Decision No. A043/2004

IN THE MATTER of the Resource Management Act 199 1

AND

IN THE MATTER of an appeal under section 174 of the Act and an application under section 3 16 of the Act

BETWEEN **NGANEKO MINHINNICK**

(RMA0425/03)

Appellant

AND **THE MINISTER OF CORRECTIONS**

Respondent

BEFORE THE ENVIRONMENT COURT

Alternate Environment Judge D F G Sheppard (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner W R Howie

HEARING at **Manukau** on 27, 28, 29, and 30 January, and 2, 3, 4, 5, and 13 February 2004. (Written submissions in reply received 27 February 2004.)

APPEARANCES

R E W Minhinnick and G S Yelchich for the appellant
P J Milne and J P Mooar for the respondent

DECISION

Table of Contents

INTRODUCTION

[1] Mrs Nganeko Minhinnick of Ngati Te Ata Waiohua has appealed to the Environment Court against a decision by the Minister of Corrections in respect of a proposed women's corrections facility at Hautu Drive, Wiri. The Minister had required the Manukau City Council to designate the site for that purpose, and accepted the Council's recommendation that it should be designated, but had modified some of the conditions recommended by the Council.

[2] By her appeal Mrs Minhinnick asked that the requirement be withdrawn, and applied for enforcement orders prohibiting the Department of Corrections from commencing anything concerning Hautu Drive as a site for the ARWCF,' and ordering that the Crown restore Ngati Te Ata rangatiratanga and kaitiakitanga to the proposed site.

[3] The grounds of the appeal, were set out fully in the notice of appeal, extending over 30 pages. We summarise them as follows:

(a) The site is ancestral land of Ngati Te Ata, who are the sole or primary kaitiaki, and the sole mana whenua relationship to the site.

(b) Matukutureia has cultural significance to Ngati Te Ata, and the site is waahi tapu (deriving from the birth-place of their founding ancestor Te Ata i Rehia), a status which extends to the secure area and building platform, and remains despite significant modification by quarrying and site remediation works.

(c) The corrections facility would interfere with Ngati Te Ata's relationship with the site.

(d) Ngati Te Ata have rangatiratanga over the site, they are sovereign, and this provides them with a right of veto of the corrections facility on the site.

(e) Kaitiakitanga requires that the corrections facility not proceed on the site as proposed.

Auckland Regional Women's Corrections Facility,

(f) The Minister has acted contrary to the principles of the Treaty of Waitangi in that he failed to consult adequately with Ngati Te Ata because he has not abandoned the proposal in the face of Ngati Te Ata's opposition.

(g) The Minister's consideration of alternative sites was inadequate.

[4] We summarise the Minister's response to those grounds:

(a) The Minister accepted that the site is ancestral land of Ngati Te Ata.

(b) The Minister accepted that Ngati Te Ata have a traditional relationship to the site, but as Te Akitai also have a significant traditional relationship with the site, did not accept that Ngati Te Ata have an exclusive or sole relationship with it.

(c) The Minister accepted that Matukutureia has traditional cultural significance to Ngati Te Ata, but did not accept that the same significance extends to the whole of the corrections facility site. The Minister accepted restrictions on the use of the parts of the site that are subject to the waahi tapu special site rule in the district plan, and Conditions 3, 18 and 19, but did not accept that any of the corrections facility site is waahi tapu in terms of section 6 of the Act, as the ancestor's birth place was at Matukutureia, and the pa there did not extend to the area of the proposed building platform. The Minister's case was that if the site ever had waahi tapu status, that had been lost when the site was subjected to extensive quarrying, and if it did have that status, any waahi tapu status could be lifted.

(d) The Minister did not accept that the corrections facility would interfere significantly with Ngati Te Ata's relationship with the site. The development of the facility would not involve any significant earthworks, and the relationship of Maori with the site had been recognised and had been and would continue to be provided for.

(e) The Minister denied that Ngati Te Ata have rangatiratanga over the site, or that they are sovereign, or that they have a right of veto of the corrections facility on the site.

(f) The Minister denied that kaitiakitanga requires that the corrections facility not proceed on the site.

(g) The Minister did not accept that taking into account the principles of the Treaty requires that the site be abandoned or that the development be shifted south on the site to accommodate Ngati Te Ata's belated development plans for the north of the site. Nor did the Minister accept that taking into account the principles of the Treaty requires the Crown to provide land to Ngati Te Ata for development. The Minister maintained that there had been consultation with Ngati Te Ata, although it had been limited by Ngati Te Ata's reluctance to take part in discussions except on the basis that the proposal would not proceed, or that significant compensation be paid to Ngati Te Ata if it did proceed.

[5] Before we address the issues in more detail, we need to consider whether the appeal has to be decided in accordance with the Resource Management Act as amended in 2003, or in accordance with the Act as it was prior to that amendment. This may be significant, as amendments were made in 2003 to sections 6, 7, and 171, all of which need to be considered in this case.

Application of 2003 Amendment Act

[6] Mrs Minhinnick's appeal was lodged with the Environment Court Registrar on 9 June 2003. The Minister submitted that in deciding the appeal, the Resource Management Amendment Act 2003 should be entirely disregarded. However Mr Roimata Minhinnick's evidence appeared to have been prepared on the basis that the appeal would be decided by reference to the Act as amended.[2]

[7] We quote section 112(2) of the Resource Management Amendment Act 2003:[3]

> If, before the commencement of this section, an appeal has been lodged . . . . the continuation and completion of that appeal . must be in accordance with the principal Act as if this Act had not been enacted.

[8] By section 2(2) of the Amendment Act, section 112 came into force on 1 August 2003.

[2] See references in paragraphs 15. 132 and 133 to s 6(f) added by that amendment Act: s 4.
[3] Immaterial words omitted.

[9] As Mrs Minihinnick's appeal was lodged on 9 June 2003, which was before the commencement of section 112 on 1 August 2003, we hold that by applying section 112(2) her appeal has to be continued and completed as if the Amendment Act had not been enacted.

[10] Therefore in deciding this appeal we apply the Resource Management Act as if the amendments made by the Amendment Act to sections 6, 7 and 171 had not been made.

The parties

[11] We start by identifying the parties to the appeal, and other people involved.

The appellant

[12] Mrs Nganeko Minhinnick is a Ruruhi Kaumatua (elder) of Te Iwi o Ngati Te Ata. She is a direct descendant of Te Ata I Rehia, eponymous ancestor of Ngati Te Ata.

[13] Mrs Minhinnick's son Mr Roimata Minhinnick conducted her case at the appeal hearing, and also gave evidence in support of her appeal. Mrs Minhinnick gave evidence herself, and another son, Mr Tahuna Minhinnick, gave evidence too.

The respondent

[14] The respondent to Mrs Minhinnick's appeal is the Minister of Corrections. The Minister gave the notice. of requirement for designation of the site for the corrections facility, and made the decision on the City Council's recommendations on the submissions received.

[15] Although more than one person has held the office of Minister of Corrections over the period, it is their official actions that are the subject of the appeal, and we need not be concerned with the individuals who held the office at various times.

Other people

[16] Mrs Minhinnick is of Ngati Te Ata of Waiohua. Te Akitai are also a hapu of Waiohua, having an ancestor in common with Ngati Te Ata, namely Huakaiwaka. The site is ancestral land of Ngati Te Ata and of Te Akitai. Although Te Akitai lodged a submission on the Minister's requirement, on Mrs Minhinnick's appeal they supported the Minister's case for the proposed corrections facility on the site.

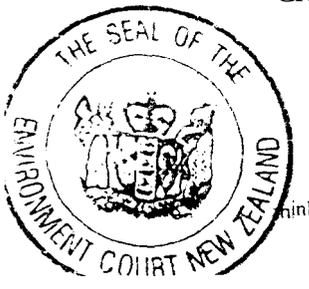
[17] Winstone Aggregates Limited (or Craig Downer Limited, of which it is a subsidiaryj owns land to the west of the site, some of which it has used as a quarry. Part of the Winstone Aggregates land, called the 'tooth' (because its shape when viewed in plan was said to resemble a tooth), is proposed to be designated for the corrections facility, and Winstone Aggregates has consented to that. Winstone Aggregates has also made an offer to Ngati Te Ata by which Ngati Te Ata would support Winstone quarrying of land adjacent to the corrections facility site in return for payment of royalties, and in return for the quarried land being reinstated and vested in Ngati Te Ata for development for a marae, sports club, playing fields, crops and planting. The proposal also provided for Ngati Te Ata support for dealings with Wiri North Quarry and Wiri South Quarry.

[18] Diesel Propulsion Limited was the previous owner of the part of the corrections facility site in Lot 6 DP 201333, having bought it from Winstone Aggregates, who had quarried most of it.

[19] Terra Firma was a subcontractor of Diesel Propulsion, previous owners of that part of the corrections facility site.

The site and its environs

[20] The corrections facility site is in two titles, for Lot 6 and part of Lot 7 DP 201333, having a combined area of approximately 47.02 hectares. Lot 6 is already owned by the Crown. Lot 7 is owned by Craig Downer Limited and is currently occupied by its subsidiary Winstone Aggregates. Winstone Aggregates has given written approval for the part of Lot 7 forming the 'tooth' to be designated, and the Department of Corrections is in the process of negotiating its purchase by the Crown.



[21] Part of the southern boundary of Lot 6 is formed by the Puhinui Creek, an arm of the Manukau Harbour. The South-western Interceptor, a trunk sewer pipeline, crosses the southern part of Lot 6.[4]

[22] The Wiri area was once distinguished by twin volcanic cones, Matukutururu and Matukutureia, and a lava field. In the last century, Matukutururu was completely quarried away. Matukutureia had formerly been occupied by a pa, with the slopes extensively modified by terracing, and the top levelled to form a tihi (citadel). More recently the majority of the southern and western slopes of Matukureia have been quarried too, and very little remains of its original form.

[23] Matukutureia (also known as McLaughlins Mountain) lies to the west of the corrections facility site, partly on land owned by Puhinui Farms Limited and mostly on land owned by Winstone Aggregates Limited. As well as having been modified by pa works and by quarrying, the form of Matukutureia has also been modified by installation on it of a large water-storage tank and access track. The eastern edge of the base of Matukutureia is about 200 metres from the proposed secure perimeter of the corrections facility

[24] To the south of Matukutureia lie the remains of the Matukuturua Stonefields,' registered as a heritage place by the New Zealand Historic Places Trust.

[25] In recent years, after quarrying on it had ceased, remediation works have been carried out on the corrections facility site itself. They included construction of stormwater management facilities, recontouring, and importation of topsoil. The original landform and the shape of the terrain are no longer apparent.

[26] The land surrounding the site is used for a variety of business and industrial activity, including fuel storage to the north, an industrial/business subdivision to the east, manufacturing distribution and storage to the south-east, a child, youth and family residential centre and the Puhinui Creek to the south. To the south-west and west of the site there is the vacant Winstone Aggregates land including most of Matukutureia, to the north of which is Puhinui Quarries' working quarry.

[27] Manukau City Centre is a major sub-regional centre about 4 kilometres to the east of the site. There is a Courthouse located there.

[4] The construction of the pipeline was the subject of Mrs Minhinnick's enforcement order application decided as *Minhinnick v Watercare Services* [1997] NZRMA 289 (Env C).
[5] The scene of Mrs Minhinnick's 1997 enforcement order application,

The proposal

[28] The Minister proposes a women's regional corrections facility on the site that would initially accommodate up to 152 inmates (and 15 more in contingencies), with expansion to 350 inmates in the foreseeable future. The facility would provide genera1 inmate accommodation in all security classifications, including remand, as well as specialist facilities for inmates assessed as being difficult to manage and those assessed to be at risk of self-harm. Self-care units for low-risk inmates nearing the end of their sentences would also be provided.

[29] The management techniques would be selected to address inmates criminogenic, educational, vocational, cultural, recreational and spiritual needs in their rehabilitation. The latest security systems would be used to reduce the risk of security breaches.

[30] The main custodial facilities are to be set back from site boundaries by between 34 and 134 metres for a security buffer and to minimise any potential effects on the corrections facility from activities on adjoining properties. The area within the secure perimeter would be 9.825 hectares.

[31] The design and layout of the facility has been developed with substantial consultation with Maori. It is structured around local mana whenua histories and site sensitivities. The entry buildings and welcoming spaces have been designed around mana whenua protocols, as has the entire Papamauri complex.

[32] The buildings (except the two-storey entry building) would be single storey, in a landscaped setting, The buildings would have a variety of roof forms so the appearance would not have an institutional character. Accommodation buildings would generally be residential in appearance, and support buildings such as the medical centre and gymnasium would be similar to structures generally found in the community. The total building area is approximately 12,000 square metres. The buildings are to be finished in natural colours.

[33] The facility itself is proposed to be located in the northern part of the site. The constraints on selection of the building platform on the site included two heritage resource areas in which building is not proposed; alignment of the entry with the top of Matukutureia; routes for a Watercare pipeline, for access to the Winstone Aggregates land, and for a proposed future road; areas of soft ground and

stormwater control; the need for separation from fuel storage facilities to the north; and security and shape factors.

[34] Car parking areas and some buildings (visitor reception, a pump station, and sheds) would be outside the secure perimeter. Screen planting is to be developed in the eastern, southern and north-western buffer areas.

[35] The balance of the site would be used for inmate employment, skills and pre-release training, horticulture and gardens, cultural development and therapy areas, and sports fields. The southern area would have access to an estuary of the Manukau Harbour. Significant areas would also be used for stormwater management ponds.

[36] Significant mitigation planting is proposed, and the corrections facility would be entirely screened by massed planting of coastal native trees and shrubs along the western and southern sections of the site. There would be massed groupings of specimen trees on the undulating slopes adjacent to the Stonefields.

The designation requirement

[37] On 28 May 2002, the Minister notified the territorial authority (the Manukau City Council) of his requirement for designation of the site for a corrections facility for female inmates and associated facilities and activities. The notice was accompanied by an Assessment of Environmental Effects (AEE), an Indicative Concept Plan, and proposed conditions. A detailed account of the site selection process, and the consideration that had been given to alternative sites and methods, was contained in the AEE. Independent specialist reports of aspects of the environmental effects that contributed to the AEE included a social impact assessment, a report on cultural impacts and tangata whenua issues, an archaeological assessment, and a visual assessment.

[38] The Minister's objectives, which the required designation was intended to enable him to achieve, were:

> *(a) To urgently provide for the national requirement for additional women's prison accommodation to meet future growth,*
> *(b)* To complete the national *network* of women's *prisons;*
> *(c) To ameliorate the shortage of women's prison accommodation in the upper North Island by establishing a women's prison on a sife which can accommodate foreseeable female inmate needs and numbers;*

(d) *lo locate the facility in an area central to the upper North /s/and area and* appropriately *located for service delivery (including* rehabilitative initiatives), visitors *and staff;*

(e) *To locate the prison within reasonable travelling distance of the majority of female court referrals in fhe upper North Island;*

(f) *lo facilitate ease of access to the prison from the southern and northern reaches of the upper North Island area by locating the facility on a site easily accessible from a major north/south transport corridor,.*

(g) *To establish the facility* on a *site* which *is* economically and technically feasible and *in a location where any adverse environmental or social impacts can be adequately avoided, remedied or mitigated.*

[39] The Minister's requirement was notified by the Council, and it received 22 submissions on it. The Council appointed commissioners to consider the requirement and the submissions, and their report was published on 24 March 2003. In their report, the commissioners recommended that the Minister confirm the requirement subject to certain conditions.

[40] On 13 May 2003, the Minister published his decision to accept the recommendation and to modify some of the recommended conditions. That is the decision that is the subject of Mrs Minhinnick's appeal.

[41] Conditions that are material to the issues in this appeal prohibit building on part of the site to the east of Matukutureia within the area identified as the Watercare designation (Condition 3); and prohibit earthworks and building on the southern part of the site containing historic remains (Condition 18); and a requirement of consultation with Ngati Te Ata and Te Akitai for any works proposed within the part of the site outside of, and to the west of, the secure perimeter (Condition 19).

Planning instruments

[42] We have regard to the planning instruments under the Resource Management Act that apply to the site.

[43] There is no applicable national policy statement, but the New Zealand coastal policy statement applies to the site which, although not within the coastal marine area, is a part of the coastal environment. The site is zoned for heavy industry and quarrying, and the physical development is intended for a part of the site remote from the Puhinui Stream and Manukau Harbour. Having reviewed the New Zealand

Coastal Policy Statement,[6] we find nothing in the proposal that would conflict with the contents of that instrument.

The regional policy statement

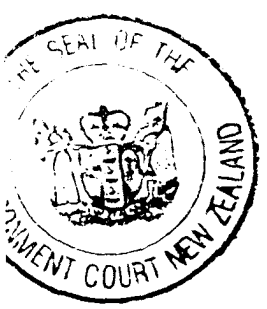
[44] The core regional planning instrument is the Auckland Regional Policy Statement.

