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Regulatory institutions and practices

June2014

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Regulatory institutions and practices

June 2014

The New Zealand Productivity Commission

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Foreword

Regulation is a pervasive feature of modern life. Its coverage stretches from the workplace to the sports field, the home to the shopping mall, and from the city to the great outdoors. When it works well, it underpins our everyday transactions and interactions, allowing us to do such things as travel within and outside of New Zealand safely, buy and sell goods and services and invest with confidence, and start businesses with ease.

Despite its extensive reach and impact, in many ways regulation is the poor cousin of government. In comparison with taxation, spending or monetary policy, little attention is paid to regulation. There is no annual review of regulation, as there is with government spending (the Budget). We do not know how much of our income is taken up by complying with regulations, as we do with our tax bills. And unlike spending, tax or monetary policy, there is no one minister or agency in charge of regulation. This lack of attention has real consequences. Although the 'price' of regulation in general may often be invisible, the costs of poor regulation are all too clear, as the events of the Global Financial Crisis, Pike River and leaky buildings have demonstrated. Rapid changes in technology and markets make the need for good regulation ever more pressing. Better regulation may be the best opportunity to reduce the pressure for more regulation.

This inquiry has looked at the various institutions, practices and elements that affect how regulation is designed and implemented in New Zealand. This report provides guidance, and is intended to serve as a resource, for officials and elected representatives designing new regulatory regimes in future and others with an interest in regulatory matters. It also makes recommendations for both ministers and government departments on how to make existing institutions and practices work better.

The picture which emerged from the inquiry was that, while New Zealand's "regulatory system" is often compared favourably with those in other countries, there are a number of areas of weakness and the current system is falling behind. A number of important quality checks are under strain, regulators often have to manage with outdated legislation, more attention should be paid to finding the right people to govern regulatory organisations, and greater effort needs to be put into developing a professional regulatory workforce. Too much of our system relies on the goodwill and commitment of dedicated individuals. We can do much better. Without improvements on these and other fronts, New Zealanders may not receive the protections they expect and deserve from regulation.

The Commission has consulted widely, receiving 104 submissions and holding 113 meetings with participants. We also surveyed businesses and chief executives of regulatory agencies, interviewed members of regulator boards, and sought the advice of international experts. This has contributed enormously to our understanding of the issues and to our recommendations. I would like thank all those who provided this valuable information.

Professor Sally Davenport, Dr Graham Scott and I oversaw the preparation of this report. We acknowledge the work and commitment of the inquiry team: Steven Bailey (inquiry director), Judy Kavanagh, James Soligo, Kevin Moar, Nicholas Green, Dennis MacManus, Rosara Joseph and Richard Clarke, and the other Commission staff and external providers who made important contributions.

MURRAY SHERWIN

Chair

June 2014

Terms of reference

IMPROVING THE DESIGN AND OPERATION OF REGULATORY REGIMES

Purpose

1. The purpose of this inquiry is to develop recommendations on how to improve the design of new regulatory regimes and make system-wide improvements to the operation of existing regulatory regimes in New Zealand. The inquiry is not a review of individual regulators, specific regulations or the objectives of regimes.

2. The aim is to improve the design and operation of regulatory regimes over time and ultimately improve regulatory outcomes.

Context

3. This Government is focused on delivering better regulation. We have improved the processes around introducing new regulation, increased our understanding of the stock of existing regulation, and conducted a number of significant regulatory reviews. There is more that can be done to improve the design and operation of regulatory regimes in light of the recent need to develop new or amended regulatory regimes and regulators to manage instances where regulation has not achieved its intended outcomes.

4. The demands on regulatory regimes are often more complex than in the past. The range of regulatory regimes, the nature of the risks involved, the expectations of the community, and the regulatory tools available to achieve regulatory objectives, are wide and varied. It is crucial that government has a good understanding across regulatory regimes of their issues, challenges, similarities and differences and how to improve their design and operation.

Scope

5. Having regard to the above purpose and context, the Commission is requested to undertake an inquiry that addresses the parameters set out below.

An overview of regulatory regimes and their regulators

6. Develop a high-level map of regulatory regimes and regulators across central government, including their organisational form.

7. Develop a set of thematic groupings which can be used to broadly categorise regulatory regimes by their objectives, roles or functions. For example core objectives might include health and safety, environmental protection, or economic efficiency.

Understanding influences and incentives on regulatory regimes

8. Outline and explain key factors which act as incentives or barriers to regulatory regimes and regulators producing the outcomes stated in legislation. For example these factors may include:

    - institutional form of the regulator
    - accountability mechanisms, including the ability to challenge regulatory decisions
    - quality of the regulatory design and clarity of mandate, functions and duties
    - performance measurement and reporting
    - resourcing and funding
    - external monitoring
    - capability
    - approach to risk management and innovation
    - approach to consultation and engagement with stakeholders

9. Undertake a series of case studies to compare and contrast the approaches taken to these factors across different regulatory regimes. A key part of this analysis would be to identify strengths and weaknesses of different approaches taken to these factors to support broader insights into the design and operation of regulatory regimes.

10. This analysis should be undertaken in the context of existing guidance about good practice for the performance of different regulatory functions.

Recommendations

11. Develop guidance that can be used to inform the design and establishment of new regulatory regimes and regulatory institutions, and the allocation of new regulatory functions to existing institutions. The guidance should take into account other existing work in this area to avoid duplication, such as the State Services Commission's Reviewing the Machinery of Government.

12. Develop system-wide recommendations on how to improve the operation of regulatory regimes over time. The recommendations may include how to both build on strengths and address weaknesses in current practices and may lead to general comments about key differences between regimes within thematic groupings. The recommendations will not be specific to particular regulations or regulators.

13. The Commission should also specifically consider how improvements can be made to the monitoring of regulator performance across central government.

14. In developing the recommendations, the Commission should take account of any key features or characteristics of New Zealand's regulatory environment that differ from other jurisdictions. For example, these may include differences in scale, resourcing, or the need to coordinate with overseas regulatory regimes.

Other matters

15. The Commission should prioritise its effort by using judgement as to the degree of depth and sophistication of analysis it applies to satisfy each part of the Terms of Reference.

Consultation requirements

16. In undertaking this inquiry the Commission should consult with key interest groups and affected parties, including on the selection of case studies in paragraph 9 above. Consultation should include both regulators and those subject to regulation.

Timeframe

17. The Commission must publish a draft report and/or discussion paper(s) on the inquiry for public comment, followed by a final report, which must be submitted to each of the referring Ministers by 30 June 2014.

Referring Ministers

Hon Bill English, Minister of Finance
Hon John Banks, Minister for Regulatory Reform

7 The Treaty of Waitangi in regulatory design and practice

Key points

- Regulators work within a constitutional, statutory and legal context that can change and evolve over time. The continuing evolution of the relationship between the Crown and Māori as partners to the Treaty of Waitangi, can generate considerable uncertainty for those applying the principles of the Treaty in the design and implementation of New Zealand's regulatory regimes.
- References to the Treaty and Treaty principles can be found in statutes which regulate features (eg, land, water, important sites, wāhi tapu and other taonga) where Māori have strong iwi and hapū relationships. Statutes with "Treaty clauses" can create obligations on parties that are not the Crown.
- A Treaty clause is a legal acknowledgement of Māori interests and rights, and provides a more specific definition of the Crown's responsibility with respect to those rights (that in the absence of a specific clause might be interpreted more generally).
- A set of factors that officials should consider in recommending the inclusion of Treaty clauses in statutes that establish regulatory regimes or regulatory agencies is proposed.
- Excellence in regulatory practice cannot be legislated for. Good practice in upholding Treaty principles of partnership, mutual respect and good faith depends on leadership, good internal policies and processes, and guidance for staff and stakeholders.
- The Commission has reviewed 10 examples from government agencies of guidance on how to apply Treaty principles. The overall quality of guidance material can be improved.
- The assessment framework used in reviewing the guidance material could be used as a tool to help regulatory agencies develop their own guidance about the application of Treaty principles.
- Sharing good regulatory practice is one way to raise the standard of practice among regulators. Lessons from the experience of the Environmental Protection Authority (EPA) have been identified. An important lesson for other regulators is that investing in good relationships to develop trust can pay off in reduced costs and better regulatory decision making.
- A really responsive regulator is responsive and attentive to the institutional environment in which it operates. Māori interests are acknowledged in the regulatory system, and there are specific statutory requirements on some regulators in administering particular regulatory regimes. The EPA fulfils its regulatory objectives within a framework that explicitly incorporates the principles of the Treaty of Waitangi. The EPA monitors how well its processes work to meet its Treaty obligations, looking to where further improvements can be made.

7.1 Introduction

Chapter 3 highlighted the challenge for regulators in responding to the constitutional, statutory and legal environment in which they are required to operate. An important issue in establishing regulatory regimes in New Zealand is ensuring that the principles of the Treaty of Waitangi are appropriately taken into account both in design and in practice. Statutes that have regulatory provisions or confer regulatory powers and responsibilities can also contain references to the Treaty of Waitangi or to the principles of the Treaty. However, even where "Treaty clauses" are not present, the particular context may require the Crown to have regard to the principles of the Treaty of Waitangi. The continuing evolution of the relationship

between the Treaty partners, and of the interpretation of the principles of the Treaty, can generate considerable uncertainty for those applying Treaty principles in the design and implementation of regulation. This chapter provides some guidance about the use of Treaty clauses in legislation. It provides a set of criteria to help regulatory agencies when developing guidance material about applying Treaty principles in their area of regulation. The chapter illustrates how "attentiveness" – to use the language of really responsive regulation (Baldwin & Black, 2008) – to the Crown's responsibility to take account of the principles of the Treaty of Waitangi, has influenced the regulatory practice of the Environmental Protection Authority (EPA).

7.2 A Treaty between the Crown and Mäori

The Treaty of Waitangi (Te Tiriti o Waitangi) was signed by representatives of the Crown and various Mäori chiefs at Waitangi on 6 February 1840 (Box 7.1).

Box 7.1 The Treaty and its Articles

The Treaty is one of New Zealand's key founding documents. It is an agreement between the British Crown and more than 500 Mäori rangatira and was signed in 1840. On the day it was signed, the Treaty had English and Mäori versions.

