

Mana and Constitutional Transformation of Treaty Making

NGĀ TOKI
WHAKARURURANGA





Ko te Tuatahi

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki, kihai i uru ki taua Wakaminenga, ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te Kawanatanga katoa o o ratou wenua.

Ko te Tuarua

Ko te Kuini o Ingarangi ka wakarite ka wakaae ki nga Rangatira, ki nga Hapu, ki nga tangata katoa o Nu Tirani te hino Rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu, ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua, ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te Tuatoru

Hei wakaritenga mai hoki tenei mo te wakaetanga ki te Kawanatanga o te Kuini, ka tiakina e te Kuini o Ingarani nga tangata Maori katoa o Nu Tirani. Ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

The Treaty of Waitangi was first signed on the afternoon of the 6th of February 1840, in the Bay of Islands at Waitangi.

It did not arise from warfare, as a Treaty of surrender, but was signed in a spirit of goodwill under the reigning conditions of Peace.

The Treaty was a Declaration of the traditional Maori rights of absolute authority over Aotearoa. Within this authority the signing Chiefs generously permitted the Crown a role.

The Treaty document is a statement of this concession and forms the fundamental constitutional basis of the Nation.

The Treaty was signed by the representative Chiefs, in the belief that it documented the natural and inalienable Maori rights of land and resource ownership, self determination and the Maori way of life. Simultaneously the Treaty assured Maori of continuing authority and unrestricted access, over all natural resources of Land, Sky and Sea, including Forests, Lakes and Waterways.

Additionally, the Treaty guaranteed to Maori the same protection and rights as British citizens. It permitted the Crown to act as the sole agent in land dealings. It also required the Crown to establish a lawful and just system of **shared Governance**, in compliance with the Treaty conditions.

The Treaty of Waitangi re-stated and re-inforced the position and authority of the Chiefs. It confirmed their right to exercise shared control over the powers of Governorship granted to the Crown.

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MANA AND THE POWER TO MAKE INTER-NATIONAL TREATIES

Who has the power to make treaties between nations or polities is a fundamental constitutional question. As Dr Moana Jackson explained in his clear, calm and meticulous way to the Waitangi Tribunal in numerous inquiries, rangatira never gave up their inherent treaty-making power to the Crown through Te Tiriti o Waitangi or in any other way. It was, and remains, an inherent and inalienable element of mana. Recognising that mana motuhake and tino rangatiratanga include the creation and maintaining of relationships with other polities is essential to honouring Te Tiriti o Waitangi me He Whakaputanga o te Rangatiratanga o Nu Tireni.

Yet, the Crown claims the Executive (in practice, Cabinet) has a “royal prerogative” power to negotiate international treaties that do not even need the consent of its Parliament. Today’s international treaties are far reaching. They cover subjects as diverse as Indigenous Peoples’ rights, climate change, workers’ rights, refugees and nuclear disarmament as well as commercial interests in trade, foreign investment, intellectual property rights and taxation. All have impacts within Aotearoa, and on Māori responsibilities and rights and the Crown’s obligations under Te Tiriti o Waitangi. Yet, Māori are denied a seat at the decision-making table, while the Crown remains unaccountable for what is negotiated, with whom and with what consequences.

This paper makes the argument for constitutional transformation in international treaty-making that is sourced in He Whakaputanga me Te Tiriti o Waitangi. It lays the constitutional foundations for ngā Hapū to exercise their mana in the international domain and the negotiation, adoption and implementation of international trade and investment treaties with other polities, as they see fit. This contrasts to the Crown’s unilateral assumption of sovereignty and the “prerogative” it claims over international treaties, sourced in the ideologies of Empire, including the Doctrine of Discovery and legal imperialism. The nexus between these historical concepts and contemporary treaty-making is critical to understanding the basis for constitutional transformation in Aotearoa today.

Much of the initial discussion draws on Dr Moana Jackson’s evidence from various Waitangi tribunals on the concepts and sources of power in the international domain. That evidence is largely quoted verbatim, so that he is always speaking. The deconstruction of the Doctrine of Discovery also draws on the recent work *Maranga Mai* and the draft National Action Plan Against Racism for Te Kāhui Tika Tangata/The Human Rights Commission, which the National Iwi Chairs’ forum withdrew from in 2024 after the National/ACT/New Zealand First Coalition Government downgraded its focus on institutional and colonial racism.

The next section provides a precise contextual analysis of the Waitangi Tribunal's limited consideration of international treaties and treaty making power to date. This starts with Te Paparahi o te Raki (Wai 1040) and the intentions of rangatira when they sought the protection of the English King in He Whakaputanga in 1835, and the limited authority of kāwanatanga in the international sphere that was agreed by the rangatira under Te Tiriti in 1840.

Two contemporary inquiries, Wai 262 on mātauranga Māori and the Wai 2522 on the Trans-Pacific Partnership Agreement, take different approaches to the Crown's authority, with Wai 262 calling for a more rigorous approach from the Crown and Wai 2522 ultimately deferring to Te Raki Stage 2 and the Tomokia Ngā Tatau Matangireia/Constitutional Kaupapa Inquiry (Wai 3300) to decide the question. That review leads into analysis of the Crown's Statement of Position in Wai 3300, including on the powers of treaty making.

Yet, at the same time as the Tomokia Ngā Tatau Matangireia inquiry proceeds, the Tribunal has been hearing urgency claims over the Treaty Principles Bill, a review of all references to the Principles of the Treaty in legislation, and a Regulatory Standards Bill, all the making of the ACT Party in coalition deals with National to form a short-term three year government. Submissions in the Treaty Principles Bill inquiry are presented and evaluated as further evidence of the imperative for genuine constitutional transformation.

The final section pieces together recent moves by the Ministry of Foreign Affairs and Trade to resist challenges to the Crown's claimed prerogative during a secret review of the treaty-making process. Even its mild proposals for reform ended up not being advanced through to the Cabinet. The Crown's determination to rule out any discussion of constitutional issues during that review highlights the challenges in achieving constitutional transformation that gives effect to the promises and expectations of Te Tiriti o Waitangi in Aotearoa today.

HE WHAKAARO HERE WHAKAUMU MŌ AOTEAROA



THE REPORT OF MATIKE MAI AOTEAROA - THE INDEPENDENT WORKING GROUP ON CONSTITUTIONAL TRANSFORMATION.

