

JUDICIAL REVIEW

A review by a judge of the High Court of... public decision-making powers, in order to determine whether the decision is unauthorized or invalid. (Crown Law extract)

Judicial review is not concerned with the merits of a decision but the process by which the decision is made. (CLO 7/29)

WHAT DECISIONS ARE SUBJECT TO REVIEW:

- Most executive actions (CLO 7/15)
- Powers deriving from statute
- Not just individual decisions, also regulations and delegated legislation
 - Phipps case – college of surgeons conducting decision – not formally a public body but performing a public function so could be reviewed
- Prerogative powers – (CCSU)

WHAT DECISIONS ARE NOT SUBJECT TO REVIEW:

- Cannot overrule statutes – CLO 7/15
- Justiciability – the sort of question that judicial process is capable of dealing with – eg question of national security; we as courts are institutionally and constitutionally inept at analyzing this
- The internal proceedings of parliament - NZMC case – attempt to stop treaty settlement deed from going through parliament
- Policy – Curtis case, sought declaration that couldn't do as armed services needed to be armed – but fundamentally matter of policy, and must be assessable through legality
- National security – CCSU
- In most of these cases – its not we will never ever go there, its just a very very high threshold
- Commercial decisions of public bodies, would not normally review – but fraud/corruption – may intervene (Lab Tests)

ILLEGALITY: THE DECISION MAKER GOT THE LAW WRONG

MATERIAL ERROR OF LAW: THE DECISION MAKER MUST GET THE LAW RIGHT

- They would be acting outside the scope of legal authority/ultra vires - *R (Public Law Project) v Lord Chancellor*
- Also applies to incorporated international obligations!
- *Peters v Davison* - leading case
 - Commission of Inquiry misunderstood/misapplied laws related to tax
- *Carter Holt Harvey Ltd. v North Shore City Council*
 - The council was empowered to make bylaws about regulating waste
 - Is waste inclusive of recycling?
 - Preferred Harvey's definition - that it had been abandoned by its former owner (but hadn't in this case as it is out for contract)
 - To the extent that the bylaw applies to that paper was ultra vires
 - Essentially, did not come under the scope of the act
- *M v Syms*
 - Rector misidentifies the meaning of "gross misconduct"
 - Boys had a sip of alcohol each
 - Must be above the very minor standards of "misconduct"
 - In these cases, context matters - in this case, the contextual assessment had not been taken
 - Rector misunderstood what was required, so there was an error of law

RELEVANCY:

- Must take into account mandatory relevant considerations as stated in statute
- Must not take into account irrelevant considerations
- May, but do not need to take into account permissible considerations
- *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*
 - Key parts of statute detailing what the Minister had to have regard to
 - Cannot question the weight, but whether or not they were given regard
 - “That is to say, the duty to consider statutory criteria extends to facts so plainly relevant to those criteria that Parliament would have intended them to be taken into account and a reasonable Minister would not fail to do so.”
- *M v Syms*
 - Failed to take into account actual factual matters and context

FAILURE TO EXERCISE DISCRETION:

- Not a mechanical exercise: do not blindly apply pre-determined policies - can be used to guide decision-making, but need to consider whether there is a reason to depart from the policies
- *M v Syms*
 - Principle has the ability to suspend a student
 - Held that the policy was applied blindly

IMPROPER PURPOSE:

- Power granted for one purpose cannot be used for another purpose
- Based on the express/implied purpose/spirit of the law
- May be okay if it is for a secondary purpose, but the decision will be invalid if it thwarts/runs counter to a statutory purpose - *Unison Networks*
- *Unison Networks*
 - Discretion should be used to promote policy and objects
- *Roncarelli v Duplessis*
 - Decided to cancel the liquor license of a Jehovah’s witness restaurant
 - Was done to persecute a religious man - improper purpose

ERROR OF FACT:

- Very difficult to prove - only reviewable if it was a serious factual error that was an important and incontrovertible fact
- *Oggi Advertising Ltd v Auckland City Council*
 - Building consent laws changed in 1996
 - Stated that it was built in 1995, was actually built in 2002
 - Central to the decision

PROCEDURAL IMPROPRIETY/UNFAIRNESS: failure to observe the basic rules of natural justice or failure to act with procedural fairness towards a person who will be affected by the decision... *CCSU*

HEARING RULE

- Legitimate expectations: if a promise was made that a certain process would be followed, sometimes in certain circumstances even if not required by statute, can be held to have to adhere to that process because the promise was made

- Notice:
 - Know what the case against you is and why
 - Chance to respond and make submissions, in person or in writing
- Oral hearing:
 - Usually written will be sufficient, unless there a literacy or legitimacy issues
 - Perhaps where the facts are in dispute
 - *Fraser* - cross examination could be required
- Generally, where your individual rights are affected, usually you would expect prior notice of the case against you, adverse material and the opportunity to make written submissions
- Crown Law Office, based off of a court process

To consider:

- Nature of the decision/decision maker:
 - *CREEDNZ* - decisions made by cabinet - oral hearings cannot be imposed due to incompatibility with the decision making ability
 - *Daganayasi* - because it was a Minister, very busy, would not expect an oral hearing
- Administrative efficiency (based on statutory scheme):
 - *Daganayasi* - can be considered, nothing in statutory scheme
 - *CREEDNZ* - purpose was to fast track, a particular process may be incompatible with fast tracking
- The importance of the right and interest:
 - *Daganayasi* - because the rights are so high, cannot just let the Minister do as they please (but in this case oral hearing not required)
- Were they made known of any material against them and allowed to respond?
- What does the current situation require in order to be fair?

Consultation: specific subset

- Will never require both regular procedural fairness and consultation
- Non-adjudicative/legislative decisions by the executive - applying to everyone, not an individual
- *Labtests*: required if in the statute, or if there is a past process of consultation
- *Wellington International Airport v Air New Zealand*
 - Have to give everyone notice of the proposal
 - Let everyone know, and give sufficient time to comment, with sufficient information
 - Have to have an open mind

RULE AGAINST BIAS

2 types:

- Actual bias – not usually seen, also really bad to say that one person is really bad and out to get another, esp if another judge
- Apparent bias – looks like decision maker may have been influenced by one of these factors – how it looks to an outside observer

Key question:

- Whether the “fair-minded [reasonably informed] lay observer would reasonably apprehend that the [decision-maker] might not bring an impartial mind to the resolution of the question” *Saxmere (No 1) and (No 2)*

How to apply:

- 1) What it is that may have lead the judge to decide the case on something other than the law and the facts/pecuniary interest etc
 - a) Pecuniary interest – money riding on it
 - b) Familial/other relationships
 - c) Personal prejudice – just don’t like you
- 2) Articulate the logical connection between that matter and the deviation – why does that prejudice be seen as something pushing judge to decide differently

- a) Consider the degree of relationship
- b) Consider the time of the event

- *Saxmere saga*:
- Not enough to show that they were friends and had business interests together
- Deciding factor was the judge owed \$74,000 to the lawyer - from the POV of the reasonable lay observer

UNREASONABLENESS

Wednesbury:

- "So unreasonable that no reasonable authority could ever have come to it"
- Example: dismissing a teacher because their hair is red
- Held that the prohibition of 15 year olds from the movies is not unreasonable
- *Woolworths* - if the decision is perverse, absurd

Wolf: selectively lower threshold

What to consider:

- Nature of the decision - is it individualized? (More likely to be appropriate for this threshold)
 - *Wolf* - was a decision affecting just him
- Who makes the decision?
 - *Wolf* - Minister made the decision, more leeway
- Are there any deficiencies in the decision making process? Statutory process?
 - *Wolf* - reached the conclusion that he had a bad relationship with the children without giving him the ability to correct it
- What is the subject matter/policy?
 - *Wolf* - international convention on the rights of the child
 - Would have broken up a family unit
- How important is the decision; how does it affect the individual?
 - More important if human rights are affected
 - *Wolf* - would have had to leave his young family, big impact on his life

