

Mana and Inter-national Treaty Making

NGĀ TOKI
WHAKARURURANGA



**Ngā Toki
Whakarururanga**

*Formed from the Wai 2522 Waitangi Tribunal claim on the TPPA, Ngā Toki Whakarururanga is a **Tiriti-driven entity**.*

*Our Moemoea is:
“**He Whenua Rangatira**”
(We are an independent and sovereign nation)*

*Our duty and responsibility is
to protect and advance Māori rights according to
Te Tiriti o Waitangi me He Whakaputanga.*

*Our goal is to achieve radical transformation through
Māori leadership in trade-related spaces
that **sets the bar to ensure that Te Tiriti is embedded
in trade policy, negotiations and agreements**.*



**Relevant
Tribunal
themes**

Theme 1: Mana motuhake, tino rangatiratanga, autonomy and self-government and tikanga

Theme 2: Kāwanatanga, constitutional legitimacy, Parliamentary sovereignty and systems, and ngā ture Pākeha

Theme 7: International Treaty-Making and Rangatiratanga

Ngā Toki Whakarururanga Statement of Position:

Rangatira never ceded
their mana to the Crown
in the international
domain, just as they
never ceded that mana
within Aotearoa



Robyn Kahukiwa, *Māori Never Ceded Sovereignty to the Crown*, 2023. *Sovereign* series.
Collection of Christchurch Art Gallery Te Puna o Waiwhetū. Photograph by Samuel Hartnett,
courtesy of the estate of Robyn Kahukiwa.

*The exercise of mana
in both the domestic and
international domains
was and remains an intrinsic
and inseparable element
of the rangatiratanga
that the authorised
representatives of the British
Crown affirmed in
He Whakaputanga o te
Rangatiratanga o Nu Tireni 1835
and Te Tiriti o Waitangi 1840.*

*That guaranteed the continuance of
their authority and responsibilities,
including treaty making.*

*The authority of the Crown was
expressly limited.*

***The Crown has repeatedly overstepped
that authority,** including in the
international domain.*

Māori have repeatedly challenged Crown's claim of exclusive powers of international treaty making as breach of te Tiriti

Internationally, eg

- The UN Working Party on Indigenous Peoples and the UNDRIP
 - WIPO and Convention on Biological Diversity
 - Climate change COP
- and **within Aotearoa**, eg.

- Multilateral Agreement on Investment (MAI)
- TPPA
- Wai 262/2522/3330 Tribunals

We can and have
developed our own
Indigenous to
Indigenous treaties
based on mana,
tikanga and
whanaungatanga

eg **Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples**, June 1993

150 delegates, 14 countries

Presented to Commission on Human Rights
Sub-Commission of Prevention of
Discrimination and Protection of Minorities
Working Group on Indigenous Populations
In year of Indigenous Peoples.

Recent Mana Wāhine **Declaration for Hineahuone - for Seed and Soil** 2025

Our full analysis is set out in
a new paper ... see
[ngatoki.nz/kaupapa/
rangatiratanga-and-
constitutional](https://ngatoki.nz/kaupapa/rangatiratanga-and-constitutional)

Mana and Constitutional
Transformation of
Treaty Making

NGĀ TOKI
WHAKARURURANGA



Mana and the right to treat

starting point is

Dr Moana Jackson's evidence in

Wai 898 (Te Rohe Potae)

Wai 1040 (Paparahi o te Raki)

Wai 2522 (TPPA)

“Treaties and the power to treat did not suddenly fall out of the sky on unaware or ignorant Māori polities in 1840. ...

The authority and understanding of treaties was an integral part of tikanga as law.”

The very nature of **mana as a taonga** meant it **could not be alienated to another authority.**

*“No matter how powerful rangatira might presume to be, **they never possessed the authority nor had the right to give it away or subordinate it to some other entity.**”*

... The right to treat is
fundamental to
political authority ...