MANA AND THE UN-CEDED RIGHT TO TREAT

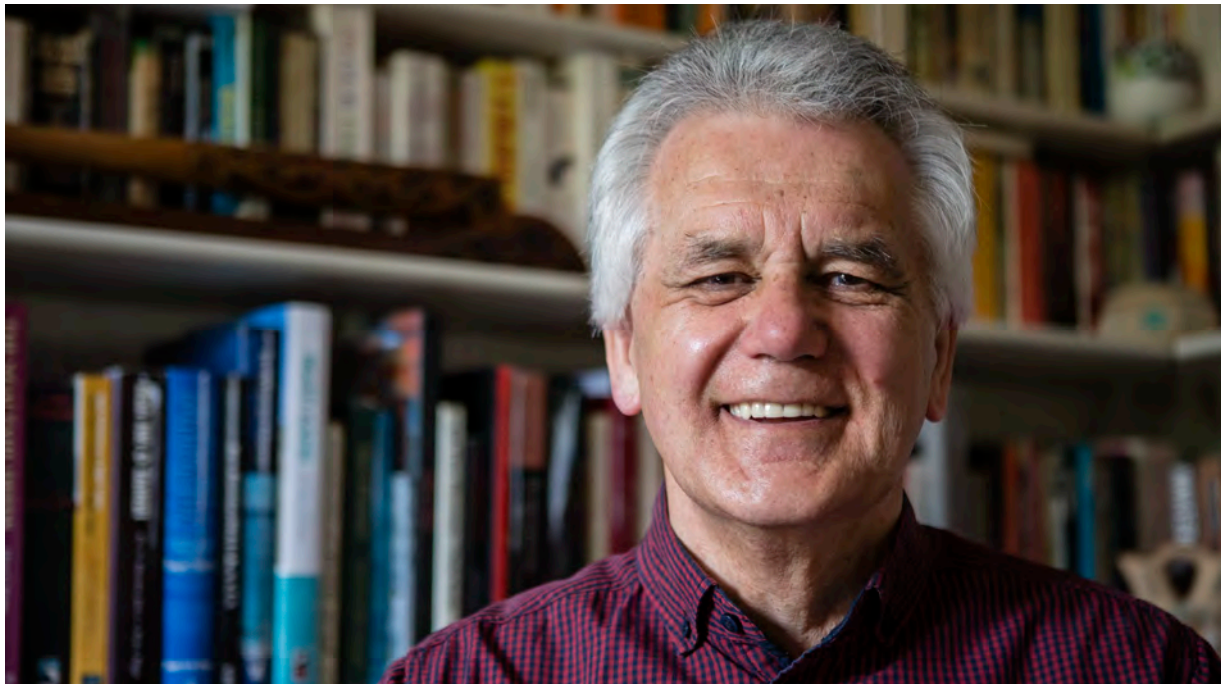
The Waitangi Tribunal in the Stage 1 Report of the Paparahi o te Raki claim (Wai 1040), *He Whakaputanga me Te Tiriti*, found that the rangatira who signed Te Tiriti o Waitangi did not cede their sovereignty. That was reiterated in the Stage 2 report of *Rangatiranga me Kāwanatanga*.

Other Hapū and Iwi did not sign Te Tiriti. Some entered into unique agreements with the Crown, including Te Arawa and Ngāi Tuhoe, which reflected the treaty making authority of those rangatira; these agreements have their own history of breach based on the same usurpation of their mana and rangatiratanga by the Crown.

Nowhere across all of Aotearoa is there any valid basis to claim that Hapū and Iwi transferred their sovereignty to the Crown, including their mana in relationships between polities and the power to make treaties. In Dr Moana Jackson's words, the signatories to Te Tiriti:

... did not cede their authority to make and enforce law over their people or their territories. Rather they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal – equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapu and territories, while Hobson was given authority to control Pākehā.

Because mana could not be ceded in tikanga or Māori legal terms it is in fact axiomatic that the authority and responsibility of Iwi and Hapū to treat could also not be ceded. It is similarly axiomatic that the authority to treat could not be delegated or subordinated in a treaty to that of another polity. If it was impossible and indeed culturally incomprehensible for one Iwi to permit another to treat on its behalf it is at best illogical to assume that Iwi would allow the Crown to do so. At worst such an assumption is a breach of Te Tiriti.



Moana Jackson, photo by Aaron Smale.

The Papa or Foundations of Māori Treaty Making

Dr Jackson's evidence in the Wai 2522 Claim on the Trans-Pacific Partnership Agreement (TPPA)¹ set out *ten papa* or foundations for the continued exercise of rangatiratanga in the international domain, and to deconstruct the Crown's rationale for the assumption of exclusive powers of international treaty making:

1. The tikanga-based concept of power that Iwi and Hapū have defined as mana, and which they have exercised as a unique, absolute and independent constitutional authority.
2. The key constituent parts of mana, including in particular the right to treat. This right is enjoyed by all polities as a necessary component of political and constitutional authority and was clearly exercised by Iwi and Hapū for centuries prior to 1840.
3. The use of treaties in tikanga (Māori law) and diplomacy as a means of cementing relationships, making peace, securing trade, negotiating borders, and protecting the nature and exercise of mana itself.
4. The notion of treaty making as an inherent and inalienable consequence of any independent political and constitutional authority, including mana.
5. The contrasting Pākehā concept of power known as sovereignty, and the concomitant constituent authority it carries to treat with other sovereign polities as defined in Pākehā politics and law.
6. The development in English and international law of what may be called the notion of "petty sovereignties" that colonising states used to rationalise treating with, and subsequently dispossessing, Indigenous Peoples who were regarded as culturally, racially and politically inferior.
7. The development of a distinct colonising jurisprudence to rationalise and "legalise" all aspects of the dispossession of Indigenous Peoples, including the links between the colonising right to treat with "petty sovereignties", in order to secure a purported cession of Indigenous authority and the subsequent claim of a colonising right to unilaterally treat with others.
8. The refinement of that law and its underlying ideologies in the New Zealand colony and the continuing and damaging effects they have had on Māori.
9. The meaning and parameters of kāwanatanga in Te Tiriti as understood from Iwi histories, and the Tribunal's formulation in the Paparahi o Te Raki hearing where it is described as a discrete "sphere of influence" that the Crown has consistently and wrongly assumed includes a unilateral Crown authority to treat with others.
10. The continued misuse of that purported authority in the particular negotiations for the TPPA, which constitutes a specific breach of Te Tiriti.

¹ Brief of Evidence of Moana Jackson to the Waitangi Tribunal Inquiry into the Trans-Pacific Partnership Agreement, Urgency hearing, Wai 2522, 26 February 2016 at [17] - [30].

Tikanga, Mana And The Right To Treat

Relations and diplomacy between nations or polities, and cementing those relationships through formal agreements, has always been and remains integral to the independent constitutional and political authority of Iwi and Hapū, sourced in mana and exercised in accordance with tikanga:

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 part of the power that societies have always accepted as fundamental to both their independence and their necessary interdependence with others.

Iwi and Hapū have been no different. However the particular cultural imperatives of the right to treat within Māori society were inevitably defined by the wider relationship between tikanga as “The first law of this land,” and mana as the collective political and constitutional authority that vested in Iwi and Hapū.

Tikanga was relationship and values-based and sought to regulate how people should relate to each other and the wider world. It was bound by the ethics of what ought to be in a relationship as well as the values that measured the tapu and mana of individuals and the collective. It set the prescriptive guidelines for what is legal (tika) behaviour and what is not.

Just as our people lived within the relationships of their whakapapa as a daily matter of political and social life so we lived within tikanga as the first law. In that context we in fact lived with the law rather than under it, and the law existed to protect who and what we were while recognising the importance of the most intimate relationships within our own polity as well as with those of other Iwi and Hapū.