INTERNATIONAL LAW

DUALIST ORTHODOXY:

- International treaty obligations are generally irrelevant unless or until the treaty is incorporated into domestic law - *Attorney General for Canada v Attorney General for Ontario*
- *Brind* - where the statute is ambiguous, the international obligation can be used to help resolve the ambiguity
 - Case where they could not directly report from terrorist organisations - IRA
 - Article 10 - freedom of expression - held that if was read this way, would frustrate the will of Parliament

RELEVANCY PRINCIPLE:

- Decision-maker is obliged to consider the international obligation, but weight given remains up to them
- *Ashby*:
 - Minister issuing visas during Apartheid
 - *Cooke J* - a treaty might be a mandatory relevant consideration where, as a matter of statutory construction, if it was "of such overwhelming of manifest importance" / "obviously or manifestly necessary" need to take it into account
 - Perhaps in this case the Gleneagles agreement was a mandatory consideration, but CERD was not
- *Tavita*:
 - A strengthening of the *Ashby* position
 - Mr *Tavita* did not leave to go back to Samoa after his visa expired

- Minister argued that he could not take into account the two international covenants as they had not been in force when he had first considered the decision
- Held: a failure to give effect to agreements New Zealand is a part of may attract criticism. It also could affect the judiciary if case is taken further to international committee. Should be reconsidered.

PRESUMPTION OF CONSISTENCY:

- Statutory powers should be read, so far as the wording allows, consistency with unincorporated treaty obligations.
- Should assume that Parliament intended that it be consistent with international obligations.
- Unless the wording excludes a consistent interpretation, then it should be available.
- Acts on the scope of the authority itself.
- *Puli'uvea:*
 - Mr and Mrs Puli'uvea had arrived on visitor permits but overstayed.
 - Mr Puli'uvea had been deported, but wife and kids still here.
 - Decision had failed to take into account the ICCPR and International Covenant on the Rights of the Child
 - This decision found to not be inconsistent with international obligations
 - Separate decision to actually execute the deportation order
- *Zaoui:*
 - Can we still deport Zaoui even if he is a refugee?
 - There is nothing in the statement of broad powers to prevent them to having regard to mitigating powers
 - Because it can be interpreted in line with international obligations, it has to be
 - Even if there is a threat, the removal is prevented if it would lead to torture/arbitrary deprivation of life.

OTHER SUBSTANTIVE GROUNDS:

- Substantive legitimate expectation
 - *Coughlan* (UK) in theory could be a ground in New Zealand
 - A substantive promise that the Court holds the decision maker to
- Inconsistent treatment - not really a thing in New Zealand
 - Should be treated the same when the facts are the same
- Disproportionality
 - Applicable in BORA context
 - Should not have disproportionate penalties
 - Otherwise not really applicable in NZ context
- Substantive unfairness - *Cooke J* - not a thing

JUDICIAL REVIEW PROCEDURE AND BASIS:

PROCEDURE:

Common Law: Part 30 of High Court Rules

- Applicability based on "publicness" – public nature of decision, affecting public etc
- Can get the remedies of declaration or injunction
- Prerogative remedies:
 - Mandamus - a requirement to do something
 - Prohibition - prevent government from doing something
 - Certiorari - power to review/quash a decision

Judicial Review Procedure Act 2016

- Simplified and streamlined procedure for cases involving
 - Exercise of statutory power and
 - Statutory power of decision
- Requirement of "publicness" stays - what does it mean? Companies and incorporated societies?

