Crown (Governor-General) & Executive – Definitions, Functions & Powers

Definitions of the Crown –

- "Crown" is a broad term – jeweled headgear, person itself, ministers, executive.
- original basis for definition: all power originally vested in King. power gradually spread to appointed inviduals – now known as Ministers.
- "one & indivisible"? traditionally idea that legitimacy to rule came from King – symbolic source of unity, continuity and stability.
- nowadays – undisputably plural – constitutional frameworks for modern democracy.

Town Investments - rented "for and on behalf of her majesty". Issue was about whether tenant had changed for purposes of the lease (and increasing the rent). Different departments – all civil servants. Held that all civil servants classified as Crown - act as agents of the Crown.

REINFORCES IDEA OF ONE & INDIVISIBLE. MINISTERS AS AGENTS.

Crown "a corporate aggregate headed by a single individual"

- "her majesty" a symbolic phrase – betokening the mana of the individual. ministers as still representing "servants of the Crown"
- However, constitutional conventions overlay legal concept; Queen no longer in charge of ministers, political reality differs from legal status - "legal substratum overlaid by constitutional conventions"

Miss Alice – whether solicitor had public interest defence for concept of court - bridge built on P's client properties. Case is relevant to defining the Crown as discusses what obligations coming within the Crown mean – Crown as coroner, army, judicary, Attorney-General & Solicitor-General.

DIFFERENT EMANATIONS OF THE CROWN. HIGH STANDARD OF BEHAVIOUR REQUIRED.

- constitutional role of the state (as represented by the Crown) is to safeguard citizens & defend the realm – state / Crown carry obligations of protection must act in the public interest
- defines Crown = state?
- there are legal implications for falling within this definition: higher standard of behaviour required – protect citizens, always act in the public interest, give effect to principles of natural justice.

Chapman **–** crown liability for public law damages of NZBORA. raises issues of seperation of powers – who should be the defendant for the Crown? Attorney-General steps in.

- Judges do not really address who would be better defendant –
- Attorney-General is only practical option: judges do not have an independent personality; executive would have to pay anyway; executive (via Ministry of Justice) provides structure of Court & appoints judges; Attorney-General in an "overt support role"

CROWN INCLUDES ALL 3 BRANCHES? STAT CONTEXT IMPLYING WIDE DEF NECESSARY.

- Elias (dissent) – defendent as state not crown. Crown broad legal manifestation of beyond authority & power to facilitating effective functioning of government.
- **If Courts failing, Crown intervene. ACCOUNTABILITY MECHANISMS.**

- If the Crown only interpreted as executive, within NZBORA no checks / balances / restraints on power of legislature & judiciary (as mentioned in NZBORA as Crown)
- **although such a wide definition frustrates seperation of powers – essential for the rule of law**

BV Harris: odd - "Crown normally understood to be an encapsulation of the Executive Branch".

Thus all 3 cases undermine common law concept that Crown = executive.

Town Investments *– corporate aggregate headed by Queen BUT political reality does not reflect legal concepts. substratum overlaid. enforces one & indivisibility: Mins as servants.*

Miss Alice *– different emannations of the Crown. Army, Coroner, AG/SG, judiciary? Purpose of Crown is defence of realm. Falling within definition of Crown: higher standard of behaviour.*

Chapman *– stat context & rule of law require broad def that encompasses all 3 branches; otherwise no accountability mechanisms for NZBORA. AG only practical d?*

Feldman: mid 20th Century distinction between Government Dept / minister & Crown itself – contempt able to be bought against former. Questions if these distinctions still apply.

Functions & Powers of the Crown –

NZCA s 2: Sovereign head of state, Governor-General representive in New Zealand.

Palmer & Palmer: government only ever agents of the state NOT embodiment. G-G ought to be bipartisan, exercise powers for democracy. neutral custodian of public interest

Bagehot: the right to be consulted, to be warned and to encourage. (Tripartite Convention)

Functions: Symbolic, Ceremonial, Constitutional (powers)

Prerogative powers (reserve powers are a subset). Legitmacy arises from traditional powers, gradually reduced as time passes. vestige = powers left over.

Letter Patent 1983 clarified powers, removed ambiguity.