*“In all societies the ability and the **right to conduct negotiations and enter into relationships with other polities** has always been among the **foundational realities** of diplomatic and political authority.*

*If co-operation and co-existence with others is seen as the reason for inter-nation or international relations then **the right to enter into treaties is ... fundamental to** both the **independence** and the **necessary interdependence** of those nations with others. “*

**What previous Waitangi Tribunals have said about
He Whakaputanga, Te Tiriti and
international treaty making**

Crown relies on Wai 262,
which predated Wai 1040

Tribunal said:

“international treaty-making is
an exercise of Kāwanatanga”
but

- decisions on some kaupapa should be joint
- some matters are so important the Crown should delegate to Māori.

We rely on

Wai 1040: No cession of sovereignty.
Crown’s role in the international domain
was to protect Māori independence, not
that Rangatira and Hapū would relinquish
their sovereignty.

Wai 2522: Wai 1040 Stage 2 and
Constitutional Kaupapa Inquiry should
decide what Wai 1040 Stage 1 means for
treaty-making authority today.

**Wai 262: Ko
Aotearoa Tēnei,
pre-Wai 1040,
set the bar low**

***Maori interests** in trade and economic development, natural resources, the protection and transmission of Maori culture and traditional knowledge, indigenous rights, and environmental protection, **are all profoundly affected by international instruments.** (680)*

*... **we expect international engagement over those same matters** – human rights, the environment, biodiversity, global warming, trade, conflict and diplomacy, and indigenous rights – **to increase in the future rather than tail off.** (p.670)*

“In the Treaty of Waitangi, the Crown acquired kāwanatanga, the right to govern, which included the right to make foreign policy and to represent the new bicultural nation on the international stage.

*In return, the Crown promised actively to protect Maori interests and tinō rangatiratanga, or full Maori authority over their own affairs. In the modern international arena, this is **no small obligation**.*

...

The Crown must work out a level of protection for Maori interests,

as identified and defined by Maori,

*that is **reasonable when balanced where necessary against other valid interests,***

and in the sometimes constrained international circumstances in which it must act. (p.684)

... it is for Maori to say what their interests are, and to articulate how they might best be protected – in this case, in the making, amendment, or execution of international agreements.

...

*... there are times when the Crown's position on **matters of core importance to Māori** must be developed by consensus, and - preferably - by a negotiated agreement with Māori. ...*

*There may even be times when the Māori interest is **so overwhelming**, and other interests by comparison so narrow or limited, that the Crown should contemplate delegation of its decision-making powers, or delegation of its role as New Zealand's 'one voice' in international affairs (pp.681-3)*

Wai 1040 Stage 1

Translation of *He Whakaputanga*
on
international powers

*“... we ask the King to remain as a protector (matua) for us in our inexperienced statehood (tamarikitanga), **lest our authority and leadership be ended** (kei whakakahoretia tō mātou Rangatiratanga).”*

*“The description of the king as “matua” in our view did not imply **British superiority except in international affairs**, and there **the request was not for Britain to usurp Māori authority but to foster it and protect it from foreign threat**.” (p.502)*

Wai 1040 on *Te Tiriti o Waitangi* and international powers

*“the rangatira appear to have agreed that the Crown would **protect them from foreign threats and represent them in international affairs, where that was necessary”*** (Stage 1 p.529). The historical context was the perceived threat from France.

Wai 1040 Stage 2 quoted *Te Mana Whatu Ahuru* that signatories to Te Tiriti in Te Rohe Pōtae wanted *“a governing power that could be used to control settlers **and protect them from foreign threats**, thereby protecting Māori and bringing mutual benefit”* (p.51).

**Wai 1040 (Stage 2)
Kāwanatanga
would not usurp
Rangatiratanga**

*The treaty negotiations provided the rangatira with further reassurance that Britain's intentions were peaceful and protective; **the Governor** would be 'a powerful rangatira to control Pākehā and protect them from foreign powers', but would not undermine their authority or exert power over them. (p.186)*

Wai 1040 (Stage 2)

“The rangatira may well have consented to the Crown protecting them from foreign threats and representing them in international affairs where necessary.

If so, however, the intention of signatory rangatira was that Britain would protect their independence,

not that they would relinquish their sovereignty.”(p.xxxiv)

**Dr Moana Jackson's deconstruction of
constitutional authority to make treaties**

... A polity's
constitutional authority
to treat has 3 key
elements ...