Self-Governing Polities As Treaty Makers

Relationships and agreements between nations, including Hapū and Iwi, are by definition informed by the constitutional notions and political processes and practices that govern the polity:

The jurisprudence, institutions and practices of law, and thus of treating, were uniquely developed by each Hapū and Iwi, but they also shared a common philosophical and value base. As a result our tīpuna lived in an ordered and organised society that was both independent and interdependent. We were never a law-less nor an isolationist people.

And just as all societies learn they cannot live in a law-less state, so our people also learned that law and social order cannot be maintained in a power vacuum. We therefore developed political and constitutional ideas and practices to govern ourselves within the distinct polities of Iwi and Hapū.

In this context government is the process or system that people choose to regulate their affairs and a constitution may be understood as the code upon which government will proceed, akin to the kawa of the marae which outlines the way the marae will be governed.

A natural corollary of government is citizenship which is simply membership within a self-governing polity. The membership of the polity always carries reciprocal citizenship obligations and rights and in our history it is clear that each Iwi and Hapū defined them within tikanga and the relationships of whakapapa.

In doing so we developed all of the components of an independent constitutionalism, including the right and capacity to treat and to create or enhance relationships through the act of treaty-making. That constitutionalism was a unique cultural creation, just as it is in every polity.

<https://esra.nz/constitutional-transformation-matike-mai/>

Constitutional Transformation and the Matike Mai Project: A Kōrero with Moana Jackson

In this interview, conducted in December 2017 by Helen Potter, Moana Jackson discusses the constitutional transformation of Aotearoa New Zealand.



9 April 2018

Download this piece as a [PDF](#).

Helen Potter: What led to Matike Mai, how did it go from an idea to an actual project?

Moana Jackson: Like everything else Matike Mai has a whakapapa. The immediate catalyst came from a number of discussions at the Iwi Chairs Forum, at a national hui on Māori development, and various other workshops around the country. A common focus of these hui was the frustration with what are called Māori perspectives or interests so often being ignored by the Crown and the difficulty in getting any real expression of rangatiratanga recognised.

Economic & Social Research Aotearoa

Concepts Of Power And Sites Of Power

This constitutional authority to treat is an abstraction that needs to be operationalised by determining who, how and where that power is to be exercised. In explaining the components of the right to treat, Dr Jackson observes that each component

*... is, however, based on what may be called a “**concept of power**” and a corresponding “**site of power**”.*

*A **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.*

Throughout our history that concept of power was known generically as mana, although it is described in some Iwi and Hapū as mana motuhake, mana taketake, or mana torangapu. More latterly it was called rangatiratanga or tino rangatiratanga.

*A **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.*

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. In some rohe it was also on occasion vested in properly constituted huihuinga or whakaminenga involving a collective of Iwi and Hapū.

Through such institutions the concept of power was given effect and the exercise of power was mandated through the sanction of law. The tenure of ariki and rangatira was always subject to how well they preserved and defended the wellbeing of the people and the whenua, and how well they ensured their protection. John Rangihau once described the authority and status of rangatira as being “people bestowed” and for that reason it was ultimately exercised for and by them.

The concept and site of power that were encapsulated in the term “mana” reflected the collective aspirations shared across Iwi and Hapū. Although there were often practical differences between Iwi and Hapū in the actual manner of its exercise it always implied an absolute independence that Dame Mira Szazy once defined as “the self-determination” implicit in “the very essence of being, of law, of the eternal right to be, to live, to exist, to occupy the land.”



Specifics Of Power

Having identified the sites of power, Dr Jackson's next step was to articulate the scope and specific components of that power.

*Like all concepts of power, mana or tino rangatiratanga is made up of a number of different but inseparable constituent parts that may be called the **specifics of power**. These included:*

- 1. **The power to define** – that is, the power to define the rights, interests and place of both the collective and of individuals as mokopuna and as citizens;*
- 2. **The power to protect** – that is, power to be kaitiaki, to manaaki and maintain the peace, and to protect everything and everyone within the polity through an ultimate authority to wage war when necessary;*
- 3. **The power to decide** – that is, the power to make decisions about everything affecting the wellbeing of the people;*
- 4. **The power to reconcile** – that is, the power to restore, enhance and advance whakapapa relationships in peace and most especially after conflict through processes such as hohou rongo.*
- 5. **The power to develop** – that is, the power to change in ways that are consistent with tikanga and conducive to the advancement of the people; and*
- 6. **The power to treat** - that is the power to negotiate and commit to formal collective agreements with other polities.*



Supplied by John Miller

Tikanga Guides The Specifics Of Power

The tikanga that guides these specifics of power was and is sourced in fundamental values and precedents. Pou Whakatupu Mātauranga Ani Mikaere of Ngāti Raukawa ki te Tonga explains that,

while there may be a degree of overlap between Western definitions of what constitutes a system of law and the content of tikanga, most authorities acknowledge that tikanga is in fact a broader term. ... Justice Durie has identified a series of “conceptual regulators of tikanga”, which he sees as “providing the fundamental principles or values of Maori law”. They include such values as whanaungatanga, mana, manaakitanga, aroha, mana tupuna, wairua, and utu.²

Tikanga provided the values, processes and laws by which Iwi and Hapū co-existed or resolved their disputes, not always peacefully. In a commentary written in 1990 following consultation with Iwi on the Draft United Nations Declaration on the Rights of Indigenous Peoples, Dr Jackson explained how the retention of ritenga and tikanga Māori was integral to tino rangatiratanga and to the protection of one Hapū or Iwi as a collective against threats from others:

The rights which Maori possess as indigenous peoples are found in the tenets of Maori law and were exercised as personal, whanau, hapu and Iwi prerogatives. However the rights which issued to individuals did so only because they were part of a wider group. ... In exercising the rights of Rangatira in relation to Iwi members, the leaders acted within a framework of rules derived from the precedents and sources of ancestral law and mana. In protecting the welfare of the Iwi and its members against other Iwi, they asserted their rights of Iwi Rangatiratanga handed down through the same weave of divine and ancestral precedent. The “legal” rights of the individual, and the constitutional or political rights of the collective, were essentially inseparable.



7 May 2012

Moana Jackson, Maori lawyer, addresses the Eleventh Session of the UN Permanent Forum on Indigenous Issues, “The Doctrine of Discovery: Its Enduring Impact on Indigenous Peoples and the Right to Redress for Past Conquests”.

² Ani Mikaere, ‘The Treaty of Waitangi and Recognition of Tikanga Maori’, in Michael Belgrave et al. eds, *Waitangi Revisited. Perspectives on the Treaty of Waitangi*, Oxford, 2004, p.331



Protest at Parliament over Seabed & Foreshore. Source: wikimedia commons. Photo: Armon

The Mana To Make Treaties Was, And Is, Inalienable

As confirmed in *Te Paparahi o Te Raki*,³ *Te Urewera*⁴ and *Te Rohe Potae*,⁵ the mana of rangatira and the exercise of rangatiratanga on behalf of Hapū and Iwi has never been given away. Nor, says Dr Jackson, could it be:⁶

This expansive reach necessarily presupposed that mana was an absolute political and constitutional power. It was absolute because it was absolutely the prerogative of Iwi and Hapū, but it was also absolute in the sense that it was commensurate with independence. It was of course always bound by tikanga but it was a totalising authority that could not be tampered with by that of another polity.

