This is a brief review of how key legislation relevant to environmental management deals with Crown obligations under te Tiriti o Waitangi/the Treaty of Waitangi (the Treaty). The issues arising from these provisions have a legal context which is significant; however there are substantive obligations and procedural safeguards that are relevant for tangata whenua working on environmental issues. Please refer to the report, the current initiatives and the case studies for further information.

Please note that this is not an exhaustive list of either environmental legislation or legislation that involves matters relevant to tangata whenua. For further information on specific legislation you can contact the agency which administers the Act that you are interested in, or check information on their website. Many iwi have resource management groups or law centres that could give you more detailed information.

The Treaty created a partnership between the Crown and Maori and imposes a number of obligations on both parties. As with all treaties, the Treaty is only directly relevant to New Zealand law to the extent that it is incorporated into statute. The Treaty is part of New Zealand constitutional law although its exact status has never been clearly defined, leading to much debate over the past 162 years.

Under Article II of the English version of the Treaty the Crown confirmed the "…full exclusive and undisturbed possession of their lands and estates forests fisheries and other properties…as long as they desire to retain…in their possession…". In the Maori version there is the often quoted promise of tino rangatiratanga over taonga. It is important to note the closeness of the matters mentioned in Article II with those matters addressed in the legislation governing natural resources discussed later in this document.

PRINCIPLES OF THE TREATY

A number of statutes refer to the principles of the Treaty;[i] however, there is much discussion and debate as to what these principles mean. The Treaty of Waitangi Act 1975 was the first statute to refer to the Treaty principles. Various institutions such as the Courts, Waitangi Tribunal and the Executive have all commented on the principles. In the late 1980s, in a series of important Court of Appeal judgements led by Cooke P, the Court outlined what the principles are.[ii] Since then the Courts and Waitangi Tribunal have further expanded on the principles and how they are to be applied in the implementation of legislation. The phrasing of the Treaty reference in a particular Act, and the general purpose of that Act, mean that the principles requiring consideration and response in one Act may be less relevant to the exercise of powers and functions under other Acts.[iii] The principles also differ depending on the institution discussing them.
A brief summary of some of the principles proposed by the Executive, Court of Appeal and Waitangi Tribunal follows.

The Executive:[iv]
- The government's right to govern
- The right of iwi to self management of their resources
- Redress for past grievances
- Equality, all New Zealanders are equal before the law
- Reasonable cooperation by both parties

The Court of Appeal includes:[v]
- 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 Maori interests by the Crown
- The Crown has the right to govern
- Maori retain rangatiratanga over their resources and taonga and have all the rights and privileges of citizenship