English text

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant-Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the first

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

Article the second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or
individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

(signed) William Hobson, Lieutenant-Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of
New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified. Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

Mäori text

KO WIKITORIA te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira – hei kai wakarite ki nga Tangata Maori o Nu Tirani – kia wakaaetia e nga Rangatira Maori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu – na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei amua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapü o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te tuatahi

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu – te Kawanatanga katoa o o ratou wenua.

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangitira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua – ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini – Ka tiakina e te Kuini o Ingarani nga tangata Maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(signed) William Hobson, Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Source: Ministry for Culture and Heritage, 2012a; 2012b.

What is the Crown?

The Treaty between the Crown and Māori opens up the question of "what is the Crown?" The answer is not simple. The Law Commission, in its paper To bind their kings in chains noted:

> … it is a fundamental difficulty that the Crown is a metaphor lacking precise definition. (Law Commission, 2000, p. 10)

Professor Philip Joseph writes: "It is not always possible to say exactly who, or what, is the Crown" (Joseph, 2014, p. 609).

Crown entities may or may not qualify as part of the Crown. Most designated Crown entities are public bodies discharging independent functions outside the service of the Crown. Crown agents are the only Crown entities falling squarely under the Crown's umbrella. State-owned enterprises are not part of the Crown. Similarly, local authorities are also "not the Crown and are therefore not the Treaty partner". (NZPC, 2013a, p. 177)

A recent discussion paper by the Parliamentary Counsel Office (PCO, 2013) offers this description:

> "The Crown" means, in its strict legal sense, the Queen in her public capacity as the bearer of governmental rights, powers, privileges and liabilities in New Zealand. The Crown has the legal personality of an individual and is able to own property, to spend money, or to make contracts. The Crown is commonly described as the executive branch of the New Zealand government and may be called the executive, the government, or the administration. (p. 23) Joseph (2014) concludes:

> The Crown might be best described as an umbrella concept, encapsulating the key machinery of executive government. It includes: the Sovereign and the Sovereign's personal representative (the Governor General); ministers of the Crown; the central government ministries and departments delivering public services in accordance with government policy; and public bodies that operate under the close control of a minister or the minister's department. (pp. 618 and 623)

The Crown is defined in specific pieces of legislation, although there are differences in the definitions used in different Acts. Some commentators have recommended including a default definition of the Crown in an Act, such as the Interpretation Act 1999, in order to improve consistency. However, for current purposes it is sufficient to rely on the statutory definitions made in specific pieces of legislation relevant to the Treaty context. The Public Finance Act 1989 is of particular relevance as Treaty settlement legislation adopts the Public Finance Act definition of the Crown. It says that "the Crown or the Sovereign—

(a) means the Sovereign in right of New Zealand; and

(b) includes all Ministers of the Crown and all departments; but

(c) does not include—

(i) an Office of Parliament; or

(ii) a Crown entity; or

(iii) a State enterprise named in Schedule 1 of the State-Owned Enterprises Act 1986; or

(iv) a Schedule 4 organisation; or

(v) a Schedule 4A company; or

(vi) a mixed ownership model company."

F7.1 While a precise definition of the Crown is lacking, it is generally accepted as encapsulating the key machinery of executive government.

Nature of the Crown's Treaty duties

The Treaty partners are the Crown and Mäori. But what happens to the Crown's duties and obligations under the Treaty when it delegates its regulatory functions to non-Crown bodies? There is general agreement that the Crown cannot avoid or modify its Treaty obligations by delegating its regulatory powers or Treaty obligations, and the Crown is under a continuing obligation to ensure that its Treaty duties are fulfilled.

In Towards better local regulation, the Commission wrote (in the context of a discussion of the Crown's Treaty duties when it has delegated functions and powers to local authorities):

> it is generally accepted that when the Crown statutorily delegates regulatory functions, it retains a responsibility to translate its related Treaty duties into procedural and policy requirements for the local authorities that carry out those regulatory functions. Central government needs to take an ongoing interest in whether the procedural and policy requirements it has placed on local authorities are effectively delivering on its Treaty duties. (NZPC, 2013a, p. 177)

7.3 Treaty clauses in legislation that establish regulatory regimes

This section examines the characteristics of the statutes that contain references to the Treaty of Waitangi or to Treaty principles (see Box 7.2 for the views of the Executive, the Court of Appeal and the Waitangi Tribunal about the nature of the Treaty principles).

Treaty clauses in statutes

The Commission has identified 36 Principal Acts[1] with references to the Treaty or Treaty principles. (Table 7.1)

Table 7.1 Primary legislation that references the Treaty of Waitangi

Statute	Treaty reference
Auckland War Memorial Museum Act 1996	"The duties, functions, and powers of the Board shall be… to observe and encourage the spirit of partnership and goodwill envisaged by the Treaty of Waitangi, the implications of mana Mäori and elements in the care of Mäori cultural property which only Mäori can provide".
Climate Change Response Act 2002	"In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi …" Mäori are to be consulted prior to a number of specified decisions being taken.
Conservation Act 1987	"This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi".
Crown Minerals Act 1991	"All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi".
Crown Pastoral Land Act 1998	"In acting under this Part, the Commissioner [of Crown Lands] must (to the extent that those matters are applicable) take into account … the principles of the Treaty of Waitangi".
Education Act 1989	"It is the duty of the council of an [tertiary education] institution, in the performance of its functions and the exercise of its powers … to acknowledge the principles of the Treaty of Waitangi".

[1] The table does not include Treaty Settlement Acts or references to Waitangi Day.

Employment Relations Act 2000	"The parties must recognise and support Part 3 of the New Zealand Public Health and Disability Act 2000 which, in order to recognise the principles of the Treaty of Waitangi and with a view to improving health outcomes for Māori, provides mechanisms to enable Māori to contribute to decision-making on, and to participate in the delivery of, health and disability services".

Statute	Treaty reference
Energy Efficiency and Conservation Act 2000	"In achieving the purpose of this Act, all persons exercising responsibilities, powers, or functions under it must take into account … the principles of the Treaty of Waitangi".
Environment Act 1986	"An Act to … ensure that, in the management of natural and physical resources, full and balanced account is taken of … the principles of the Treaty of Waitangi".
Environmental Protection Authority Act 2011	"In order to recognise and respect the Crown's responsibility to take appropriate account of the Treaty of Waitangi …" the act provides for, among other things, the establishment of a Māori Advisory Committee.
Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012	"In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act …" a number of sections provide for Māori consultation, recognition and notification.
Fisheries Act 1996	"The object of sections 175 to 185 is to make, in relation to areas of New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapü … [through] better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi".
Hauraki Gulf Marine Park Act 2000	"Subject to subsections (2) and (4), the provisions of Part 3 relating to the Park must be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi".
Hazardous Substances and New Organisms Act 1996	"All persons exercising powers and functions under this Act shall take into account the principles of the Treaty of Waitangi".
Historic Places Act 1993	"This Act must continue to be interpreted and administered to give effect to the principles of the Treaty of Waitangi, unless the context otherwise requires".
Human Rights Act 1993	"The Commission has … the following functions … to promote by research, education, and discussion a better understanding of the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international human rights law". "In recommending persons for appointment as Commissioners or alternate Commissioners, the Minister must have regard to the need for Commissioners and alternate Commissioners appointed to have among them knowledge of, or experience in ... the Treaty of Waitangi and rights of indigenous peoples".
Judicature Act 1908	"If the appeal involves … an issue affecting … the Crown's obligations under the Treaty of Waitangi … the Judge may direct that the Solicitor-General be served with the notice of appeal and with documents subsequently filed in the appeal".
Land Transport Management Act 2003	"In order to recognise and respect the Crown's responsibility to take appropriate account of principles of the Treaty of Waitangi …" a number of mechanisms are available to help Māori participate in the process of making decisions about land transport.

Local Government Act 2002	"In order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi …" two parts provide principles and requirements for local authorities that are intended to help Māori participate in the processes of local authorities to make decisions.
Local Government (Auckland Council) Act 2009	"[Part 7] establishes a board whose purpose is to assist the Auckland Council to make decisions, perform functions, and exercise powers by … ensuring that the Council acts in accordance with statutory provisions referring to the Treaty of Waitangi".
Local Legislation Act 1989	"Nothing in subsection (1) affects the validity of, or affects or prevents the making of, any claim under the Treaty of Waitangi or based on a right arising or alleged to arise out of the Treaty (whether under the Treaty of Waitangi Act 1975 or otherwise)".

Statute	Treaty reference
Mäori Fisheries Act 2004	"The Mäori Fisheries Act 1989 was enacted to make better provision for the recognition of Mäori commercial fishing rights secured by the Treaty of Waitangi …"
Mäori Language Act 1987	"Whereas in the Treaty of Waitangi the Crown confirmed and guaranteed to the Mäori people, among other things, all their taonga: And whereas the Mäori language is one such taonga".
Mäori Television Service (Te Aratuku Whakaata Irirangi Mäori) Act 2003	"In recognition that the Crown and Mäori together have an obligation under the Treaty of Waitangi to preserve, protect, and promote te reo Mäori the purpose of this Act is to provide for …" a number of functions, duties, rights, accountabilities and governance arrangements.
Marine and Coastal Area (Takutai Moana) Act 2011	"In order to take account of the Treaty of Waitangi, this Act recognises, and promotes the exercise of customary interests of iwi, hapü, and whänau in the common marine and coastal area …"
Museum of Transport and Technology Act 2000	"In carrying out its functions under section 13, the Board must recognise and provide for, in such manner as it considers appropriate, the following: biculturalism and the spirit of partnership and goodwill envisaged by the Treaty of Waitangi".
New Zealand Geographic Board (Ngä Pou Taunaha o Aotearoa) Act 2008	"In order to recognise and respect the Crown's responsibility to take appropriate account of the Treaty of Waitangi …" the Act confers on the Board the function of collecting, and encouraging the use of, original Mäori names of geographic features on official charts and maps. Two members of the Board are appointed on the recommendation of the Minister of Mäori Affairs.
New Zealand Public Health and Disability Act 2000	"In order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Mäori, Part 3 provides for mechanisms to enable Mäori to contribute to decision-making on, and to participate in the delivery of, health and disability services".
Ngä Wai o Maniapoto (Waipa River) Act 2012	"A guiding principle is the Treaty of Waitangi, because Maniapoto and the Crown are partners under the Treaty of Waitangi and the agreements in the deed in relation to cogovernance and co-management of the Waipa River, which are given effect through this Act, are sourced in this Treaty relationship".
Public Finance Act 1989	"Nothing in [the Mixed ownership model companies Part of the Act] shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".