- Process:
 - No in person evidence
 - File for affidavits
 - Relatively rapid process
- Relief:
 - S16 - based on prerogative writs
 - Mandamus - a requirement to do something
 - Prohibition - prevent government from doing something
 - Certiorari - power to review/quash a decision
 - Common remedies - refer the decision back to decision maker - s17 - risk of decision being the same
 - S18 - relief is discretionary: can decide to not grant relief
 - Alternative remedies - statutory process that could have been used but was not
 - Merit - will not win even if referred back, not used a lot
 - Public administration - out of proportion, would cripple etc.
 - Poor conduct - has taken ages, may be declined
 - Mootness - issue has been resolved, resolution will not really do anything

BASIS: where does the authority to engage in judicial review come from?

Legislative intent:

- Applying the intention of Parliament
 - The will of Parliament and the parameters they have set up for Executive
- Although there is no direct express authority from Parliament, can argue that conferring discretion is a legislative act to allow the courts to engage in review
- Counter Arguments:
 - Doesn't really just involve policing boundaries - e.g improper purpose
 - Reality of lawmaking is that they do not think about administrative law
 - Kinghit - courts also review where authority is not given by statute

Common law model:

- About what superior courts do in liberal democracies
- Created by and developed by courts - Inherent jurisdiction
- If Parliament don't like it, then it can be overruled

Convergence of theories:

- A presumed legislative intent
- Parliament knows that the Courts engage in judicial review, have not done anything to stop it - presumed approval

PUBLIC LAW TOOLBOX:

OMBUDSMEN:

- Officer of parliament, elected by the Governor General
- Can look at any decision or recommendation by central government department or organisation listed in schedule 1 - parts 1 and 2
- Can also look when they fail to do something
- Some exception as to what they cannot review
 - An internal review/repeal process already exists
 - A lot to do with the armed forces
- Must effect a person or body of persons in their personal capacity
- Can investigate a complaint, or look at something on their own motion
- Inquisitorial, rather than adverse, process
- Reporting powers when something seems to be contrary to the law

What can they do?

- Solid reporting powers
 - Can consider that should be referred to appropriate authority for further consideration
 - Omission should be rectified
 - Decision should be cancelled or varied
 - Law on which decision etc was based should be reconsidered
 - Reasons should have been given for decision
 - Any other steps should have been taken
- Extremely powerful tool
 - If officials haven't taken steps, can then send on to Minister
 - Then have discretion to set before the House of Representatives and the Prime Minister
 - Usually will get something out of it in practise

OFFICIAL INFORMATION ACT:

- Before the OIA, the default was secrecy - Official Secrets Act 1951
- Transparency as a right - began in Sweden, then USA

Who can request?

- s12 - Citizen, permanent resident, person in New Zealand, body corporate

From who?

- s2 – any government department (named in schedule 1 part 1 ombudsman act), Minister of the Crown, or organization (schedule 1 part 2 ombudsman act, schedule 2 OIA act)
- s5 – also includes any independent contractor to gov
- Not local authorities – separate act

For what?

- For any official information
- Held by department, Minister of the Crown, or organisation
- Information does not necessarily have to be document/writings – could be for example someones recollection of a meeting
- Cannot request personal information about a natural person - governed by privacy act
- Corporate person information

Format of requests:

- Request with “due particularity” – don't be broad, be as specific as possible
- Oral and written requests – best result, mentioning OIA is best, and writing is easier
- Urgent requests, but reasons must be made – but no meaning in statute of urgency

Who processes?