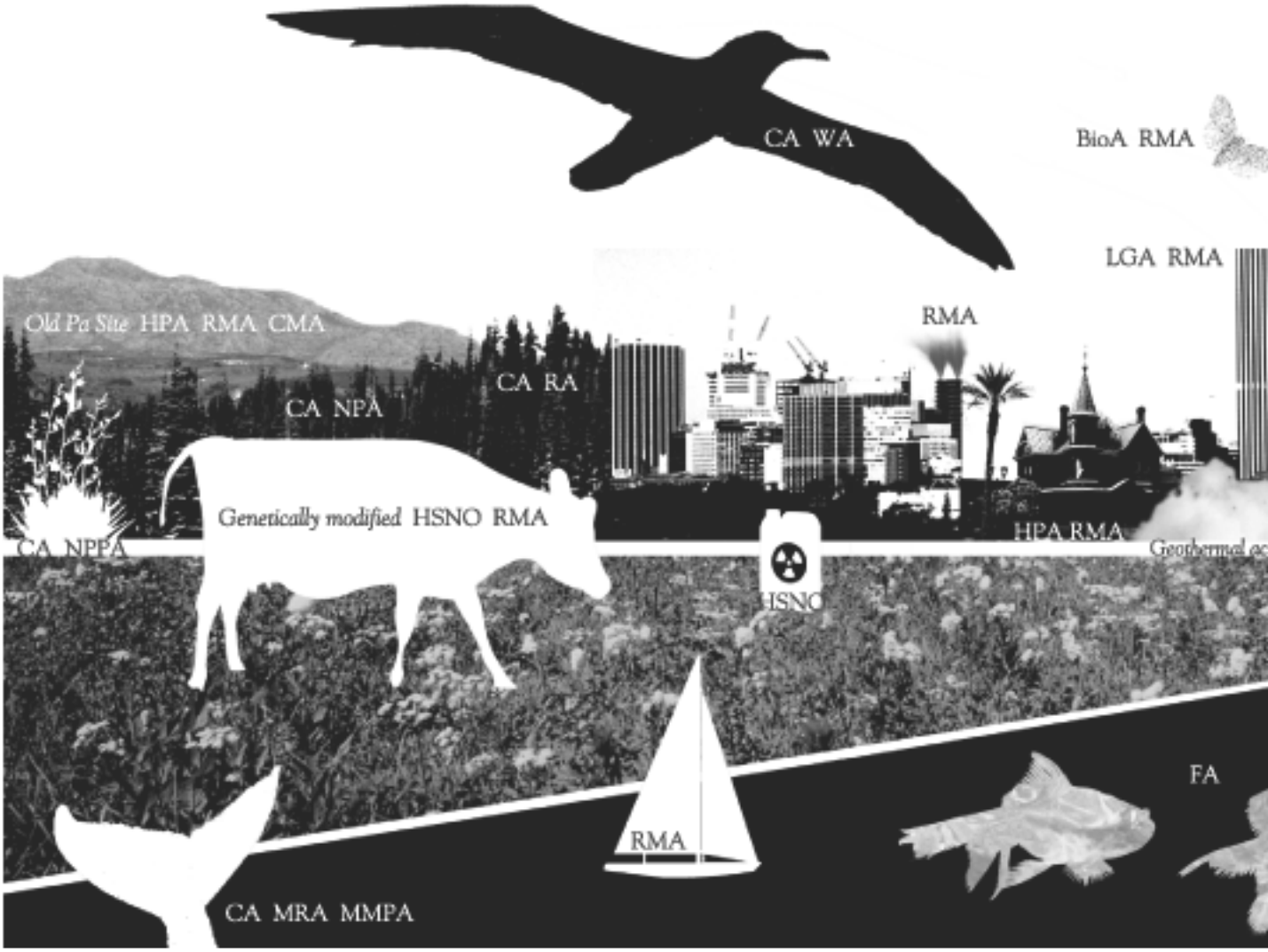
The Waitangi Tribunal was established by the Treaty of Waitangi Act. The Tribunal's functions are to make recommendations relating to claims, comment on proposed legislation, and to determine if matters are inconsistent with the Treaty principles. As the Tribunal is a recommendatory body the Crown is not obliged to implement the Tribunal's recommendations. Following on from the Tribunal process the Crown negotiates settlements with iwi and hapu and these settlements may contain environmental provisions such as statutory acknowledgements.

The Waitangi Tribunal principles include:[vi]
- Partnership
- Fiduciary duties
- Reciprocity – being the cession of Maori sovereignty in exchange for the protection of rangatiratanga, leading to the duty to act reasonably, honourably and in good faith
- Mutual benefit 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 Maori interests by the Crown
- Options – the principle of choice
- The courtesy of early consultation

This list is neither exhaustive nor conclusive and is included to demonstrate the way in which the principles vary.
Any summary of the principles is difficult as although the wording used by the various institutions may be similar, the meanings, interactions and nuances can be significantly different.[vii] There are grounds for a range of interpretations that can result in confusion and controversy. The Courts[viii] and the Waitangi Tribunal have discussed the principles at length over time and they continue to evolve. Further reading is recommended.

Some of the Acts discussed in this document do not refer to the Treaty itself; instead they may refer to terms such as tangata whenua or kaitiakitanga. It is important to acknowledge this treatment of kaupapa Maori as a response by the Crown to protect Maori rights and obligations under the Treaty. In addition, the common law doctrine of aboriginal title is also relevant to Maori, although the doctrine is largely undeveloped in New Zealand. The test for aboriginal title requires that the land was used and occupied by the aboriginal people and that their title has not been specifically extinguished by statute, purchase or cession. It is recognised that aboriginal title has been extinguished for much of the land in New Zealand, particularly land in private ownership. There is debate surrounding the foreshore

Diagram of the Acts referred to in the text to demonstrate some of the linkages and comple



and seabed which is likely to have implications for the environmental management of these areas. Of significance is a High Court decision in 2001[ix] concerning the Marlborough Sounds. Despite the findings that the foreshore and seabed were not considered to be "customary Maori land", the Court made it clear that this did not preclude Maori from establishing other customary rights over the foreshore, the seabed and waters, short of exclusive possession and ownership. This would include traditional relationships and customary rights such as fishing and gathering.