Mana was in fact absolutely inalienable. It was a taonga handed down from the tīpuna to be exercised by the living for the benefit of the mokopuna, and 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 fact that there is no word in Te Reo Maori for ‘cede’ is not a linguistic shortcoming but an indication that to even contemplate giving away mana would have been legally impossible, politically untenable, and culturally incomprehensible.

And just as mana as a totalising authority could never be ceded, so its constituent parts were inalienable. Thus the right to declare war was as jealously guarded as the right to hold the land and would never be ceded or delegated to another polity to exercise on one’s behalf. It would have been impossible for example for Ngāti Kahungunu to delegate its authority to maintain peace or declare war to say Ngai Tahu.

Similarly the right to treat was also fundamentally inalienable and would never, could never, be ceded or delegated to another polity to exercise on one’s behalf. It would have been impossible for example for Ngāti Manawa to delegate its authority to treat and make agreements with others to say Ngāti Mutunga.

At a more personal level the citizenship rights of a mokopuna were also inalienable and unable to be subordinated to that of another polity. It would have been impossible for example for Tuhoe to ever accept that its mokopuna could be made “subject” to say Ngāti Porou or have their rights and obligations subordinated in an agreement to which their polity had not been a party.

³ Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Report on Stage 1 of the Te Paparahi o te Raki inquiry, Wai 1040, 2014.

⁴ Waitangi Tribunal, *Te Urewera*, Wai 894, 2009.

⁵ Waitangi Tribunal, *Te Mana Whatu Ahuru*. Report on Te Rohe Potae Claims, Wai 898, Parts I and II, 2018.

⁶ Brief of Evidence of Moana Jackson, Wai 2522, 26 February 2016 at [31] - [35].

THE CROWN'S PRETENDED POWER OF SOVEREIGNTY & TREATY MAKING

It was and is perfectly possible for different concepts of power and sites of power that are possessed and exercised by different nations to peacefully co-exist, as envisaged by Te Tiriti, if each recognises the other and seeks to develop a means for reciprocal recognition and mutual respect. But the ideological rationale that supported and continues to underpin the Crown's assertion of exclusive sovereignty denies that possibility.

Sovereignty: the Crown's concepts and sites of power

Dr Jackson analysed the claims to constitutional authority under imperial Europe and the Westminster system in terms of both the **concepts** of power and **sites** of power:

Polities in Europe also developed their own culturally distinct concept of power which they called "sovereignty". It naturally reflected their histories and culture, and after the consolidation of (Catholic and then Protestant) Christianity it reflected in particular the centralised hierarchy of the Church and its monist beliefs in a single all-powerful god.

The Westminster constitutional system developed in the particular cultural circumstances of England. Its hierarchical structure headed by a Crown or sovereign is a cultural product that grew out of the historical tensions between the monarchs and those deemed to be below or in opposition to them.

It is a distinct artefact that over the centuries has sought to accommodate the long-disputed interests of the nobility, the Church and the "lower classes" while preserving the notion of individual property rights. Its concept of power became known as sovereignty which was exercised in a site of power known as Parliament.⁷

The ideological rationale for the Crown's assertion of sovereignty was therefore not unique to the English. It drew on **concepts** of power that were developed in Europe over several centuries.

Although the concept of sovereignty is generally understood as an English or Westminster construct it was of course first defined in France by the political philosopher Jean Bodin in 1569. His definition is still apposite today and still marks the distinctive cultural ethos that is inherent in the Crown notion of political and constitutional authority.

Bodin's view of sovereignty was essentially based in a belief that it marked a hierarchy of progress from societies of apolitical barbarism (such as those of the recently "discovered" Indigenous Peoples in the Americas) to those countries in Europe with a "civilised" constitutional order. It presumed that proper political power could only exist once "man ... purged himself of troubling passions" and moved up "the great chain of being ... and its hierarchical order".

Once a peoples became "civilised" they attained the reason to develop a concept of power vesting in a sovereign, "a single ruler on whom the effectiveness of all the rest depends". Sovereignty was thus the "most high ... and perpetual power over the citizens" and it was that power "which informs all the members and ... to which after immortal God we owe all things". It was a hierarchical ideal of constitutionalism that could only be held by civilised peoples.⁸

The **site** of that power was located in a single sovereign:

The site of that power throughout Europe was the monarch or alternatively the "monarch in Parliament" which had absolute authority and dominion over the land and its peoples. It was that culturally-defined and "civilised" notion of constitutional authority or "dominion over" which the Crown of course brought to Aotearoa after 1840.

⁷ Brief of Evidence of Moana Jackson, Wai 2522, 26 February 2016, at [46] – [48].

⁸ Brief of Evidence of Moana Jackson, Wai 2522, 26 February 2016, at [49] – [51].

It was therefore an inalienable and absolute authority which was exercised within a site of power that was most often based upon a single sovereign – a King, Queen, or Emperor whose power was ordained by god. Over time that site of power was modified in England in particular within a constitutional monarchy framework as “The King (or Queen) in Parliament”.

However the inalienability and the singularity of its absolute power remained its most essential component.⁹

What Dr Jackson calls the “**specifics** of power” under Crown sovereignty were both domestic and international.

Under that system the various constituent parts of sovereignty were also inalienable including the authority to treat and the obligation to maintain the peace and the right to declare war when necessary. Treaty-making was an honourable expression of the sovereign’s will and like the act of mahi tūhono it was an authority that could never be ceded or delegated to another polity to exercise on the sovereign’s behalf since only the sovereign was ordained by god to make treaties just as he or she was ordained by god to declare war.

Subordinating The Other

Te Tiriti o Waitangi assumed that rangatiratanga and tikanga would continue to prevail, at least for Māori, and could co-exist with the Crown’s application of its own law to its own. To repeat Te Raki, the relationship of rangatiratanga and kāwanatanga was one of equals, while having different roles and spheres of influence.¹⁰

Empire could not envisage or permit such mutual respect and co-existence, and developed an ideology that was used to justify repression and even extermination of “others” in the name, and through the instruments, of its own law:

When Christopher Columbus stumbled into the Caribbean in 1492 he unleashed a frenzy of European colonisation in the Americas that eventually led to the world-wide dispossession of millions of Indigenous Peoples. It also led to the creation of a colonising jurisprudence in which the purported reason of the law in countries from England to Spain became the unreasoned rationalisation for the violent and unjust taking of the lives, lands, and power of innocent peoples. Colonisation spawned a new and pernicious legalism that was eventually brought to Aotearoa.