[45] The proposed corrections facility is an urban activity, in that it does not rely on the rural resources of the region for its operation. As such the Auckland Regional Policy Statement policy directs that the activity is to be located within the metropolitan urban limits.' The proposed corrections facility is also regional infrastructure as defined by the regional policy statement, which sets a policy that such infrastructure is to be located within metropolitan urban limits.* The Hautu Drive site selected for the corrections facility is within the metropolitan urban limits defined by the regional policy statement.

[46] The regional policy statement encourages efficient use of natural and physical resources. In making use of an exhausted quarry, and being located within the urban area where it will promote transport efficiency for staff, visitors and those providing services, the proposed use of the site is an efficient use of natural and physical resources.

[47] The design of the corrections facility in consultation with Maori, linking with the- coastal and built environments, and incorporating extensive landscaping and planting, would serve the regional policy statement policies of enhancing amenity values and promoting sustainable management of the region's resources.

[48] The Minister's planning consultant, Mr H F Bhana, made an assessment of the proposal against the Auckland Regional Policy Statement, and gave the opinion that the proposal would not be inconsistent with it. His evidence in those respects was not contested, and we accept his opinions and find that the proposal is consistent with the Auckland Regional Policy Statement.



[6] N Z Gazette 5 May 1994, p 1563.
[7] Policy 2.5.2.3.
[8] Policy 2.6.7.

Proposed Regional Plan: Air, Land, Water

[49] A proposed Regional Plan: Air, Land, Water was notified on 23 October 2001. A large number of submissions and further submissions were received, and the process of completing the contents of the plan has not yet been completed.

[50] By the proposed plan, two parts of the Hautu Drive site are identified as being in the Urban Air Quality Management Area: the very southern tip of the site, and a small portion in the west of the site. The purpose is to minimise competing incompatible land uses, and to avoid reverse sensitivity conflict from discharges to air.'

[51] As the proposed corrections facility would not have any significant discharge to air, and would have ample buffer distances on a large site, it would not affect, nor would it be affected by, those provisions, That could be confirmed by monitoring in due course if considered necessary.

[52] Mr Bhana gave the opinion that the proposal would not be contrary to the objectives and policies of the proposed plan. His evidence in that respect was not contested, and we accept it. We find that the proposal would not infringe the proposed regional plan.

The district plan

[53] The Manukau City operative District Plan contains a policy that adverse effects on tangata whenua taonga should be avoided, remedied or mitigated.[10] It identifies involvement of tangata whenua authorities in vetting resource consent applications for assessment of effects as a method for achieving this.

[54] By the district plan, the north-western part of the site (about 10.25 hectares) -including part of the building platform- is in the Business 6 zone, and the rest is in the Quarry zone.

[55] A segment of the western part of the site (about 0.7 hectares) -including part of the 'tooth'-adjacent to Matukutureia is noted as being associated with *Heritage Resource 13 Matukuturua Stonefields* as Waahi Tapu to be protected. Any

[9] Policy 4.4.6.
[10] Policy 6.4.3.

development in that area would be a discretionary activity. None of the building platform is near the part so identified.

[56] The south-western part of the site (about 23 hectares) -including the 'tooth'– is identified as being associated with *Heritage Resource 1.5 Maunga Matukutureia (McLaughlin 's Mountain),* and is subject to a Waahi Tapu special site rule, by which any development in that area would be a controlled activity. The matters over which the Council has reserved control are observance of the correct protocols to recognise the status of the land, and a requirement to consult with tangata whenua.' [1]

[57] The district plan contains this definition of the term 'waahi tapu':

> *Waahi tapu* means an area or place sacred to *Maori in* the *traditional, spiritual, religious, ritual or mythological sense, for example pa, ara (tracks), urupa, battle sites and tauranga waka (canoe landings).*

[58] Some discrepancies of detail in respect of those Heritage Resource provisions of the district plan were discovered by Mr Bhana. Those discrepancies had been brought to the Council's attention in Mr Bhana's evidence to the Council's commissioners considering the requirement, and as they had not been resolved by the Council prior to the appeal hearing, he gave evidence of them to us.

[59] The discrepancies were then investigated by counsel for the Manukau City Council, Mr N D Wright, who was able to provide an explanation of them, for which we are grateful.

[60] In summary, the discrepancies arise from text of the district plan describing the areas to which those Heritage provisions apply. Although both areas deserve recognition because of the importance to tangata whenua of Matukutureia and its surrounds, Area 13 (which includes the more intact remnant of the mountain) was considered to be worthy of greater protection than Area 15 (which has been heavily compromised by past quarrying). So the intention had been that works that may have an adverse effect on Area 13 would be a discretionary activity, and works that may have an adverse effect on Area 15 would be a controlled activity.

[61] However in the text the descriptions of the features to whicheach area applied were misleading, and the Council invited the Court to give it a direction under section 292 of the Act to amend the district plan to correct them.

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[1] Section 6.10.

[62] We decline to do so in these proceedings, not because the corrections are not needed (they are), but because the parties to these proceedings may not be all those who would have an interest in the proposed amendments to the district plan. Rather, we expect that the City Council will propose a plan change, so that all those interested could make submissions.

[63] In any event the corrections facility building platform does not extend anywhere near Area 13, nor does it extend on to the part of the site in Area 15. Moreover, those provisions gave rise to Conditions 5(c), 18 and 19 of the requirement, which are in some respects more stringent. We accept the Minister's submission that any activities authorised by the designation that would take place on the parts of the site in Areas 13 and 15 would not be contrary to the policies and rules which apply to those areas.

[64] Lot 6 is also affected by a designation for the route of the South-western Interceptor, and by indications of the routes of possible future roads.

[65] The Business 6 zone, which applies to the north-western part of the site, is intended for potentially offensive or noxious activities. Most industrial activities are permitted activities in that zone, including those involving discharges to air. Activities that may be sensitive to air discharges are discretionary activities, and more sensitive activities are non-complying in the Business 6 zone.

[66] Corrections facilities and prisons are not provided for in the table of activities for the Business 6 zone, so they are classified as non-complying activities in that zone. [12]

[67] The Quarry zone applies to most of the corrections facility site. It allows for quarrying as an interim use of land, and provides for the remaining landform to be suitable for a more permanent urban land use, intending that the land would then be rezoned for appropriate activities. [13]

[68] Quarrying has ceased on the corrections facility site, which has been rehabilitated to render it suitable for a more permanent urban use. However the land has not been rezoned for non-quarrying activities, and the corrections facility would be a non-complying activity in the Quarry zone. [14]

[12] Rule 14.10.1(e).
[13] Para 17.8.9.1.
[14] Rule 17.8.10.1(d).

[69] Indeed, the district plan does not provide for a corrections facility in any zone, but the Business 6 and Quarry zones are the least sensitive zones. As no reverse sensitivity issue is likely to arise, we accept Mr Bhana's opinion that the proposal is not contrary to the district plan policies in general, nor to the policies for those zones in particular.

[70] Mr Bhana observed that the district plan uses the term 'waahi tapu' in a much wider way than has been accepted by the Courts in the context of section 6(e) of the Act, or than accords with common understanding of the term. The witness gave the opinion that Area 15 may be of heritage or cultural significance, but is not waahi tapu as that term has been interpreted by the courts.

[71] Counsel for the Minister submitted that section 6(e) applies to the traditional relationship of Maori with their lands, water, sites, waahi tapu and other taonga, *so* that a traditional approach to the concept of waahi tapu is relevant, tempered by what is still current and relevant. Counsel contended that the district plan definition is not consistent with the traditional view of waahi tapu or with how that term is used in section 6. Counsel also observed that the district plan does not support Mrs Minhinnick's claim that the whole site is waahi tapu.

[72] The majority of the site, (including all of it within the secure perimeter) is not in Areas 13 or 15, and is not identified in the district plan as being waahi tapu. Development and use of the parts of the site in Areas 15 and 13 is not prohibited, nor is it classified as a non-complying activity. We accept the correctness of Mr Bhana's analysis that it would be a controlled activity, except in the small part of the Watercare designation where discretionary activity consent would be needed. In either case, consultation with Maori would be expected, and that is reflected in the conditions mentioned. But the fact that a site is said to be waahi tapu does not mean that further development is prohibited.[15]

[73] The Minister has consulted with Maori with regard to the landscaping, and the ancillary activities planned for the Area 15, has excluded all of that area from the secure perimeter, and has agreed to special conditions to reflect the heritage status given to it by the district plan. Further consultation with Maori would be required for any other development of the parts of Areas 13 and 15 within the corrections facility site, and the applicable protocols would need to be followed.[16]

[15] *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karangn v Carterton District Council* (HC Wellington AP6/01, 25/06/01 Chisholm J).
[16] District Plan, Section 6. 10.1.

[74] Mr Bhana also assessed the proposal against the operative district plan. He observed that specific provision is not made for corrections facilities, and having reviewed the several zones, concluded that the zone provisions applicable to the Hautu Drive site make it more suitable than other zones. He concluded that the facility is not inconsistent with the district plan. Again that was not contested.

[75] Having reviewed Mr Bhana's assessment process we are of the same opinion.

[76] In summary, we accept the Minister's submission and find that there is nothing in the statutory planning instruments which indicates that a corrections facility is not an appropriate development and use of the site, and on the particular part of the site within the proposed secure perimeter.

Iwi planning documents

[77] Mr Roimata Minhinnick submitted that the Department of Corrections was required to have regard to iwi planning documents by virtue of section 74(2)(b)(ii).

[78] Section 74 of the Resource Management Act prescribes matters to be considered by a territorial authority when preparing or changing a district plan. Subparagraph (ii) of section 74(2)(b) directed a territorial authority preparing or changing a district plan to have regard to any relevant planning document recognised by an iwi authority affected by the district plan."

[79] This appeal concerns a requirement for a designation, not the preparation or change of a district plan. Section 74(2)(b)(ii) has no application to the consideration of a designation requirement. Section 171(l)(d), which lists the classes of planning instrument to which a territorial authority is to have regard in considering a designation requirement, contains no corresponding provision referring to an iwi planning document.

[80] Anyway, the Ngati Te Ata Cultural Development Plan relied on by Mr Minhinnick is still in draft, and has not been approved by a hui-a-iwi.

[17] Subparagraph (ii) was repealed by s 3 1(1) of the RMAA 2003 but, as stated in para [9] above, this appeal has to be decided as if that Amendment Act had not been enacted.

[81] So we do not accept Mr Minhinnick's submission that the Department of Corrections was required to have regard to iwi planning documents by virtue of section 74(2)(b)(i), and we do not accept that the Court is required to have regard to an iwi planning instrument in deciding this appeal. However we consider the development proposals for Maungatukutureia described in the draft Ngati Te Ata Cultural Development Plan later in this decision.

The legitimacy of the New Zealand Parliament

[82] In the appeal hearing, Mr Roimata Minhinnick questioned the Crown's legitimacy to govern Ngati Te Ata, and questioned the constitutional status of New Zealand. He asserted that Ngati Te Ata had never ceded its sovereignty but had retained it, and asked the Court for a declaration to that effect. Mr Minhinnick relied on a case in the Appellate Division of the High Court of Southern Rhodesia *Madzimbanuto v Lardner-Burke*" and on the Judgment of the New Zealand Court of Appeal in *Te Runanga o Wharehauri Rekohu Incorporated v Attorney-General*[19] (the Sealord case).

[83] Counsel for the Minister accepted that the *Court* in *Lardner-Burke* had determined issues of sovereignty, but submitted that it provides no authority for the Environment Court determining such issues in the present case. They submitted that those issues are simply beyond the jurisdiction of this Court.

[84] Counsel for the Minister also submitted that the Sealord case did not determine the foundations of the New Zealand constitutional system, quoting a passage to that effect from the Judgment of the Court of Appeal in that case.[20]

[85] There is some irony in Mr Minhinnick's attitude, in that by this appeal, Mrs Minhinnick has chosen to invoke a right of appeal conferred by the Resource Management Act 1991 of the New Zealand Parliament, an appeal to this Court which was itself created by that Parliament.

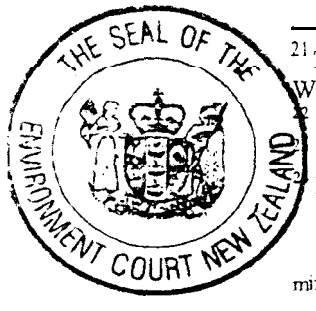
[18] [1968] R AD 457.
[19] [1993] 2 NZLR 301 (CA).
[20] Ibid. page 305, lines 17-20.

[86] Although the Environment Court is a court of law, it is not a court of general jurisdiction. It has only the functions conferred on it by Parliament. That jurisdiction does not extend to such lofty questions as the legitimacy of New Zealand or its Parliament. So we accept the Minister's submission that this Court does not have authority to give a declaration on the question raised by Mr Minhinnick.[21]

[87] Even if this Court had jurisdiction to consider the question, we have no doubt that as a proposition of law, there is no validity in Mr Minhinnick's assertion. The *Lardner-Burke* case was to the effect that under the Southern Rhodesia Constitution of 1961, leave to appeal to the Judicial Committee of the Privy Council had to be sought from the Privy Council itself. Nothing in that case supports Mr Minhinnick's assertions of Ngati Te Ata's claim to sovereignty. We also accept the Minister's submission that in the Sealords case, the Court of Appeal made no determination on the foundations of the constitutional system,

[88] Rather, the relevant authorities provide no support for Mr Minhinnick's contention. They include the Judgments of the Court of Appeal in *R v Knowles*[22] and *R v Waetford*,[23] and the more recent Judgment of Justice Penlington in *Warren v Police*[24] in which the learned Judge reviewed several cases on the topic.

[89] On those authorities we hold (if we lawfully may) that the New Zealand Parliament is empowered at law to make legislation; that Acts of Parliament do not derive their authority from cession by Iwi in subscribing to the Treaty of Waitangi; that Acts of Parliament are binding on all persons within New Zealand, both pakeha and Maori; that the courts of New Zealand (including the Environment Court) are subservient to the Parliament of New Zealand; and that they must uphold its Acts, including the Resource Management Act 1991,



[21] *Te Ohu o Nga Taonga Ngati Maru v Stratford District Council* Environment Court Decision W074/99.
[22] CA146/98 12/10/98, Keith J.
[23] CA406/99 2/12/99, Richardson P, para [7].
[24] HC Hamilton AP133/99 1/02/00 Penlington J, para [39].

Mana and Rangatiratanga

The cases of the parties

[90] Mr Roimata Minhinnick referred to the Waitangi Tribunal report on Mrs Minhinnick's Manukau claim for the proposition that mana and rangatiratanga are really inseparable, and he quoted this sentence from the report:[25]

> *As we see it, 'rangatiratanga' denotes 'authority: 'Mana' denotes the same thing but personalises the authority and ties it to status and dignity.*

[91] Mr Minhinnick gave his understanding that the concept of rangatiratanga includes sovereignty, authority, control, self-government, self-regulation, and Maori autonomy, and extends to political, social and economic factors. He submitted that the exercise of mana and rangatiratanga of Matukutureia remains with Ngati Te Ata; that Mrs Minhinnick is a direct descendant of Te Ata i Rehia; and that they wish to retain their exercise of authority concerning the corrections facility site, having never consented to its original alienation.

[92] The Chairman of Ngati Te Ata, Mr Tuherea Kaihau, gave evidence that locating the prison in the proposed location will be an affront on the mana of the people, their history in the area, their aspirations to re-establish their marae next to their sacred maunga, their identity and existence as Ngati Te Ata.

[93] Mr Roimata Minhinnick gave evidence that Ngati Te Ata continue to visit Matukutureia for ceremonial purposes in acknowledgement of their mana there. He asserted that when Ngati Te Ata had not been consulted over the engagement by the Department of Corrections of a Maori architect to advise over designation of the corrections facility, and that this had been an affront to Ngati Te Ata's mana. Later he explained that the design was an affront because of the way the tribal ancestral guardian taniwha is wrongly represented.

[94] Mr Tahuna Minhinnick stated that the proposal would create an imposing unwanted structure on the site, which would be a visual attack on the historical and future cultural identity of Matukutureia and Ngati Te Ata. Asked in cross-examination his view about Matukutureia, Mr Tahuna Minhinnick replied simply "It's ours".

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[25] Waitangi Tribunal Manukau Report, 1985, 67.

[95] The Minister accepted that Ngati Te Ata (and Te Akitai) have a traditional and cultural relationship with the land in the site, and that this relationship needs to be recognised and provided for. The Minister maintained that the relationship Ngati Te Ata have with the site has been recognised and provided for (including by consultation, by the design and location of the development, and by the conditions), albeit not to the Minhinnicks' satisfaction.