Statute	Treaty reference
Public Records Act 2005	"In order to recognise and respect the Crown's responsibility to take appropriate account of the Treaty of Waitangi …" requires the Chief Archivist to ensure, among other things, consultation with Māori and that at least two appointments to the Archives Council have knowledge of tikanga Māori.
Resource Management Act 1991	"In achieving the purposes of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi".
Royal Society of New Zealand Act 1997	"The Council may co-opt members … if, in the opinion of the Council, it is necessary to do so having regard to the desirability of giving effect to the principles of the Treaty of Waitangi".
State-Owned Enterprises Act 1986	"Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".
Supreme Court Act 2003	"The purpose of this Act is … to establish within New Zealand a new court of final appeal comprising New Zealand judges … to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions".
Te Ture Whenua Māori Act 1993	"Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed".

Table 7.1 reveals that:

- almost all statutes with Treaty clauses contain regulatory provisions of some kind;
- most references to the Treaty or to Treaty principles are in statutes governing physical resources and the environment, where Māori have strong iwi and hapū relationships, often involving kaitiaki relationships[34] – including land, water, important sites, wāhi tapu and other taonga;
- some references are made to Treaty principles in legislation governing other areas in which Māori have an interest, for example, taonga such as the language (te reo) and health (hauora) and Māori protocol;
- the statutes create obligations on a range of parties, and many are not the Crown, such as obligations on local government, Crown entities, Officers of Parliament and a Body Corporate.
- The wording of clauses, where there is similar intent, varies. For example, "take account of" (Marine and Coastal Area Act, 2011), "take into account" (Hazardous Substances and New Organisms Act, 1996) "take appropriate account of" (New Zealand Geographic Board, 2008).
- There appears to have been a trend towards the inclusion of more specific Treaty clauses that specify the action to be taken in satisfaction of Treaty principles instead of broadly stated Treaty clauses, in more recent legislation. For example, to recognise and respect the Crown's responsibility to take account of the Treaty of Waitangi, the Environmental Protection Authority Act 2011 established a Māori Advisory Committee to advise the Authority on policy, process, and decisions. The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) is another example of legislation with more specific statutory provisions.

F7.2 Statutes with references to the Treaty of Waitangi or to Treaty principles often contain regulatory provisions and create obligations on a range of parties that are not the Crown.

7.4 Role of the courts and the Waitangi Tribunal

Role of the courts

Breaches of the Treaty by the Crown were not justiciable – capable of being decided by a court – until 1975.

> Only customary rights were enforceable at law not Treaty rights per se. It is instructive to consider why that was so, not in an attempt to atone in some way for past breaches by the Crown of its obligations, but to understand why there was no effective remedy at law for the breaches.

[34] Kaitiakitanga forms one of two foundational and interlinked concepts within Mäori thinking on environmental management. The first is whanaungatanga –the organisation of concepts and relationships through whakapapa or familial connections. As the Waitangi Tribunal explains:

> Kaitiakitanga is really a product of whanaungatanga – that is, it is an intergenerational obligation that arises by virtue of the kin relationship. It is not possible to have kaitiakitanga without whanaungatanga. In the same way, whanaungatanga always creates kaitiakitanga obligations. (Waitangi Tribunal, 2011, p. 105)

Because the relationship Mäori have with the environment is described in terms of whakapapa, the claim that particular Mäori groups have to kaitiakitanga is based on this sense of relationship. In Mäori cosmology, there is little or no distinction between human ancestors and whenua, maunga or awa from which one descends (or to put it in the appropriate cultural context ”can whakapapa to”).

> In fact the reason why the Treaty was not justiciable in the courts can be simply stated. It has long been a principle of the law that the executive branch of government, that is to say the Cabinet and the departments of state, should not be able to make law: law-making is a matter for Parliament alone. Treaties normally involve international relations, and these are the preserve of the executive rather than of the Parliament. Accordingly, any treaty entered into by the executive of New Zealand has never been enforceable in the domestic courts unless and until its terms had statutory recognition. (Graham, 2001, p. 21)

Developments in the last 25 years have changed the role of the courts in respect of the Treaty. In 1986 the Government determined that all future legislation should be enacted against the backdrop of the Treaty. Cabinet agreed that at the policy approval stage for legislation, attention would be drawn to any implications for Treaty principles. References to Treaty principles began appearing in statutes, with early examples including the Environment Act 1986, the State-Owned Enterprises Act 1986 and the Conservation Act 1987, beginning a new Treaty jurisprudence.

The watershed case was New Zealand Maori Council v Attorney-General (the Lands case) 1987, which arose under the State-Owned Enterprise Act 1986 (“SOE Act”). Section 9 of the Act declares: “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty.” The New Zealand Mäori Council contested the transfer of Crown land that was subject to (or likely to become subject to) a claim before the Waitangi Tribunal. The Court addressed the spirit of the Treaty, the textual differences between the English and Mäori language versions, past breaches of the Treaty, and the interpretative approach on statutory recognition of Treaty principles (Joseph, 2014, p. 76). The Court rejected a strict or literal interpretation of the Treaty and declared the Treaty must be viewed as a living instrument capable of adapting to new and changing circumstances: “What matters is the spirit.” (Lands case (1987), p. 663).

Since the landmark decision in the Lands case, the courts have built upon its findings and developed Treaty jurisprudence as a distinct body of administrative law. Most of the decisions on Treaty matters deal with statutory provisions that require a decision maker to consider the Treaty or Treaty principles in some way. In these cases the courts have determined: the relevance of Mäori customary rights in judicial review; Mäori rights of preference in matters touching Mäori ancestral lands; that any special obligations owed to Mäori do not warrant the courts imposing unreasonable burdens on the Crown; that any substantive obligations owed by the Crown under the Treaty must be balanced against the Crown’s wider responsibilities; and the impact of Mäori spiritual beliefs on the exercise of statutory discretions. (See Joseph, 2014, pp. 77-81 for summaries of these cases.)

The general rule is that a decision maker is under a legal requirement to take the Treaty into account only when it is referred to in legislation. However, in certain contexts the courts may find that the Treaty and its principles are a consideration that a decision maker must take into account even if the empowering statute does not require it

(Huakina Development Trust v Waikato Valley Authority, 1987). This is called "contextual review": the context of decision making imports Treaty considerations (Joseph, 2014, p. 921).

In some contextual review cases the courts apply the Treaty on conventional administrative law grounds, while in others Treaty principles are elevated "to a status approximating a constitutional instrument" (Joseph, 2014, p. 923). The key requirements for contextual review are relevance and context. The courts have said that the Treaty was "designed to have general application" and therefore "colour[s] all matters to which it has relevance" in the application of public powers (Barton-Prescott v Director-General of Social Welfare, 1997, p. 189). It is "part of the fabric of New Zealand society [and] is part of the context in which legislation which impinges upon its principles is to be interpreted" (Huakina Development Trust v Waikato Valley Authority, p. 210).

In Huakina, the leading decision on contextual review, the High Court imported Mäori spiritual and cultural values as criteria governing the Planning Tribunal's functions. In another case the promotion of Mäori language and culture was held to be a mandatory relevant consideration in the allocation of radio frequencies under the Radiocommunications Act 1989, even though the Act was silent as to Treaty principles (Attorney-General v New Zealand Maori Council, 1991). In that case, it meant that the Government had to take account of Waitangi Tribunal recommendations on Mäori broadcasting and the protection of Mäori taonga. In another case, the High Court held that the principles of the Treaty governed the application of the Guardianship Act 1968 although the Act did not refer to the Treaty or Treaty principles. The familial organisation of Mäori was considered taonga and therefore guaranteed under article 2 of the Treaty and entitled to protection under the Act:

> Since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the Treaty in the statute (Barton-Prescott v Director General of Social Welfare, p. 184).

In addition to the application of Treaty considerations in judicial review, the courts also apply a general presumption of statutory interpretation that Parliament will legislate in line with the principles of the Treaty (Legislation Advisory Committee, 2012a). Presumptions of interpretation are used where there is ambiguity in how the law is to be applied in a given situation. If the provisions of the statute are not inconsistent with Treaty principles, but more than one interpretation is possible, then in the process of determining what Parliament intended, the courts will endeavour to interpret statutes in a manner consistent with the Treaty. This is similar to how the courts might take into account any number of factors external to the legislation, including the social, economic and environmental context, other statutes such as the Bill of Rights Act 1990, documents created during the legislation's inception, and the common law (ibid).

Role of the Waitangi Tribunal

The Waitangi Tribunal was established by the Treaty of Waitangi Act 1975. The Tribunal inquires into claims that the Crown has breached the principles of the Treaty, causing prejudice to Mäori (Treaty of Waitangi Act 1975, s 6(2)). The Tribunal has no binding powers of decision, but may recommend to the Crown that it make reparations where a claim is upheld (Treaty of Waitangi Act 1975, s 6(3)-s 6(4)). The Tribunal's interim and final reports often facilitate the claimants and the Crown entering into direct negotiations for Treaty settlements.

When first enacted, the Treaty of Waitangi Act covered only acts or omissions of the Crown from 1975. The Act was amended in 1985 to extend the Tribunal's jurisdiction to the signing of the Treaty on 6 February 1840. Most of the Tribunal's work concerns historical grievances.

The Tribunal has been pivotal for the airing of Mäori grievances and facilitating redress for historical Treaty breaches. Some claims are substantial and complex. The Ngäi Tahu claim hearing covered 73 separate grievances and extended for more than two years and resulted in a 1,200 page report. The Tribunal determines its own procedure.

7.5 Analysis of existing Treaty provisions

References to the "Treaty" and the "principles of the Treaty"

Sometimes legislation refers to the "Treaty", sometimes it refers to the "principles of the Treaty". Several reasons have been advanced in support of reference to Treaty principles. First, Palmer (2001) explains that referencing Treaty

principles "indicates it is the spirit and intent of the Treaty which is important, rather than its bare words…consistent with the constitutional significance of the Treaty and the broad, open textured reading of such documents" (p. 208).