SYMBOLIC –

- Sovereign / monarch – unity of power etc.
- **Palmer & Palmer:** "embodies values of the nation"
- Gordon (GG in 19th C NZ): role was nothing more than symbolic.
- reveals changing fabric of NZ society? women, māori

CEREMONIAL –

- openings, laying wreaths, speechs etc
- commander-in-chief of NZ Army

CONSTITUTIONAL –

Royal prerograive powers – powers are overlaid by the Cardinal Convention: Governor-General must act on advice of ministers. G-G on advice of PM.

- **appointing & dismissing Ministers**
- **summoning, dissolving & proroguing Parliament** – i.e snap elections / when appears House might be losing confidence.

    - Adams – Canada – makes clear it is not that G-G takes advice unquestionably. Prorogued (as PM requested) but deliberated in making decision – importance of bipartisan nature of G-G.
- Royal assent

Reserve powers – reserve powers are a **subset** of the royal prerogative. they are classified as such because inherent in the exercise of them is the lack of ministerial advice, or the rejection of ministerial advice. Thus the Cardinal convention does not apply to reserve powers. The use of reserve powers legitimacy is thus found elsewhere – in the confidence of the House.

G-G can therefore reject advice in order to act in the interest of democracy.

- **appointing & dissmissing PM** – following an election, the G-G must appoint a PM. this done by finding where the confidence of the house is. The G-G can enquire by asking relevant MPs etc where the confidence lies. Mataparae: inherently political enterprise, G-G will not assess on subjective merits.
- forcing a dissolution & refusing to dissolve Parliament – again, legitimacy lies in the confidence of the house. A G-G does not take orders from the PM unquestionably – may refuse or force action if it clear the PM does not have the confidence of the house or if it is unclear who does.
- ordering Parliament to reconvene – Tuvalu. PM critical MPs (thus likely lost confidence of the house), delayed convening Parliament. GG ordered Parl to convene, dimissed PM and ordered a vote of confidence.
- refusing royal assent? what if legislation sought to usurp representative democracy.
    - Palmer & Palmer: no – refusing royal assent goes step too far. "so reserved as to be to a qualitively different nature"
    - Joesphs: most controversial but no doubt that it exists in law.
    - Cartwright / hardieboys: listed as power.

How has role of G-G in NZ changed over the years?

Cartwright: Generally, decreasing of power but increasingly becoming reflective of NZ's identity. Office of G-G has to come to mean its own thing in New Zealand. Woman / Māori etc.

G-G as a protector of democracy – presence & powers ensures effective functioning of NZ const.

How would you advise G-G if bill was passed removing elections (e.g. something usurping democracy)

- **inform government bad idea, delay in signing**: try working out internally.
- **resign as G-G:** bring attention to the bill. relevance of accountability mechanisms in place in society – media, voters. entrenchment of democracy (NZ never had a revolution relevant) in society means public outcry. political crisis. Parl Sov cannot operate in vacuum – interplay with other protection mechanisms.
- **Sign and let Courts sort it out?** role of Court as arbiters of justice. however, principle of non-interference would likely mean Courts could not do anything. or Cooke: judges released from doctrine of PS and free to adjucate without "fear or favour"

Defining The Executive **–** Ministers & their departments – public servants.

The Executive has changed dramatically in New Zealand over the last 40 years. It has increasingly fragmented, transitioning from a hierarchy of key departments to a network of ministries, departments, entities and SOE's – corresponding with the general trend of corporatisation, competition and decentralisation of the state. As functions the Government has performed have becoming increasingly private, defining the executive is becoming evermore amibigous.

- ***Lab Tests*** **–** corportisation and privatisation, extensive deregulation and economic liberalisation and decentralisation. Increased use of contracting: private sector performing work once done by public.
- ***Gill*** **–** divides executive into three categories: centralised, markets & K, mixed.
  - 1920s – 1970s: centralised control of Government. active role in economy
  - 1970s – 1990s: corporatisation and privitisation. began to model on principles of competition – rationalised as means efficency. State owned enterprises, decentralised control of the economy. Local govt more autonomy
  - 1990s – 2010s: mixed governance.
- ***Mclean*** **–** public service now focused on means of accountability. new emphasis on reporting & ends (as opposed to process & outputs) – seperate units able to focus on clear & unified objectives. disaggregation of large departments & creation of arms length agencies.
  - **Political notions –** Public servants "means by which Government acts"
  - **Legislative definitions –** arms length / agency. Public Finance Act: "supplies of outputs". discrete entities responding to various incentives.
    - pragmatically: which internal government accountability and control mechanisms should apply.
    - State Sector Act – OIA; PFA; Crown Entities
- ***CIR v Medical Council of NZ*** **–** emphatic of change. manifestation of stereotypical govt function, yet are expected to create own income, self sufficient etc.
  - test no longer about nature of entity – instead about **nature & degree of control** Ministers exercise over entity
  - on facts – completely independent of Minister control. Not subject to PFA, OIA or Ombudsman; no reporting.