[96] However the Minister did not accept that Ngati Te Ata have rangatiratanga or sovereign authority over the site, or that they are entitled to self-government and self-regulation in respect of it to the extent that would exempt them from actions authorised by the Resource Management Act. The Minister also submitted that the level of offence that the proposal would cause, and the claimed interference with Maori relationships with the site, was being exaggerated by the Minhinnicks.

[97] Mr Buddy Mikaere, an independent consultant on tangata whenua consultation called on behalf of the Minister, gave evidence that in this case rangatiratanga equates to recognition, and that it is the people who are the source of mana. He considered that where the land over which rangatiratanga was claimed is no longer in Maori ownership, what remains in Maori hands is cultural, rather than legal, authority. He considered that making provision for rangatiratanga in this case could be achieved by keeping the door open to Ngati Te Ata for consultation, for appropriate involvement in cultural matters in the planning, construction and operation of the corrections facility.

Our findings on Rangatira and Mana

[98] We accept that Ngati Te Ata are entitled to regard themselves as having rangatiratanga and mana in respect of Matukutureia, and that this extends to the land in the corrections facility site. They are entitled to have their relationship with the land recognised and provided for as a matter of national importance, and we will address that more fully later in this decision.

[99] But at law Ngati Te Ata do not own the land in the corrections facility site. They have not done for about 160 years. Nor, as a matter of law, does their rangatiratanga and mana in respect of the site entitle them to sovereignty, control, self-government, self-regulation, or autonomy in respect of it to the extent that they can prevent the owner of the land obtaining and exercising authorisation under the Resource Management Act to develop and use the land for a purpose and in a way

that Ngati te Ata may not approve. The Act provides for consideration of their relationship with their ancestral land, but does not provide that those considerations will prevail in every case.

[100] We do not accept Mr Tahuna Minhinnick's evidence that the proposal would create an imposing structure on the site. The evidence is to the contrary. With the exception of the two-storey entry structure, the buildings are all to be single storey, and similar to buildings in residential suburbs. The whole development is to be landscaped and planted in trees and shrubs.

[101] Mr Roimata's feeling of affront at the design of the complex due to the way in which the taniwha is represented does not bear on the subject of the designation itself. The Minister has assured the Court of continuing opportunities for Ngati Te Ata to take pan in the development and running of the corrections facility in the kind of ways described by Mr Mikaere. If Ngati Te Ata choose to do so, that would be an exercise of their rangatiratanga and mana in respect of the site. If they choose not. to, then it would be they who forgo the opportunity, not the Minister who denies it them.

Mana whenua

Mrs Min hin n ick 's case

[102] By her notice of appeal, Mrs Nganeko Minhinnick asserted that Ngati Te Ata hold mana whenua status in respect of the land that surpasses the relationship of any other Maori group with it; and that the Department of Corrections had not recognised that Ngati Te Ata were Mana Whenua holding customary authority of the site. In his submissions Mr Roimata Minhinnick explained that the Department had merely accepted those with an interest and had failed to determine whether or not the interest was one of customary authority (mana whenua).

[103] In her evidence Mrs Nganeko Minhinnick asserted that Ngati Te Ata are mana whenua of Matukutureia. In respect of a Maori Women's Advisory Group convened by the Department to advise on design and operation of the corrections facility, and consultation with other hapu and iwi, Mr Roimata Minhinnick said in his evidence:"

[26] Statement of Evidence, p 15 para 48

> ... as the principal manuwhenua of that particular site, Ngati Te Ata believes it should not have to feel pressured info joining some women's club, when its women are more than capable of providing more culturally appropriate women's advice for that particular site. It further should not be prejudiced by the position of other Maori who were consulted and had no issue with consultation practices or wahi tapu to the area.... It is a concern of being marginalised through other collectives, groups or even other tribes whereby their views should have influential weighting in an area where their traditional Kaitiaki interests are not the same.

[104] This witness stated that Te Akitai's kaitiaki role in respect of Matukutureia should be viewed in the context that traditionally Ngati te Ata were the principal manuwhenua of Matukutureia (as it was their tupuna Te Ata I Rehia, who was born there), while Te Akitai are the principal kaitiaki of MaungaKieKie (One Tree Hill).

The Minister's case

[105] The Minister responded that he and the Department have recognised Ngati Te Ata (and also Te Akitai) as kaitiaki of the Matukutureia area, including the corrections facility site. They had never treated Ngati Te Ata as having only a secondary role, but had declined to treat them as having an exclusive, or even primary role. The Department had consulted with Ngati Te Ata, and had taken their views into account in the design of the facility, by adjusting the proposal to exclude building on parts of the site, and by offering them an ongoing role in the operation of the facility.

[106] Mr Mikaere gave evidence that an important feature of mana whenua is continuous occupation of the land concerned; that there is no black-and-white definition of mana whenua (that being a complex issue); and that where there is more than one group claiming to be mana whenua, it is not for the Department to decide. As section 6(e) refers to Maori generally, rather than those holding mana whenua, it envisages an inclusive rather than an exclusive approach.

[107] In this case Ngati Te Ata had desired that participation be exclusive to them, but the Department had dealt with all those who had expressed an interest, so that all those able to show an association or interest in the site had opportunity to participate in its development. To Mr Mikaere, the important point was that Ngati Te Ata had been clearly recognised as kaitiaki, and an attempt made to deal with their issues.

[108] The National Property Manager for the Department of Corrections, Mr W G Whewell, stated in evidence that the Department had always acknowledged Ngati Te Ata's status as mana whenua and kaitiaki, however it had not regarded them as sole

kaitiaki. He added that the Department had not sought to deal with Ngati Te Ata to the exclusion of other iwi or hapu or wider Maori interests, but had accepted that they and Te Akitai did have a special place given their relationship to the land in the area. The witness observed that in their role as mana whenua, Te Akitai had responded to the Department's invitation to be involved with the planning and operation of the facility.

[109] Mr Whewell confirmed that the Department continued to seek Ngati Te Ata's involvement with the facility and with the rehabilitation of inmates in recognition of their ancestral connections to the land and the surrounding area. But the witness stated that this involvement could not be to the exclusion of Te Akitai.

[110] The Manager of the Department of Corrections Treaty Relationships Unit, Mr C W Tawhiao, gave evidence that the Department had endeavoured to progress consultation with all Maori who showed interest in the corrections facility site, and in particular with Ngati Te Ata and Pukaki ki Te Akitai in recognition of their mana whenua /kaitiaki status with the site.

[11 1] Mr Tawhiao also gave evidence that the Department had invited Mrs Nganeko Minhinnick to produce a cultural impact report that would advise the Department on issues of waahi tapu, manawhenua status, and the reasons for Ngati Te Ata's overall objection to the Hautu Road site. The witness reported that there had been subsequent discussions with Mr Tahuna Minhinnick about production of the report, but although the Department continued in its efforts to obtain a cultural impact report from Ngati Te Ata, one was never presented to the Department.

[112] This witness also reported that at meetings with the Waikato Raupatu Lands Trust at which the Department had sought information regarding manawhenua status in the South Auckland area, the Trust had identified Pukaki Marae as one of the groups holding manawhenua status and Mr and Mrs Rauwhero had later confirmed their view that Ngati Te Ata also held manawhenua status. The witness added that the Department has sought to ensure that the values held by Ngati Te Ata are respected and protected in the design, construction and operation of the proposed facility.

[113] Mr Brownie Rauwhero, a kaumatua of Te Akitai, confirmed that Ngati Te Ata and Te Akitai have whakapapa ties to Matukutureia and surrounding areas, which include the corrections facility site. Asked in cross-examination by Mr

Roimata Minhinnick whether Te Akitai acknowledged that Ngati Te Ata are principal kaitiaki of Matukutureia, Mr Rauwhero replied "No".

[114] Mr Grant Hawke of Ngati Whatua was community liaison advisor for the regional prisons programme in South Auckland. He confirmed that from the pre-launch phase, Ngati Te Ata had been recognised and met with. Mr Hawke gave details in his evidence of a number of occasions in which the department had been able to meet with representatives of Ngati Te Ata, and other occasions where meetings had not been achieved. The Department had met with a number of interested Maori groups and Ngati Te Ata had always been invited, although they had not always attended.

[115] The Department had viewed a site suggested by Mrs Nganeko Minhinnick, and although that possible site had fallen outside the parameters of the site selection process, they had discussed it with property staff. Mrs Minhinnick had also taken part in discussions about design of a marae entrance and matching features, and having a marae separate to the facility, and although the discussions were continuing, Ngati Te Ata had chosen not to be involved further.

[116] Mr Hawke confirmed that the cultural advisers had been satisfied that the Hautu Drive site had been free of cultural issues because in their opinion it had been culturally desecrated by quarrying, and there was no intention to intrude on Matukutureia which Ngati Te Ata had said was waahi tapu.

Our findings on mana whenua

[117] In the Resource Management Act, unless the context otherwise requires, mana whenua means customary authority exercised by an iwi or hapu in an identified area.[27] In the scheme of the Act, the question of who holds mana whenua in respect of an area relates to kaitiakitanga, being the exercise of guardianship by the tangata whenua of an area. The term tangata whenua is given the meaning of the iwi or hapu that holds mana whenua over a particular area.[28] So to be kaitiaki in an area, an iwi or hapu need to exercise customary authority in that area. More than one hapu can hold mana whenua in respect of the same area."

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[27] S 2(1).
[28] See definitions in s 2(1) of kaitiakitanga and tangata whenua.
[29] *Ngati Hokopu ki Hokowhitu v Whakatane District Council* Environment Court Decision C168/02.

[118] We have not been able to identify any provision of the Resource Management Act applicable to this case that requires the Court to identify who hold mana whenua in respect of a site required to be designated. Nor have we been able to find any provision by which the Court has to decide whether they have been given the respect due to their status, to the exclusion of those who may not have that status.

[119] We accept the Minister's case that throughout the process leading to this appeal the Minister and the Department of Corrections have been aware of, and have recognised Ngati Te Ata (along with Te Akitai) as kaitiaki of the Matukutureia area. We find that the Minister responded to that recognition by actively consulting with them, by seeking their advice, and by altering the proposal in various respects in response to their wishes. (We consider the evidence on the consultation process, and give our findings on it, later in this decision.) The Minister has also sought to engage Ngati Te Ata (and Te Akitai) in an ongoing relationship

[120] Although Ngati Te Ata hold mana whenua in respect of the corrections facility site (and Te Akitai may well do so too), the proposed facility is not intended for Ngati Te Ata and Te Akitai alone. Even if the facility is established on the Hautu Drive site, from time to time staff and inmates may be present who are associated with other iwi, with other cultural traditions. In our judgement it was appropriate and necessary that the Department, in selecting the site, and in designing the facility, consulted widely with Maori of any iwi who were willing to assist. Since they were not excluded, but indeed were specifically invited to take part and to produce a cultural impact report, there was no occasion for Ngati Te Ata to take umbrage at consultation with Te Akitai and with other iwi and hapu.

[121] In summary, we do not accept that Mrs Minhinnick or Ngati Te Ata have any ground for challenging the Minister's requirement for designation of the Hautu Drive site arising from Ngati Te Ata's status as holding mana whenua in respect of the area that includes the site.

Kaitiakitanga

Mrs Mitt It in n ick 's case

[122] By her appeal, Mrs Nganeko Minhinnick claimed that Ngati Te Ata would be unfairly prejudiced by placing the corrections facility on the proposed site as their past commitment of time and resources to the exercise of kaitiakitanga, and current

plans to continue their exercise of kaitiakitanga concerning Matukutureia, would be severely inhibited or rejected. In his submissions in support of the appeal, Mr Roimata Minhinnick gave these particulars of ways in which the exercise of kaitiakitanga would be inhibited:

(a) Plans to build a marae on the site.

(b) Plans for 'raising of the maunga' by excavating land around it.

(c) The possibility that plans for a whare kura (high school) on neighbouring land would be rejected.

(d) Restriction of possible development of adjacent land for cultural tourism and a canoe-racing venue.

The Minister's case

[123] As already mentioned, the Minister accepted that Ngati Te Ata are kaitiaki in respect of the area that includes the site, though not to the exclusion of Te Akitai who are also kaitiaki in respect of it. But the Minister submitted that having particular regard to kaitiakitanga requires consultation and involvement of the kaitiaki if they wish to be involved, but does not amount to giving kaitiaki a right of veto.

[124] In respect of this case the Minister maintained that he had paid particular regard to kaitiakitanga, and had recognised and provided for kaitiakitanga in respect of the area containing the site in these ways:

(a) By consulting with the kaitiaki Ngati Te Ata and Te Akitai.

(b) By taking their views into account in developing the design of the corrections facility (accepting that Ngati Te Ata had chosen to take only a limited part, and claimed to be offended by the design).

(c) By the accidental discovery protocol (Condition 20 of the Minister's decision).

(d) By restricting development of parts of the site (Conditions 3, 18 and 19) to protect the cultural resources of the site.

(e) By offering them ongoing roles in the operation of the corrections facility.

[125] The Minister did not accept that kaitiakitanga requires that the corrections facility not be established on the site, and observed in particular, that until a very late stage there had been no indication of a desire by Ngati Te Ata to establish a marae on the corrections facility site. Te Akitai are content to exercise their kaitiakitanga role by involvement in the project, and although Ngati Te Ata have chosen not to, that was their own choice, not a failure by the Minister to have particular regard to kaitiakitanga. In the event the only practical course had been to rely on the advice of Te Alcitai.

The evidence

[126] In cross-examination, Mr Kaihau acknowledged that Te Akitai were also kaitiaki in respect of the Minister's site, along with Ngati Te Ata. He was asked whether it was an equally shared role between Ngati Te Ata and Te Akitai, and responded "most likely to be equally related".

[127] Mr Kaihau gave evidence of Ngati Te Ata's intention to re-establish their marae on the current site. Mrs Nganeko Minhinnick stated in cross-examination that the proposal for a marae was well before the corrections facility proposal: but she was not able to say that the site for the marae was on the corrections facility site until they had seen that the prison would be standing in that area. This witness referred to a customary need for a marae to face the east.

[128] Mr Tahuna Minhinnick produced a document of which he had been the principal author, titled *Matukutureia: A Cultural Development Plan.* He explained that the site for the marae shown on that plan had been intended to be excavated for rock on the land, and that it would take 15 years to get it. The desires expressed to him by Ngati Te Ata representatives had been to have the marae built on land for which they would not have to wait for excavation of rock to take place, and they would probably put the marae on the 'tooth'. That had been about the end of 2000. He agreed that the plans did not include any plan showing a marae proposed on the Minister's site or the Winstone 'tooth'. Asked if it had not been until May 2003 that he had made the Department aware of a desire to build a marae on the building part

of the Minister's site, the witness responded that he believed so, but could not be exact.

[129] In cross-examination Mr Tahuna Minhinnick described the effect of the proposed corrections facility on the development described in his cultural development plan in this way:[30]

> *. . a proposal to put a prison right beside our development and, culturally speaking, on top of our development.*
> *... the presence of a prison on the /and on top of cultural /and or beside our development, would have a massive impact on us culturally.*

[130] That witness agreed that the proposal that Winstone Aggregates quarry the land around the mountain (described as 'raising the maunga') depended on the Crown agreeing to an exchange with Winstones and another party of other land known as Wiri North and Wiri South. He agreed that this proposal did not include quarrying or filling of the piece of land referred to as the 'tooth'.

[131] Mr Roimata Minhinnick accepted that Ngati Te Ata's desire to establish a marae on the Minister's site may not have been made known to the Department until May 2003. He stated that naming Hautu Drive and Ha Crescent, planting of trees and plans for rock gardens and two carved poupou, had been part of the intention to place a marae there.

Our findings

[132] By section 7(a) of the Act, functionaries are to have particular regard to kaitiakitanga, which is defined in section 2(1) as the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship."

[133] Mr Roimata Minhinnick asserted that kaitiakitanga extends beyond that to ownership, authority, control or aboriginal title over the area. However in the Resource Management Act, Parliament has used the term kaitiakitanga in the way it has defined The meaning asserted by Mr Minhinnick is not supported by that definition. So for the purpose of these proceedings under the Resource Management Act we do not accept his submission in that respect, and do not give kaitiakitanga that extended meaning.

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[30] Notes of evidence, p 159, lines 27-32.
[31] Definition of kaitiakitanga as substituted by s 2(4) RMAA 1997.

[134] There was no issue that Ngati Te Ata are tangata whenua of the Matukutureia area, including the corrections facility site, and according to tikanga Maori they have guardianship in relation to natural and physical resources of the area. We find that Te Akitai are also tangata whenua of that area, and have that guardianship too.