- Department/minister/organisation who you asked
- If you asked wrong body, a transfer is permitted
- More closely connected w other body's functions

Time limit:

- As soon as reasonably practicable, and in any case, 20 working days
- Extensions possible – good reasons “reasonable period”

How the OIA is fulfilled:

- Where it is a document - s16 - could be given a copy, summary, oral briefing, or go in and have a look at it
- Has to be made available how you want it unless impracticable
- S17 - information can be deleted or blacked out

- There can be charges levied for labour and materials, but when they are charging they must see if they can narrow the scope so that it costs less

Refusals/deletions:

- Substantive reasons:
 - S 6,7,9 - prejudice of New Zealand's security, supply of international intelligence information, safety, major economic damage
 - S 7 - parts of New Zealand that aren't New Zealand, e.g Cook Islands
 - S 9 - reasons that are only permissible if not outweighed by the public interest
 - Would prejudice someone's commercial position
 - Collective ministerial responsibility
 - Trade secrets
 - Protect confident communication with the sovereign etc.
 - S 10 - can neither confirm nor deny the information - where saying that something exists would prejudice
- Administrative reasons:
 - Will be released soon anyway
 - Criminal disclosure
 - Does not exist or cannot be found
 - Substantial collection and research required - do not have to create information
 - Frivolous, vexatious, trivial
- Reasons need to be given - if balancing exercise, also explained

If not complied with, can complain to the Ombudsman, or Privacy Commissioner if to do with personal information.

TE TIRITI O WAITANGI/TREATY OF WAITANGI

GENERAL STRUCTURE:

Issue statement: usually...

- Are X's actions inconsistent with the principles of Te Tiriti?
- Are the ordinary courts going to intervene in response?

The nature of the Crown's obligations in regards to the treaty principles (in this case)

- Incorporated into legislation
 - Clause is exactly the same as in another piece of legislation - Parliament intended for it to have the same effect - *Mighty River Power*
 - Where there is a principles clause, that is a substantive limit on Crown power - *Broadcasting Assets*
 - An express standard; Court to form judgment on whether the standard has been met
- Context
 - Statutory scheme links Acts with treaty clauses - *Huakina*
 - The Planning Act and the Water Act become a comprehensive scheme as they were linked by public policy and general purpose, so it is possible to consider Maori cultural and spiritual values as they were held to be a consideration under the Water Act
 - No express legislative reference to the Treaty, but the fact that it involves a taonga makes considerations relevant - *Radio Frequencies*
 - Not strictly a taonga, but relevant as it is so closely connected to other taonga and guaranteed rangatiratanga - *Whales*
- Positive obligation
 - Conservation Act section 4 - this Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi
- Negative obligation

- State Owned Enterprises Act section 9 - nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi

Which principles?

- Partnership
 - Parties to act reasonably towards each other and in good faith - *SOE*
 - "Creates responsibilities analogous to fiduciary duties" - *SOE*
 - Consultation - there is a duty of consultation where appropriate
 - *SOE* - consultation could hold up the the process of government in a way that is contrary to the principles of the Treaty
- Active protection
 - Positive steps to protect a taonga and preserve it to use to the fullest extent possible
- Right of redress
 - When there is a breach, a duty to give a remedy if the claim has merit
 - Equally a breach to do something that may restrict your ability to provide redress in the future
- Right to development?
 - Potential - only in certain circumstances like *Whales*

What do they require? Were they breached?

- Partnership
 - No absolute duty to consult: depends on circumstances:
 - In some circumstances, in order to make fully informed decisions there will be a duty to consult - *SOE*
 - Consultation could hold up the the process of government in a way that is contrary to the principles of the Treaty - *SOE*
 - Duty will differ depending on the nature of the taonga - national hui vs. regional hui - *Mighty River Power*
 - In some circumstance, to limit to consultation would be hollow; consultation also as a bare minimum - *Whales*
 - Genuine engagement
 - Due to the strength of the interest in the case
 - Report had not been released, duty of the Crown to be fully informed when making decisions - *Radio Frequencies*
 - Entitlement to a reasonable degree of preference - (because of 3 distinct features in combination) *Whales*
 - Analogous to taonga
 - Essentially a tribal activity, rather than individual Maori
 - Pioneers of industry
 - DOES NOT EXTEND TO A RIGHT OF VETO
- Active Protection
 - Is taonga in a vulnerable state? If so, and especially if it can be linked back to past Treaty breaches by the Crown, there is a heightened level of what is required - *Broadcasting Assets*
 - Is the asset substitutable? - *Broadcasting Assets*
 - Land is unique
 - Broadcasting assets can be substituted for other things, can use other means to promote Te Reo Maori
- Right of Redress
 - *Mighty River Power*: material impairment to future redress - assess the ability before and after the transfer
 - Before intervening, the Court must be brought to the conclusion that the proposed privatisation is inconsistent with Treaty principles;
 - There will be inconsistency, if the proposed privatisation would d; and
 - The Court must address this issue directly and form its own judgment, along the lines discussed in [89].
- Right to Development?