Constitutional Conventions –

Tripartite, Cardinal, Collective Cabinet Responsibility, Individual Ministerial Responsibility, Caretaker

- not legally enforceable – political practice that has developed over time.
- Articulated & defined in Cabinet Manuel; actors are enforcers, **interpret their own behaviour.**
- breach?
  - Politically: removed from role, demoted etc
  - Legally:
    - G-G can dismiss.
    - Clarification of law (NZCA s 6 following 1984 election).
    - Court can address convention (even if not enforcing).

Evans v Information Commissioner - black spider memos. facilitated discussion around number of conventions. Court can enquire into existence of conventions & some scope of their application.,

- cannot crystallise into law
- **Jennings Test -**
    i. existence of precedent
    ii. belief actor was bound
    iii. good reason for the rule

Tripartite Convention –
Bahegot: right of the monarch to be advised, to warn & to encourage.

Cardinal Convention –
Minister acts on advice of G-Gs. Reinforces idea of legal substratum overlaid by constitutional conventions.

Collective Cabinet Responsibility – *confidence, confidentiality, unamity.*
reflects democratic principle – House expresses confidence in the collective whole of Cabinet rather than in individual members. Cabinet Manuel Chapter 5.
Exceptions?

- Ministers outside of Cabinet –
    - Support party ministers: bound by convention in relation to their ministerial portfolio only, free to criticise and speak out on other issues.
    - coalition: may establish 'agree to disagree' in relation particular issues
- conscience votes

Knight: argues unamity aspect of CCR is waning due to MMP. Gives example of Key allowing Rodney Hide dissenting on matter within his portfolio (by saying he had his ACT hat on).

Individual Ministerial Responsibility – *explanatory, amendatory, culpability*
A Minister must explain the situation – a Minister is responsible to Parliament. Must then fix the consequences – "essence" of convention.
Must resign when have lost confidence of the House.

- Lack of clarity around the convention? not explicit whether actual or alleged behaviour, within or outside of portfolio, personal or vicarious liability.
    - Latter is increasingly relevant within the current trend of decentralisation & fragmentation of departments and entities. Chief Executive's given more autonomy in running departments – HR, day-to-day running and decisions – therefore difficult to demarcate fault of Minister.
- conflict between amendatory & culpability. Often resigning will be easiest way out but this does not necessarily amend the problem (Cave Creek).

Cave Creek example – NB: direct cause of collapse was lack of funding thus easily fall to Min & his policies.
Explanatory: Minister of Conservation had to explain what happened to Parliament.
Amendatory: implemented changes & increased funding
Culpability: resigned as Min of Conservation. BUT – remained MP & Minister of the Crown.

Maurice Williamson & the police – Cabinet Manuel states Ministers should exercise good judgment when dealing with public service & need to go through relevant minister. Also strong convention that do not interfere with police.
Culpability: resigned his ministerial portfolio.

Cabinet Manuel also dictates that Ministers must declare interests. If they have an interest –

- withdraw OR seek permission from PM
- do not recieve papers about interest
- transfer responsibility to another Min / Dept
- disvestment OR place in a blind trust
- resign from organisation etc

Judith Collins & Oravida – Dairy & export not in her portfolio but was in China on Min Business.
Cabinet Manuel: must not endorse products while in Min capacity; organisation may not publicise event.

Caretaker Convention –
Outgoing government to manage day-to-day runnings of government but cannot make any major policy decisions.

- If a major policy decision must be made – act on the advice of the incumbent government.
  - if the incumbent government is not known, delay making the decision.
    - if a delay is not possible, consult with all MPs.

1984 election – Muldoon refused to float dollar despite demands from incumbent government. resulted in amendment in NZCA.