[135] We accept the Minister's submission that the Resource Management Act does not confer on tangata whenua or kaitiaki a power of veto over use or development of natural and physical resources in their area. That was established in Mrs Nganeko Minhinnick's litigation over the construction of the South-west Interceptor across the Matukuturua Stonefields.[32]

[136] We find that Mr Tahuna Minhinnick's cultural development plan described a site for a marae at Matukutureia to the south-west of the mountain, well away from the corrections facility site. A marae could be laid out there so that it faced east. There was no evidence that to the extent that Ngati Te Ata collectively had a plan for a marae at Matukutureia, the site had been determined to be on the land that has been acquired for the corrections facility site until about the time when the Minister gave his decision on the submissions on the designation requirement.

[137] Although the designation may inhibit Ngati Te Ata from building a marae on the designated land, we do not accept that the designation would inhibit Ngati Te Ata's exercise of kaitiakitanga by building a new marae elsewhere at Matukutureia, in particular on the only site for it identified on a plan.

[138] The plans for 'raising the maunga' arose from discussions between Mr Tahuna Minhinnick and Winstone Aggregates by which land around the mountain would be lowered in level by being excavated for rock.

[139] A critical inhibition on Ngati Te Ata's plans for a marae, a school, for cultural tourism, and for canoe racing, was that they do not own or control the use of any of the relevant land. Although Winstone Aggregates had made an offer of land, that offer was conditional on exchange of ownership of other land involving the Crown and another private party. The offer had not been accepted, and that condition has not been fulfilled.

[32] *Watercare Services v Minhinnick* [1998] NZRMA 113 (CA).

[140] We accept the Minister's evidence that the Department consulted with both Ngati Te Ata and Te Akitai. (We address the evidence on consultation with Ngati Te Ata later in this decision.) We also accept that the Department took their views into account in the design, and in the conditions.

[141] In summary, we find that the Minister had particular regard to kaitiakitanga, recognised Ngati Te Ata's role as kaitiaki, and provided opportunities for Ngati Te Ata to exercise guardianship of the natural and physical resources of the area in accordance with tikanga Maori.

[142] We understand Ngati Te Ata's desire for a marae, school, and other development at Matukutureia. We find that the corrections facility might seem to some Maori to be, culturally speaking, "on top of' their development, But it is not the designation that would inhibit realisation of the proposed cultural development. Rather the inhibition is that Ngati Te Ata do not have an interest in any of the relevant land, and until they acquire such an interest (and any resource consent and other authorisations that may be needed) they are not able to develop it,

Waahi tapu

[143] Another important issue concerned whether, and the extent to which, the corrections facility site is waahi tapu; and if it is, whether the Minister had failed in his duties in that respect.

The appellan t 's case

[144] It was Mrs Minhinnick's case that the corrections facility site is an inextricable part of Matukutureia, and is waahi tapu in that :

{a) Ngati Te Ata's founding ancestor, Te Ata I Rehia, was born there.

(b) Her whenua (afterbirth) was buried or placed at the foot of tarata trees there.

(c) The atea of the former Matukutureia Marae was there.

(d) It was the site of a major battleground.

(e) It was the seat of cultural activity and political direction.

(f) It was predicated on mana.

[145] The appellant's case continued that the status of the land as waahi tapu required the Minister to give effect to the cultural preferences of Ngati Te Ata in the site selection process, for which consultation alone would not be an adequate response. She asserted that the Minister had failed in those duties in these respects:

(a) By excluding of cultural considerations from the Minister's objectives;

(b) By excluding cultural considerations from the desktop site visit scoresheet; and

(c) By the Minister's technical experts failing to consult with tangata whenua

The Minister 's case

[146] The Minister maintained that none of the corrections facility site is waahi tapu in terms of section 6(e) of the Act, but accepted that part of the site outside the proposed building platform is subject to waahi tapu rules in the district plan. The Minister contended :

(a) That being the birthplace of an ancestor does not make a site waahi tapu.

(b) That in any event the evidence suggests that the birthplace was Matukutureia.

(c) That the pa did not extend to the proposed building platform.

(d) That if the corrections facility site had ever been waahi tapu, that *status* had been destroyed by the extensive quarrying on the site.

(e) That in any event any waahi tapu status the site possesses can be lifted.

(f) That Ngati Te Ata's more recent plans for the site, and Mr Tahuna Minhinnick's seeking of compensation in return for Ngati Te Ata's support for the corrections facility, are inconsistent with the claimed waahi tapu status of the site.

The meaning of waahi tapu

[147] Although section 6(e) of the Resource Management Act uses the term waahi tapu, the Act does not contain an explanation of the intended meaning of it.

[148] In her notice of appeal, Mrs Nganeko Minhinnick quoted definitions of waahi tapu in other statutes:

> *land of special spiritual, cultural* or historic tribal *significance*[33]
>
> a place sacred to Maori in *the* traditional, spiritual, religious, ritual, or mythological *sense*[34]

[149] She also referred to this passage in the Waitangi Tribunal's Report on her claim in respect of the Manukau Harbour:[35]

> *In the identification of site, the Forest Service should not accept the whole of the former blocks* as *wahi tapu,* simply *on the grounds that they were once so* described, but should *strive* to *identify those sites that are strictly wahi tapu through burials or through having* a particular *sacred* significance for *the tribe. But nor should the Forest Service restrict itself to those sites that might be protected in accordance with the Historic Places Trust Act 1980. As noted in paras 7.3 and 9.3.2, that Act does not ensure a proper protection in accordance with the Treaty. The* test *should be whether the site* can be shown to *have a sacred* significance for *Ngati Te Ata.*

[150] On Mr M'ikaere's evidence, the Minister submitted that Mr Roimata Minhinnick's views as to the nature of waahi tapu do not reflect the traditional view of waahi tapu, or current cultural practice, but are revisionist. The Minister contended that there is a strong element of modern revisionism in the view that the site (as distinct from the maunga) is waahi tapu.

[151] The Minister quoted the definition of waahi tapu in the district plan:

> *Waahi Tapu means an area or place sacred to Maori in the traditional, spiritual,* religious, ritual or mythological sense, for example pa, *ara* (tracks), *urupa,* baffle *sites and tauranga waka (canoe landings).*

[152] Counsel for the Minister submitted that section 6(e) addresses the traditional relationship of Maori with their waahi tapu etc, and that a traditional approach to the concept of waahi tapu should be tempered with what is still current and relevant.

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[33] State-owned Enterprises Act 1986.
[34] Historic Places Act 1993, s2.
[35] Waitangi Tribunal Manukau Report, p 93.

They contended that the district plan definition is not consistent with the traditional view of waahi tapu, nor with how that term is intended in section 6.

[153] Mr Mikaere gave the opinion that because section 6(e) of the Act addresses the traditional relationship of Maori with their lands, waahi tapu etc, a traditional approach to the waahi tapu concept should be taken. He considered that traditionally a waahi tapu is a very specific place, usually very small, set apart from normal domestic life because of the danger to people who might accidentally transgress on them, such as urupa (burial places), and ceremonial or religious sites. Pa sites, fortifications, earthworks and cultivations, being secular, rather religious, are not waahi tapu.

[154] Mr Roimata Minhinnick considered that the notion of waahi tapu being very small is comparative, citing the urupa (burial ground) at Taupiri Maunga, and the tapu associated with Aoraki (Mt Cook) recognised in the Ngai Tahu Claims Settlement Act 1998. He refuted the notion that physical severance of people from a site severs the relationship, and cited examples.

[155] This witness also raised the question of who determines what is waahi tapu, answering that in this case the history, culture and traditions of Ngati Te Ata have done so (asserting that there had been ongoing cultural activities and plans, citing Mr Tahuna Minhinnick's Cultural Development Plan). He asserted that it is not for non-Maori archaeologists to tell Ngati Te Ata what is, and what is not, so. Similarly Mr Rauwhero stated that his marae whanau had the view that it was not appropriate to discuss waahi tapu in this forum because to do so would go against and undermine their traditional beliefs, and waahi tapu must not be scorned or blasphemed against.

[156] Mr Mikaere accepted that Ngati Te Ata are entitled to their own beliefs, but he considered that the Act refers to the traditional Maori view of waahi tapu. He did not accept that there were degrees of tapu, otherwise it would lose its efficacy as a form of social control.

[157] Mr Tawhiao stated that the Department respects Ngati Te Ata's claim that the site is waahi tapu, and recognises that they have the authority to say that it is waahi tapu, the only people to determine what is right for Ngati Te Ata. The witness stated that the Department has sought to ensure that the values held by Ngati Te Ata are respected and protected in the design, construction, and operation of the proposed facility.

[158] Mr Roimata Minhinnick stated that tapu applies to people in certain circumstances as well as places; that maunga are tapu, and old pa sites and fortifications add significance to them; and that tapu does not stand alone but contributes to the entire cultural make-up of tangata whenua.

[159] Section 6(e) of the Act directs functionaries to recognise and provide for the specified matters of national importance, including the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. From that list, it is plain that the term waahi tapu is used in that provision as being different from ancestral lands, sites and other taonga with which Maori and their culture and traditions might have an important relationship worthy of being a matter of national importance.

[160] For the purpose of Court proceedings, the question whether or not a site is waahi tapu is a question of fact, to be decided in the same way as a court decides other questions of fact. Especially where there is no physical evidence of a metaphysical concept such as waahi tapu, a court should not make findings on assertions of waahi tapu alone,[36] but on an objective consideration of evidence tending to show the existence of an established waahi tapu.[37] That is not to scorn or undermine traditional beliefs, nor to blaspheme against them. Rather it is to avoid relying on claims about metaphysical matters that may be inconsistent with traditional beliefs.

[161] Possible sources of such evidence about waahi tapu were suggested by the Environment Court in *Ngati Hokopu Ki Hokowhitu v Whakatane District Council:* [38]

> *The Court can decide issues raising beliefs abouf those values and traditions by listening to,* reading and examining (amongst other things):
> - *Whether the values correlate with physical features of the world* (places, *people),*
> - People's *explanations* of their values and their traditions,
> - Whether *there* is external evidence *(eg Maori* Land *Court* Minutes) or *corroborating information (eg waiata or whakatauki) about the values. By external we mean before they became important for a particular issue and (potentially)* changed by value holders.
> - The internal consistency of *people's* explanations (whether *there* are *contradictions);*
> - *The coherence of the values with others,*
> - How widely *the* beliefs are expressed and held.

[36] *Greensill I' Waikato Regional Council* Planning Tribunal Decision W17/95.
[37] *Te Runanga O Taumarere v Northland Regional Council* [1996] NZRMA 77, 93; *TV3 Network Services v Waikato District Council [* 1997] NZRMA 539 (HC); *Te Kupenga 0 Ngati Hako v Hauraki District Council & ors* Environment Court Decision A010/2001 paras [96], [100].
[38] Environment Court Decision A168/2002.

[162] We respectfully consider that this passage illustrates the appropriate application of judicial method to reaching findings about contested claims of waahi tapu.

The evidence on whether the site is waahi tapu

[163] We now consider the evidence tending to show whether or not the corrections facility site is waahi tapu according to the several bases for that relied on by the parties.

The birthplace of Te Ata I Rehia

[164] Mr Tuhere Kaihau, Chairman of Ngati Te Ata Iwi since 1987, stated his belief that the area is tapu in that the tupuna (ancestor) Te Ata I Rehia had been born there. Asked in cross-examination to mark on a photograph of the area where the ancestor had been born, Mr Kaihau marked the top of the mountain.[39]

[165] Mr Tawhiao stated that he was unaware that the ancestor had been born on the corrections facility land, nor that such an event (if it did occur) would make the site waahi tapu. In cross-examination, he agreed that in some areas such an event could warrant the place being deemed waahi tapu.

[166] Mr Mikaere also was not aware that the project site was the birthplace of the eponymous ancestor. He accepted that the event had occurred somewhere in the area, possibly on Matukutureia maunga itself. If shown the particular spot where the birth occurred, he would probably accept that particular spot as being waahi tapu. Mr Mikaere observed that the corrections facility project does not impinge on Matukutureia maunga, and any waahi tapu status associated with the maunga would not be compromised.

The burial place of Te Ata I Rehia's whenua

[167] Mr Roimata Minhinnick stated that the whenua (afterbirth) of their ancestors being buried there is waahi tapu enough for Ngati Te Ata. He stated that a grove of tarata trees had been planted by Huatau on the borders of the Atea, and that it was

[39] Exhibit 6.

customary practice in Ngati Te Ata tradition to bury the whenua beside trees, which mark the burial spot. In cross-examination, Mr Minhinnick stated that there is a strong likelihood that the whenua was placed on the designated site in accordance with tikanga, and as opposed to a pinpointed spot, includes the entire designated site, he could only generalise where.

[168] Mr Mikaere questioned the association of the whenua with the tarata trees, observing that the tarata leaves would not have been used in tattooing and in the accommodation of visitors if they were associated with an area of tapu. In cross-examination, he explained that he was referring to the traditional view of tapu, and how other iwi would view the practice.

The atea of the former Matukutureia marae

[169] Mr Roimata Minhinnick stated that it would be culturally offensive that a women's prison be placed on the location of the atea of the former marae (the open space in front of the marae where visitors are challenged or welcomed, and ceremonial speeches are made). Traditionally the atea always had to remain clear open space, so the approach of potential enemies could be viewed. He claimed that the evidence of a 1945 aerial photograph showed that the Marae Atea was situated where the designated site for the prison is to go.

[170] In cross-examination the witness stated that his knowledge came from oral tradition, and from the tradition that marae face east, and that the designated site is the only site that faces east. He explained that the atea was tapu in that only in special circumstances did women stand and speak there.

[171] Mr Kaihau marked on Exhibit 6 where he thought the marae had been, indicating an area between the Minister's site and the maunga.

[172] Mr Rauwhero, kaumatua of Te Akitai who are also kaitiaki of the area, stated his understanding that the marae had been accessed from the Puhinui Creek, by canoe, rather than over the land where the corrections facility site is located.

[173] It was Mr Mikaere's evidence that the site of a former marae atea may signal the historic importance of an area, but not its status as waahi tapu. He doubted that the marae atea would have been in the area of the site, considering that it would have been associated with the maunga which, even before its base was quarried, would

still have stood outside the project area on the western side. This witness remarked that the traditional practice of women not speaking on the marae atea related to tikanga, rather than to tapu.

[174] Mr Mikaere considered that the claim that the project site includes the former marae atea (which has not been used for 185 years) is unproven, and out of line with the plans to have the proposed marae on adjacent Winstone Aggregates land. He considered the recent suggestion of using the northern part of the Minister's site somewhat opportunistic.

[175] Mr R E Clough, a consulting archaeologist and heritage consultant, gave evidence that the designation site was part of the lava field and stonefields, which is not consistent with it being a flat open area suitable for a marae atea. An aerial photograph flown in 1952,[40] prior to quarrying of the land, shows the northwestern part of the land to be designated as having an uneven surface. From examining it Mr Clough gave the opinion that the focus of settlement, including the pa and marae, had been on the neighbouring Winstone Aggregates land (south of the maunga).

[176] We accept that if the focus had been there, the marae and atea would still have been able to face east, a large flat area exists there, and the sacred Tuaho stone (used for ceremonial tattooing) is also there. These indications are consistent with Mr Clough's interpretation.

The site of a major battle

[177] Mr Kaihau stated that Matukutureia was named following a major battle that had been fought on the site. Mr Roimata Minhinnick stated that according to oral tradition it had been on the area of the Marae Atea where the battle of Matukutureia had occurred (the attackers being led by the renowned giant Kawharu, and the defenders by Te Rangi Ha Hautu), and observed that a great battle site is not normally forgotten. In cross-examination, he stated that this was the most likely place for a battle to occur, because the atea is traditionally regarded as the field of the God of War, and because it was the front door of the pa, an open space area.

[178] Mr Mikaere gave the opinion that it was speculation on his part and, he thought, on the part of the appellants, that the corrections facility site had been a significant battlefield. In cross-examination, he explained: "We don't know exactly

[40] Exhibit 2.

where that happened, we just know it's somewhere in the area." In any event he considered that a battle does not necessarily render a site a permanent waahi tapu. It would usually hold that status for so long as that status was observed, but as the project site had been so severely compromised culturally, it could not hold waahi tapu status.

The seat of cultural activity and political direction

[179] Mr Tawhiao stated that ancient pa sites fall under the category of sites of significance, but some specific parts of some pa are held to be waahi tapu.

[180] It was Mr Mikaere's evidence that the historic seat of cultural and political activity is of historic importance but not traditionally associated with waahi tapu status, and doubted whether the proposed secure area coincides with that historic area.

[181] Mr Roimata Minhinnick disagreed with the notion that old pa sites cannot be waahi tapu as they are associated with secular, not religious, activities, saying that it does not reflect variables associated with tapu, or activities that would have occurred within old pa sites or contemporary marae. He cited restrictions on taking food into a whare tupuna.

Predicated on mana

[182] Mr Mikaere questioned that this is a base for waahi tapu.