Its foundation 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. Among its many deliberately engineered falsehoods was the claim that Indigenous People had neither a “real” law nor a “real” capacity to “properly” govern themselves which led in turn to a number of doctrines which attempted to justify everything from the actual taking of indigenous lands to a definition of “aboriginal rights” that were necessarily subordinate to the rights of the colonisers. They have neither reason nor justice but are rather a kind of verbal gymnastics based on little more than a will to dispossess and ultimately a certain racist illogicality.¹¹

In his seminal commentary on colonisation and imperialism, Orientalism, Egyptian historian Edward Said describes the Western concept of the Oriental as the creation of “a sovereign Western consciousness out of whose unchallenged centrality an Oriental world emerged.”¹² The “Other” is viewed only from within this “intellectual and imaginative territory” of the West and its dominant social, economic, cultural, political and legal structure. That internal consistency makes perfect sense from the Western perspective, while it imposes an alien and oppressive conceptual framework on the Other.

⁹ Brief of Evidence of Moana Jackson, Wai 2522, at [52] – [54].

¹⁰ Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, Wai 1040, at pp. xxii and 527.

¹¹ Brief of Evidence of Moana Jackson, Wai 2522, 26 February 2016 at [55] – [56]

¹² Edward Said, *Orientalism*, London, Penguin, 1978, p.8.

Legal Imperialism

The Crown's claims to sovereignty and the exclusive prerogative to make treaties, and its denial of mana motuhake and the exercise of rangatiratanga in the international domain, rest on several enduring colonial fictions.

One is sourced in the ideology of colonial law. The colonial project, wherever it was pursued, required a state apparatus, including a legal system, through which to achieve its economic, political and ideological objectives. The institutional form, ideology and doctrinal tools of that legal system broadly replicated those operating in the metropole, but were adapted for local conditions.

A paradigm case is the "intellectual territory" of law that was imposed in British colonies. As expressed by Sir William Blackstone, English law was the birthright of Englishmen.¹³ Wherever they went in the Empire, they expected to be governed by English law and English courts. The mere accident that they inhabited one colony rather than another, or lived at Home, was irrelevant. This, in turn, was the law by which all Others in the colony would be judged.

English law defined what was natural, civilised and universal. Its absence was equated with anarchy or untamed nature. Resistance, redefined as deviant behaviour, could legitimately be disciplined by the colonial power, even if it broke its own tenets of liberal law, like freedom, equality or protection of property. Notable liberal John Stuart Mill argued in his essay *On Liberty* that: "Despotism is a legitimate mode of government in dealing with barbarians provided the end be their improvement".¹⁴

Law of Empire could not envisage a system of law other than its own. Dr David Williams identified parallel experiences of colonial law in Tanganyika (now Tanzania) and Aotearoa New Zealand:

*when one studies colonial legal systems of the British Empire one is confronted with unambiguous evidence that state power was exercised as an instrument of monocultural imposition and legal domination.*¹⁵

As Moana Jackson explained in relation to tikanga:

*Colonisation demanded, and still requires, that Maori no longer source their right to do anything in the rules of their own law. Rather they have to have their rights defined by Pakeha; they have to seek permission from an alien word to do those things which their philosophy had permitted for centuries.*¹⁶

Tikanga Māori was redefined as 'custom', a lesser, malleable and temporary set of rules, decision-making procedures and administrative mechanisms that could be manipulated to serve the objectives of colonization.

The imperialist mind-set was epitomised in colonial New Zealand in a booklet explaining the laws of England to Māori, compiled for Governor Gore-Browne in 1858 by the drafter of the Native Lands Act 1865, and later chief judge of the Native Land Court, Francis Dart Fenton:

The people of England were not so fortunate in days of old as are the people of New Zealand now. When they began to frame for themselves laws, in generations long past, they had no example to direct them. They had to open for themselves a road through the thick bush; sometimes right, sometimes wrong; try it here, and find it wrong; try it there; try it on the right hand, if wrong, try it on the left hand; where should the right road be found? ...

*In the present day, the Maori is more fortunate. A path has been cleared and opened through the forest, it lies before him; he has but to walk in it. A wise and generous people, the English, have settled in his land; and this people are willing to teach him and to guide him in the well-made road which themselves have traveled for so many generations; that is, in the path of the perfected law – in the path by which themselves have attained to all the good things which they now possess; wisdom, prosperity, quietness, peace, wealth, power, glory and all other good things which the pakeha possesses. Let there now be no doubt nor hesitation, but be patient and earnest and follow the direction of those who have been appointed to shew you the right and finished path.*¹⁷

¹³ William Blackstone, *Commentaries on the Laws of England*, Book 1, Oxford, Clarendon Press, 1765, pp.104-5

¹⁴ J.S. Mill 'On Liberty', in *Utilitarianism, On Liberty, Essays on Bentham*, London, Fontana, 1962, p.136.

¹⁵ David Williams, 'The Recognition of "Native Custom" in Tanganyika and New Zealand. Legal Pluralism or Monocultural Imposition' in Sack and Mincham (eds) *Legal Pluralism*, ANU, Canberra, 1986, p.20

¹⁶ Moana Jackson, 'The Treaty and the Word', 6 quoted in Ani Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Maori', p.342 fn87.

The same supremacism found judicial expression in Prendergast CJ'S judgement in *Wi Parata v Bishop of Wellington*: Māori were deemed to have no law because they did not maintain institutional structures and practices that replicated those of the English common law:

*On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. ... The Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, these rights and duties which, jure gentium, vest in and devolve upon the first civilized occupier of a territory of thinly peopled by barbarians without any form of law or civil government.*¹⁸

Prendergast is a pariah today. Yet his sentiments have parallels in relatively recent case law. In 1979 Blackwood SM rejected the cultural defence of He Taua, a group of young Māori and Pacific activists who faced charges of riot and assault for stopping engineering students from denigrating the haka as part of their capping day stunts, in very similar terms:

However offended these defendants may have felt, that does not entitle them to take the law into their own hands

which is exactly what they chose to do. They chose to operate a kind of lynch-law, a concept unacceptable to our land and, I believe, unacceptable in any civilised society. We are one people, of differing religious beliefs, cultural heritages and racial backgrounds. We are governed by one law. Every civilised society has rules by which it lives and it makes those rules to that the society may survive; without those rules the law of the jungle would operate.

*Commonly in these courts we refer to it as the rule of law and it is the duty of the court to uphold the rule of law. Expressed simply the rule of law is that every citizen of this country is equal before the law, but is equally subject to that law. There cannot be one set of laws, for example, for one ethnic group and another set of laws for others. If the rule of law is not upheld, we have anarchy. If we have anarchy then civilised society will perish.*¹⁹

To bring this back to international treaty making, the Crown's claim to prerogative rests on the denial of mana and tikanga as legitimate concepts, sites and specifics of power that are intrinsic to mana and remain vested in Hapū under Te Tiriti o Waitangi.



Members of He Taua outside court, including Hone Harawira on the far right, next to his sister Hinewhare, Zena Tamanui and James Pasene on the left and Ben Dalton at the centre, his hair in a top knot. Image: supplied/private collection.

¹⁷ Francis D. Fenton, *The Laws Compiled and Translated into the Maori Language by Director of His Excellency Colonel Thomas Gore-Browne, C.B. Governor of New Zealand*, Auckland, 1858.

¹⁸ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 at 77.

¹⁹ *Police v Dalton and others*, unreported, Magistrates Court, Auckland, June 1979, per Blackwood SM.