Formation of government –

Governor-Generals role: underlying principle is democracy = confidence of the house. G-G's role is to observe where the confidence lies.
Mataparae: political enterprise, will not assess on merits
Hardieboys: "communicate with leaders" – political leaders must clarify.
Where support is unclear, G-G must rely on elected reps to clarify who supports. can seek independent advice. about ascertaining the will of Parliament.

4 types of government can form –

- **Majority coalition –** 2 or more parties enter into coalition agreement together.
- **Minority coalition –** 2 or more parties enter into agreement to support house.
- **Single party majority –** single party in Government
- **single party minority –** one party does not have majority, enters into confidence & supply agreement with another party.

Thus, two types of agreement: Coalition & Confidence and Supply.
There are few constitutional constraints on inter-party bargaining: no time duration (except NZCA requirement of convening 60 days after election), no rules to be bound by. Agreements can be

flexible – some are broad & short, setting out general principles whereas some are detailed, setting out specific goals & policy promises.

Coalition – two parties enter into government together.

- minority in cabinet, therefore bound by collective cabinet responsibility.

Confidence & supply – smaller party agrees to give confidence to bigger party.

- minority does not have to be cabinet
- less involved in decisions of Government BUT ensures identity & indepedence of smaller party – not bound by CCR.

Palmer & Palmer: small parties have tended to lose their identity when entering into a coalition.

Confidence of the House –

The confidence of the House is rationalised by democracy. The Government cannot rule if they do not have support of the House of Reps, as those are the people elected. A vote of confidence can be either implied in the bill or expressly requested – raises the issue of Government survival in office.

- Implied – if these are lost, it is implied confidence is lost.
  - Bills of supply – Budget and imprest & supply (public spending) bills
  - bills setting annual tax rates
- Express – can only be motioned on issues that invoke debate of whole party performance
  - PM's statement – first debate of the year
  - Address in repl – first debate of Parl
  - budget debate
  - imprest & supply debate
- Express declarations by Government?
  - Government may wish to invoke a confidence vote to ensure passage of a bill they would have lost otherwise
  - reassert their authority

The Public Service – loyalty, neutrality, animity.

Palmer: Rationalised on basis they are actors of Ministers – cannot carry a seperate identity.
Loyalty: loyal to Govt of the day. Limited by neutrality
Neutrality: support in spite of any political beliefs – constitutional convention.
Anonymity: 'grey and faceless'. Raising public profile would carry risk of seperate profile & undermine neurality.

- CE: day-to-day running, duty to act indepentendly, financial management & performance – free & frank advice to Mins
- Min: high level policy setting, obtain info as necessary.

Palmer – is the public service in a state of tension? Trust unravelling
Under MMP the loyalty principle is in a state of tension

- when multiple Ministers, have to manage expectations & relationships between parties

Demarcating responsibility between CE & Min

- efficency & freedom has made unclear who decides what

OIA is placing pressure on advice – questions of neutrality & loyalty

- chilling effect on “free and frank” advice – advice no longer being given

Prominence of Ces

- privitisation has had corrolary effect of influencing management style & culture

Ministers undermining trust by attacking public servants.

Admin Law – Judicial Review & other accountability mechanisms.

Judicial Review – a flexible & potent means of ensuring Courts control activies of the executive and safeguard the rights of the citizens. PROCESS NOT MERITS.
whether decision of XX to XX is amenable to judicial review; and if so, whether decision of XX to XXX is invalid on the grounds of XXX?

Judicial Review enables the Court to review public actions or decisions made by executive officers – as empowered through statute – to determine whether it was unauthorised or invalid. (***CCSU***) There are three well-established grounds for review:
illegality, procedural impropriety / unfairness, unreasonableness / irrationality. (***CCSU***)

Amenable to review?
Decision must be made by a member of the executive – defined generally as a public body.
Phipps – power deriving from statute; powers that are public in effect but have no statutory basis
Curtis – must be “legal yardstick”. policy is not reviewable – inherently political matter.
NZMC – internal processes of Parl will not be reviewable – principle of non-interference.
Lab Tests – emphatic of changing role of executive. commercial decision of public bodies reviewable (Auckland DHB) – nature & function of body, particular isses on facts

Illegality.
when the decision-maker gets the law wrong – the decision-maker must understand correctly the law that regulates his power & give effect to the law correctly. (***CCSU***).

There are 5 sub-grounds of illegality;
error of law, error of fact, relevancy, improper purpose & failure to exercise discretion.