Second, reference to the Treaty principles better copes with the historical nature of the Treaty. New issues and ways of managing them emerge, and the Treaty relationship between the Crown and Māori has evolved and will continue to evolve.

Third, the Treaty has Māori and English versions. The two versions have a number of important differences. The Waitangi Tribunal has determined that both versions should be taken into account when interpreting the scope of the Treaty. Principles more easily allow this to be done than a literal interpretation of the words.

Finally, principles should promote a more positive relationship between Māori and the Crown by allowing a focus on the spirit of the agreement rather than a more limiting and legalistic focus on the literal meaning of the terms.

The PCO submitted that it would be preferable for statutory references to be to the Treaty itself rather than to Treaty principles. It argued that the Treaty is able to adapt to change and that uncertainty is created by referring to the "principles of the Treaty". Omitting "the principles" from statutory provisions would remove the need for interpretation of possible principles. The preferable approach, according to the PCO, would be to take a "living", evolving approach to the interpretation of Treaty obligations (PCO, sub. DR 88).

It may be that in practice there is little material difference between the PCO's preferred approach and how the courts and the Tribunal have approached the interpretation of the "principles of the Treaty". Both focus on the nature of the relationship between the Treaty parties and the obligations that flow from that relationship. Both also require interpretation to apply the Treaty or its principles to the particular situation.

What are Treaty Principles?

The Courts, Waitangi Tribunal and the Executive have all offered their views on the nature of Treaty principles (Box 7.2).

Box 7.2 Treaty principles – three views

The Executive[2]

- The Government's right to govern
- The right of iwi to manage their resources
- Redress for past grievances
- Equality – all New Zealanders are equal before the law
- Reasonable cooperation by both parties.

The Court of Appeal

- A relationship of a fiduciary nature that reflects a partnership imposing the duty to act reasonably, honourably and in good faith
- The Government should make informed decisions
- The Crown should remedy past grievances
- Active protection of Māori interests by the Crown
- The Crown has the right to govern

[2] First expressed by the Fourth Labour Government.

- Mäori retain rangatiratanga over their resources and taonga and have all the rights and privileges of citizenship.

The Waitangi Tribunal

- Partnership
- Fiduciary duties
- Reciprocity – being the cession of Mäori sovereignty in exchange for the protection of rangatiratanga, leading to the duty to act reasonably, honourably and in good faith
- Redress for past grievances
- Equal status of the Treaty parties
- The Crown cannot evade its obligations by conferring its authority on another body
- Active protection of Mäori interests by the Crown
- Options – the principle of choice
- The courtesy of early consultation.

Source: Parliamentary Commissioner for the Environment, 2002.

These lists are neither exhaustive nor conclusive. The Courts are an important authoritative source on the meaning of the principles, but have also said that in interpreting the principles weight should be given to the opinions of the Waitangi Tribunal (New Zealand Mäori Council v Attorney-General, 1992).

Are there key principles?

The Court of Appeal has stated that the Treaty of Waitangi enacts a relationship akin to a partnership and its central obligation is to act in good faith and work out answers in a spirit of honest cooperation (Lands case). The principle of consultation can be regarded as particularly important. Without it, Mäori interests and values can be overlooked when developing and implementing legislation. In 1989 the Court of Appeal found that the principle of good faith "must extend to consultation on truly major issues" (New Zealand Mäori Council v Attorney-General, 1989). In some circumstances the Crown's obligations will go beyond consultation to include "active steps to protect Mäori interests" (Ngäi Tahu Mäori Trust Board v DirectorGeneral of Conservation, 1995).

Explaining the differences in wording

Current Treaty provisions are divisible into two main types: those directed towards the decision-making process and those directed towards the substantive decision outcome. Most existing Treaty provisions are of the former, process-focused type. They require a decision maker to take the Treaty or Treaty principles into genuine consideration when making certain decisions, but do not require that the decision outcome be consistent with or give effect to the Treaty or Treaty principles. There a limited number of statutory provisions that are focused on the decision outcome. They require a decision maker to give effect to or act consistently with the Treaty principles.

Process requirements

Most Treaty provisions are process-focused. The decision maker must take a mandatory consideration into account. However, the requirements to "have regard to" or "take into account" do not import a requirement "to give effect to". They also do not establish a presumption that the decision will be made consistently with the mandatory consideration (Liu v Chief Executive of Department of Labour, 2012). A decision maker may properly conclude that a mandatory consideration was not of sufficient significance to outweigh other relevant considerations:

> The tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the tribunal considers appropriate. But having done that the tribunal is entitled to conclude it is not of sufficient

> significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function (New Zealand Co-Operative Dairy Company v Commerce Commission, 1992, p. 611).

The process-focused Treaty provisions use various wordings to express how the decision maker must consider the Treaty or Treaty principles. Existing Treaty provisions in legislation include requirements for decision makers to:

- give particular recognition to the Treaty or Treaty principles (eg, the now repealed s 10 of the Royal Foundation for the Blind Act 2002, stated that one object of the Foundation is to "give particular recognition to the principles of the Treaty of Waitangi and their application to the governance and services of the Foundation");
- take into account the Treaty or Treaty principles (eg, s 3 of the Resource Management Act 1991 requiring that the exercise of functions and powers under the Act "take into account the principles of the Treaty of Waitangi");
- ensure full and balanced account of the Treaty or Treaty principles (eg, the Preamble to the Environment Act 1986, stating that one purpose of the Act is to "ensure that, in the management of natural and physical resources, full and balanced account is taken of … (iii) The principles of the Treaty of Waitangi");
- have regard to the Treaty or Treaty principles (eg, s 4 of the Crown Minerals Act 1991, requiring that the exercise of functions and powers under the Act "shall have regard to the principles of the Treaty of Waitangi"); and
- acknowledge the Treaty or Treaty principles (eg, s 181 of the Education Act 1989, stating that one duty of a council of a tertiary education institution in exercising its functions and powers under the Act will be to acknowledge the Treaty principles).

These various phrasings have different emphases, imposing different statutory imperatives as to how a decision maker must deal with Treaty principles[3]. On the face of it, "give particular recognition to" is a stronger imperative than "acknowledge". However, the choice of statutory wording might be of more symbolic than legal importance.

First, administrative law principles require a decision maker to give genuine consideration to all mandatory considerations. Mandatory considerations "must be taken into account, considered and given due weight, as a guide in the decision making process" (Staunton Investments v CE Ministry of Fisheries, 2004, at para [19], citing Ishak v Thowfeek, 1968; New Zealand Co-Operative Dairy Company v Commerce Commission, 1992).

Second, the weight to be given to mandatory considerations is a matter for the decision maker. The courts have emphasised that the weighting and balancing of relevant considerations is an integral part of the exercise of decision-making discretion and a value judgement for the decision maker to make, not the courts (Alex Harvey Industries Ltd v Commissioner of Inland Revenue, 2001). In a judicial review the courts will be wary of finding that a decision maker has given the wrong weight to a particular consideration.

There might be two possible exceptions to this (Joseph, 2014, p. 953). The first exception is that some judicial decisions suggest that the courts may intervene on judicial review if a decision maker gives "excessive weight" to some factor or "patently inadequate weight" to another (Alex Harvey Industries Ltd v Commissioner of Inland Revenue at para [14]). In addition, one judicial decision suggests that the court might intervene where the statute specifies the weight to be given to a particular mandatory relevant consideration. In Ye v Minister of Immigration (2009),[4] the decision maker was required to take into account the best interests of the child as a primary consideration. Glazebrook J held that the weight to be given to that consideration had to be appropriately assessed and was not left to the decision maker's discretion.

Third, an applicant faces significant evidential hurdles in trying to prove that a decision maker failed to give appropriate weight to a particular consideration.

In addition to such broadly worded phrases that are of general application to a decision maker's exercise of powers, some statutory provisions impose more specific requirements on decision makers to give effect to principles of the

[3] Some of the cases discussed in this section refer to considerations a decision-maker must weigh, other than Treaty principles.

[4] The decision was reversed on appeal in the Supreme Court.

Treaty. There has been a trend in recent years towards these types of more specific provisions. They might, for example, require decision makers to:

- consult with Māori before making specified decisions (eg, s 3A of the Climate Change Response Act 2002: "In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi …" before recommending the making of an Order in Council, the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Māori that appear to the Minister or chief executive to be likely to have an interest in the order); or

- take specified actions to facilitate participation by Māori in decision-making processes (eg, ss 4, 14, 81 of the Local Government Act 2002).

Substantive requirements

Some Treaty provisions are directed towards the decision outcome. They require a decision maker to give effect to or act consistently with Treaty principles. There are relatively few of these types of provisions. Two prominent examples are the Conservation Act 1987 and the SOE Act. Section 4 of the Conservation Act states: "This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi". Section 9 of the SOE Act provides that the Crown must not act under the Act inconsistently with the principles of the Treaty. The Hauraki Gulf Marine Park Act 2000 is another example of an Act with a provision requiring that the Act is administered consistently with the principles of the Treaty.

In this context, the next section proposes factors that officials should consider when advising on including a Treaty clause in legislation that establishes a new regulatory regime. The section then discusses an alternative approach to the current case-by-case approach to referencing Treaty principles in legislation.

7.6 Guidance for officials – getting Treaty clauses right

Considerable care is required when deciding the circumstances when legislation should include reference to Treaty principles. By including a Treaty clause in statute, it will be clear that legal provision is being made for Māori rights. It also signals the Crown's intent, compared to the absence of such a clause. But the nature and magnitude and implications of those rights may not be clear to the regulator, Māori, other stakeholders, and even the courts.

Legislation Advisory Committee guidelines (Chapter 5: Principles of the Treaty of Waitangi) provides advice for officials on consultation, managing conflict between Treaty principles and the legislation, and common law rights.

The Crown Law Office should be consulted on legislative issues involving Treaty of Waitangi matters. It advises on the likely impact of particular wording. It does not advise on whether that impact is appropriate in the circumstances. This is the responsibility of the departmental officials most familiar with the subject areas and the nature of stakeholders. Officials are responsible for formulating their best advice to ministers on whether to introduce a clause, and the form it should take.

Te Puni Kōkiri should be consulted on all proposals that might have implications for Māori "as individuals, communities or tribal groupings". Te Puni Kōkiri provides advice to government agencies on effective engagement with Māori, and on Treaty principles, on a case-by-case basis and more generally.