The extent of tapu

[183] In cross-examination, Mrs Nganeko Minhinnick stated that Matukutureia Maunga and its surrounds were tapu. Mr Tahuna Minhinnick stated that the mountain is sacred to Ngati Te Ata, not just the three acres or so of waahi tapu that can be fenced off so that whatever was tapu there won't be disturbed. Asked in cross-examination what area Matukutureia covers, he replied ". . .from the top of the mountain to the river and the harbour;"[41] and later explained that the mountain is paramount;[42] the entire mountain is sacred.[43]

[41] Notes of evidence, p 162, lines 5-6.
[42] Notes of evidence, p 168, lines 35-36.
[43] Notes of evidence, p 169, lines 2-23.

[184] Mr Roimata stated that Matukutureia is not limited to the north-western end of the mountain, but includes the mountain and immediate surrounding area, including the site.

[185] Mr Tawhiao stated that part of the area of the former base of the maunga is on the site, but is excluded from the proposed secure area and building platform, and is protected by conditions, He did not state the basis on which he had come to that opinion. In cross-examination he stated that a lack of specificity around the boundaries of waahi tapu make it almost impossible to apply any particular protective measure. In re-examination he reported his experience that because they are places of exclusion from prevailing activity, the extent of waahi tapu are very small areas in order that life may continue.

[186] Mr Mikaere did not accept that the whole maunga is waahi tapu, and doubted whether the part of the site within which the proposed secure perimeter lies was ever waahi tapu.

Silence of the district plan

[187] The district plan identifies certain waahi tapu at Matukutureia, but none of them is on the land required to be designated. The district plan also identifies heritage resource areas which extend on to parts of the land required to be designated (although not to the part within the proposed secure perimeter), and applies the waahi tapu special site rule to control development of those heritage resource areas. But that does not mean that the heritage resource areas are waahi tapu. The Minister has proposed conditions limiting development of those parts of the corrections facility site.

[188] Mr Roimata Minhinnick stated that in 1995, when submissions on the proposed district plan could be made, he had been in Wellington, Ngati Te Ata had no one employed at the time, and had been overloaded with resource consent issues from seven counties and tangihanga commitments that year.

[189] Even so, the district plan does not identify the land to be designated as waahi tapu, nor does it contain anything that corroborates the appellant's claim that it is.

Destruction of waahi tapu status by past quarrying

[190] It was Mr Mikaere's evidence that in cultural and traditional Maori terms any waahi tapu aspect the site may have had has been completely compromised by the original material having been quarried away, and new fill having been placed on it, so there is no physical remnant on the corrections facility site to which a waahi tapu could be 'anchored'. The physical association of people and the site has been severed, and the physical remnants no longer exist. He stated that waahi tapu cannot be retrospectively imposed on a site whose tapu nature, if it ever existed, has been corrupted or polluted, and the waahi tapu status of the corrections facility site had been so compromised as to make it meaningless.

[191] Mr Roimata Minhinnick denied that modification of an area alters it being viewed as waahi tapu. He stated that if the urupa (burial ground) of Ngati Te Ata *was* desecrated or destroyed, it would remain tapu to Ngati Te Ata.

Consistency with plans for development of site

[192] Mr Tawhiao remarked that Ngati Te Ata's understanding of waahi tapu is permissive of development (including the further quarrying and educational and cultural activities described in the Cultural Development Plan) provided the development has the approval of Ngati Te Ata. He expressed difficulty with the notion that what is permissible and what is not becomes a matter of subjective opinion, rather than relating to their historical relationship with the land. In cross-examination, the witness stated that he considered a corrections facility as being entirely consistent with the nature of development that has been proposed by Ngati Te Ata for adjacent land.

[193] Mr Tawhiao had concluded from the proposal for adjacent land that institutions designed to bring about positive change in Maori are permitted activities on Ngati Te Ata lands, and he considered a corrections facility as not being prejudicial to Ngati Te Ata's interests. He considered that Matukutureia would not be impacted on by the corrections facility any more than it would be by the development proposed by Ngati Te Ata for adjacent land. His experience had been that mining is absolutely in opposition to the values that are held in waahi tapu, and diminishes the tapu.

[194] Mr Mikaere observed that for Ngati Te Ata to carry out their development proposals on the project site would require significant further disturbance by bulldozers and other construction equipment. He gave the opinion that if the site was indeed waahi tapu, that would not have been considered.

Consistency with seeking compensation

[195] Mr Tawhiao was asked in cross-examination about his inference from discussion with Mr Tahuna Minhinnick that waahi tapu could be lifted for appropriate compensation. He answered that the specific nature of the discussion had been that the site is waahi tapu, but those restrictions could be overcome if the Crown was willing to satisfy the needs of Ngati Te Ata for land in the area. He had inferred that Mr Tahuna Minhinnick was representing Mrs Nganeko Minhinnick whom he had accepted as representing the interests of Ngati Te Ata.

[196] It was the appellant's case that in those negotiations, Mr Tahuna Minhinnick had not been acting with the authority of Ngati Te Ata or of Mrs Nganeko Minhinnick.

Ability to lift waahi tapu status

[197] It was Mr Mikaere's evidence that there is no immutable tapu where absolutely no development would be possible. Just because tapu activities took place on a particular site in the past does not lock the site into being tapu forever. Rather, tapu can with appropriate ceremony be lifted from any site.

[198] Mr Roimata Minhinnick accepted that Maori tradition enabled the lifting of tapu in some instances, but observed that bulldozers and their decision-makers are incapable of lifting tapu. He considered that it would be culturally inappropriate to willingly lift tapu so that the very people who dispossessed the Iwi of the land can once again do so with their blessings.

Our findings on whether the site is waahi tapu

[199] The Minister submitted that the evidence fell short of establishing that any of the corrections facility site is waahi tapu, and was inconsistent on the basis for and extent of any waahi tapu. Te Akitai, the other kaitiaki, believed that the corrections

facility should go ahead, and that waahi tapu is not an impediment to that. Mr Rauwhero was not cross-examined about that.

[200] In this appeal the Court does not need to decide whether the maunga itself, or the top of it (identified as Ata i Rehia's birthplace) is waahi tapu, as the designation would not extend anywhere near it. We confine ourselves to deciding whether the land to be designated is, or contains, waahi tapu. There is no evidence that Ata i Rehia was born on that land.

[201] From the 1952 aerial photograph, and Mr Clough's expert opinion, we consider it quite implausible that the atea of the former marae was on the land required to be designated. Nor do we consider that there is sufficient evidence that the land to be designated includes the place where Ata i Rehia's whenua was buried, or where the Battle of Matukutureia was fought.

[202] We have not been persuaded that a seat of cultural activity and political direction is itself tapu (even though the site of particular activities in such a centre might have been tapu). Anyway, there is no evidence that any such centre existed on the land to be designated.

[203] We accept that protecting their waahi tapu may be a responsibility which reflects the mana of tangata whenua. However that does not bear on the question whether or not waahi tapu exist on the land to be designated. So we do not find that the base for Mrs Minhinnick's claim that it is predicated on mana adds weight to her contention that there are waahi tapu on that land.

[204] We have carefully considered the appellant's case that the tapu of Matukutureia extended to the whole maunga and the surrounding area, including the corrections facility site, and out to the harbour. Section 6(e) calls for recognition and provision for waahi tapu, but it does not warrant treating them as if they extended to such large surrounding areas.[44] That would not be consistent with the passage from the Waitangi Tribunal's Manukau Report quoted by Mr Minhinnick. Without evidence external to the appellant's family that the tapu of Matukutureia extended so far, we prefer the independent evidence of Messrs Mikaere and Tawhiao in that regard. We are not persuaded that the tapu of the maunga extends to the land to be designated.

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[44] Cf *Beadle v Minister of Corrections* Environment Court Decision A7402 confirmed on appeal sub nom *Friends and Community of Ngawha v Minister of Corrections* (HC Wellington AP 110/02; 20/06/02, Wild J pp 13, 16) and (CA216102 1711212002 pp 7-8).

[205] We have also considered Mr Minhinnick's explanation of the failure of Ngati Te Ata to make a submission seeking identification of the land to be designated as waahi tapu. It is Mrs Minhinnick's case that the tapu of Matukutureia is crucial to the Ngati Te Ata. It is difficult to accept that the opportunity to have so important a waahi tapu identified would be lost in the daily round of considering resource-consent applications. Even so, the absence of identification in the district plan is not itself sufficient to refute the claim that the corrections facility site is waahi tapu. Rather, the absence of a submission seeking that it be so identified is consistent with the evidence of those who doubt that it is waahi tapu.

[206] On the effect of quarrying and rehabilitation earthworks on any waahi tapu status of the land to be designated, we accept that this could depend on the attitudes and practice of the particular iwi. But as we have not found persuasive evidence of the land to be designated having been waahi tapu prior to quarrying, it is not necessary for us to test, in the ways suggested in *Hokowhitu*, the claim that it still is.

[207] Despite Mr Tawhiao's opinion, we do not accept that Ngati Te Ata's wish to develop the land for a marae is necessarily inconsistent with it being waahi tapu, in the way that development for entirely secular activities such as sports grounds would have been. Nor do we regard Mr Tahuna Minhinnick's dealings with the Department over compensation for acquiescing in development of the corrections facility as necessarily inconsistent with the site having waahi tapu status. Undoubtedly Ngati Te Ata (perhaps with Te Akitai's assent) could lift the tapu status of any waahi tapu if they chose. Although it is unlikely that they would lift the tapu status of the maunga itself for any consideration, the prospect of being able to develop and maintain a marae, educational and recreational facilities might have been sufficient for them to lift the tapu status from surrounding land. But we understand that only the tangata whenua could make decisions of those kinds.

[208] Having reviewed all the considerations raised by the parties in the light of the evidence, it is our judgement that the evidence for the waahi tapu on the designation site is insufficient. We do not accept that the land to be designated is, or that it contains, waahi tapu.

Did the Minister fail in duties regarding waahi tapu?

[209] Even if we had found that the designation site did contain waahi tapu, recognition and provision for waahi tapu does not necessarily require protection

from all development;[45] nor does it require facilitating Ngati Te Ata's aspirations for development of land that they do not own or control.

[210] The Minister has provided for the relationship of Ngati Te Ata (and Te Akitai) with Matukutureia, and for the heritage resource areas identified by the district plan, by consultation with tangata whenua, in the design and layout of the proposed corrections facility, and in the opportunity for tangata whenua to take part in its development and operation. We do not overlook Mrs Minhinnick's specific complaints about the excluding of cultural considerations, and about technical experts not consulting. We address them under relevant headings later in this decision.

[211] In summary, even if (contrary to our finding) the designation site contained waahi tapu, we do not accept that the Minister failed in any duties arising from that.

Grievances about past breaches of the Treaty of Waitangi

[212] By her notice of appeal Mrs Minhinnick invoked claims of past breaches of the Treaty of Waitangi. These included attacks by British troops, loss of lives, confiscation of property (including the corrections facility site), land alienation, undermining their tino rangatiratanga, and others,

[213] Mrs Minhinnick lodged a claim with the Waitangi Tribunal concerning the Manukau Harbour, and the Tribunal has published its report on them.[46] We were told that Mrs Minhinnick has lodged further claims with that Tribunal on behalf of Ngati Te Ata,[47] and that the first claim has recently been amended with specific reference to Matukutureia.

[214] Mr Roimata Minhinnick argued that the Minister of Corrections, who at one point had also been the Minister of Lands, should have been open to redressing the alleged breaches or have made an attempt to facilitate some process, but Ngati Te Ata had been refused opportunity to negotiate directly with the Crown through the Department of Corrections.

[45] *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council* (HC Wellington AP6/01; 25106101 Chisholm J) paras 26-28.
[46] WAI 31.
[47] WAI 508.

[215] We do not belittle the claims of past breaches of the Treaty. However we accept the Minister's submission that this Court is not the forum for such claims to be examined, and we hold that it is not the business of this Court to form an opinion on their validity,[48] let alone presume that they deserve to be accepted by the Crown.[49] An appeal to the Environment Court against a requirement for a designation does not provide an appropriate opportunity for obtaining a decision on grievances that the Crown has not in the past fulfilled its obligations under the Treaty of Waitangi.[50]

[216] Likewise, we are not aware of any legislation conferring on the Environment Court jurisdiction to decide, in the context of the requirement for designation of the corrections facility site, whether or not the Minister of Corrections was bound to facilitate direct negotiation of Ngati Te Ata's Treaty grievances. We hold that this Court should not consider that question.

Site selection

[217] The process by which the Hautu Drive site had been selected for the corrections facility was another major complaint by Mrs Minhinnick.

The cases of the parties

[218] It was Mrs Minhinnick's case that the process had been unsatisfactory in these respects:

(a) Consideration of properties was limited to those whose owners were willing to sell.

(b) The assessments of possible sites did not include Maori cultural and traditional values.

(c) Sites suggested by Mrs Minhinnick had been rejected for insufficient reason.

(d) Tangata whenua had not been consulted in preparation of technical reports.

[48] *Haddon v Auckland Regional Council* [1994] NZRMA 49, 57.
[49] *Contact Energy v Waikato Regional Council* Environment Court Decision A04/2000, para [112].
[50] *Hauraki Maori Trust Board v Waikato Regional Council* Environment Court Decision A 078/2003.

[219] It was the Minister's case that adequate consideration had been given to alternative sites. In response to the particulars of Mrs Minhinnick's complaint, the Minister maintained that:

(a) He had not been obliged to consider sites that would have required compulsory acquisition.

(b) Cultural factors had been for him to determine after advice from the Department, and his selection of the Hautu Drive site had been subject to an acceptable cultural report, which had been before him when he announced his decision of the preferred site.

(c) There had been no need to shift focus to the sites suggested by Mrs Minhinnick, because the Hautu Drive site was considered suitable,

(d) The cultural features. of the two short-listed sites had been discussed with the technical experts before their final reports were prepared.

The evidence

[220] We address separately the evidence relating to each of the appellant's complaints about the site selection process.

Confining consideration to sites of willing sellers

[221] Mr Whewell gave evidence that the Department's approach had been to acquire a site on a willing-seller/willing-buyer basis, and the Minister would only use compulsory acquisition as a last resort.

[222] In his evidence Mr Roimata Minhinnick claimed that the Crown could have compulsorily acquired other land, but chose not to do so, regarding that as a last resort. The witness argued that the relevant cultural and environmental tests in the Act could have been considered in respect of land that had not been offered for sale, and that the Department failed to adhere to the Act in this regard, in that whether the owner is a willing seller is of little relevance to section 171.

Excluding cultural considerations from assessments

[223] In submissions for the appellant, Mr Roimata Minhinnick cxiticised that the Department's desk-top and site-visit assessment criteria for omission of Maori cultural and traditional values.

[224] In his evidence Mr Roimata Minhinnick claimed that Mr Whewell had not confirmed that cultural and traditional Maori values had been considered, and asked who gave the cultural and traditional Maori advice to the Minister, whom did the Minister consult in obtaining local cultural and traditional history, and if there was any record or report of the cultural advice given to the Minister. The witness questioned Mr Whewell's evidence that cultural and traditional Maori issues had been considered, and claimed that the Department had chosen to balance consulting tangata whenua about the possible sites with a risk to confidentiality, claiming that owners who had offered their properties should have been aware of the Department's practice of consulting tangata whenua and considering cultural factors.

[225] Mr Roimata Minhinnick also questioned the wording of the site-selection criteria used by the Department. One criticism was that classification of a site regarded as less than satisfactory, but possible, could override Treaty responsibilities. Another criticism was that a site's relative remoteness might override Treaty responsibilities in respect of cultural and traditional interests and aspirations, although many other prisons seem to exist well enough in remote areas.

[226] It was Mr Whewell's evidence that the consultation with tangata whenua had proceeded from 1998 right through the process, and that the kaitiaki had been consulted about the specific sites considered in January 2001 before the Minister would proceed. He explained that a traffic expert was not expected to assemble a cultural measure for a technical report. He also showed that the score sheet for the site visit in respect of the Hautu Drive site had referred to topography, the proximity of the Stonefields, to Matukutureia, and to waahi tapu on the site.

[227] Mr Whewell also gave evidence that on 6 March 2001 the Minister had been given a briefing recommending completion of cultural evaluation of sites before proceeding, another briefing on 9 March outlining the status of consultation and cultural reporting, and a briefing with a cultural impact report on 3 April 2001 prior

to the Minister's decision the next day announcing the Hautu Drive site as the preferred site.

Rejection of sites suggested by the appellant

[228] Mrs Minhinnick raised concern that several sites for the corrections facility suggested by her had been rejected. The sites she had suggested are at Awhitu Peninsula; Kilpsch Road, Waiuku; Kingseat Hospital; and Papakura Army Camp.