Error of law – *Carter Holt Harvey; Syms; Peters v Davidson*
A decision-maker incorrectly interprets the scope of powers conferred, thus acting ultra vires (***Carter Holt***). Error must be relevant and not minor or technical. (***Peters v Davidson***).

Carter Holt Harvey: council incorrectly classified paper Carter Holt organised to pick up in order to recycle as waste. Therefore council acting ultra vires in requiring Carter Holt license UV.
Peters v Davidson: error of law reviewable in and of itself. tax evasion – do not need to show tribunal extended beyond its jurisdiction.
Syms: Rector incorrectly interpreted meaning of “gross misconduct” when applying statute.

Relevancy – Syms; NZ Fishing; CREEDNZ; Moxon
A decision maker must have regard to mandatory relevant considerations, and not consider irrelevant considerations (***NZ Fishing***) – as express from statute or implied in statutory context (***CREEDNZ***). May, but need not, take into account permissible considerations (***NZ Fishing***). Fact of proper or reasonable consideration cannot be enough to establish mandatory. (***CREEDNZ***).

Courts will therefore review matters taken into account but not review the relevant weight given to each matter unless the decision is unreasonable (***Moxon / NZ Fishing***).

NZ Fishing: increasing price of quotas for fishing. Ministers decision reasonable within explicity statutory considerations.
Syms: failed to have regard to mandatory relevant considerations via discretions.
CREEDNZ: fact it was reasonable / proper to have regard to certain considerations does not mean they are mandatory.
Moxon: casino, weight not reviewable.

Policy: JR is underpinned by rule of law / parl sov: the decision cannot be unauthorised or invalid as it is the intent of Parl that enables the legitimacy of the decision. If weight is reviewable, would undermine effective functions of constitutional principles.

***Failure to exercise discretion* –** Syms
A decision-maker should not rigidly apply policy. A decision-maker can adopt policy / guidelines but should not apply blindly to exclude the factual merits of a case. (***Syms***)
"may" ... "shall" etc. WHAT IS LEGISLATIVE INTENT IN CONFERRING DISCRETION.

Syms: Rector, in blindly applying school's zero tolerance to alcohol consumption policy, failed to exercise discretion and failed to take into account factual matters relevant to 'gross misconduct'. Decision was one that could have been reached on facts BUT Rector's process did not give due effect to what was required by law.

***Improper purpose* –** Unison Networks – HARDEST TO SATISFY
Discretion / other purposes will be invalid if it "thwarts or run counter to the statutory purpose" Pursuit of other purposes, if do not compromise policy or objectives of Act, will not be invalid. (***Unison Networks***).

Error of fact – Oggi; Moxon
Traditionally, an error of fact is outside the function of the Court – evidence a reasonable authority would accept. (***Moxon***). However, a serious factual error - "important or incontrovertible fact" – may be reviewable (***Oggi***).

Oggi: incorrect date Billboard had been put up. very narrow – fact was single basis of decision – explicit date set out in statute. Other facts not relevant in statutory context.

Procedural impropriety.
A decision-maker must give effect to rules and requirements of natural justice (***CCSU***).

There are two sub-grounds – right to a fair hearing and bias.

Right to a fair hearing - *Daganyasi, CREEDNZ, CCSU*

What one's fair hearing rights are depends on the facts & circumstances of the case, but at the bare minimum one must be informed of the decision and have reasonable time to respond. (***CREEDNZ)***.
At other end of spectrum there is right to oral hearing.

Relevant considerations include –

Statutory context (***CREEDNZ***)

- what hearing rights did Parl envision

Nature of decision and decision-maker (***CREEDNZ***)

- Cabinet not gonna have an oral hearing

Nature of affected rights and interests (***Daganyasi***)

- BUT: rights as infringed on as possible, yet still no oral hearing (IMPORTANCE OF STAT CONTEXT)

Admin efficency (***CREEDNZ***)

Legitimate Expectations (***CCSU)***

- past practices or assurances relevant

If group decision – consultation? Similar considerations – Statutory requirements, legitimate expectactions. (***Lab Tests***).

Wellington Airport: notice of decision; chance to comment; open mind. Distinction between good practice & what is actually required from the statute.

Daganyasi: Daganyasi did not have a chance to respond to Dr adverse evidence re: availability of food (cheese), fridges etc on island.