The advice of officials should take into account the perspectives of stakeholders interested in the policy being developed. However, a minister need not take the advice of officials, and may deal directly with stakeholders to arrive at a preferred position. A wider discussion of any Treaty clause can be expected at Cabinet before a government bill is introduced. Further opportunities exist for consideration first by a select committee after the bill's first reading, and then by Parliament as the bill travels through the legislative process.

Factors to consider when advising on Treaty clauses

The Commission proposes that the following factors should considered by officials when developing their advice (Box 7.3).

Box 7.3 Incorporating Treaty clauses in legislation establishing regulatory regimes

Mäori

- Whether Mäori have a strong, relatively unified and legitimate interest in the policy being developed and/or how it will be subsequently implemented.
- Whether Mäori would have the capability, capacity and incentive to effectively litigate to protect their rights. If the legal rights are unenforceable, they may have little value.
- The extent to which the clause might negatively impact Mäori or some groups of Mäori (for example, strengthening rights to traditional kai moana could be at the expense of Mäori recreational and Mäori commercial take).
- Whether Mäori trust the Government to deliver appropriately on their Treaty interests in the absence of a Treaty clause.
- The extent to which a Treaty clause might be valued in its own right, for example, as an acknowledgement of mana or partnership.

Stakeholders

- The ability of stakeholders to meet any additional standards required of them, and the cost of their doing so. This requires considering the range of stakeholders likely to be affected, their interests and capabilities.
- The degree of uncertainty likely to be generated for stakeholders, and the ability of those stakeholders to manage that uncertainty.

The Crown

- Where it is desirable that legal provision be made for Mäori rights and where the Crown wishes to signal how this is to be done.
- Whether the rights are deemed to be better defined and protected by the Executive through statute rather than by the Judiciary (as customary rights).
- Whether the agency administering the legislation is formally part of the Crown or not.
- The nature and extent of Crown risk (legal and more generally) taken on or reduced as a consequence of the clause.

Not all factors need to be present. Any one factor may be sufficient justification for a Treaty clause, although in practice a number of factors combined would provide a more compelling case. There are also trade-offs to consider. For example it might be hard for Mäori to effectively litigate to enforce their rights in statute (bullet point 2), but a Treaty clause would be valued as an acknowledgment of mana or partnership (bullet point 5). There are also trade-offs to be made between the interests of Mäori, stakeholders and the Crown. And while the capacity of stakeholders to meet the standards required of them is a consideration (bullet point 6), including a Treaty clause may be a catalyst for stakeholders to develop the capability required. Whether a Treaty clause should be included in legislation requires careful judgement. It is not a decision to be made in a formulaic fashion. Instead it requires the careful balancing on a case-by-case basis of key considerations relating to the regulatory area and the likely impact on Mäori, other stakeholders, and the Crown. If a decision is made that including a Treaty clause is appropriate, the next step is to decide on the form of that clause – whether it is specific or broad and whether it provides direction about the process to be undertaken or the substantive content of the regulatory decision.

An alternative approach

In the course of the inquiry, a number of participants expressed the view that putting Treaty clauses in legislation on a case-by-case basis implied that the Crown could be selective in choosing when and how it would be bound in legislation to uphold the principles of the Treaty of Waitangi. An alternative approach could be to have an overarching Treaty provision in legislation, separate from the jurisdiction the Treaty of Waitangi Act 1975 confers on the Waitangi Tribunal to investigate actions inconsistent with Treaty principles. The Bill of Rights Act or the State Sector Act 1988 had been suggested as suitable locations for such a clause. This "chapeau" legislative provision would mean that all agencies administering Acts would be required to incorporate the principles as appropriate. It would not necessarily preclude including specific Treaty clauses in Acts to provide more guidance on how to apply the principles in specific circumstances. Specific clauses, however, should not diminish the obligations in the "chapeau" clause.

The Ministry for Primary Industries submitted that specific Treaty clauses are "useful as they enable legislators to specify how the statute provides for Treaty principles … thus providing greater clarity and certainty to users and sector parties". It expressed concern that a generic overarching Treaty clause would "be at the detriment of the more detailed and flexible bespoke Treaty clauses" (sub. DR 102, p. 10).

The Treasury and SSC also supported a case-by-case approach because "it is necessary to consider what the clause means in each regulatory context and it is better to determine this before creating legal obligations under particular regulatory regimes" (sub. DR 97, p. 17).

The PCO's submission observed that for an overarching Treaty clause to be applicable in all contexts "it would necessarily be drafted in non-contextual language, exposing decision makers to litigation risk". This enhanced risk could lead to the unintended outcome of "straightjacketing the consideration given by decision makers to purely legalistic concerns …" This would not, in the PCO's submission, "be conducive to a healthy and co-operative relationship between the Treaty parties" (sub. DR 88, p. 21).

The Ministry of Justice however, supported further consideration of the proposal:

> With over 60% of historical Treaty of Waitangi settlements completed, consideration of an overarching Treaty clause is a timely contribution to the Crown-Māori relationship as it moves into a post settlement environment. (sub. DR 87, p. 2)

A key consideration for the Commission, in the context of this inquiry, is whether an overarching Treaty clause would improve the operation of regulatory regimes in New Zealand compared to the status quo drafting of Treaty clauses on a case-by-case basis.

It is difficult for all parties if the Crown, in engaging with Māori on regulatory issues, is obliged to "take account of", "take into account", "take appropriate account of" or ensure a "full and balanced account is taken of" the Treaty or the principles of the Treaty. These differences can add complexity and cost for regulators, regulated parties and other stakeholders with an interest in the regulator's decisions. That is not to say that the design of regulators or regimes should be uniform and that all differences are unjustified, but careful consideration needs to be given to the impact of the differences to ensure that they are justified. As outlined in more detail later in this chapter, the EPA has a Treaty clause in its own legislation and in four of the Acts it administers, with different wording in each case – a difficulty the EPA has to manage carefully. Careful legislative drafting should ensure that differences are justified and that the wording chosen is in the interests of providing clarity and specificity around the operation of a regulatory regime.

The Commission has not heard a compelling case for an overarching Treaty clause, but more attention needs to be given to ensuring that differences in wording are justified. Differences in drafting legislation should not add unnecessary complexity and cost to regulatory processes.

F7.3 When drafting legislation, greater care to ensure that differences in wording are both intended and justified, with respect to Treaty principles, would reduce the complexity and cost of regulatory processes.

While the Commission is not recommending an overarching Treaty clause, it does note the views of the Ministry of Justice on the evolving nature of the Crown-Māori relationship as it moves into a post settlement phase. The Ministry

of Justice's submission demonstrates that, as outlined in Chapter 3, regulatory regimes operate in – and must be cognisant of – a changing institutional environment.

7.7 Guidance for good practice

While legal rights and obligations are enforceable in a court of law where behaviour falls below a minimum standard, excellence cannot be legislated for. Providing guidance on how to apply Treaty principles and sharing good practice can improve the practices of regulators, as appropriate for their area of regulation.

In the submission from Environment Canterbury, Dame Margaret Bazley offers insight on effective approaches, and also points to the weaknesses of relying on legislative requirements:

> Environment Canterbury has experience and insight to offer on effective approaches to working in partnership with Mäori… in terms of its Tuia partnership with Ngai Tähu. This partnership has been built from the ground up, and has been progressed from identifying and respecting past issues and grievances to working shoulder to shoulder to set in place new ways of working focussed on solutions and practical outcomes. Tuia is premised on mutual good faith and commitment to do what is right and in the best interest of the iwi and the region, not on narrow legislative requirements. (sub. 4, p. 1)

Good practice from regulators in upholding Treaty principles of partnership, mutual respect and good faith starts at the top. It depends crucially on the attitudes and behaviours of the chief executive and senior management. It will require putting internal policies, processes and practices in place, and offering guidance for staff about how to apply the principles in their work.

This section looks at what guidance has been produced for applying Treaty principles in a range of contexts and for a range of purposes. The section also provides a framework for assessing Treaty guidance material.

The quality of guidance available

A number of government agencies have developed guidance about applying Treaty principles. The Commission located 10 examples for review:

- Best practice guidelines: Tangata whenua effects assessment – a roadmap for undertaking a Cultural Impact Assessment (CIA) under the Hazardous Substances and New Organisms Act 1996 (HSNO Act) (Environmental Risk Management Authority, 1996);
- He tirohanga o kawa ki te Tiriti o Waitangi (Te Puni Kökiri, 2001);
- Guidelines for cultural safety, the Treaty of Waitangi and Mäori health in nursing education and practice (Nursing Council of New Zealand, 2011);
- New Zealand coastal policy statement 2010 guidance note policy 2: The Treaty of Waitangi, tangata whenua and Mäori heritage (Department of Conservation, 2010);
- Guidelines for consulting with tangata whenua on the Resource Management Act 1991 (RMA): An update on case law (Ministry for the Environment, 2003);
- Guidelines for cultural assessment – Mäori Under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (Ministry of Health, 2004);
- Good practice guidelines for working with tangata whenua and Mäori organisations: Consolidating our learnings (Landcare Research, 2005);
- Guidance on the Marine and Coastal Area (Takutai Moana) Act 2011 (Ministry of Justice, n.d.);
- Ngä Ara Tohutohu Rangahau Mäori guidelines for research and evaluation with Mäori (Ministry of Social Development, 2004);

- Consistency with the Government's Treaty of Waitangi obligations (in New Zealand Treasury, 2013a).

Some of the guidance has been written to help with policy development or with research, some by regulatory agencies to help with applications, and some for capability building. Not all of the guidance relates to regulation making or regulatory practice.

Guidance on any topic ought to cover what needs to be covered, be accurate and relevant, and meet stakeholders' needs. A number of sources provide tips and advice for producing guidance material. For example, the RMA quality planning resource website (www.qualityplanning.org.nz) advises councils on how to produce pamphlets and guidance material about resource consents. It advises that the material should be non-technical, readily available, and current.

In this section a framework is offered for assessing Treaty guidance material (Box 7.4). The framework is then applied to the guidance documents listed above. It makes transparent the criteria on which the guidance is being assessed, promotes assessment consistency across the different types of guidance material, and is able to identify specific areas where the material could be improved.[5]

[5] There are of course limitations to the assessment framework – it sheds no light on how well the guidance is being applied and it does not identify areas of government activity that need, but do not have, guidance material.