1. ***“concept of power”***
2. ***“site of power”***
3. ***“specifics of power”***

**CONCEPT of power
is the idea of
political and
constitutional
power.**

*It is the **philosophical base**
that a people develop about
what government should be,*

*as well as the **values** upon
which the will of the people
should be manifest.*

Māori **CONCEPT** of power
was known
generically as mana.

Some Iwi and Hapū
described it as *mana
motuhake*, *mana taketake*,
or *mana tōrangapū*.

More latterly it was called
rangatiratanga or
tino rangatiratanga.

Crown: Polities in Europe developed
their own culturally distinct concept of
power which they called “sovereignty”,

based on a **hierarchy of progress from
societies of apolitical barbarism to
their “civilised” constitutional order.**

That **still** marks the distinctive cultural
ethos that is **inherent in the Crown
notion of political and constitutional
authority.**

The “**SITE of power**” is the governing institution through which the **concept** of power is given effect.

*It is the **institutional place** where governing and constitutional **decisions are made.***

For Māori, in Aotearoa prior to 1840 that **SITE of power resided within the collective of rangatira or ariki who were acknowledged by each Iwi and Hapū as having the skills and ability and mandate to govern.**

Crown's site of power is the **inalienable and absolute authority and dominion held by the sovereign over the land and its people, modified** over time within a constitutional monarchy framework as “**the King (or Queen) in Parliament.**”

“Concepts of power”
are made up of
a number of different,
but inseparable,
constituent parts or
“SPECIFICS of power”.

Specifics of the power of **mana or tino rangatiratanga** include:

- The power to **define**
- The power to **protect**
- The power to **decide**
- The power to **reconcile**
- The power to **develop**
- The power to **treat: to negotiate and commit to formal collective agreements with other polities**

For Māori, the very nature of **mana** meant the specific “**power to treat**” could not be alienated to another authority.

For the Crown, the **specifics** of power, the **constituent parts of sovereignty**, are all **inalienable**, including the **authority to treat**, the obligation to maintain the peace and the right to declare war when necessary.

Treaty-making is deemed an honourable expression of the sovereign’s will.

The Crown claims
a “prerogative”
treaty making
power in New
Zealand sourced
in its
“sovereignty”

The Crown asserts **exclusive power** to make international treaties on behalf of State of NZ, **sourced in the “royal prerogative”** of the Queen or King of England / NZ.

Derived from imperial law that denied, and still denies, the legitimacy of tikanga as first law and rangatiratanga as sovereignty, and **justifies the exclusive application of English common law & sovereignty.**

Dr Moana Jackson:

Colonial jurisprudence

*sought and seeks to
justify this, in denial of
tikanga*

“English law defined what was natural, civilised and universal. Its absence was equated with anarchy or untamed nature.

*There was a deliberately developed and rationalised **presumption that Indigenous Peoples by their very nature were an inferior “other”** who could be legitimately dispossessed because of their inferiority ...*

***Resistance**, seen as deviant behaviour, could legitimately be disciplined by the colonial power. “*

Underpinned by the
“**Doctrine of Discovery**”
derived from Papal Bulls,
which presumed the mere
“discovery” of indigenous
lands by someone from
Europe validly transferred
title in said land to the
“discoverer”.

The “*doctrine of discovery*”
entitled Europeans,
as a **superior civilisation**,
to seize “discovered lands” and
impose their own constitutional
systems and law on all “others”.

The **Crown has not renounced** the
Doctrine of Discovery – the Solicitor-
General blocked a draft briefing
paper for Cabinet paper by Te Kahui
Tika Tangata/ Human Rights
Commission in 2023

Dr Moana Jackson: ...

“The idea that “discovery” could transfer land and power is related to the foundational belief that because Indigenous Peoples were of lesser worth, they had lesser rights and capacity ... with no real understanding of sovereignty or its concomitants such as a right to properly govern themselves. ...

With regard to treaty making:

*It also **necessarily implied a “petty” capacity to treat** that only involved the ability to give away or cede “real” sovereignty to the Crown.*

*In effect the petty polities of **Iwi and Hapū** were only capable of treating in order to give away that capability to the coloniser.”*

This concept
underpins the
Crown's
“principles of
constitutionalism”
in the
Wai 3300 inquiry

Constitutional legitimacy comes from “*a constitutional monarchy with a parliamentary system of government*” under the Constitution Act 1986.