- disclose evidence against you / know the case against you
- chance to rebut / respond
- proper consideration be given to such representations

CREEDNZ: proposed smelter. Would frustrate the purpose of the Act to allow oral hearing as statute was passed for faster decisions (admin efficency). Decision maker is Cabinet – Cabinet not a fact finding body; incompatible with oral hearing as Parliament never would have intended.

CCSU: fact GSCB public servants had 'long standing right' to be union members to fair hearing rights

- should have been consulted on decision before it happened

Bias – *Saxmere, Ebner*

Bias, or the appearance of bias, is rationalised on the importance of having an impartial decision-maker / decision-maker with an open mind. ***Saxmere*** sets out the test: whether the reasonable layperson observer, having their mind turns to all circumstances, would think that the impartiality of the decision-maker might be or actually be affected.

It is the appearance of the bias, as opposed to actual bias that is of paramount importance to the inquiry. ***Ebner*** sub test – (1) identification of what it is said that might lead a decision-maker to

decide a case other than on its legal & factual merits; (2) there must be an articulation of the logical connection between the matter and feared outcome.

Indicators of bias – DEGREE OF INTEREST / TEMPORAL CONSIDERATIONS
pecuniary interest - relationship (family, close friend) - personal prejuidice - close-mindedness

Saxmere (no 1): no bias – nature of relationship and business does not articulate a logical connection. Business is not actively transacting – passive – collects rent. equal ownership. Reasonable layperson would be attuned to realities of New Zealand legal system – lots of people know one another, judges know counsel all the time.
Saxmere (no 2): connection able to articulated. Business WAS actively transacting, looking to buy more property. Judge could reasonably be thought to be 'beholden' – payments of around 240k.

Irrationality / unreasonableness* – *wednesbury, wolf, woolworths

If a decision is so unreasonable, no reasonable person could have come to it (***Wednesbury***).
So outrageous in its definance of logic of accepted moral standards (***Woolworths***)

Lowering the threshold for reasonableness?
Wolf: CONTEXTUAL TEST: nature of decision / decision-maker –

- process - subject matter & policy content
- importance of the decision to those affected – consequences of decision RIGHTS OF CHILD
- who made the decision.

Wednesbury: decision to open cinema on Sundays but only to people over the age of 15. close relationship with discretion – in light of Council reasoning (wellbeing of children) – not unreasonable.
Woolworths: rates for commercial and private properties. test must be stringent.
Wolf: fact he had not told his child his real name meant he did not care for them? judge allows a lower standard of reasonableness when the situation calls for it. ARGUMENTS AGAINST AN ANALOGY: extend of rights involved (child) – other issue of not being able to respond to ex-wife's adverse evidence.

Relief – Judicature Procedure Act; High Court Rules Part 30 (common law).
JPA clarifies and simplifies powers – orders, prohibition, declaration / relief.
Beatson: discretionary nature of relief. Alternative remedies – merits – needs of Public Admin – conduct of the applicant – efficency.
Taylor: referral back most common.

Consitutional foundations? Craig

Specific Legislative intent – Courts apply the intent of Parl
General Legislative intent – Parl legislates generally, Courts interpret precise ramifications
Common Law model – legislative comes from the policing of power in general – it is the Courts who develop principles of JR. Unless Parl makes explicit limits, controls continue to operate.

Admin law & international law.

Dualist orthodoxy – ***ex parte Brind***: MAYBE if statute is ambigious.

Relevancy principle – ***Ashby:*** maybe MRC if, as a matter of statutory construction, overwhelming manifest importance
Tavita: Treaty should be MRC, executive ratifying 'window-dressing' otherwise. amends immigration manual
Pulieva: assumes Treaty is MRC following ***Tavita*** and amendment.

Presumption of consistency – ***Zaoui***: despite no mention of treaties in s 72 - executive must act consistently with unincorporated treaties unless **explictly** stated otherwise.

Ashby: 1986 Springbok tour visas – Minister did not consider UNCRD but had considered gleneagles agreement (& in general opposition to apartheid). Treaty may be a MRC if, as a matter of statutory construction, of manifest importance or obviously & manifestly necessary to take into account – PARL INTENDED FOR IT TO BE TAKEN INTO ACCOUNT?
Tavita: immigration – Convention on the rights of the Child (T had not had child in initial application, Minister claimed he would not have to conisder it second time). A failure to give practical effect to international obligations may attract critiscm. Immigration Manual amended
Puli'eva: assumes Treaty MRC.