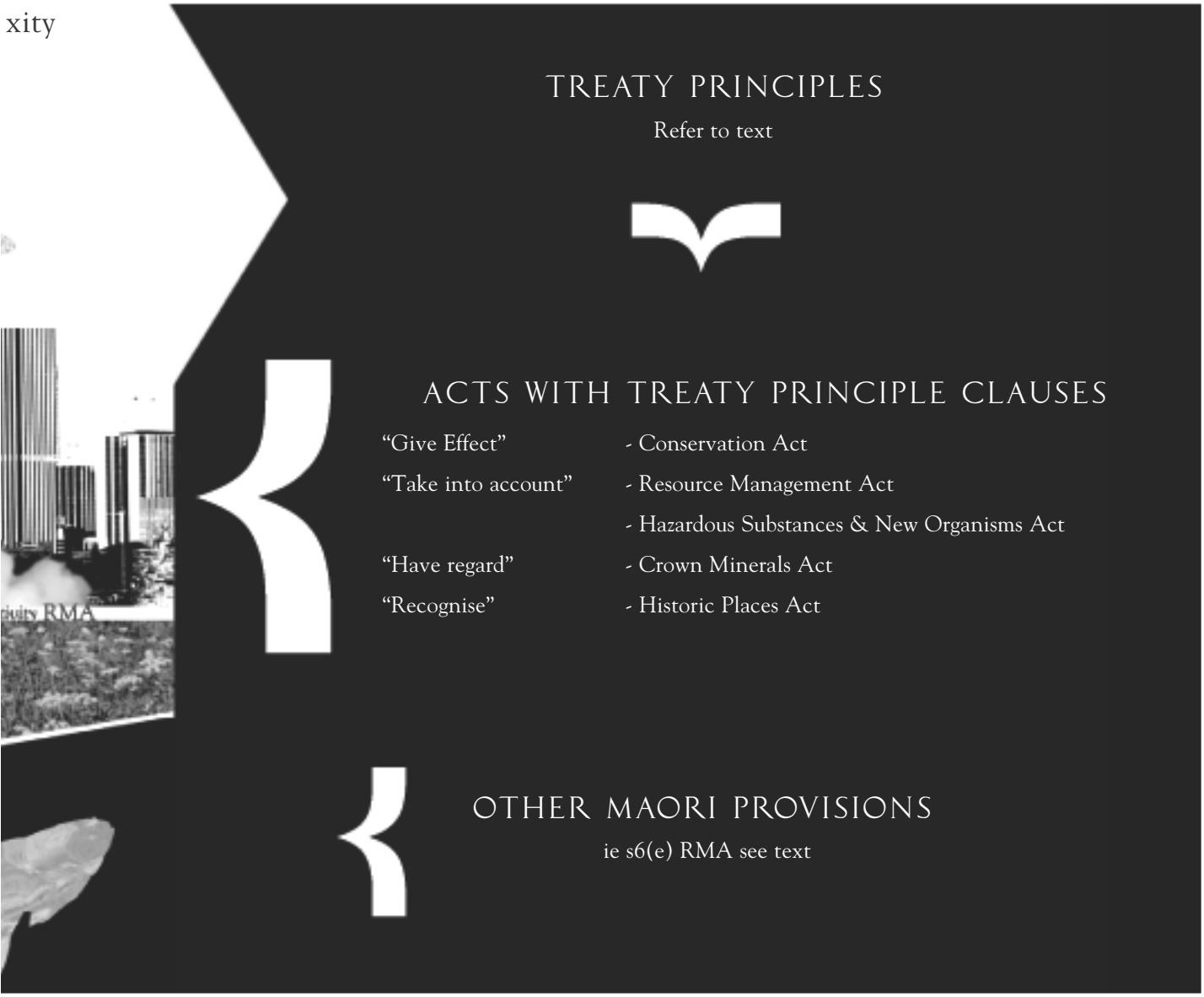
ENVIRONMENTAL LEGISLATION

Many environmental statutes refer to the Treaty and/or other kaupapa Maori, although the importance placed on either the Treaty or related provisions varies between the statutes. Provisions that require public authorities to *"give effect"* or to *"recognise and provide"* have similar standing and are the most strongly worded of the clauses. A provision that requires public authorities to *"take into account"* a matter, is considered to have weaker standing, but is in turn stronger than to have *"particular regard"*.[x]

Most environmental case law involving the Treaty/Maori clauses are decisions related to the Resource Management Act 1991.[xi] There are also some important Court of Appeal decisions related to the Conservation Act 1987 and other matters.

The courts have often said that Treaty clauses and Maori provisions are more than just procedural and are not easily dismissed, or to be narrowly construed. These Treaty clauses will, however, be interpreted in a way that is consistent with the purpose of the Act concerned.[xii] The specific wording of the clause will determine the weight it is given and the obligations that flow from it.

xity



RESOURCE MANAGEMENT ACT 1991 (RMA)

Part II of the RMA establishes the purpose and principles of the RMA, the purpose being to promote the sustainable management of natural and physical resources.

- Section 6 lists matters of national importance. Section 6(e) requires people exercising functions and powers under the Act to *recognise and provide for* "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga."
- Section 7 lists other matters to be given *particular regard* when exercising powers and functions under the Act. In section 7(a) "Kaitiakitanga" is listed as one of these matters.
- Section 8 requires people exercising functions and powers under the Act to *take into account* the principles of the Treaty. This imposes a statutory obligation on local authorities when acting in the capacity as a "consent authority", to take the Treaty principles into account in their decision making and work under the RMA.

Case law has established that when decisions are made under the RMA a balancing exercise ensues. Matters of national importance carry a substantial weight, but are subordinate to the purpose of sustainable management.[xiii] Similarly matters listed in section 7 are considered as part of the balancing exercise but have less weight than matters of national importance. In most cases the provisions in sections 6(e), 7(a) and 8 are considered together as they often overlap. To fulfil duties imposed by Part II there has been a strong focus on consultation. Issues associated with consultation are explored in the PCE's *Kaitiakitanga and Local Government* report.[xiv]