Representative democracy sourced in majority rule is “*the underlying principle of New Zealand’s key constitutional conventions.*”

Treaty of Waitangi (not Te Tiriti) is “*a*” **founding document** and “*one of*” **the sources** of NZ’s constitution, along with legislation, common law, constitutional conventions, and Parliamentary customs.

The Treaty of Waitangi “*affects, in various ways and to varying extents, how public power is exercised in New Zealand*”

It also underpins
the Crown's
"principles of
constitutionalism"
on international
treaty making
in Wai 3300

Cabinet's Manual sets out prerogative, of the Crown (in reality, the Cabinet):

*"The **Executive is responsible for negotiating international agreements**".*

It recognises that the **growing reach** of international processes and treaties today means the ...

"powers of national governmental institutions are correspondingly reduced".

But the Crown **still defends the Executive's exclusive authority** over treaty making.

Today's more expansive scope of treaties just gives more power to the Cabinet.

International trade and investment treaties are even outside Crown's parliamentary process

- Crown (Executive) has **exclusive right to negotiate, sign and ratify treaties**.
- **Negotiated in secret** by the Executive; not made public until concluded.
- **Complex and technical**, 20-30 chapters
- Based on **Western capitalist worldview**
- **Not even parliamentary participation** until concluded, if at all.
- Restricts **law and policy** on culture, digital, IP, organics, rongoā, health, tobacco, etc
- Weak or no **protections for Tiriti compliance and mātauranga**
- **No Māori seat** at the negotiating table.

2001 Crown Strategy for Engagement with Māori on International Treaties

Prepared in response to
criticisms in 1990s of
international treaties.

Crown agency in charge of treaty has the duty to consult with Māori.

Officials decide on a **“sliding scale”**:

- If there is an issue of relevance to Māori
- How important it is
- What level of engagement is required
- What is reasonable
- How to weigh it up with other interests

Assumes that

- officials understand there are issues,
- have political will to engage,
- are willing to act on what Māori say.

Crown refuses to review the 2001 Strategy for Engagement with Māori on International Treaties

Many examples of failure.

Strategy was criticised in Wai 262, Wai 2522, Trade for All Group report.

TPK urged priority to review the Strategy as part of the MFAT's secret review of international treaty making and Cabinet paper (which overtook TPK's Te Pae Tawhiti)

MFAT rejected that, so 2001 "Sliding Scale" Strategy remains.

Ngā Toki Whakarururanga's

Mediation Agreement in Wai 2522
(TPPA) Inquiry promises

**"genuine and meaningful
influence"**

over trade policy and negotiations

Crown remains in total control of information, access is subject to **confidentiality**, must be kept **secret** from other Māori. The other negotiating state has to agree even to that.

Crown then decides **what action** is taken on advice, if any, and and **what protection** is provided for Te Tiriti responsibilities, obligations and rights.

**Crown/MFAT
conducted a
secret review of
international
treaty making
2021-2022**

*“**incremental & pragmatic** change” would*

*“best balance the need to **address the recommendations and improve outcomes** of the international treaty process for Māori and the public,*

while avoiding the need to consider proposals that would require significant constitutional change, which could be challenging to navigate.”

Cabinet paper ...

... does not seek to substantially change the Crown's prerogative,

or address fundamental issues of constitutional balance of the Executive's role in negotiating and concluding treaties with Māori interests as Tiriti partner.

This would require a first principles review which I am not proposing at this time.

*“... this process **may elicit calls** from civil society and others **to go further** and provide a greater role for Parliament ...*

*It is **also likely that the changes proposed in this paper will not fully meet the expectations of some Tiriti partners who advocate for systemic constitutional change**”.*

Even this “incremental” and “pragmatic” paper never reached the Cabinet.

A Tiriti-based solution

**The Crown says,
correctly, that the
state must speak
with one voice
internationally**

There is no reason why the State of Aotearoa New Zealand cannot **speak with one voice that reflects the rangatiratanga/ kāwanatanga relationship envisaged in He Whakaputanga me Te Tiriti.**

That is what constitutional transformation in the international treaty space would look like.

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