Zaoui: refoulment – Convention against Torture, Convention relating to status of refugees – despite section conferring broad discretion, section must be interpreted by GG & Min consistently with the Conventions. Inspector-General (when deciding security risk) – conventions not relevant. If the Government wishes to act inconsistently with treaties ratified but not incorporated, they must say so.

Geringer –
Relevancy principle: process focused – what the decision-maker must take into account. as per orthodox JR, Court will not inquire into the relevant weight given.
Presumption of consistency: outcome focused – decision maker expected to act consistently with obligations. Parliament is presumed to not legislate contrary to international obligations.

OMBUDSMAN ACT
CAN INVESTIGATE SUBSTANCE – s 22(1).
- contrary to law
- decision unreasonable, unjust, oppressive or discriminatory
- based wholly or partly on a mistake of law or fact
- wrong generally

BROAD DISCRETIONARY POWERS – s 22(2).

OFFICIAL INFORMATION ACT
Government departments, agencies & entities – any information.
Extensive list of declining information: s 6 conclusive reasons, ss 7, 9 & 16: balanced in the PI.

Treaty of Waitangi – Principles & Tribunal

As established in the landmark ***SOE Case***, the 'spirit' of the Treaty is of the utmost importance & a broad approach must be conferred. It is not the text itself, but the principles – partnership, active protection & right to redress.

Partnership.

This forms the fundamental basis of the Treaty. There are obligations as a Treaty Partner - Crown must act reasonably and in good faith – what would a reasonable treaty partner do. (***SOE***). Partnership, as reasonable, cannot be absolute & unqualified (***Broadcasting Assets***). Requires the Crown to be fully informed (***Radio Frequencies***).

Active Protection

protecting the guarantees made in article 2 is not a light duty, nor passive (***SOE***). It cannot, however, extend beyond what is reasonable in the circumstances. What is reasonable in the circumstances can involve a consideration of the economy, vulnerability of the taonga & past assurances and practices. (***Broadcasting Assets***). What was envisioned by the Treaty partners in 1840 may also be relevant, and whether there is a 'special interest' in the taonga (***Ngai Tahu***)

Right to Redress

whether the proposed action taken, materially impairs the Crown ability to give redress (***Broadcasting Assets***). It will be relevant if the redress is subsitutable – if alternative but adequate other forms of redress are available (***Mighty River Power***).

Huakina – aid to statutory interpretation.
no legislative incorporation – environmental (water) context implies Treaty is relevant.

State Owned Enterprises – partnership made in the utmost good faith. spirit of Treaty
legal parameters not to confine – broad, unquibbling & practical approach.
not text of the Treaties but "spirit". Treaty "embryo" as opposed to fully developed set of ideas.
Prof Kawhere – complete government, unqualified exercise of chieftainship.
Partnership: Crown must act reasonably and in good faith.
Treaty signified partnership, analogous to fiduciary duties.
MUST BE REACTIVE TO CHANGING SOCIETAL CONCERNS; preserve Māoritanga
duty to consult? elusive & unworkable. no general right is created but will often be part of the obligation as a manifestation of good faith.
Active protection: affirms positive guarantees made in article 2
Right to Redress: affirms Honour of the Crown.

Radio Frequences – reasonable Treaty partner (Minister) would wait for Tribunal report.
no legislative incorporation but subject-matter closely connected to taonga (language) that must be MRC.

Ngai Tahu – Ngai Tahu not to be restricted to mere matters of procedure - ought to have been consulted and **entitled to a reasonable degree of preference.** "special interests"
Legislative framework = strongest incorporation of principles. Commercial whalewatching not envisioned by Treaty partners in 1840, cannot be given right to veto. However, closely connected to taonga – seas / whales – accorded special interests that Ngai Tahu has developed in the use of these

coastal waters. special relationship due to relationship with land despite not being a use reasonably contemplated by Treaty partners.
INTERVENING ON WEIGHT GIVEN.

Broadcasting Assets – Crown still able to exercise subs degree of control, ability to fulfill obligations under the Treaty.
Partnership: reasonable, constant and in good faith but cannot be absolute and unqualified.
partnership founded on "reasonableness, mutual co-operation and trust"
Active protection: Protecting taonga cannot go beyond what is reasonable in the circumstances: economy, vulnerability and past assurances & expectations.
Court decides, on the evidence, when it is right for the Court to intervene on reasonableness = SUBSTANTIVE INQUIRY TO WEIGHT GIVEN.
Redress: impair to material extent, the Crown's ability to undertake reasonable action.
IS ASSET SUBSTITUABLE? *c.f. SOE:* land not subsitutable.
Broadcasting assets are not the taonga – it is protecting the language. other means of achieving this.