- Commercial whale watching is a modern exercise, development is coming to be recognised, but not necessarily exclusive of others - *Whales* is a unique case, indigenous rights are not frozen at a point in time. Only could argue in very analogous circumstances potentially.

Will the courts intervene?

- Obligation to protect Maori and uphold Te Tiriti is not absolute
- A strong statutory provision will bolster that it is worth caring about - high threshold of obligations
 - Where there is a principles clause, that is a substantive limit on Crown power - *Broadcasting Assets*
 - An express standard; Court to form judgment on whether the standard has been met
- If there is a breach, are there policy factors that are so compelling that they make it okay despite that breach?
 - *Broadcasting Assets* - general policy
 - if the country is in a recession
 - if the country is doing well economically
 - importance of the decision
 - urgency of the decision
 - benefits of the decision
 - climate crisis
 - COVID-19 pandemic
 - The Crown's right to govern

Conclusion

- Potential remedies/outcomes:
 - Te Awa Tupua - giving the river a legal personality
 - *Radio Frequencies* - requirement to wait for Waitangi Tribunal report to be fully informed - essentially remake a decision
 - *Broadcasting Assets* - no breach as substitutable bar Cooke J minority judgment
 - *Mighty River Power* - national vs. regional hui, idea of Shares Plus
 - *Ngai Tai Te Tamaki* - misstatement of the law, remake decision?

Huakina:

Dairy farmers applied to the WVA for water rights

Huakina Development Trust rejected, appealed decision up to High Court

- No doubt that the Treaty is a part of the fabric of New Zealand society, and a part of the context in which legislation should be interpreted
 - The Treaty can be used as a guide to resolving interpretation issues
 - In a context which "impinges upon its principles"
- The Planning Act and the Water Act become a comprehensive scheme as they were linked by public policy and general purpose, so it is possible to consider Maori cultural and spiritual values as they were held to be a consideration under the Water Act

State Owned Enterprises Case:

Concern that Crown assets would be transferred to state owned enterprises and therefore not be available for future treaty claims/settlements

- Section 9: nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi
- Requires a protection mechanism:
 - Any land transferred to a state-owned enterprise and on sold will continue to come with the disclaimer that it may be subject to future Treaty of Waitangi claims
 - Waitangi Tribunal receives the jurisdiction to make binding orders in regards to returning former state-owned enterprise land
- Cooke J:
 - Need to take a generous purposive approach

- "A broad, unquibbling, and practical interpretation is demanded"
- "What matters is the spirit"
- The treaty signified a partnership
- There are rights and obligations that need to be balanced
- Creates responsibilities analogous to fiduciary duties
 - To conduct yourself in the best interests of someone else in a special relationship
 - Careful to say that there is no legal requirement
- Need to recognise that the Treaty of Waitangi sets up a relationship ready to be applied to new/changing circumstances; it is not a frozen document

Radio Frequencies:

No FM radio frequencies allocated to Maori in Auckland or Wellington

- No express reference to the Treaty, but the context makes it relevant; as it involved a taonga (Te Reo Maori)
- Young people use FM frequencies
- Te Reo Maori report:
 - Addressed broadcasting to some extent, but only widely
- Radio Frequencies report:
 - Hearings had been required, and the Tribunal were in the process of writing the report
- Issue whether he was required to consider the Radio Frequencies report in addition to the Te Reo Maori report
- Treaty obligations require good faith, informed decision making: therefore at a minimum, they had to wait for the report to be completed before making a decision
 - Does not have to comply with recommendations, just be fully informed