There are a number of other sections of the RMA that mention kaupapa Maori.[xv] These sections are in the main relevant to plan and policy considerations, Iwi Management Plans and wahi tapu. Section 33 is also important as it allows authorities to transfer functions to iwi authorities, although to date no such transfer has occurred.

Provisions for Maori interests are also found in the New Zealand Coastal Policy Statement 1994 (NZCPS).[xvi] This is a RMA National Policy Statement and contains a wide range of provisions relating to the interests and values of Maori in the coastal environment. The NZCPS includes a general principle that "tangata whenua are the Kaitiaki of the coastal environment" and also states that it is a national priority to protect characteristics of the coastal environment "of special spiritual, historical or cultural significance to Maori identified in accordance with tikanga Maori".

The Court with jurisdiction for RMA matters is the Environment Court (formerly the Planning Tribunal), which is a Court of record. The Environment Court is a specialist Court and consists of Environment Judges (who are also District Court Judges) and Environment Commissioners. This Court also has jurisdiction under the Historic Places Act, Local Government Act, Public Works Act, Forests Act and Transit NZ Act.[xvii]

CONSERVATION ACT 1987 (CA)

The CA establishes the Department of Conservation (DoC) which administers the CA to promote the conservation of New Zealand's natural and historic resources. Section 4 states "This Act shall be so interpreted and administered as to *give effect* to the principles of the Treaty of Waitangi." The First Schedule of the Act lists some 26 other Acts that DoC administers including: Marine Mammals Protection Act 1978 (MMPA); Marine Reserves Act 1971(MRA); National Parks Act 1980 (NPA); Reserves Act 1977 (RA); and Wildlife Act 1953 (WA). The Court of Appeal has found that Acts administered by DoC are linked to the CA and therefore have an "indirect incorporation" of the Conservation Act Treaty clause, so far as their provisions are clearly not inconsistent with the principles of the Treaty.[xviii]

The CA also establishes the New Zealand Conservation Authority (NZCA) as having an advisory role.
The membership of NZCA includes a Ngai Tahu seat[xix] and two other dedicated Maori representatives.
The regional Conservation Boards also have provision for Maori representation.