[229] Mr Roimata Minhinnick argued that rejection of the Klipsch Road site suggested by Mrs Minhinnick had not been reasonable. He claimed that this site is accessible from courthouses at Manukau, Papakura and Pukekohe, and that the availability of the site for sale had not been determined. He contended that delay at a late stage should have been weighed against Treaty responsibilities to keep a mind open to change, or even to start afresh.[51]

[230] It was Mr Whewell's evidence that the Department had considered the Papakura Army Camp in 1997, but had not proceeded with it because of the proximity of residential housing. Kingseat Hospital had been included in the initial site selection process, but it did not proceed because its availability within the Department's time frames could not be established. The Department had considered the Klipsch Road site and other sites in the Waiuku area. One had been removed from the list due to its remote location, and two others were removed following site visits.

Failure to consult tangata whenua in preparing technical reports

[231] In his evidence Mr Roimata Minhinnick criticised the Department's process in three respects. First he argued that it had been inappropriate of the Department to have omitted cultural considerations in the draft technical reports. Secondly he urged that it had been inappropriate from the very start to consider cultural variables and advice from others without wider consultation with tangata whenua reaffirming Treaty breaches. Thirdly he claimed that it had been inappropriate and prejudicial to progress the process without cultural input, as all of the technical issues have an impact on cultural issues with varying degrees.

[51] Citing *Wellington International Airport v Air New Zealand* [1993] NZLR 671 **(CA).**

[232] Mr Whewell denied that the experts had failed to take into account cultural considerations in preparing their documents. He explained that a deliberate attempt had been made not to double-count issues under the headings, and that the cultural issues had been for the Minister to determine, who had wished to build a relationship regardless of the technical results.

[233] This witness gave evidence that the cultural issues had been discussed in a forum with the technical experts on 26 January, when they had completed their draft reports, and came to measure the short-listed sites based on their professional expertise. Maori advisers had been present and there had been full participation by all those at the meeting, and wide-ranging discussion on all issues, including the cultural status of the two sites under consideration. It had been agreed that the selected site remained the preferred site.

Our consideration of this issue

[234] Parliament has restricted the role of the Environment Court with respect to selection of sites the subject of designation requirements. The Court is required to have regard to whether adequate consideration has been given to alternative sites." This requires the Court to consider whether the requiring authority has acted arbitrarily, or given only cursory consideration to alternatives;[53] or has carried out sufficient investigations as to the alternatives to satisfy itself as to the site put forward.[54] It does not require the Court to eliminate speculative or suppositious options;[55] nor to assess the relative merits of each alternative and itself make a choice as to the preferable alternative;[56] nor to test each alternative against Part II.[57]

[235] We find that consideration of properties for the corrections facility site was limited to those whose owners were willing sellers. Where the site suitability factors for a public work limit the range of possible alternatives, compulsory acquisition has sometimes to be considered. But the factors making a site suitable for the corrections facility are not so constraining. A requiring authority might then properly make a policy decision to exclude from consideration properties that would have to be taken compulsorily. The authority is accountable in the political arena for

[52] Resource Management Act, s 17 1(1)(b).
[53] *Waimairi District Council v Christchurch City Council* Planning Tribunal Decision C030/82.
[54] *Transit New Zealand v Auckland Regional Council* Environment Court Decision Al 00/00.
[55] *Environmental Defence Society v Mangonui County Council* (HC Auckland M101/81; 23110181: Speight J).
[56] Idem.
[57] *Auckland Volcanic Cones Society v Transit New Zealand* [2003] NZRMA 3 16 (FC) para [61].

that policy. In such a case the Environment Court, whose role is restricted in the way mentioned in the preceding paragraph, should not substitute a policy of its own.

[236] We have reviewed the evidence on the complaint that the desk-top and site visit assessment criteria omitted Maori cultural and traditional values. We find that the score sheet from the site visit assessment of the subject site did not omit those values. We also find that the site selection process as a whole certainly included consideration of those values. We do not accept that the site-selection process was inadequate in having failed to consider them.

[237] We have also considered the part of the selection process where the pool of possible sites was examined, some were eliminated, and others chosen for closer investigation and consideration. We reiterate our understanding that the Court is concerned with the adequacy of the process, not with the decisions to discard or advance particular sites. The rejection of particular sites for relative remoteness, or proximity with housing, or ready availability, were all matters of judgement. They are not indications of an inadequate process, nor of other factors overriding Treaty responsibilities in respect of cultural and traditional interests or aspirations.

[238] We now address the complaint that tangata whenua were not consulted in the preparation of technical reports. We find that where they were relevant, cultural effects were not excluded from the technical reports. But we accept the validity of Mr Whewell's example that they would not be relevant to a traffic engineer's report. The important step was the meeting of the technical experts with the cultural advisers, where the effects on Maori cultural and traditional values were able to be considered. Further, we do not accept Mr Roimata Minhinnick's opinion that there should have been consultation with tangata whenua reaffirming Treaty breaches, because unresolved claims of past breaches of the Treaty would not have been relevant to the site-selection process. It is not for us to test each alternative against Part II.

[239] Finally, as in this case the requiring authority is a Minister of the Crown, we accept the soundness of the policy that the influence of the cultural issues was for the Minister to determine. That is consistent with the Crown's status in the Treaty of Waitangi.

[240] In summary, we find that the consideration that was given to alternative sites was methodical and business-like, not arbitrary or cursory. We make no finding on the relative merits of individual sites. Rather, considering the selection process as a whole we find that adequate consideration was given to alternative sites.

Consultation with Maori

The parties ' cases

[241] It was Mrs Minhinnick's case that the Minister had failed to consult Ngati Te Ata in good faith, and gave the following particulars:

(a) Undertaking a desk-top and site selection process which excluded cultural and traditional Ngati Te Ata values, and failed to weigh the cultural and traditional values of Ngati Te Ata to those sites:

(b) Failed to consult Ngati Te Ata before preferred sites were short-listed and agreed to by the Minister:

(c) Failed to consult Ngati Te Ata about the architectural planning and design until after the actual design was completed:

(d) Failed to consider the first series of cultural preferences of Ngati Te Ata that the corrections facility be placed in Waiuku, at Awhitu, at Papakura Army Camp or at Kingseat:

(e) Failed during consultations to act in utmost good faith by misrepresenting those discussions concerning –

i. The evidence of Mr Tawhiao to the Commission that Ngati Te Ata had not provided specific examples of the traditional relationship to the proposed site, or that the nature and extent of that relationship had not been made clear; and

ii. A letter of Mr Whewell to Ngati Te Ata dated 5 May 2003:

(f) Failed to avoid, remedy or mitigate adverse effects in light of the above.

[242] The Minister responded that there had been consultation with Ngati Te Ata, but that it had been limited by Ngati Te Ata's reluctance to take part in discussions except on the basis that the proposal would not proceed, or that significant compensation be paid to Ngati Te Ata if it did proceed, Although Ngati Te Ata made the Department aware of their opposition, wider consultation (including with Te Akitai) had suggested that there was no impediment to the Minister proceeding with the site.

The evidence on consultation

[243] We review the evidence on consultation in respect of each of the particular respects in which Mrs Minhinnick contended that the Minister had failed in his duty to consult.

Omission of Ngati Te Ata cultural values from site selection process

[244] In his evidence Mr Roimata Minhinnick questioned whether cultural and traditional considerations had been taken into account, and claimed that it is difficult to pinpoint exactly what advice the Minister had received, or from whom. The witness stated that when on 27 September 2001 he had questioned whether the criteria used to determine the Hautu Drive property as the site had included cultural and traditional considerations, the Department had dithered, and the desk-top and site-selection criteria had excluded those considerations

[245] It was Mr Whewell's evidence that the Department had undertaken extensive consultation with tangata whenua, providing extensive information about the proposed facility and the site selection process, listening to concerns and actively seeking feedback from tangata whenua, including on the site-selection guidelines. In particular the Department had sent Ngati Te Ata a copy of its draft site-selection guidelines on 21 October 1998, and Mr Tahuna Minhinnick had commented on them in a meeting with the Department on 2 November 1998. The location of distinct waahi tapu areas on the Hautu Drive site had been well-defined in the district plan.

[246] On 2 March 1999 the Department had left a message for Mrs Nganeko Minhinnick to follow up her suggestion of suitable land, and had written to her on 13 April 1999 proposing further discussions following identification of a shortlist Further meetings had been held with Mrs Minhinnick in 2000, and with Mr Tahuna Minhinnick in the following year.

[247] Mr Whewell produced copies of the score sheets used in the 1999 process, which showed that cultural factors had been considered.

[248] More recently, the input of tangata whenua had been sought to discuss cultural considerations around the establishment of a corrections facility on the Hautu Drive site. This witness gave details of the consultation process in those respects, as did Mr G P Hawke, Mr Tawhiao, Mrs Rauwhero and Mr Mikaere.

[249] It was Mr Whewell's evidence that the Department had considered both cultural and non-cultural aspects of the sites, and where either class of concern was too great to be avoided or mitigated, the site had been eliminated from further consideration. However discussions with Ngati Te Ata had not been able to be progressed due to their opposition to the proposed facility, their assertion of sole mana whenua rights, and their request for very substantial funding from the Department in return for preparing a cultural impact report. Even so, the Department had continued to inform the Minhinnick family of progress and seeking their involvement with the project for the benefit of the inmates, and the Minister had met Mrs Nganeko Minhinnick and Mr Roimata Minhinnick on 25 October 2002. The Department had made further approaches to the Minhinnicks in early 2003.

Failure to consult before short-listing of sites

[250] Mr Roimata Minhinnick stated that the issue was one of good intent coupled with good timing concerning the provision of vital information so that crucial matters could be discussed, and this had not happened. He criticised the Department for having no real policy or method to determine the level of interest or mandate of those to be consulted. Ngati Te Ata had not been consulted in the 1999 site-selection process.

[251] Mr Whewell refuted Mrs Minhinnick's suggestion that the Department had not considered cultural factors in the 1999 site-selection process. He stated that those factors had been considered for the 12 sites that proceeded to the site visit stage. At that point, sites with cultural issues of a scale or importance that would make them unusable for a prison had been removed from further consideration, and sites with cultural issues that could be mitigated continued to be assessed. Cultural issues identified in respect of one of the four sites in the short list had required further investigation through Te Puni Kokiri, the Waikato Raupatu Lands Trust, and

the Department's cultural advisers. Those sites had been reconsidered in 2000. The Minister had met members of the Minhinnick family on 1 December 2000.

Failure to consult on planning and design

[252] Mr Roimata Minhinnick stated that Ngati Te Ata had not been invited to hui of tribal representatives held by the architect (Mr R Hoskins) engaged by the Department to advise on cultural aspects of the design. The first time that he (Mr Minhinnick) had been contacted about the design had been on 27 September 2001, when the design had been completed.

[253] Mr Roimata Minhinnick also expressed concern that the design of the corrections facility in the form of a stingray, Ngati Te Ata's taniwha *Kaiwhare*, who had formerly taken the form of a shark. The witness stated that to have neither of these representations noted by the designers is cause for major concern but not surprising as Ngati Te Ata had not been included in the early hui. He explained that because Ngati Te Ata had not wanted the prison to go there, it made sense not to participate in the design until the preferred site had been notified, as they had not wanted it to be thought from Ngati Te Ata participation in the design that the Iwi consented to the prison going ahead on that site. A design representative of a stingray is not considered appropriate by Ngati Te Ata.

[254] In cross-examination, Mr Roimata Minhinnick stated his understanding that Mr Tahuna Minhinnick had had communication in regard to design matters, and he believed that Mr Tahuna Minhinnick had declined to participate, but could not be sure about that. He agreed that there certainly would be designs considered appropriate to Ngati Te Ata, but that representation of its taniwha would be inappropriate. The witness agreed that the design process had not begun until the site had been chosen, and at that time Ngati Te Ata had been given a number of opportunities to be involved, but had declined.

[255] Mr Minhinnick asked Mr Rau Hoskins in cross-examination why Ngati Te Ata had not been included in the iwi consultations about design concepts for the facility. Mr Hoskins responded that it had been his understanding that at the time, based on their objections to the proposal, they had chosen to remain outside of that particular iwi forum process. He (Mr Hoskins) had relied on Mr Saul Roberts to fulfil the liaison role with them.

[256] Mr Hoskins also stated that in light of the reinterpretation of the stingray concept by the Maori Womens Advisory Group, and the more general desire of a concept to provide a spinal link between Manukau and the prison, he saw the stingray concept as much more of a preliminary nature and not governing the design of the facility. It had now been subsumed in the wharetangata concept in the detailed design of the facility.

[257] We have already mentioned Mr Grant Hawke's evidence of Mrs Nganeko Minhinnick's participation in discussions about design of a marae entrance and matching features.

Failure to consider sites suggested by appellant

[258] Although the ground of appeal referred to sites suggested at Waiuku, Awhitu, Papakura Camp, and Kingseat, this ground was pursued at the appeal hearing in respect only of Kingseat Hospital.

[259] In his evidence Mr Roimata Minhinnick referred to the Kingseat Hospital site, which had not been further considered as its availability within the time-frame could not be established. The witness gave the opinion that this site should have been considered for compulsory acquisition in line with the purposes of the Resource Management Act.

[260] Mr Whewell described the consideration that was given to the sites suggested by Mrs Minhinnick, and the various reasons for rejecting them. He confirmed that the availability of the Kingseat Hospital site within the Department's time-frames could not be established. The witness was not cross-examined about that by Mr Minhinnick.

Failure of good faith in misrepresenting discussions

[261] Mrs Nganeko Minhinnick gave particulars of two respects in which she claimed that the Minister had failed during consultations with Ngati Te Ata to act in utmost good faith. The first related to evidence by Mr Tawhiao that Ngati Te Ata had not provided specific examples of their traditional relationship with the proposed corrections facility site.

[262] In his evidence Mr Roimata Minhinnick referred to evidence given by Mr Tawhiao at the hearing by the commissioners appointed by the City Council that no explicit examples had been given by Ngati Te Ata for their waahi tapu claims, and that the nature and extent of the waahi tapu had never been made clear. Mr Minhinnick asserted that in giving that evidence, Mr Tawhiao had totally misrepresented his communication. Mr Minhinnick quoted from minutes of a meeting on 27 September 2001, referring to the sacred maunga, and to waahi tapu and protection thereof. He stated that during his meetings with Mr Tawhiao he had discussed the origin of the name of Matukutureia and two adjoining roads, the afterbirth ceremony of Te Ata I Rehia at Matukutureia, and the battle story.

[263] Mr Roimata Minhinnick acknowledged that the Department had assisted Ngati Te Ata to secure access to the Minister, without giving Ngati Te Ata the expectation that it would be influential in their land development proposals. The witness criticised this as being consultation merely as a matter of process, a shallow charade, making a mockery of the Department's open-door policy and lacking any good faith in the process.

[264] In cross-examination by Mr Roimata Minhinnick, Mr Tawhiao explained that this witness did not consider the link between Matukutureia and the birthplace of Te Ata I Rehia to be an explicit link between why there should not be a corrections facility on the site and the birth of the ancestor. He saw a corrections facility as being entirely consistent with the nature of development proposed by Ngati Te Ata for the adjacent land, and as not prejudicial to the interests of Ngati Te Ata.

[265] The second respect in which Mrs Minhinnick asserted that the Minister had failed during consultations to act in utmost good faith concerned alleged misrepresentations concerning a letter from Mr Whewell to Ngati Te Ata dated 5 May 2003.

[266] We have searched through the statements of evidence of the appellant's witnesses (including the extensive statement of evidence of Mr Roimata Minhinnick) but we have not found any reference to such a letter. We have also reviewed the notes of the extensive cross-examination of Mr Whewell by Mr Roimata Minhinnick, and have found no reference to that letter there either. We infer that the claim of failure of good faith in respect of it was abandoned in preparation for hearing of the appeal.

Failure to avoid, remedy or mitigate adverse effects

[267] We now refer to Mrs Minhinnick's contention that the Minister had failed to avoid, remedy or mitigate adverse effects of the proposed corrections facility in light of the alleged failures in the Minister's duty to consult with Ngati Te Ata. The essence of this contention is that the Minister failed to consult adequately because he did not abandon the proposal to establish the corrections facility on the Hautu Drive site.

[268] The Minister did not accept that adequate consultation requires that the site be abandoned, and contended that wider consultation had suggested that there was no impediment to the proposed development and use of the Hautu Drive site.

[269] The Minister also contended that consultation with Maori had led to adjustments of the proposal and to conditions that would avoid, remedy or mitigate adverse effects. Counsel cited the avoidance of areas recorded in the district plan as being of cultural significance, the imposition of special conditions in the designation, responses in the layout and design of the corrections facility, and the opportunities provided to tangata whenua to take part in the operation of it.