Dissent:

- Allocation of weight is a policy decision
- Unlikely that the inquiry will identify wholly new issues
- However supported that principles should be taken into account based on context, even without incorporation

Broadcasting Assets:

Direct link in legislation to Section 9 of SOE

Physical assets used to broadcast content

Majority finds that the transfer will not significantly prejudice treaty interests

Cooke J minority - the last lever that government has to control Maori programming, should be held onto

- Obligations to Maori are not absolute and unqualified, but grounded in reasonableness
- Reasonable steps may vary
- Reflect the intent of the Treaty as a whole - includes, but is not confined to, express terms
- Considerations:
 - Is the taonga in a vulnerable state? If so, and especially if it can be linked back to past Treaty breaches, there is a heightened level of what is required
 - What is the state of the economy, wider policy considerations etc.
 - Is the asset substitutable?
 - Land is unique
 - Broadcasting assets can be substituted for other things, can use other means to promote Te Reo Maori
- Privy Council clarification that they can do more than only intervene where there is unreasonableness in a judicial review sense; where there is a principles clause, that is a substantive limit on Crown power
 - Varies from case to case, "the question is a matter on which the Court must form its own judgment on evidence before the Court"
 - An express standard; form judgment on whether standard has been met

Mighty River Power:

Mixed Ownership Amendment Act

1st SOE energy company to be converted to mixed ownership model

S 45Q - carbon copy of s 9 of SOE Act - reinforces the importance and generous purposive approach

- Waitangi Tribunal report:
 - Maori have residual “property rights” in relation to freshwater bodies
 - Will privatisation have an impact on Maori rights?
 - If there are others now making money of the body, Maori deserve a share of it
 - Management of water resources
 - Solutions:
 - Shares plus idea floated
 - Recommended a national hui for consultation - don’t move on until can ascertain what the Maori interest is and how to proceed

3 point test at [90]:

1. Before intervening, the Court must be brought to the conclusion that the proposed privatisation is inconsistent with Treaty principles;
2. There will be inconsistency, if the proposed privatisation would “impair, to a material extent the Crown’s ability to take the reasonable action which it is an obligation to undertake in order to comply with the principles of the Treaty”; and
3. The Court must address this issue directly and form its own judgment, along the lines discussed in [89].

No material impairment in this case as there were other options.

BUT, legitimate expectations have been created

- Providing other options/saying what it can do
- Crown recognises Maori rights in regards to freshwater

Ngai Tahu v Director-General of Conservation (Whales):

Ngai Tahu Sea Fisheries Report -

- Authority of rangatiratanga is essential to the tribe
- Rangatiratanga over the waters some 12 miles or so out - but do not need to demonstrate for practical purposes

Whales case:

Operating commercial whale watching with permit

Director General issued another permit

Claimed were entitled to time of operation protected from other permit holders

- Conservation Act s4 - This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi. A positive obligation
- A commercial business does not constitute a taonga, but because it is so closely connected to other taonga and guaranteed rangatiratanga, it is analogous to a taonga e.g Ngai Tahu had pioneered this industry, related to water
- Crown is not correct to limit the principles to consultation - they require active protection, and to limit to just consultation would be hollow
- Conservation objective is paramount consideration in the Act - treaty principles are not unqualified/absolute
- Right to development - commercial whale watching is a modern exercise, development is coming to be recognised, but not necessarily exclusive of others - *Whales* is a unique case, indigenous rights are not frozen at a point in time
- Ngai Tahu entitled to a reasonable degree of preference because of 3 distinct features in combination
 - Analogous to taonga
 - Essentially a tribal activity, rather than individual Maori
 - Pioneers of industry
- Right does not extend to a right of veto