ENVIRONMENT ACT 1986 (EA)

The EA provides for the establishment of the office of the Parliamentary Commissioner for the Environment (PCE)[xx] and the Ministry for the Environment (MfE). The long title states at c(iii) that the Act is 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", among other matters. At section 17(c) the EA refers to any land, water, sites, fishing grounds, or physical or cultural resources, or interests associated with such areas, which are part of the heritage of the tangata whenua and which contribute to their wellbeing, as matters to which *regard is to be given*. Having regard to these matters is discretionary for the PCE; however, MfE must have regard to these matters "so far as practicable".[xxi]

HAZARDOUS SUBSTANCES AND NEW ORGANISMS ACT 1996 (HSNO)

HSNO is to prevent or manage the adverse effects of hazardous substances and new organisms, and establishes the Environmental Risk Management Authority (ERMA) to administer the Act.

- Section 6(d) provides that persons exercising powers shall "…*take into account*…the relationship of Maori and their culture and traditions with their ancestral lands, waters, sites, wahi tapu, valued flora and fauna, and other taonga…". This provision, recognising kaupapa Maori, is similar to the stronger formula in s6(e) of the RMA (although that section does not include "valued flora and fauna").
- Section 8 provides that "all persons exercising powers and functions under this Act shall *take into account* the principles of the Treaty of Waitangi…".[xxii] This is the same formula for recognising Treaty principles as used in the RMA. The Authority has a special Maori advisory committee, Nga Kaihautu Tikanga Taiao, to help fulfil this Treaty responsibility.

A recent High Court decision made it very clear that sections 6(d) and 8 HSNO are to be given weight as part of the balancing exercise, but do not give a right of veto in themselves.[xxiii]

FISHERIES ACT 1996 (FA)

The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability. Section 5(b) of the Act provides that the "Act shall be interpreted … in a manner consistent with the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992".
The Act also requires that prior to the Minister setting any sustainability measure, or altering a quota management area, the Minister must undertake consultation with interested tangata whenua, and have particular regard to kaitiakitanga.[xxiv]

Part IX of the Act provides for the establishment of taiapure and mataitai, and for Maori customary fishing. There are also provisions for closures, restrictions and prohibitions to protect the customary non-commercial fishing rights of tangata whenua. The object of Part IX is to make "better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi".[xxv]

HISTORIC PLACES ACT 1993 (HPA)

Due to historic linkages between legislation, s4 of the Conservation Act applies to this Act under s115(2) of HPA. Section 4 of the HPA provides that the purpose of the Act is to "promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand". Section 4(2)(c) requires that "…all persons exercising functions and powers under it shall *recognise*… the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga".

Section 42 requires that at least three of the eleven trustees of the New Zealand Historic Places Board must be Maori. There is a particular focus throughout the Act on historic areas and on wahi tapu and wahi tapu areas. For Maori concerned about the protection of wahi tapu, there are opportunities to register the site or area using the provisions of this Act. The mechanisms for protection under the HPA are closely linked with the RMA heritage provisions.

LOCAL GOVERNMENT ACT 1974 (LGA)

The LGA establishes how local authorities operate and obviously there are many links with the RMA. There is no Treaty clause in the LGA but when local authorities are undertaking RMA functions they must comply with the Treaty and Maori provisions of the RMA. The LGA is currently undergoing review and the Local Government Bill 2001 (LGB) currently includes a Treaty clause and some specific Maori provisions. Clause 4 of the LGB introduces a new phrase into environmental legislation with *"recognise and respect* the principles of the Treaty of Waitangi". See the report section 3.6.

BIOSECURITY ACT 1993 (BIOA)

This Act has a dual focus of protecting New Zealand biosecurity through controlling imports and the management of pests. The BioA has a close relationship with the RMA but does not have a Treaty clause. However, s73(1)(a) requires a regional council to consult with tangata whenua in the preparation of a proposed regional pest management strategy.