Findings on consultation

[270] There was no issue that the Minister had a duty to consult in good faith with Maori over the proposed corrections facility. The dispute is whether the Minister did so in good faith. We adopt what was said in the Ngawha corrections facility case about the content of consultation:[58]

> *Those consulting need fo impart enough about the proposal that those consulted are able* to respond *with appropriate and* accurate *information on the potential effects on affected Maori, so that if may be considered by the decision-maker. The consulting party, while entitled to have a working plan in mind, has to keep ifs mind open and be ready to change or even start afresh. However although consultation involves meaningful discussion, it does nof require agreement, and does nof necessarily involve negotiation towards agreement. The principle does not give a right to veto any proposal.*

[271] We also respectfully adopt this passage from the Hampton Downs decision:[59]

[58] *Beadle v Minister of Corrections* Environment Court Decision A074/2002, para [549]
[59] *Land Air Water Association v Waikato Regional Council* Environment Court Decision Al 10/01, para [453].

While those consulted cannot be forced to state their views they cannot complain if, having had both time and opportunity, they for any reason failed to avail themselves of the opportunity.

[272] Mrs Minhirmick's claim that the desk-top and site-selection process had excluded cultural and traditional Ngati Te Ata values had apparently arisen from summary sheets that had omitted reference to that consideration. However the true question is whether the opportunity was given Ngati Te Ata to have those values considered in the site-selection process. In that regard, we accept Mr Whewell's detailed evidence. We find that throughout the process, the Department made considerable efforts to have Ngati Te Ata's response to the site-selection process, and particularly in respect of the cultural and traditional values associated with the Hautu Drive site. The Minhinnicks were able to meet the Minister in person on two occasions. Cultural and traditional values were taken into account to the extent that the Department was informed of them. Ngati Te Ata were not excluded, but chose to limit their participation.

[273] The more specific complaint that the Minister had failed to consult Ngati Te Ata before preferred sites were short-listed and agreed to by the Minister was not made out either. We find that Ngati Te Ata were sent the draft site-selection criteria and commented on them; they were approached several times before the short-list was determined; and before the Minister decided on the preferred site. They had full opportunity to respond, but restricted their contribution to the process.

[274] We do not accept that Ngati Te Ata were not consulted about design of the proposed facility until after it had been completed. The evidence establishes that the design process was not begun until after 4 April 2001, when the site had been chosen. Mr Tahuna Minhinnick had been invited to contribute, but had declined. Mr Roimata Minhinnick was contacted about the design on 27 September 2001. Since then, the design concept has been developed so that the stingray form (to which Ngati Te Ata took exception) no longer governs it.

[275] Furthermore, this appeal concerns the *designation* of the Hautu Drive site for the corrections facility. The appeal is not concerned with the *design* of the facility that would be authorised by the designation. That may be the subject of an outline plan under section 176A of the Act. If it is, then the right of appeal to this Court conferred by that provision could be exercised. Therefore on this appeal it would be inappropriate for the Court to pass any opinion about design and form of the corrections facility.

[276] We do not accept that the Minister failed to consider Ngati Te Ata's preference for the Kingseat Hospital site. Mr Whewell's evidence showed that this alternative site was considered, and that it was discarded because of doubt about its availability in time. He was not cross-examined about that. The discarding of the other sites was not pursued at the appeal hearing, but the evidence showed that they too had been considered. As already explained, it is not for the Court to decide whether or not the decision to discard any alternative site was justified.

[277] The particular respect in which Mrs Minhinnick alleged that the Minister had failed during consultation to act in utmost good faith related to her assertion that Mr Tawhiao had misrepresented to the Council's hearing commissioners that Ngati Te Ata had not provided specific examples of traditional relationships to the proposed site, and that the nature and extent of that relationship had not been made clear.

[278] In cross-examination, Mr Tawhiao explained why he had given the evidence that he did at the primary hearing. It is similar to the conclusion we reached, that the fact that Te Ata I Rehia was born on Matukutureia was not an explicit reason for precluding a corrections facility on land that is nearby, but does not extend to Matukutureia. We also understand Mr Tawhiao's opinion comparing the corrections facility with other activities for land adjacent to Matukutureia proposed in the cultural development plan.

[279] We accept that the Minhinnicks are entitled to have different opinions on those questions. But those differences do not justify a finding that the Minister had failed to negotiate with Ngati Te Ata in utmost good faith. Nor do they justify a finding that the consultation was a shallow charade, or a mockery. We have found no evidence at all that tends to suggest that.

[280] In addition, even if we had reached a different conclusion than Mr Tawhiao expressed to the primary hearing commissioners, it would not be material, because on Mrs Minhinnick's appeal the Court conducts a full rehearing de novo of her case against the designation requirement. The appeal is decided on the evidence given before the Court, and the evidence given to the commissioners is no longer relevant.

[281] Finally in respect of consultation, Mrs Minhinnick contended that the Minister had failed to avoid, remedy or mitigate adverse effects in light of the particular failures she had identified. As we have found that the Minister did not fail

to consult Ngati Te Ata in good faith in any of those respects, the allegation of failure to avoid, remedy or mitigate adverse effects in light of them falls.

[282] In any event, we do not accept that an allegation of failure of adequate consultation is established by the fact that the Minister did not abandon the site, particularly in a case where other tangata whenua see no impediment. A right to be consulted does not amount to a power of veto.

[283] Further, we find that the Minister did act in response to consultation with Maori so as to avoid, remedy and mitigate adverse effects on their cultural and traditional interests. The design and layout of the proposed corrections facility has been adjusted to avoid areas of the site that are regarded as culturally sensitive. The stingray form of the facility (to which Ngati Te Ata took exception) has been modified. Conditions have been imposed restricting development in heritage resource and other sensitive areas,

[284] In summary, having carefully considered the particular respects in which Mrs Minhinnick claimed that the Minister had failed to consult Ngati Te Ata in good faith, we find that claim is not justified, and we do not accept it.

Ngati Te Ata's development proposals

[285] Another important ground of Mrs Minhinnick's appeal was that, prior to the site being proposed for the corrections facility, Ngati Te Ata had had plans for the development of the area for cultural, social and economic enhancement. Those plans included plans to build a marae on the site, a beautification project including two carved poupou, four rock gardens, planting traditional tarata trees, a whare kura (high school) on the neighbouring block, and a cultural complex for tourism and potentially an international canoe-racing venue on adjacent land.

[286] Those plans had been outlined in the Cultural Development Plan prepared by Mr Tahuna Minhinnick. The plans had been discussed with Terra Firma (subcontractors of Diesel Propulsion, prior owners of the site), and with the Mayor of Manukau City (Sir Barry Curtis) who had given assurances of support by the Manukau City Council for building the marae.

[287] It was the appellant's case that the nature and intention of the corrections facility would severely inhibit, or seriously undermine and detract from, those plans.

[288] The effect of designation of land is that, without the prior consent of the requiring authority, nobody may do anything on the land (other than for the designated purpose) that would prevent or hinder the work to which the designation relates.[60] An interim restraint to similar effect applies from the giving of notice of requirement for the designation.[61] So in general the effect of a designation requirement in respect of private land is to disappoint the plans of those having interests in the subject land,

[289] In this case we have found that, although the designation may inhibit Ngati Te Ata from building a marae on the designated land, the designation would not inhibit building a marae on the site identified in the cultural development plan. The designation would not inhibit any of the development beyond the designated area, but that development would depend on Ngati Te Ata acquiring an appropriate interest in the land, and obtaining any resource consent and other authorisations that may be needed.

The putative name of the facility

[290] It was also the appellant's case that a stigma would arise from the corrections facility being known as being at Matukutureia.

[291] The Minister responded that the name "Auckland Regional Women's Corrections Facility" is the project name, and may not be the final name of the facility; and that the Department will consult before deciding on the name. The facility would not be named after local features or communities.

[292] Without belittling the importance of this issue to Mrs Minhinnick and Ngati Te Ata, we merely observe that the subject of this appeal is the requirement for designation of the Hautu Drive site for a corrections facility. The name to be given to the facility is not part of the designation, nor is it a matter to which the Resource Management Act applies. We hold that it is beyond the proper scope of the Court's jurisdiction, and decline to consider it further.

[60] Resource Management Act, s 176.
[61] Ibid, s 178.

Section 171 criteria

[293] We have addressed the main issues between the parties, and given our findings on them. We have now to follow the directions in the Act applicable to deciding the appeal. In particular we are directed by section 174(4) to have regard to the matters set out in section 171. Those matters are listed in section 17 1 (I), which is expressed to be subject to Part II. Because Part II (and particularly section 5) has to guide our ultimate judgement of the appeal, we defer our consideration of it and have regard first to the more particular factors identified by section 171(1).

Sections 3 68 and 169 matters

[294] Section 171(1) prescribes that when considering a requirement, regard is to be had to the matters set out in the notice given under section 168, together with any further information supplied under section 169, and all submissions.

[295] As prescribed by section 168(3), the Minister's notice under section 168 described the reasons why the designation is needed, the physical and legal description of the site, the nature of the work and proposed restrictions, the potential effects on the environment and proposed mitigation measures, an outline of the consideration of alternative sites and methods, and specifies the resource consents needed. We have had regard to that notice. To the extent that the contents are relevant to the issues between the parties to this appeal, we have considered them elsewhere in this decision.

[296] The Minister's notice under section 168 was accompanied by the AEE, and a statement of the consultation undertaken (among other documents). We are not aware that any further information was required under section 169.

Submissions

[297] By section 17 l(1) we are to have regard to all submissions. However of the submissions lodged with the City Council, only Mrs Minhinnick's submission related to the subject-matter of her appeal. Neither party proposed that we should give further attention to the other submissions, so we do not refer further to them.

Necessity for achieving objectives

[298] By section 171(l)(a), we are to have particular regard to whether the designation is reasonably necessary for achieving the objectives of the public work for which the designation is sought.

[299] We have quoted the Minister's objectives earlier in this decision. Mrs Minhinnick was critical of them for not including traditional and cultural preferences of tangata whenua. We consider that her criticism shows a misunderstanding of the purpose of the statement of the objectives of the proposed work. The scheme of the Act provides in section 6(e) for recognition of and provision for the relationship of Maori, their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. It provides for particular regard to be had to kaitiakitanga in section 7(a). And it provides in section 8 for the principles of the Treaty of Waitangi to be taken into account. So the place for traditional and cultural interests of tantaga whenua is in the application of those provisions. It would obscure the statement of the objectives of the work to include the preferences of tangata whenua in it.

[300] In any event, Mrs Minhinnick's appeal did not state any ground of appeal that the designation is not reasonably necessary for achieving the Minister's objectives, so that was not in issue in the appeal.

[301] Because this appeal has to be considered as if the 2003 Amendment Act had not been enacted, we have to give particular regard to whether the *designation, as* a planning mechanism, is necessary to achieve the objectives. Our duty does not extend to considering whether the work itself is necessary to achieve the objectives, nor to whether the objectives are necessary or appropriate.[62]

[302] M r Bhan gave the opinion that designation is appropriate and preferable to other planning mechanisms (resource consent or plan change) because it provides a flexible, secure and long-term authorisation, gives notice to the public of the location of a public work, and provides opportunity by the outline-plan process for further consideration at the detailed design stage.

[303] We accept the uncontested opinion of that experienced planner.

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[62] *Wymondley against the Motorway Action Group v Transit New Zealand* (HC Auckland CIV-2003-404-000038; 17/09/03, Williams J) para [29]. (Leave to appeal to the CA granted 18/12/2003).

[304] It was Mr Whewell's evidence that there is a national need for a new women's corrections facility. He described the expected numbers of women inmates, the accommodation currently available, the upper North Island situation, short-term contingency measures, alternatives to a new women's facility in Auckland, and timing of the proposed facility in relation to demand.

[305] Mr Whewell's evidence in that respect was not contested, and we accept it. If it should be held that the Court does have to have particular regard to whether the work itself is necessary to achieve the objectives,[63] then we find that it is.

[306] Although there was no issue on the point, we state our finding that because the corrections facility needs a security buffer, and areas of the site outside the secure perimeter for inmate employment and rehabilitation, designation of the whole of the site is reasonably necessary for achieving the objectives.

Adequacy of consideration of alternatives

[307] By section 171(l)(b), we are to have particular regard to whether adequate consideration has been given to alternative sites, routes or method of achieving the project or work for which the designation is sought. As the work is not a line utility, such as an electricity transmission line or a road, the question of alternative routes does not arise.

[308] We have already reviewed the evidence and given our findings on the site selection process earlier in this decision. We found that the consideration that was given to alternative sites was methodical and business-like, not arbitrary or cursory, and that adequate consideration was given to alternative sites.

[309] Mrs Minhinnick's notice of appeal did not state any ground that adequate consideration had not been given to alternative methods of achieving the work.

[310] Mr Whewell gave evidence about the consideration given to alternatives to a corrections facility, alternatives to imprisonment, and alternative facilities. That evidence was not contested, and we accept it.

[311] Accordingly we find that adequate consideration has been given to alternative methods of achieving the work for which the designation is sought.

[63] That is, if the appeal to the Court of Appeal in *Wymondley* is successful,

Unreasonableness of expecting use of alternatives

[312] By section 171 (l)(c) we are to have particular regard to whether the nature of the project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route or method.

[3 13] Counsel for the Minister submitted that if we found that adequate consideration had been given to alternative sites and methods of achieving the work, it would be unreasonable to expect the Minister to use an alternative site or method (citing Environment Court decisions to that effect).@ However counsel also referred to *Takamore Trustees v Kapiti Coast District Council*[65] in which Justice Ronald Young rejected the proposition that there must be a viable alternative route before paragraph (c) can effectively be considered. The learned Judge described the question to be considered for paragraph (c) in this way-"'

> *Is there anything in the nature of the work which means if would be unreasonable to expect the territorial authority to use an alternative? If the answer was "yes" the* nature *of the* work *would affect the* alternative *routes, then is if unreasonable to* expect *the territorial authority to use the* alternative? *If the answer was "yes" the nature of the* work would *affect alternative routes then the question would be: Is it unreasonable to expect the* territorial *authority to use the alternative?*

[314] Counsel for the Minister submitted that the passage quoted is of little relevance to the present case, being concerned with the Environment Court's view that section 171(l)(c) did not apply where alternative routes would require approvals and land acquisition. He contended that the issue in that case had been whether the alternative routes had to be available to the requiring authority, and the passage quoted had not been strictly necessary to the Court's decision.

[315] However that may be, the place of the Environment Court in the hierarchy of Courts obliges us to apply interpretations of the law by the superior Courts. We intend to do so as best we are able.

[316] Addressing the first of the three questions identified by the learned Judge, we find nothing in the *nature* of a women's corrections facility for the Auckland region which means it would be unreasonable to expect a requiring authority to use an alternative. On the second question, whether the nature of the work would affect the

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[64] *Quay Property Management v Transit* NZ Environment Court Decision W28/00; *Beadle v Minister of Corrections* Environment Court Decision A074/2002, para [874].

[65] (HC Wellington AP191/02; 4/04/03, Ronald Young J) paras [101]-[104].

[66] Ibid, para [104]. In that case the territorial authority was the requiring authority.

alternative site, that would depend on the site and its environs. A women's corrections facility on another site would not have the same environmental effects as the proposal does on the subject site. However it is our finding that the current proposal would have only minor effects on the Hautu Drive site. The genera1 suitability of this site is such that in our judgement it is unlikely that the environmental effects at an alternative site (though different) would be less overall.

[317] So having applied the questioning process directed in *Takamore*, **we** conclude that Mr Bhana's opinion should be adopted, and that the nature of the project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route or method.

Provisions of planning instruments

[318] By section 171(l)(d) we are required to have particular regard to all relevant provisions of any New Zealand coastal policy statement, regional policy statement, regional plan, proposed regional plan or district plan. We have considered the relevant instruments in an earlier section of this decision, and found that there is nothing in them which indicates that a corrections facility is not an appropriate development and use of the site, and on the particular part of the site within the proposed secure perimeter.

Part II of the Act

[319] Having complied with the direction in section 174(4) to have regard to the matters set out in section 171, we have now to form our judgement whether to confirm or cancel the requirement, or modify it or impose conditions.[67] Our judgement is to be informed by the purpose of the Act described in section 5, applying the directions in sections 6, 7 and 8 as far as they are applicable to the case.

The relationship of Maori with the land, sites, and taonga

[320] We start with the direction in section 6(e) to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. We have considered Mrs Nganeko

[67] Resource Management Act, s 174(4).

Minhinnick's claim that the land to be designated is, or contains waahi tapu. Having considered the evidence, we have not accepted that claim.

[321] However the Minister did not contest that the corrections facility site is ancestral land of Maori, nor did he contest that Maori have a traditional and cultural relationship with it, as part of the surrounds of Matukutureia, and part of the Matukuturua Stonefields. We find that the relationship is stronger with the iconic maunga itself, and with the stonefields. Although the designation would apply to part of the stonefields, neither the stonefields nor the maunga would be physically affected by the proposed development of the corrections facility. Further, the parts of the site identified in the district plan as heritage resources are recognised and provided for by conditions restricting future development there.