Ngai Tai Te Tamaki

About concessions granted under Conservation Act in regards to Rangitoto and Motutapu Island

Ngai Tai have manawhenua in relation to the islands (as well as others)

Previous two settlements - collective and individual

Two concessions granted to MRT and Fullers

- Key issue: the reports that had formed the decision stated that there was no basis for any preferential treatment
- Enabling iwi or hapu to reconnect to their ancestral land by taking up opportunities on the conservation estate is one way that the Crown can give practical effect to the Treaty principles
- Statutory scheme: land in question is administered by the Department of Conservation under the Reserves Act - a direct link back to the Conservation Act

- Other statutory obligations under HGMP Act, Auckland Conservation Management Safety Act, Collective Redress Act and Motu Plan, Ngai Tai Settlement and Conservation Relationship Agreement
- Section 4 does not exist in a vacuum, but should not be seen as being trumped by other others
- Other objectives should be achieved in a way that give effect to s 4
- Crown's obligations are not diminished by the fact that they already have a settlement
- Misstatement of the law - no provision to allow for any preference for allocation with these decisions (can't take into account economic benefit); however Ngai Tahu was entitled to substantive preference in *Whales*, a part of what s 4 provides
- Handwritten notes on report that said that declining an application may be the only way to guarantee active protection (but not the case here)
 - Did not trump, misapplied law meant that potentially inappropriate weight given to some factors rather than others - "preference in favour may have been of greater substance"
 - Decision did not therefore nevertheless apply, although previous Courts had held that it was a fair decision

Waitangi Tribunal

- Appointed by the Governor-General on the advice of the Minister of Maori Affairs with consultation from the Minister of Justice. They consider:
 - Personal attributes and expertise
 - Commission of enquiry - expected to bring their own knowledge
 - Have regard to partnership - usually 50/50 Maori to non-Maori
 - Chairperson will also try to ensure 50/50 male to female
- Usually include:
 - Academics, historians
 - Experience in iwi communities
 - Respected New Zealanders
 - Lawyers - all panels have someone legally trained
 - Governmental/public policy
 - Former MPs
 - Private sector
- Cannot make binding recommendations except in the case of land stemming from the SOE case
- Claims:
 - Any Maori person can make a claim
 - For an act or omission
 - By the Crown
 - That has some prejudicial effect and inconsistency with treaty principles
 - Can only consider contemporary claims now (Sealords deal created principles for dealing with historical)
 - Cannot consider commercial fisheries - already been settled
 - Also other exceptions in the Act
 - Cannot investigate claims in relation to licensed land, if claim trivial, if there is an alternative remedy if Bill before Parliament (but Bill can also be referred to Waitangi Tribunal)
- Te Arawhiti (Treaty Settlement Ropu) in charge of the negotiations

Ko Aotearoa Tenei

- 20 years from claim to report
 - Began from kumara - concern that varieties that were no longer available - bound up with traditional Maori knowledge that was now separated and could be lost
1. Taonga works and intellectual property
 2. Genetic and biological resources of taonga species
 3. Relationship with the environment
 4. Taonga and the conservation estate
 - a. Amount of land DOC owns, iwi needing to get permits to access traditional resources
 5. Te Reo Maori - structural issues
 6. When Crown controls Mataranga Maori - museums, archives

7. Rongoa Maori - traditional medicine
 - a. Link between physical and traditional knowledge
 - b. If cannot get access to resources to make, cannot pass on knowledge, also extends to karakia
8. Making of international instruments

Notes s4 as the most powerful treaty clause

Treaty Principles:

- Partnership
 - To act reasonably and in good faith towards each other
- Active Protection
 - Framed as positive guarantees (based on art. 2)
- Right of Redress
 - If a right is breached, there should be a remedy
 - Crown cannot limit itself in the redress that it can provide
- Right to development?
- Consultation?