Mighty River Power – alternative but adequate means of redress. while privitisation would result in diminished control; crown retained ability to buy back shares, provide direct compensation, would not affect claims in relation to resumption of land in dams, nor would privitisation make a material difference to policy around water rights.
SOE CASE – treaty jurisprudence – language of s 9. ONGOING OBLIGATION
consultation? no long as Crown enters consultation with an open mind – rejection not a basis for inferring empty or pre-determined consultation.
considerations?

- court should be cautious of insisting on protection measures which would prevent Crown from obtaining full value – frustrate purpose
- significance of shares should not be overtstated but Crown can always buy them back
- difficult to see how certain redress (shares+) would provide reperation more beneficial to Māori that can't be achieved by regulatory reform

Assurances by the Crown, extent to which such options are substantially in prospect, capacity of queen to provide meaningful redress, proven willingness and ability of the crown to provide such redress.

Ngāti Whātua case study.

Tribunal Report.

Principles of Treaty interpretation: McNair's rule
Textual differences: Prof Kawahu – closest Māori word to give effect to English version is mana
Normanby's instructions: reiterates good faith, leave Māori with land
Reciprocal / right of first refusal: qualified by Normanby's intent

- humantarian basis for intervening
- right of pre-emption restricted to land not required by Māori for livelihood
- Normanby assurance that Māori would benefit
- assurances by Hobson that Treaty would not disposses
- rationale for pre-emption as protecting speculation
- well-established fact Māori would not have signed if they had not been assured their land would be protected.

Tāmaki Mākaurau report.

Process –

- mode of dealing left other Tangata whenua "uninformed, excluded and disrespected"
- characterising other TW as 'overlapping claimaint' instantly creates HIERARCHY
- breeds disenchment w process – HONOUR OF THE CROWN
- importance of oral consultaton
- minimal commuication, commercially sensitive as a means to restrict info, no conflict framework, no management / mediation, no future consultation planned, sole focus on Ngāti Whātua, lack of compliance with Tikanga – BREACH OF PARTNERSHIP AND ACTIVE PROTECTION.
- whanaungatanga

Outcome –

- individualised claim denies reality
- predominant interest wrong question – shared importance
- symbolic interest unique
- predominance of interest Pākehā concept

Crown must –

- hold hui in region
- identify other TW groups & treaty equally
- Active role in facilitating process
- amend red book – policy & practice needs to be explained better.

COLLECTIVE REDRESS ACT – developed framework for joint management. established first right of refusal over properties that could then be withdrawn for other Treaty settlements if needed.

Ngāti Whātua Ōrakei v A-G – proposed settlement due before Parliament does not necessarily raise principle of non-interference if rights & interests are involved and plead.
ONGOING OBLIGATION OF CROWN EVEN AFTER SETTLEMENT.
Declarations allowed to proceed to trial – "live, ongoing issues to rights"

- NW had mana whenua & ahi ka over land in question
- overlapping claims policy ought to be applied consistetly w Tikanga
- when Crown developing & making offers tho iwi who do not have ahi ka must be made in accordance with Tikanga
- Crown ought to have consultd with NW due to transfer eroding NW mana whenua

Overboard to suggest that the fact a decision may potentially be the subject of legislation is out of the reach of the courts – ignore Court functions in making declarations as to rights.
Declarations declined – related to the decision in question therefore invoked non-interference

- **particular** decision to transfer land not developed consistently with tikanga
- **particular** decision made inconsistently with Treaty & int'l treaty obligations

c.f. Elias: allow all declarations – nothing limits Parl right to legislate to effect rights. Court considering such matters cannot consitute a interference. Parl speaks through enacted legislation only.

Sealords: tried to stop a bill before parliament.
Milroy: Tūhoe did not plead affected rights & interests
Port Nicholson: "rights at issue" may be justiciable. LEGAL YARDSTICK – "it would be wrong in principle & in practice for the courts to leave the Crown as the sole arbiter of its own justice where the controversey raises issues of customary law"