Box 7.4 Framework for assessing Treaty guidance material

Content

- Comprehensive: Covers the things that need to be covered:
  - for policy development: Problem definition, identification and assessment of options, consultation, implementation and review;
  - for policy implementation: The purpose of the relevant legislation, the key Māori interests (iwi and non-iwi), how they are to be identified and built into the regulatory function, how to assess whether this is being done appropriately.
- Accurate and up to date: The information should be based on contemporary thinking in the subject area, and should be accurate and internally consistent.
- Relevant: The purpose of the guidelines should be clear. The information should be relevant to the regulatory subject area: the issues likely to arise, the nature of the stakeholders (including their interests and capabilities) and the purpose and objectives of the legislation.
- Accessible: The guidance material should be appropriate to guiding officials in their work. It should also be accessible to stakeholders to promote a shared understanding, manage expectations, reduce uncertainty and promote agency accountability for their performance against the guidelines.
- Excessive prescription should be avoided: Māori are not a single homogenous group. Interests, values, historical circumstances capability and capacity vary widely across Māori communities. So there is no standard process for determining whether proposed regulation or its implementation will raise Treaty of Waitangi issues, or how those issues are best managed.
- Promotes best practice: While it is important that the guidelines help officials to identify and manage legal risk as appropriate, it is even more important that the guidance promote regulatory best practice.
- Good practice example: This helps to make the theory real for officials and stakeholders, aiding learning, acceptance and demonstrating relevance.
- Spill-over benefits: Where appropriate, the relevance of the approach outlined for other stakeholders should be identified. For example, issues focused on cultural sensitivity are relevant to many groups beyond Māori.

Process

- Well promoted: The guidance should be accessible and well publicised. In some cases, training in its use should be available.
- Further information: The guidance should identify further relevant sources of information and contacts to aid officials (and others) in applying the information.
- Reviewed: There should be periodic reviews of the guidance, involving officials, experts and stakeholders to keep the guidance current and relevant.

An overall assessment is made about the quality of the material produced, with comments on a number of aspects noted below.[6]

Overall assessment

Nearly all of the guidance reviewed promoted best practice over simple legal compliance (7 out of the 10 examples reviewed). No guidance was considered so bad that it would not add value to stakeholders, although the difference between the best and the worst was significant. The guidance was rated on a scale of "passable" to "excellent". Overall, the quality of the guidance was too low. The reasonable expectation of the Commission is that guidance should have rated "very good" or better on the assessment criteria, but only three of the examples reviewed achieved this standard.

Meets the needs of stakeholders

The guidance prepared by the Ministry of Justice on the Marine and Coastal Area (Takutai Moana) Act 2011 was the only guidance reviewed that had sections specifically targeted to different stakeholder groups (Māori claimants, local authorities and business). In contrast, the guidance for cultural assessment under the Intellectual Disability (Compulsory Care and Rehabilitation) Act (2003) was not targeted to the range of stakeholders identified (a number of mental health professionals, a specialist in tikanga, and whānau). Different stakeholder needs could have been better met by providing a range of guidance products (for example, a pamphlet for the patient/whānau, a formal document for the health professionals, and another for the specialist in tikanga focusing on expectations and boundaries).

Accurate

While a few errors were detected in the guidance reviewed, it is of concern that at least one example appears inaccurate and misleading. Guidance prepared for the Environmental Risk Management Authority (ERMA), now the EPA, to help applicants prepare a CIA, says applicants are expected to consider whether Treaty principles are "impacted by the proposed application, and if so how?" But the principles apply to Māori and the Crown. The applicant will usually be neither. The regulator and affected Māori should make making judgements on whether the application, if approved, would impact Treaty principles. This is not the role of the applicant. The guidance should have tried to more precisely articulate the nature of Treaty principles from the regulator's point of view. This would have been more useful for the applicant and Māori.

Up-to-date guidance

The guidance on the Marine and Coastal Area (Takutai Moana) Act 2011 is up to date. And because applications under the Act are possible only up to 2017, it is unlikely to need further review/updating. There is a named contact for enquiries. In contrast, the guidance to improve research (undertaken for the Ministry of Social Development and its contractors), where that research requires input from Māori, seems not to have been kept current. Nor are the identified contacts current.

The Treaty

Where taken head on, the Treaty section often appeared somewhat forced and contrived – in many guidance documents it represented something of a "judder bar". Typically, the Treaty was dealt with through referencing court decisions and Waitangi Tribunal opinions. Those documents that did not deal with the Treaty explicitly appeared to have the best logical flow and clarity.

F7.4 Overall the quality of guidance to help apply Treaty principles could be improved. Some guidance was misleading or inaccurate.

[6] Assessment notes are in Appendix E. The Commission did not interview any agency that produced the guidance to seek their views. The guidance was taken and assessed as it was found. The Commission took the view that the target audience should be able to make use of the guidance without needing further explanation or clarification.

The framework was developed as a means of formally assessing the quality of guidance on how to apply Treaty principles according to a consistent set of criteria. But the framework could help regulatory agencies develop their own guidance as to how Treaty principles apply to their area of regulation. Agencies developing guidance material can use the criteria as a checklist to ensure that the guidance is accurate and covers what needs to be covered, is relevant and accessible to the range of stakeholders it is intended for, and promotes good practice. The framework reinforces the importance of guidance being readily available, easily found, and kept up to date.

The two examples that the Commission rated as "excellent" (Appendix E) also provide useful models for other agencies to look at when developing their own guidance about the application of Treaty principles.

F7.5 The framework for assessing guidance material proposed by the Commission could be used as a tool to help regulatory agencies develop guidance about applying Treaty principles in their area of regulation.

7.8 Sharing good practice – the experience of the EPA

Sharing good regulatory practice is one way to raise the standard of practice among regulators. This section reviews the approach to and results achieved by the EPA in incorporating the principles of the Treaty of Waitangi into its decision making. The purpose is to distil lessons for other regulators to help them improve their performance against Treaty principles. This is taken from the full case study prepared for this inquiry (Pickens, 2014).

The Environmental Protection Authority

The EPA was established on 1 July 2011 by the Environmental Protection Authority Act 2011 as a Crown Agent (Figure 7.1).

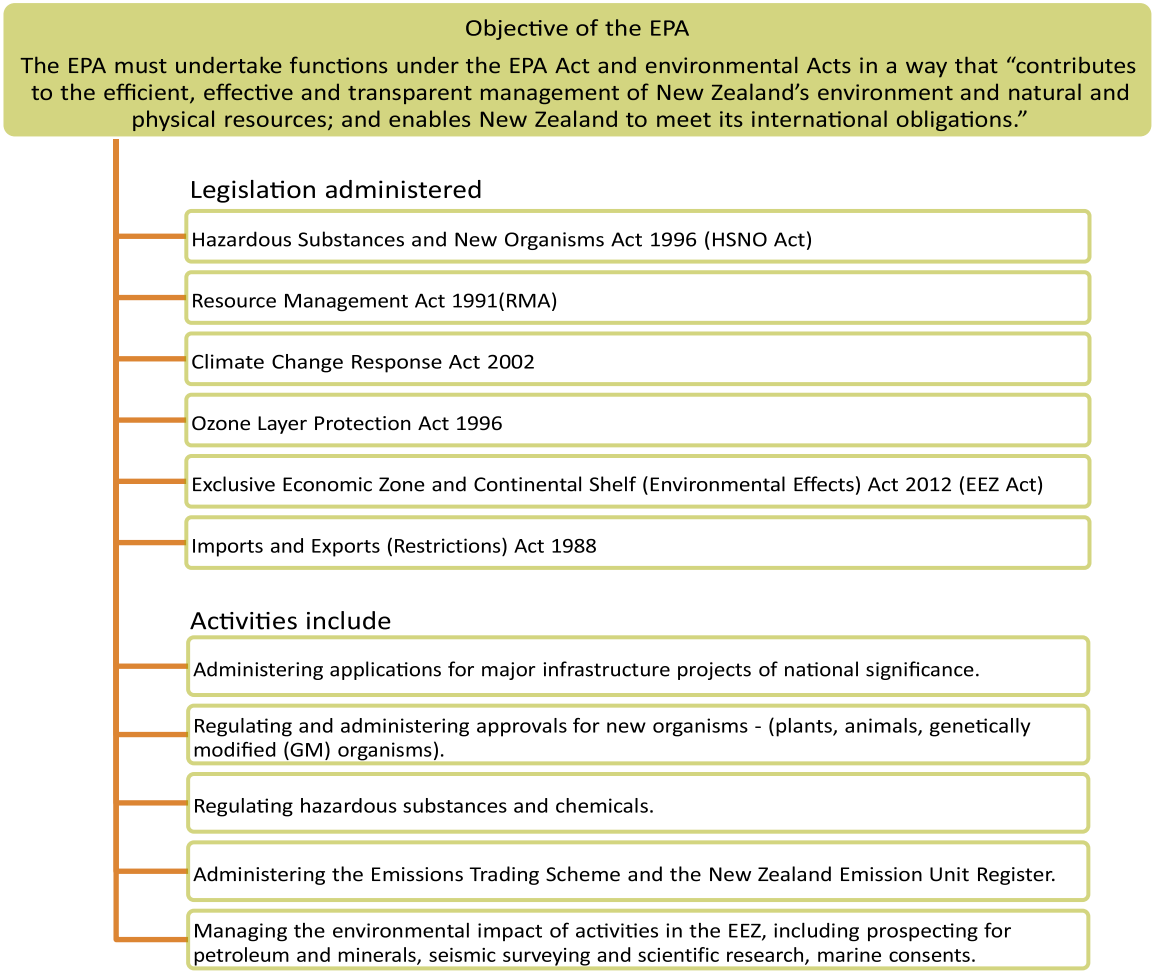
The EPA is a quasi-judicial body of 6–8 people appointed by the Minister for the Environment who are selected to represent a "balanced mix of knowledge and experience" in the appropriate areas. The Authority is supported by the staff and infrastructure of the government Agency and together the Authority and the Agency form the EPA. Much of the EPA's work is spent facilitating the decision-making process for proposals from applicants for nationally significant resource management proposals under the RMA and administering proposals for new applications under the HSNO Act.