CROWN MINERALS ACT 1991 (CMA)

This Act governs the management and administration of Crown owned minerals and mining generally. Section 4 of this Act provides that "All persons exercising functions and powers under this Act shall *have regard* to the principles of the Treaty of Waitangi".

i See diagram for examples such as s 8 of the RMA.

ii One of the leading cases was *New Zealand Maori Council v A-G* [1987] 1 NZLR 641.

iii See *Haddon v Auckland RC* [1994] NZRMA 49.

iv As described by Hon Margaret Wilson in the House of Representatives on 30 April 2002, referring to the 1989 principles published by the fourth Labour Government entitled "Principles for Crown Action on the Treaty of Waitangi".

v Please note that these principles arose from and have been discussed in a number of cases. The Court of Appeal has not made a conclusive list of principles in any judgement.

vi Please note that these principles arose from multiple Waitangi Tribunal Reports. The Waitangi Tribunal has not made a conclusive list of principles in any report.

vii For a full discussion of these principles and the differences between the Courts and the Waitangi Tribunal, please see: Te Puni Kokiri. 2001. *He tirohanga o kawa ki te Tiriti o Waitangi: a guide to the principles of the Treaty of Waitangi as expressed by the courts and the Waitangi Tribunal*. Te Puni Kokiri, Wellington; Parliamentary Commissioner for the Environment. 1988. *Environmental management and the principles of the Treaty of Waitangi – report on Crown response to the recommendations of the Waitangi Tribunal 1983-1988*. Parliamentary Commissioner for the Environment, Wellington; Hayward, J. 1997. "The principles of the Treaty of Waitangi". Appendix in Ward, A. 1997. *National Overview Volume Two of the Waitangi Tribunal Rangahaua Whanui Series*. GP Publications, Wellington.

viii Please note that Courts other than the Court of Appeal also discuss the principles of the Treaty of Waitangi.

ix *A-G v Ngati Apa* HC 2001 AP152/2000.

x *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR [HC] 213, makes it very clear that to "recognise and provide for" requires actual provision of the matter as opposed to "take into account" which requires a matter to be part of the balancing decision.

xi For a summary of RMA case law on consultation see Ministry for the Environment. 1999. *Case Law on Tangata Whenua consultation. RMA Working Paper*. Ministry for the Environment: Manatu Mo Te Taiao, Wellington.

xii *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

xiii *NZ Rail Ltd v Marlborough DC* [1994] NZRMA 70; *Harrison v Tasman DC* [1994] NZRMA 70.

xiv Parliamentary Commissioner for the Environment. 1998. *Kaitiakitanga and Local Government: Tangata Whenua Participation in Environmental Management*. Parliamentary Commissioner for the Environment, Wellington.

xv Such as sections 61(1), 61(2)(a)(ii), 62(1)(b), 66(2)(c)(ii), 74(2)(b)(ii) and 42(1)(a) RMA.

xvi Department of Conservation. 1994. *New Zealand Coastal Policy Statement 1994*. Department of Conservation, Wellington.

xvii http://www.courts.govt.NewZealand/environment_court/environment.html

xviii *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

xix Introduced as part of the Ngai Tahu Claims Settlement Act 1998.

xx The PCE is an Officer of Parliament and has an investigative reporting role for issues arising in relation to environmental management generally. Please see the report section 1.1 for a full discussion.

xxi Section 32 EA.

xxii The Royal Commission on Genetic Modification recommended that section 8 be strengthened to provide that "*effect is to be given* to the principles of the Treaty of Waitangi". Royal Commission on Genetic Modification. 2001. *Report and Recommendations* 2001. Royal Commission on Genetic Modification, Wellington. Page 309.

xxiii *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR [HC] 213.

xxiv See Part III and Part IV of the FA.

xxv Section 174 FA.

For more information please visit our website: www.pce.govt.nz

He rangahau ki te aria ko te Tiriti te putake e whakatuturutia ai nga tikanga mo te taiao

Exploring the concept of a Treaty based environmental audit framework

Legislation

Nga Ture

PARLIAMENTARY COMMISSIONER FOR THE ENVIRONMENT
May 2002