The Racist “Doctrine Of Discovery”

Perhaps the most profound and enduring imperial fiction is the “doctrine of discovery”, as exposed in Dr Moana Jackson’s evidence to several Waitangi Tribunal inquiries, his and Tinā Ngata’s work on the Doctrine of Discovery,²⁰ the report for the tangata whenua caucus of the National Action Plan Against Racism for Te Kāhui Tika Tangata/The Human Rights Commission and the accompany draft Cabinet paper on renouncing the doctrine, which was never presented.

Both Moana Jackson and Tina Ngata have intensively researched and deconstructed the Crown’s conceptualisation of its own right to sovereignty and its consequential treaty-making authority, which they trace back to the “doctrine of the right of discovery”. According to Dr Jackson this

presumed that the mere “discovery” of indigenous lands by someone from Europe validly transferred title in said land to the “discoverer”. The doctrine was of course limited in its application to indigenous “others” and no European jurist ever suggested for example that an English explorer could have a valid claim to France simply by asserting that he had “discovered” it.²¹

Maranga-Mai, the report prepared by the Tangata Whenua Caucus for the National Action Plan Against Racism²² for Te Kāhui Tika Tangata/ The Human Rights Commission provides a concise history of the doctrine, sourcing it from the

edicts of Papal Bulls delivered by Catholic Popes from the mid-1400s onwards. The Dum Diversas (1452) encouraged the conversion of new peoples to Christianity, while also justifying, if necessary, their enslavement, subjugation, or destruction as “enemies of Christ”. This doctrine birthed virulent colonial racism which, combined with white supremacy, matured into the colonists’ manifest duty.

The Romanus Pontifex (1455) legalised the taking of lands from Indigenous peoples in new worlds without their knowledge or consent. Alongside other Papal Bulls, this emerged as the Doctrine of Discovery that articulated a violent European Christian entitlement to seize “discovered lands”. This led to the destruction of Indigenous economies and “the genocide and deaths of millions of men, women and children”.²³

The report explains how the “doctrine of discovery” was integral to British claims to annex Aotearoa:

Aotearoa New Zealand was first colonised by the British Crown under an international legal principle known as the Doctrine of Discovery. This fifteenth century Papal Bull asserted that non-Christian, Indigenous peoples inhabiting ‘discovered lands’ were enemies of God, less human than Europeans and therefore their land could be taken from them. This was key to the authority by which the British Crown first gained its sovereign and property rights in Aotearoa. ...

In Aotearoa, the Doctrine of Discovery “underpinned the European belief in their right to set up government sculpting societal reasoning of European superiority over all who are non-white and non-Christian alongside a supreme European entitlement to all non-white, non-Christian lands and resources.” ...²⁴

In similar vein, Dr Jackson observed how

... such arrogant presumptuousness marked all of colonising law which the Lumbee jurist Robert Williams has described as the “discourses of conquest” devised solely to give some “veneer of legitimacy” to an essentially illegitimate dispossession. By the 18th century such ideas were fundamental to Britain’s own colonising jurisprudence and were inevitably brought to New Zealand. Thus for example James Cook’s Secret Admiralty Orders in 1769 included an instruction to claim whatever lands he encountered by right of discovery, which he subsequently did at Whitianga and Motuara Island in what is now Queen Charlotte Sound.

Later in 1840, even while the Treaty of Waitangi was still being signed, Hobson issued proclamations taking the land in the north by right of discovery²⁵ while one of his functionaries did the same in the South Island. The discovery proclamations were part of the colonising legal theatre which purportedly gave the Crown its “veneer of legitimacy” in this land.

²⁰ Tina Ngāta, *Kia Mau: Resisting Colonial Fictions*, Rebel Press, 2019. Available at <https://tinangata.com/wp-content/uploads/2020/06/kia-mau-resisting-colonial-fictions.pdf>

²¹ Brief of Evidence of Moana Jackson, Wai 2522, 26 February 2016 at [59].

²² Tangata Whenua Caucus of the National Anti-Racism Taskforce, *Maranga-Mai*, Te Kāhui Tika Tangata/ The Human Rights Commission, November 2022. Available at https://tikatangata.org.nz/cms/assets/Documents/Reports-and-Inquiry/Tangata-Whenua-reports/Maranga-Mai_Full-Report_PDF.pdf

²³ *Maranga Mai*, p.30. References omitted

The proclamations in fact became an accepted part of the “jurisdictional steps” which the legal academic Paul McHugh has claimed were necessary for the Crown to “annex” our land. Annexation is really just a euphemism for colonisation yet it is somehow accepted that “discovery” along with the Treaty gave to the Crown the overarching authority to govern, and thus to unilaterally treat.²⁶

The “Doctrine Of Discovery” And The Right To Treat

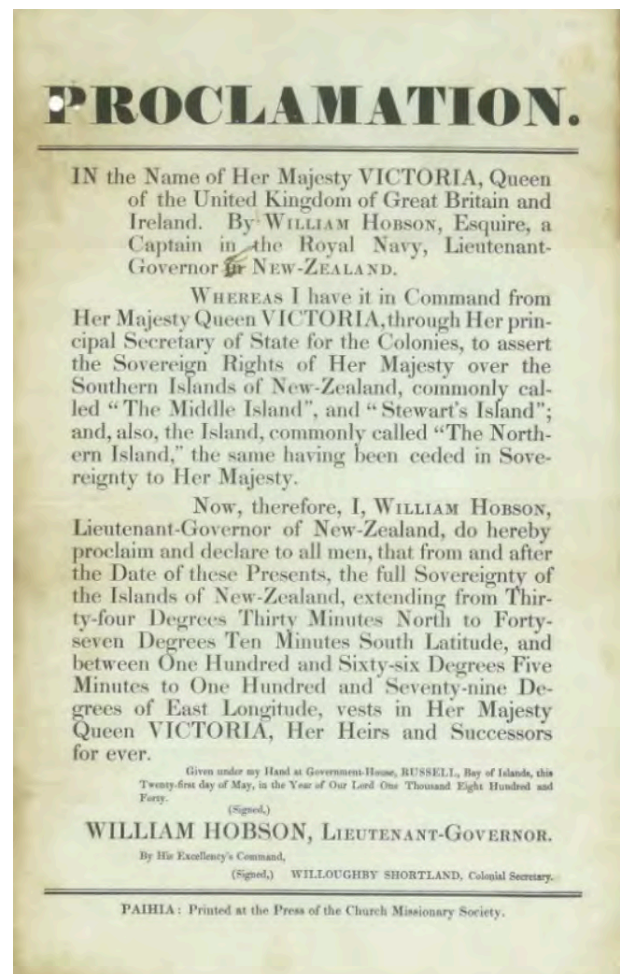
The Crown’s assertion of sovereignty over Aotearoa included an assumed exclusive prerogative for it to engage in inter-national relations and to treat with other states. The premises of the “doctrine of discovery” assumed that Māori had no capacity or status to treat beyond the treaty-making action that purportedly gave away their mana to the Crown.

