of a conflict between the proposed legislation and the principles of the Treaty of Waitangi, does the legislation include additional measures to safeguard Māori interests?

*If legislation has the potential to come into conflict with the rights or interests of Māori under the Treaty, additional measures should be considered to ensure recognition of the principles of the Treaty or the particular rights concerned.*

Two general classes of measures may be included in legislation to acknowledge or safeguard Māori rights and interests under the Treaty:

- **General measures**—These provisions relate to the manner in which the legislation is administered or the way a power is exercised. For example:
  
  - section 4 of the *Conservation Act 1987* provides: “This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi”;
  
  - section 9 of the *State-Owned Enterprises Act 1986* provides: “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”; and
  
  - section 4 of the *Crown Minerals Act 1991* provides: “All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)”.

Even subtle differences in the wording of legislation (for example, the contrast between “give effect to” and “have regard to”) may have significant effects and must be carefully considered with the benefit of legal advice.

- **Specific measures**—In these provisions, the Treaty and its principles are tied to specific mechanisms by which they are recognised in the legislation. For example, section 4 of the *Environmental Protection Authority Act 2011* provides:

  “In order to recognise and respect the Crown’s responsibility to take appropriate account of the Treaty of Waitangi,—

  (a) section 18 establishes the Māori Advisory Committee to advise the Environmental Protection Authority on policy, process, and decisions of the EPA under an environmental Act; and

  (b) the EPA and any person acting on behalf of the EPA must comply with the requirements of an environmental Act in relation to the Treaty, when exercising powers or functions under the Act.”

Other examples include section 4 of the *New Zealand Public Health and Disability Act 2000* and section 7 of the *Public Records Act 2005*.

Specific measures have been the usual approach since 2000. They have the advantage of demonstrating that the Government has actively worked through what is required in order to
recognise and safeguard what the principles of the Treaty mean in the particular context. In doing this, the provisions provide greater certainty than general measures.

5.7 Does Parliament intend to legislate inconsistently with the principles of the Treaty of Waitangi?

*Clear language is required where legislation is intended to be inconsistent with the principles of the Treaty.*

In rare cases, the Government may wish to achieve an outcome that risks being held by a court to be inconsistent with the principles of the Treaty. In such circumstances, great care must be taken to express the policy intention as clearly as possible, both in the legislation itself, and in the policy documentation underlying the Act. If the intention is not clear, the courts will presume that Parliament intended to legislate consistently with the principles of the Treaty. This may yield results inconsistent with the intended policy outcome.