Recent history

While the EPA is a relatively new body, at its core are the responsibilities carried forward from ERMA. To these have been added new responsibilities such as regulating activities in the Exclusive Economic Zone (EEZ).

With respect to incorporating the principles of the Treaty of Waitangi into its decision making, ERMA had a strong culture of identifying, understanding and incorporating, as appropriate, Māori views into its processes. This had not always been the case. The 2001 Report of the Royal Commission on Genetic Modification found many Māori believed they were disenfranchised from ERMA's processes. Specifically, the Commission found "Māori concerns that consultation is being carried out too late, is too brief and that, on occasion, isolated individuals have been expected to respond on behalf of one or more hapū or iwi, and even on a national basis"(chapter 11, p. 303). It was not only Māori who were dissatisfied with the process. Applicants requiring consent for activities found it hard to know who they should consult with, and there were complaints of the cost of doing so.

Figure 7.1 The EPA



In response to the Commission's findings, the Government agreed to establish Ngä Kaihautü (the Mäori Advisory Committee) to advise ERMA on issues relating to Mäori. Further, in 2003 ERMA established Te Herenga (a national network of Mäori representatives). Both bodies were carried forward into the EPA, although only Ngä Kaihautü has statutory backing.

The amalgamation of a number of regulatory functions previously undertaken by other agencies, and the addition of new functions, within the EPA was almost universally supported by stakeholders interviewed. Mäori stakeholders spoke of amalgamation better accommodating the "big picture" perspective they favoured, in preference to having to navigate the different bureaucracies to settle issues that stretched across multiple agencies. The EPA had also "gone the extra mile" by facilitating Mäori access to other regulators by, for example, inviting relevant regulators to hui and helping to build Mäori capacity for engaging with those regulators.

The EPA's approach to decision making

Consistent with the purpose statements of the legislation the EPA administers, the Authority takes a netbenefit approach to decision making. This means that if the expected benefits of an application are expected to outweigh the expected costs, then the application is approved. For example, the purpose of the RMA is to promote the sustainable management of natural and physical resources. This means managing the use, development, and protection of natural and physical resources in a way or at a rate that enables people and communities to provide for their social, economic, and cultural wellbeing (section 5). The EEZ Act is similarly focused on sustainable management (section 10(2)). Section 9(1) of the HSNO Act states that "the Governor-General may from time to time, by Order in Council, establish a methodology (which includes an assessment of monetary and non-monetary costs and benefits) for making decisions … and the Authority shall consistently apply that methodology when making such decisions".

HSNO (Methodology) Order 1998 articulates the principles to take into account when assessing costs and benefits (Box 7.5).

Box 7.5 The HSNO Act – a consideration of costs and benefits

The purpose of the Act is to protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms. Principles to be recognised and provided for in the legislation include safeguarding the life-supporting capacity of air, water, soil, and ecosystems. Matters to be taken into account in relation to the purpose of the Act include the sustainability of all native and valued introduced flora and fauna, intrinsic value of ecosystems, public health, relationship of the Mäori people with the biophysical state, economic and related benefits and costs, and New Zealand's international obligations. The Authority is required to take into account the need for caution in managing adverse effects, where there is scientific and technical uncertainty about those effects.

Source: Barratt et al., 2007.

A balanced and even-handed approach to stakeholders and their interests was commented on by most interviewees. This is enabled by the net-benefit approach to decision making. The EPA's approach is striking in that it does not limit its role to ensuring applicants comply with the regulatory standards required before an application is approved. EPA staff are able to help applicants prepare their applications. The conflicts of interest that would normally arise in this situation are minimal – the Authority acts autonomously, advised (but not instructed) by its staff, with input from experts if required. This independence allows the Authority to better resist activist and other political influences that might affect the decision-making process. Conflicts or perceptions of bias are further minimised as the EPA also helps those affected by applications, including Mäori, to engage in processes relating to applications. Further, the HSNO Act requires the application and evaluation process to be open, transparent and public – features that promote accountability and better performance by the regulator. The pre-application stage involves applicants identifying all significant impacts and issues, and engaging with affected parties. During the application phase, the application is open to public submissions to ensure concerns have been adequately addressed. A public hearing may be called for; if called, it must be held.

F7.6 The EPA does not limit its role to ensuring that applicants comply with regulatory standards before an application is approved. Applicants are helped in preparing their applications and the EPA also helps those affected by applications. Conflicts of interest are minimised because the application process is open, transparent and public.

The principles of the Treaty of Waitangi

The EPA's Act provides that "in order to recognise and respect the Crown's responsibility to take appropriate account of the Treaty of Waitangi, a Mäori Advisory Committee will advise it on policy, process and decisions" (s. 4a) and "the EPA and any person acting on behalf of the EPA must comply with the requirements of an environment Act in relation to the Treaty, when exercising powers or functions under the Act" (s. 4b). Further, the RMA and HSNO, Climate Change and EEZ Acts administered by the EPA also contain provisions relating to the principles of the Treaty of Waitangi and the interests of Mäori.

Notably, the EPA takes Treaty principles into account within the parameters provided by a net-benefit, decision-making approach (the assessment of expected costs and benefits as described above).

Stakeholders were universally supportive of the way the EPA was discharging its Treaty responsibilities under its legislation, with some even pointing to the Act as simply codifying what was the best approach for the EPA. Others pointed to the value of the Treaty clauses in cutting across what they viewed as unhelpful debate from stakeholders resisting incorporating Mäori interests into the process.

However, there was also concern from some interviewees that the "narrow" Treaty clause in the EPA Act could result in a minimalistic interpretation of the EPA's responsibilities. It was noted, for example, that while Ngä Kaihautü has statutory backing, the widely supported Te Heranga does not and so could be disbanded.

While incorporating Treaty clauses in legislation can be an important catalyst for change, its success is highly dependent on the motivation, incentives and capability of those who work within it. It also depends on goodwill, trust and a shared commitment to making it work. While some Mäori stakeholders have been able to point to risk with respect to the Treaty clauses, to this point without exception those risks do not appear to have eventuated. This is in no small part due to the EPA's investment in establishing and maintaining good relationships with its stakeholders.

An investment in good relationships

This section considers four mechanisms that the EPA uses to incorporate the Treaty principles into its decision making (Figure 7.2).

Ngä Kaihautü (Mäori Advisory Committee)

The Ngä Kaihautü members interviewed see their role as mainly that of "process guardians". This means their role is to ensure Mäori have adequate opportunity to contribute their views into the EPA decisionmaking process. Ngä Kaihautü also contributes its own views in a "safety valve" role, in particular if it considers the decision makers have not accessed the information they need through the consultation process. The Ngä Kaihautü interviewees were very clear that, while they do offer a Mäori perspective, they do not represent the views of Mäori.

Mäori stakeholders interviewed valued the role played by Ngä Kaihautü, in particular its oversight role within the process that contributed to building trust. Applicants also valued the role it played in putting context around, and promoting an understanding of, submissions by Mäori stakeholders on applications.

Te Herenga (Mäori National Network)

On its establishment, there was an identified risk that Te Herenga might become a liability. For example, it might be captured and discredited by a few dominant personalities, see its role as combative, or might not be accepted by other stakeholders or by Mäori more widely. These risks have not materialised. Of the mechanisms identified as driving EPAs success, none were spoken of more highly than Te Herenga, in particular from the Mäori perspective.

Te Herenga has provided the face-to-face (kanohi ki te kanohi) relationship needed across all levels of policy development and implementation. Its permanent and formal structure has made it easier to build capability and trust and realise the associated benefits. For example, the growing trust of Mäori in Te Herenga is realising savings for Mäori, as it has increasingly been relied on to accurately and effectively bring the views of Mäori to the table on their behalf. A number of interviewees were also positive about Te Herenga being more hapü than iwi based. The protocols around how it operates and the involvement of Kähui Kaumätua were believed to have worked to moderate extremes, promoting consistency across the network and managing risks more generally.

From the perspective of applicants, Te Herenga has provided a useful filter for views on their applications and has promoted the right information getting to the right people, so reducing risks and costs to applicants.

From a system-wide perspective, it was noted that Te Herenga, and Mäori more widely, were sometimes the only submitters on some applications, and that their involvement in these cases was necessary for the integrity of the system and promoting robust decision making.

Figure 7.2 Mechanisms to incorporate Treaty principles in EPA decision making

Notes:

1. Inspired by Gordon Walters

Some stakeholders spoke of the importance of adequately resourcing Mäori to participate in consultation on applications. Some reimbursement of direct costs is made available to Mäori stakeholders. However, some Mäori thought obtaining Mäori cultural information should be funded on a similar basis to contracting experts reviewing, for example, the impact of an application on the biota of a region. This is a difficult issue. The two situations are not directly comparable. A contractor is directly accountable to the funder for the product provided, and their services will be discontinued if the funder does not consider their advice is adding value. Mäori stakeholders would not find these restrictions acceptable.

It should be acknowledged that Mäori have additional steps and costs to incur when developing submissions, which need to be accommodated. At least to a point, the EPA appears to have done this. But the EPA appreciates that regulators need to monitor these expenses carefully, having regard to the capability of respective stakeholders and the importance of gaining their perspectives. Any funding must be directly related to gaining those perspectives.

F7.7 Mäori have additional steps and costs to incur when developing submissions, but care is needed when considering funding, having regard to the capability of respective stakeholders and the importance of their perspectives, and ensuring funding is directly related to gaining those perspectives. Regulators need to monitor these expenses carefully.

Guidance

The Commission has reviewed the quality of a number of guidance documents across the public sector (section 7.7). The quality of the EPA's documents is with the best of those reviewed, being well balanced, comprehensive, accessible, and focused on best practice rather than being legalistic. EPA's documents use practical examples, are relevant, and provide good links to extra information, including EPA contacts. Consistent with the other Treaty guidance reviewed, the Treaty section appears forced. It is unclear what it adds to the rest of the document. Rather than as a separate section, the Treaty might instead have been presented as the foundation within which the guidance is provided. Alternatively, it could be used to communicate directly with applicants about the nature of Treaty principles from the EPA's perspective.

F7.8 Providing guidance for applicants and other stakeholders about navigating the process is considered a core part of the EPA's role as a regulator.