The idea that “discovery” could transfer land and power is of course related to the foundational belief referred to above that because Indigenous Peoples were of lesser worth they had lesser rights and capacity – they were only what Lord Normanby’s Instructions to Governor Hobson referred to as “petty tribes” with no real understanding of sovereignty or its concomitants such as a right to properly govern themselves.

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.

In spite of the prevailing humanitarian ethos of the time, and in spite of the fact that we were sometimes labelled as “noble savages” our people were still deemed to be the inherently savage and lesser “other” who could and should be colonised. It was therefore accepted that the Crown should take the absolute right to rule while subjecting Iwi and Hapū to a lesser status. Indeed the earliest descriptions of Māori society used all of the ideology of the “other,” from the very idea of “petty tribes” to the negative and inaccurate depictions of a “warrior race”. Most particularly they depicted our people as somehow lesser in both our capacity and right to govern ourselves.²⁷

Acting Governor Willoughby Shortland dismissed suggestions from his own Attorney-General William Swainson in 1842 that parts of the country where consent to the Treaty of Waitangi was not acquired, saying “British sovereignty was deemed to have been established throughout the whole country in 1840, by formal act of state, and whether they had signed the Treaty or not the Maori were all British subjects”.²⁸



²⁴ *Maranga Mai*, p.30. References omitted

²⁵ Dr Jackson explains that Hobson’s false claim to a cession of sovereignty through the Treaty of Waitangi, as affirmed in the Waitangi Tribunal’s report on Te Paparahi o Te Raki inquiry, reduces it to a claim by discover over both the North Island and the South Island.

²⁶ Brief of Evidence of Moana Jackson, Wai 2522 at [60] – [62]

²⁷ Brief of Evidence of Moana Jackson, (Wai 2522) at [63] – [66]

²⁸ Alan Ward, *A Show of Justice. Racial ‘Amalgamation’ in Nineteenth Century New Zealand*, Auckland University Press, 1995, p.62.



Te Kāhui Tika Tangata
Human Rights Commission

Maranga Mai!

The dynamics and impacts
of white supremacy,
racism, and colonisation
upon tangata whenua in
Aotearoa New Zealand

International Moves To Repudiate The Doctrine Of Discovery

Treating the “doctrine of discovery” as an historical relic conceals its ongoing influence, as *Maranga Mai* explains:

*The doctrine is still recognised under international law insofar as it has never been repudiated. In this way, it continues to underpin the position of the New Zealand government and its legislation.*³⁰

Indigenous Peoples have fought long and hard to secure its repudiation. Paragraph four of the Preamble of *The UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*, to which the Aotearoa New Zealand is a party, affirms that:

all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.

In 2012 the United Nations Permanent Forum on Indigenous Issues held a special session on the doctrine of discovery with expert speakers,³¹ including Dr Jackson.³² The session recommended that:

- (i) States repudiate racist doctrines, such as the doctrine of discovery, that are based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences; and
- (ii) The Permanent Forum encourages the conduct of processes of reconciliation between States and indigenous peoples.³³

The following year the Permanent Forum strongly recommended the implementation of the recommendations of the Special Rapporteur on Indigenous Peoples that

*... the “doctrine of discovery” be denounced and that its use and application be discontinued.*³⁴

As Tina Ngata points out, in 2023 the Vatican finally rejected the Doctrine of Discovery based on its Papal Bulls (Catholic laws) that were issued during the fifteenth century. But the Pope still did not own the Catholic church’s responsibility for the doctrine and for the violence, dispossessions and genocides it was used to justify, or seek to provide redress.³⁵

³⁰ *Maranga Mai*, p.31.

³¹ ‘Impact of the Doctrine of Discovery on indigenous Peoples’, 1 June 2012, UN Department of Economic and Social Affairs. Available at: <https://www.un.org/en/development/desa/newsletter/desanews/dialogue/2012/06/3801.html>

³² The UN Permanent Forum on Indigenous Issues, Panel Discussion on Doctrine of Discovery, Presentation of Moana Jackson, 7-18 May 2012. Available at: <https://www.converge.org.nz/pma/mj070512.pdf>

³³ “Te Whakaakoranga Tūhura: ētahi tauira Waiwai: The Doctrine of Discovery: some basic facts”, September – Mahuru 2023, Te Kahui Tika Tangata/ Human Rights Commission, Available at: <https://tikatangata.org.nz/cms/assets/Documents/General/Indigenous-resources/The-Doctrine-of-Discovery-Some-Basic-Facts-Te-Kahui-Tika-Tangata.pdf>

³⁴ Closing session, Permanent Forum on Indigenous Issues Reaffirms Unswerving Desire to Preserve Identity, Secure Fully Fledged Plan on Global Stage, 31 May 2013. Available at: <https://press.un.org/en/2013/hr5142.doc.htm>

³⁵ “Vatican’s rejection of racist doctrine is a start”, Te Kahui Tika Tangata/ Human Rights Commission, 2 April 2023. Available at <https://tikatangata.org.nz/news/vaticans-rejection-of-racist-doctrine-is-a-start>

Draft Briefing To Cabinet To Renounce The Doctrine Of Discovery

A briefing paper for Cabinet ministers on the doctrine of discovery, its application in Aotearoa and its relevance to the implementation of the UNDRIP was drafted by Tina Ngata and the Iwi Chairs Independent Monitoring Mechanism as part of the *Maranga Mai* process and discussed with the Solicitor-General, but it was never presented to ministers or Cabinet. The paper advised that:

Numerous government agencies are currently developing strategies for addressing institutionalised racism. The doctrine of discovery is understood by race theorists as both the progenitor of colonialism and modern racism. Understanding the role of the doctrine of discovery in the shaping and embedding of racism in modern institutions will enhance both the understanding of racism in general and the colonial racism which provides the underpinnings for how racism has manifested in Aotearoa.

The paper traced the historical application of the doctrine of discovery in Aotearoa from James Cook in the 18th century, Governor Hobson's proclamations in May 1840 and the *Wi Parata* decision in 1877 through to the present day. It challenged the Crown's claim to contemporary exceptionalism in its speech to the United Nations in 2010 that dropped its opposition to the UNDRIP, but sought to distance New Zealand from the "doctrine of discovery" by sourcing its sovereignty in "the Treaty of Waitangi". The Waitangi Tribunal's finding in Stage 1 of *Wai 1040 He Whakaputanga me Te Tiriti* that there was no cession of sovereignty was simply ignored.

Specifically in relation to foreign policy, the draft paper said

... the New Zealand government's assumption to represent the interests of Aotearoa stands as the primary expression of the doctrine of discovery in relation to foreign policy. Further, there are specific functions carried out through New Zealand's multilateral agreements that function to support both the domestic and international dominance of European imperialism, in addition to relying upon the doctrine of discovery principles and entitlements in order to develop and expand New Zealand imperialism throughout

the Pacific region [and] it set the foundations for global economic infrastructure, which included the economic domination of the global north over the global south. ...

Further, in understanding the global extractive economy as a contemporary derivation of the doctrine of discovery, there are numerous instances of the extraction from Indigenous territories and exploitation of Indigenous persons which occurs through multilateral trade agreements.