Kaitiakitanga

[322] By section 7(a), functionaries are to have particular regard to kaitiakitanga. In a previous section of this decision we reviewed the evidence in this respect. We found that the Minister did have particular regard to kaitiakitanga, recognised Ngati Te Ata's role as kaitiaki, and provided opportunities for them to exercise guardianship of the natural and physical resources of the area in accordance with tikanga Maori.

Principles of the Treaty of Waitangi

[323] By section 8 of the Act, functionaries are directed to take into account the principles of the Treaty of Waitangi. In that respect an issue arose about what the relevant principles are. We need to resolve that issue before considering the extent to which designating the subject land for the corrections facility would take account of them.

What are the relevant principles of the Treaty?

[324] Mrs Minhinnick submitted that the following are principles relevant to this case:

(a) Principle of partnership 'essential bargain':

(b) Principle of balance of power 'shared decision-making':

(c) Principle of active protection:

(d) Principle of Maori autonomy (self-government, self-management and self-regulation):

(e) Principle of active assistance to Maori development (the right to development and principles of mutual benefits and options):

(f) Principle of a duty to provide redress for past breaches:

(g) Principle of spiritual concerns:

(h) Principle of a duty to consult:

(i) Principle of foreseen needs.

[325] We summarise the Minister's case in respect of that submission:

(a) The suggested principles of balance of power and shared decision-making, Maori autonomy, active assistance to Maori development, redress for past breaches, spiritual concerns, and foreseen needs are entirely novel.

(b) The principle of active protection does not apply, as the land is not Maori land.

[326] Of the principles in question, Mr Minhinnick cited legal authority for only one of them, the asserted principle of a duty to redress past breaches of the Treaty. In that regard, he quoted a passage from the Judgment of Justice Somers in New *Zealand Maori Council v Attorney-General* [68] (the SOE case), and a passage from the Judgment of the Court of Appeal in *Te Runanga 0 Te Ika Whenua v Attorney-General.*[69] Although in the SOE case Justice Somers remarked that the right of redress for breach may be described as a principle, neither case is authority for the proposition that there is a principle of the Treaty to redress past breaches.

[68] [1987] 1 NZLR 641,693 (CA).
[69] CA124/93, 17 December 1993.

[327] That apart, Mr Roimata Minhinnick's arguments for the Treaty principles in question were developed from contents of various reports by the Waitangi Tribunal. He submitted that those reports are admissible in this Court, and rightly that was not contested by the Minister. The Tribunal's reports are indeed admissible and worthy of consideration. But the Environment Court cannot adopt any findings of fact contained in them. The Environment Court needs to make its own findings on evidence in the particular case before it.

[328] Likewise, any opinions on questions of law expressed in Waitangi Tribunal reports, while worthy of respectful consideration, are not binding on the Environment Court. We apply the law declared by the superior Courts. On questions on which the superior Courts have not declared the law, we have to make our own decisions, on which we may find ourselves assisted by reasoning in such sources as Waitangi Tribunal reports.

[329] Counsel for the Minister relied on the Judgment of the Court of Appeal in *New Zealand Maori Council v Attorney-General*[70] (the Broadcasting Assets case) for their submission that there is no Treaty principle of redress. They contended that retention and development by the Crown of previously private land does not diminish the Crown's ability to provide redress if Ngati Te Ata's claims of past breaches are found to be valid.

[330] We hold that the reference in section 8 to the principles of the Treaty is to be understood in its context of an Act to be applied by a variety of functionaries, including local authorities. It can scarcely have been Parliament's intention that a consent authority deciding a resource-consent application or a designation requirement should trawl through the body of Waitangi Tribunal reports for indications of new principles of the Treaty. We consider that we should be cautious about doing that too. There is challenge enough in applying the established principles already identified by the superior Courts.

[3313 We have considered the reasoning presented by Mr Roimata Minhinnick, and the passages he quoted from various Waitangi Tribunal reports in support. We do not accept that as a matter of law, the Treaty principles referred to in section S extend to embrace the principles asserted by Mr Minhinnick of shared decision-making and Maori autonomy. The Resource Management Act contains elaborate provisions for who is to make various classes of decision under it. There is no room

[70] [1992] 2 NZLR 576,601 (CA)

for inferring that iwi are to be decision-makers as well, especially as the Act gives them no power of veto.

[332] The claimed principles of active assistance for Maori development, redress for past breaches, and provision for foreseen needs would require allocation to Maori of public resources. If public resources are to be allocated to Maori, that should be the done by *or under* the explicit authority of Parliament, not by a functionary under the Resource Management Act in the context of deciding whether land should be designated for a public work. The examination of claims to redress for past Treaty breaches is the province of the Waitangi Tribunal, not of territorial authorities or the Environment Court in performing Resource Management Act functions.

[333] Mr Roimata Minhinnick's argument for a principle of spiritual concerns would involve Maori cultural relationships with land, waahi tapu and other taonga. Parliament has, in sections 6(e) and 7(a), expressly directed the provision to be made for those relationships. To infer from the reference to Treaty principles in section S any different or additional consideration in that respect would be inconsistent with those express provisions. We hold that this would not be a principled interpretation of section 8.

[334] In summary, we decline to accept Mrs Minhinnick's submissions for recognition of the Treaty principles in question.

[335] On the principle of active protection, Mr Roimata Minhinnick submitted that the Minister was obligated to take positive steps to protect the rights of Ngati Te Ata to the proposed site. He relied on the Court of Appeal decisions in *New Zealand Maori Council v Attorney-General*[71] (the SOE case) and *Ngai Tahu Trust Board v Director-General of Conservation.*[72]

[336] Counsel for the Minister submitted that the principle of active protection relates to Maori property and taonga, including spiritual and intrinsic values, and does not necessarily require preserving the status quo and prohibiting development of a resource, nor does it imply a veto of development by those asserting Maori interests. They quoted a passage from the Environment Court decision in *Beadle v Minister of Corrections*[73] in which authorities were cited. Counsel also contended that there are no waahi tapu or other sites of significance on the corrections facility

[71] [1987] 1 NZLR 641 (CA),
[72] [1995] 3 NZLR 553 (CA).
[73] Environment Court Decision A074/02.

site, it is not Maori land, and provision for protection of Ngati Te Ata interests had been made by the conditions imposed on the designation in conjunction with the provisions of the district plan.

[337] Although Ngati Te Ata assert rights to the corrections facility site, as a matter of law they do not possess any property rights in respect of it. Their claims before the Waitangi Tribunal concerning the site have not yet been examined, nor made the subject of a report by the Tribunal.

[338] Any further protection would have the effect of preserving the status quo, and effectively according a power of veto to Ngati Te Ata. In our judgement that would not be justified where the significance of the site is as part of the surrounds of the maunga, rather than itself being a site of significance or other taonga.

Does the designation take into account the relevant principles?

[339] Mrs Nganeko Minhinnick contended that the Minister had failed to address all the principles important to her and therefore had failed to act in utmost good faith as a Treaty partner.

[340] The Minister submitted that section 8 does not require functionaries to act in conformity with, or to apply, relevant Treaty principles.

[341] Of the principles of the Treaty asserted by Mrs Minhinnick, we eliminate all but the principles of partnership (giving rise to the duty to consult), and of active protection.

[342] In an earlier section of this decision we rejected the appellant's case that the Minister had failed to consult with Ngati Te Ata in good faith. In taking into account the Treaty principle of partnership, we find that the principle was upheld by the Minister's consultation with tangata whenua in good faith.

[343] On the Treaty principle of active protection, Mrs Minhinnick asserted that the mauri (life force) of the corrections facility site is a taonga which the Department of Corrections have a duty to protect and return to Ngati Te Ata.

[344] We find that the Minister has acted to provide protection for Ngati Te Ata traditional cultural interests by adjusting the layout and design of the proposed

development, and by imposing conditions to apply to the designation, in conjunction with the district plan, restricting development of areas identified as cultural resources (including the stonefield part). We have not found that there are waahi tapu or other sites of significance on the corrections facility site. Maori have a traditional and cultural relationship with the land to be designated because part is stonefield, and the rest is part of the surrounds of Matukutureia maunga, which itself is beyond the corrections facility site.

[345] We do not accept that the active protection principle extends to a duty to protect and return to Ngati Te Ata the mauri of land that they have not owned for more than a century. They are free to pursue in the Waitangi Tribunal their grievance over the way in which it passed from their ownership. But it would not be appropriate for us to make findings on that grievance, or to presume that it will be adjudged to be well-founded,

Finding, on the Treaty principles

[346] In summary, we find that in requiring the designation the Minister has appropriately taken into account the relevant principles of the Treaty.

The single purpose of sustainable management of natural and physical resources

[347] We have complied with such of the directions in Par-t II of the Act as are relevant to the case. We have now to consider whether to confirm or cancel the Minister's designation requirement, judging that question by which result would better serve the purpose of the Act described in section 5, namely, to promote the sustainabie management of natural and physical resources. For that purpose,–[74]

> ..."sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and fur their health and safety while–
> (a) Sustaining the potential of natural and physical resources (excluding minerals) fo meet the reasonably foreseeable needs of future generations,, and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment

[74] Resource Management Act, s 5(2)

Permitted baseline

[348] Because we are to decide the appeal as if the 2003 Amendment Act had not been enacted, in considering the environmental effects of activities on the site we are to apply the permitted baseline as described by the Court of Appeal in *Bayley v Manukau City Council*,[75] *Smith Chilcott v Auckland City Council*,[76] and *Arrigato v Auckland Regional Council."*

[349] The permitted baseline of the site is development and use of the land to be designated for quarrying and for factories. It is our judgement that the development and use of the land for the proposed corrections facility would have no effects on the environment that would be other than or further than the environmental effects of the permitted factory and quarrying activities. Therefore any environmental effects of the corrections facility are to be treated as part of the existing environment and ignored.

Broad judgement

[350] Deciding whether a proposal would promote the sustainable management of natural and physical resources involves a broad judgement comparing any conflicting considerations arising from the two main elements of the definition of sustainable management, the scale and degree of them, and their relative significance or proportion in the final outcome.[78]

[351] In this case the Minister submitted that there are no conflicts, as the corrections facility should not adversely affect the nature of Ngati Te Ata's relationship with the site or its cultural well-being. His counsel reminded us that any matter of national importance under section 6 is subordinate to the overriding purpose of sustainable management of resources.[79]

[352] We do not accept that in this case there are no conflicts. We have found that Maori do have a cultural and traditional relationship with the land to be designated as ancestral land. That is a matter of national importance, to be recognised and

[75] [1999] 1 NZLR 568 (CA).
[76] [2001] 3 NZRMA 481 (CA).
[77] [2002] 1 NZLR 323 (CA).
[78] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (HC).
[79] *NZ Rail v Marlborough District Council* [1994] NZRMA 70, 86 (HC); *Auckland Volcanic Cones Society v Transit NZ* [2003] NZRMA 316,328 (FC).

provided for. Although the Minister has recognised it and provided for it, the Minhinnicks maintain that he has not provided for it sufficiently.

[353] Even Maori traditional and cultural relationships with ancestral land are subordinate to the statutory purpose, and have to be independently weighed and placed in perspective against the overall circumstances of the case.[80] They have to be balanced objectively against the benefits for sustainable management of the proposal, and taking into account the restrictions and conditions to be imposed.[81]

[354] In that balancing we place on one side of the scales the uncontested public benefits of the badly-needed proposed corrections facility, which we find would manage the use and development of the natural and physical resources of the site in a way that would enable people and the community to provide for their social, economic and cultural well-being, and for their health and safety.

[355] We take into account that the restrictions and conditions on exercise of the designation are calculated to limit the management of those resources to enable Maori people and their community to provide for their social, economic and cultural wellbeing and for their health and safety.

[356] We have already given our finding in respect of paragraph (c), We find that the matters in paragraphs (a) and (b) do not arise in this case.

[357] On the other side of the scales, we place the traditional cultural relationship that Maori have for the subject land, as part of the Matukuturua Stonefields, and as part of the surrounds of Matukutureia maunga. The corrections facility would have no adverse physical effect on either of those valued resources, so the effect would be relatively minor in scale or degree in significance or proportion in the final outcome.

[358] That is not to say that non-physical effects would always deserve less weight in the metaphorical scales than physical effects. There have been cases where they have prevailed."

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[80] *Te Kupenga 0 Ngati Hako v Hauraki District Council* Environment Court Decision A01 0/2001, para [100].

[81] *Watercare Services v Minhinnick [* 1998] NZRMA 113, 124 (CA); *TV3 Network Services v Waikato Regional Council* [1997] NZRMA 539, 548 (HC).

[82] See for example *Te Runanga O Taumarere v Northland Regional Council* [1996] NZRMA 77; *Landcorp/CDL Land v Whangarei District Council* [1997] NZRMA 322; TV3 *Network Senices v Waikato Regional Council* [1997] NZRMA 539.

[359] Even so, in this case it is our unanimous judgement that the traditional cultural relationship, valid as it is, cannot outweigh the relative significance of the proposed badly-needed women's corrections facility in the Auckland region; and that confirming the designation requirement would promote sustainable management of natural and physical resources, but cancelling it would not.

Decision of the appeal

[360] Therefore Mrs Minhinnick's appeal against the Minister's requirement will be disallowed.

Application for enforcement order

[361] We now return to Mrs Minhinnick's application for an enforcement order prohibiting the Minister from commencing anything concerning the Hautu Drive site for the Auckland Regional Women's Corrections Facility, relying on section 314(l)(a) of the Act. The ground of the application was that the proposed works would be offensive or objectionable to such an extent that they are likely to have an adverse effect on the environment.

[362] In support of that it was contended that the Department of Corrections had not proven that an ordinary reasonable Maori person acting objectively would not have found the proposal 'offensive' and 'objectionable' in assessing–

a) *The effects on the spiritual, cultural,* and special value of *(Ngati Te Ata as part of the wider community) to the site* for present and future generations; and
b) *The socio-economic effects on Ngati Te Ata as referred to earlier; and*
c) The visual effects on *Ngati Te Ata in that looking from the front of the mountain, no amount of landscaping will hide the facility.*

[363] There are two legal problems associated with the way in which the application is presented.

[364] The first is that the contention that the Department of Corrections had not proven that the proposal would not be offensive or objectionable incorrectly reverses the onus of proof on an enforcement-order application. On such an application the onus lies on the party applying for an order, not on the party against whom an order is sought.

[365] The second legal problem is imputing a test of what an ordinary, reasonable Maori person acting objectively would find offensive or objectionable. On her enforcement order application in respect of the South-western Interceptor crossing the Matukutururu Stonefields, the Court of Appeal held that the judgement was not imputed to be that of a Maori person.[83] That is, of course, an authoritative declaration of the true interpretation of the law, and is to be applied by this Court.

[366] The issues raised in paragraphs (a) and (b) are effectively the same as the issues that we have considered in respect of Mrs Minhinnick's appeal against the Minister's requirements. In respect of paragraph (c), we have found that screen planting is to be developed in the eastern, southern and north-western buffer areas, the corrections facility would be entirely screened by massed planting of coastal native trees and shrubs along the western and southern sections of the site, and there would be massed groupings of specimen trees on the undulating slopes adjacent to the Stonefields. The whole development is to be landscaped and planted in trees and shrubs.

[367] As on the appeal, so on this application, we have to make an objective, balanced judgement. Again we weigh the contribution to sustainable management of the proposed corrections facility against the relationship that Maori have with the subject land. In deciding how much weight to place on that side of the scales, we bear in mind that the more significant important Maori relationships are with the iconic maunga itself, and with the stonefields, neither of which would be physically affected by the corrections facility. The part of the subject land that is to be developed is part of the land surrounding the maunga, and adjacent to the stonefields. It is our judgement that in those circumstances the effect of the proposal on the Maori traditional and cultural relationship with the land does not outweigh the value of the corrections facility in enabling people and the community to provide for their social, economic and cultural well-being, and for their health and safety.

[368] Mrs Minhinnick also sought an enforcement order that the Crown restore Ngati Te Ata rangatiratanga and kaitiakitanga to the site. Such an order would be beyond the scope of the Resource Management Act, and beyond the jurisdiction of the Environment Court.

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[83] *Watercare Services v Minhinnick* [1998] NZRMA 113, 125 (CA) upholding the decision of the Environment Court.

[369] So we decline to make the enforcement orders sought by Mrs Minhinnick in these proceedings.

Determinations

[370] For the reasons given, the Court makes the following determinations:

(a) The application for a declaration that Ngati Te Ata had not ceded its sovereignty, and that the Crown does not have legitimacy to govern Ngati Te Ata, is declined.

(b) The application for enforcement orders against the Minister is declined.

(c) Subject to modifications to the conditions to be made in other appeals, the Minister's designation requirement is confirmed.

(d) Mrs Minhinnick's appeal against the designation requirement is disallowed.

DATED at Auckland this 6th April **2004.**

For the Court:

D F G Sheppard
Alternate Environment Judge