Kaupapa Kura Taiao (Mäori Policy and Operations Group)

At this point, having Kaupapa Kura Taiao – a separate Mäori Policy and Operations group – is regarded by the EPA as a superior model to using those resources to build Mäori capability and capacity within the other units (integration). But a number of stakeholders thought that full integration would be the natural end point.

All stakeholders spoke very highly of the EPA staff, and in particular of Kaupapa Kura Taiao. In particular, they commented on its open and timely communication, accessibility, balanced approach, pro-active work, capability and credibility. Less tangibly, but importantly, stakeholders commented that its approach was promoting a necessary culture of respect and understanding between parties, and a shared desire to protect a system that stakeholders believed was serving their interests well. Nearly all stakeholders emphasised "good relationships" and "trust". To a large extent, this must be credited to the work and attitude of the EPA's staff and its leadership. The EPA's staff are the common ingredient across all the EPA's systems and processes used to build Treaty principles into the EPA's decision making.

Having produced a suite of guidance material, the EPA has shifted to working directly with stakeholders. This makes it even more important that the EPA has access to excellent staff. An obvious risk for the EPA to manage is retaining, motivating and training its staff.

F7.9 Open and timely communication, accessibility, a balanced approach, pro-activity and a culture of respect and understanding, comes from the leadership of the organisation, through to its staff, and is demonstrated in the behaviour and actions of the EPA.

Challenges from the EPA perspective

The EPA has avoided a legal and minimalist approach to Treaty principles in its legislation and in the legislation it administers, favouring an approach that facilitates achievement of its regulatory objectives through building strong relationships and trust.

The EPA was candid about the challenges it faces in maintaining its approach to incorporating Treaty principles in its decision making. The Authority is expecting that its decision making approach will increasingly face legal challenge at some point either by applicants or stakeholders, and that this may undermine the non-legalistic approach taken by the EPA. It was also noted that while cultural impacts are included in the net-benefit approach to decision making, as with all qualitative assessments, they carry less weight than quantitative assessments of costs and benefits.

There was some nervousness expressed about the recent addition of the EEZ legislation to EPA's responsibilities, and whether the EPA's current approach to applicants and stakeholders could be maintained under the EEZ legislative framework. This is despite the provisions in the EEZ Act for Mäori consultation, recognition, and requirements to notify affected Mäori groups of consent applications that may affect them.

EPA staff are justifiably proud of the EPA's organisational culture and approach. Staff noted that the EPA's reputation, with respect to the way the organisation incorporates the principles of the Treaty of Waitangi in its processes and in its decision making, is a result of the leadership of the Board and the Chief Executive. Changes in leadership can have a significant impact on attitudes, practices and processes (Chapter 4), but the Treaty clause in the EPA's legislation can provide some protection.

Lessons

All interviewees identified the EPA as the standard setter with respect to incorporating Treaty principles into its decision making, with a number commenting they believed this was also more widely acknowledged by their respective stakeholder groups.

The institutional structures and processes that the EPA uses have clearly worked for it in achieving its regulatory functions and meeting the diverse range of interests of its stakeholders. Some features of these arrangements might prove useful for other regulators. Even so, the arrangements should not be blindly copied. Rather, it should be acknowledged that the arrangements are a model that has brought the EPA positive change so that today it enjoys a high level of stakeholder support.

In designing their own arrangements to build Treaty principles into their decision making, regulators should focus on their own regulatory responsibilities and functions, and the capabilities, capacity and incentives of their stakeholders. To do this successfully is challenging, with significant risks and costs, in particular in the early years. But for many regulators, retaining the status quo is also a risky and costly strategy, and one which may become unsustainable and compromise the overall objectives of New Zealand's regulatory regimes.

F7.10 In designing institutional arrangements, processes and practices to incorporate Treaty principles into their work, regulators should focus on their own regulatory responsibilities and functions, and the capabilities, capacity and incentives of their stakeholders.

Looking to the EPA example, perhaps the most important lesson for other regulators is that the investment in developing good relationships reaps benefits. For the EPA, that investment has been in the form of:

- the cost of establishing and supporting Te Herenga and Ngä Kaihautü;

- holding hui;
- developing and promulgating high-quality guidance;
- ensuring the EPA is accessible to enquiries where the guidance by itself is insufficient;
- the cost of EPA's Māori Policy and Operations group, and integrating its work with the rest of the EPA;
- having the General Manager of the Māori Policy and Operations Group on the leadership team; and
- promoting information exchange, and training opportunities.

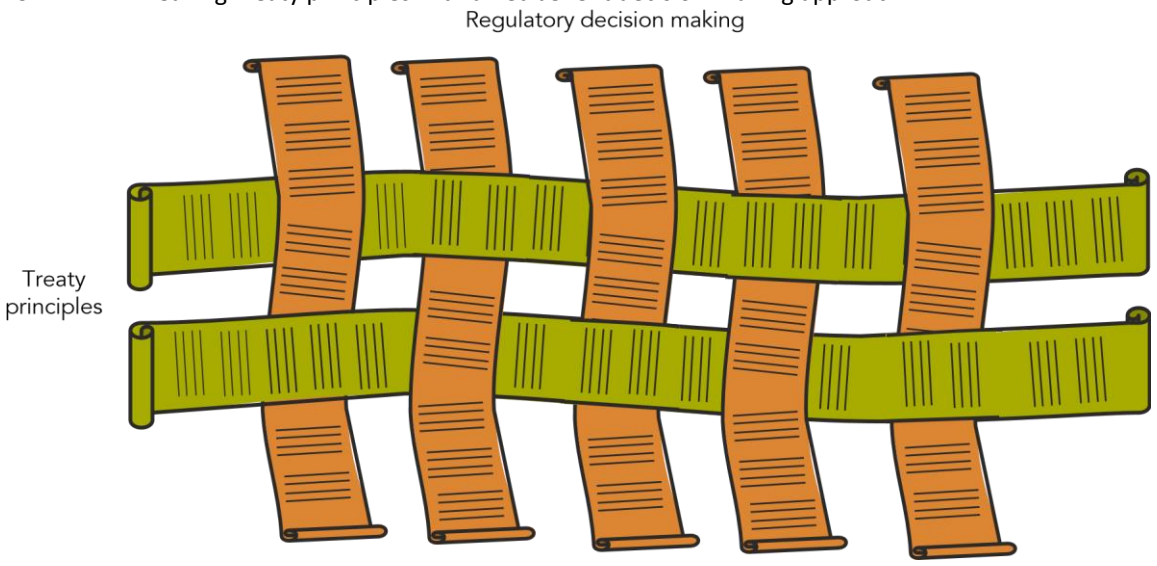
Beyond this, and perhaps just as important, the EPA has actively developed a culture that promotes within its relationships, respect, openness, honesty, fair dealing and dignity for all. In turn, this has produced a strong dividend in the form of trust – a word emphasised by most stakeholders interviewed.

Stakeholders believe this investment has been reducing the cost on all parties involved in the application process (for example, litigation, consultation and ongoing coordination), while improving the quality of engagement and the resulting decisions. Such investment has also brought buy-in to the success of the EPA approach and a shared commitment to making it work. Further, when decisions go against stakeholders, those decisions are now more readily accepted and are less likely to be contested or breed unhelpful cynicism. These dividends are expected to continue to accrue over time, although stakeholders identified a few risks that may require active management.

F7.11 An important lesson from the EPA's experience for other regulators is that the investment in developing good relationships pays off in the form of reduced cost on all parties involved in the application process, while improving the quality of engagement and the resulting decisions. Such investment has achieved buy-in to the success of the EPA approach and a shared commitment to making it work. When decisions go against stakeholders, those decisions are now more readily accepted and are less likely to be contested.

Finally, the EPA appears to have successfully built the Treaty framework into its broader decision-making framework, which is strongly grounded in a public welfare approach – maximising expected benefits relative to expected costs (Figure 7.3). Too frequently the Treaty and public policy frameworks are treated as competing rather than complementary and reinforcing paradigms. These tensions were not found here.

Figure 7.3 Weaving Treaty principles with a net-benefit decision-making approach



7.9 Summing up

It is important that the principles of the Treaty of Waitangi are appropriately taken into account when designing and implementing regulatory regimes. The continuing evolution of the relationship between the Treaty partners, and the interpretation of Treaty principles by the courts, can generate considerable uncertainty for those applying the principles in regulatory regimes. This chapter has provided some guidance to help work through the issues.

"Treaty clauses" – references to the principles of the Treaty of Waitangi – are in about 36 statutes. Treaty clauses are often in statutes where Māori have a relationship with the land, water, important sites, wāhi tapu and other taonga. Most of the statutes contain regulatory provisions and create obligations on a range of parties that are not the Crown. The inclusion of Treaty clauses is a legal acknowledgement of Māori interests and rights, and a clearer definition of the Crown's responsibility with respect to those rights (that, in the absence of a specific clause, might be interpreted more broadly).

Yet the legislative route does have drawbacks. A legalistic approach may be at odds with the central Treaty principle of good faith. It is in this context that this chapter provides a set of factors that officials should consider in recommending the inclusion of Treaty clauses in statutes that establish regulatory regimes or regulatory agencies.

Excellence in regulatory practice with respect to Treaty principles, however, cannot be legislated for. Good practice in upholding Treaty principles of partnership, mutual respect and good faith depends on senior leadership, good internal policies and processes, and guidance for staff and stakeholders.

A number of examples of guidance about how to apply Treaty principles have been reviewed against a set of criteria. While the assessment criteria the Commission has used reveals that the overall quality of existing guidance material can be improved, the real value in the assessment framework is as a tool to help regulatory agencies develop their own guidance about how to apply Treaty principles in their area of regulation.

Sharing good regulatory practice is one way to raise the standard of practice among regulators. Lessons from the experience of the EPA are identified. In particular, investing in developing trust through good relationships can pay off in reduced costs and better regulatory decision making. Other regulators can adopt the lessons learned to improve their regulatory practice with respect to the principles of the Treaty of Waitangi.

Chapter 3 emphasises the importance of being really responsive to the institutional environment in which both regulator and regulatees operate. A really responsive regulator is able to evaluate its performance and adapt its strategy over time, and this is no less important with respect to Treaty obligations.

This chapter illustrates how the EPA fulfils its regulatory objectives within a framework that explicitly incorporates the principles of the Treaty of Waitangi. The EPA monitors how well its processes work to meet its Treaty obligations, looking to where further improvements can be made.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