Pointing to the findings of the Waitangi Tribunal that Māori did not cede sovereignty, said paper recommended that the Crown recognise the consequence that the current constitutional framework is an expression of the "doctrine of discovery". It called on the Crown to officially renounce the racist doctrine, and in doing so commit to constitutional transformation.

The draft paper was discussed with, but did not make it past, the Solicitor General and his staff. The politics of the time - the backlash against He PuaPua, the 2019 roadmap for Aotearoa New Zealand to implement the UNDRIP, and the Three Waters strategy that recognised Māori have rights in relation to water - meant no Cabinet minister was about to defend it.

In 2021 the Crown rejected another opportunity to renounce the doctrine of discovery. The Department of Conservation (DOC) was the state party representative for the New Zealand Government at the World Conservation Conference of the International Union for the Conservation of Nature (IUCN), one of two environmental organisations with observer status at the United Nations, in France in September 2021.

The Congress adopted Motion 048 – Renunciation of the Doctrine of Discovery to Rediscover Care for Mother Earth.³⁶ The DOC abstained, explaining in response to an Official Information Act request that it was supportive in principle, but needed to have consulted Māori and across government, which was not possible due to Covid. However, that did not seem a barrier to the official from New Zealand's Embassy in Paris "to vote on our behalf in support of motions that clearly aligned with existing government policy".³⁷

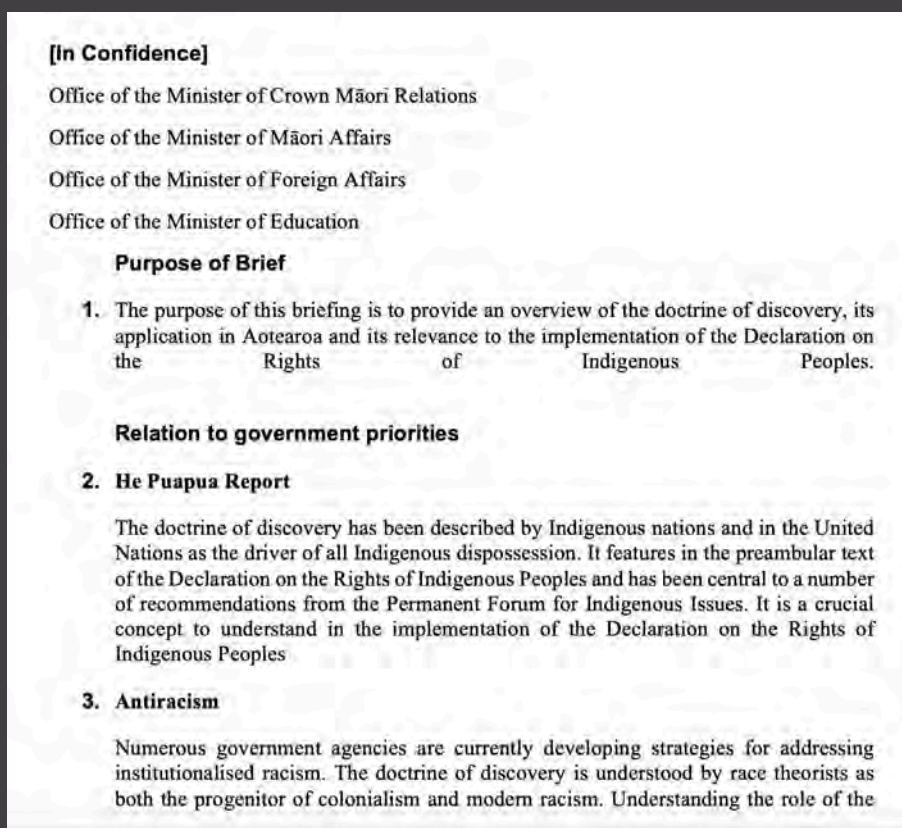
³⁶ '048 – Renunciation of the Doctrine of Discovery to rediscover care for Mother Earth', 22 September 2021. Available at: <https://www.iucncongress2020.org/motion/048>

The anti-Māori backlash that intensified under the National/NZ First/ACT government elected in 2023 also ended moves to include the doctrine of discovery in the new history curriculum. The 2012 United Nations Permanent Forum on Indigenous Issues had recommended that States include a discussion on the doctrine of discovery, and related aspects, in education curricula. The draft paper for Cabinet as part of the *Matike Mai* process emphasised the importance of delivering on this recommendation in the proposed new history curriculum for schools:

The government has committed to teaching Aotearoa New Zealand’s histories in all schools and kura from 2022 onwards and is currently undergoing a review process. The doctrine of discovery is a vital aspect of our history that contextualises our own domestic colonial experience within a broader global phenomena of imperial expansion. This remains sorely misunderstood and under-taught, in spite of a 2012 United Nations recommendation that all member states incorporate the doctrine of discovery in their national curricula.

When the Coalition Government called for colonial history, including the “doctrine of discovery”, to be dropped from the National Action Plan Against Racism, the National Iwi Chairs delegates walked out of the process.³⁸

In sum, the “Doctrine of Discovery” continues to underpin the Crown’s unilateral assertion of sovereignty in Aotearoa and internationally, with no indication that it is prepared to renounce its application or even to debate its legacy.



³⁷ Response from Department of Conservation to an Official Information Act request by Dr Aroha Mead, 1 November 2021.

³⁸ Tina Ngāta, “Why we walked away”, *E-Tangata*, 7 April 2024. Available at: <https://e-tangata.co.nz/comment-and-analysis/tina-ngata-why-we-walked-away/>

TREATY MAKING: WHAT THE WAITANGI TRIBUNAL REALLY SAID

The Waitangi Tribunal has made definitive findings in the claims of Ngāpuhi, Tuhoe and Te Rohe Potae that those Hapū never ceded sovereignty to the Crown. That has put a stake in the ground for challenges to the Crown’s “prerogative” power in the international domain. As set out above, Moana Jackson explained in his evidence to several tribunal inquiries that it was inconceivable for rangatira to cede their mana and power to treat with other polities and to confer a supreme “prerogative” on the Crown to unilaterally conduct international relations and treaties that excluded them.³⁹

No Waitangi Tribunal has yet inquired into what those findings mean for the power to make international treaties. This falls to the Tomokia Ngā Tatau Matangireia/Constitutional Kaupapa Inquiry (Wai 3300), now underway. However, a small number of historical and contemporary Waitangi Tribunal reports have commented on the question of authority in the international sphere. These have been interpreted fast and loose by the Crown as supporting its prerogative, and require much more careful analysis. This section starts with a snapshot of the relevant reports. It then examines each of them in some more detail, before analysing the Statements of Position on Constitutional Principles tabled by the Crown and by Ngā Toki Whakarururanga in Wai 3300.

A Snapshot Of The Tribunal On Treaty Making

Both the Stage 1 and Stage 2 reports of the Waitangi Tribunal in the **Te Paparahi o te Raki** (Northern tribes) inquiry reflected on how He Whakaputanga o te Rangatiratanga o Nu Tireni and Te Tiriti o Waitangi related to the exercise of kāwanatanga internationally. Their analysis was historical, situated in the 1830s at a time when international affairs, foreign policy and diplomacy were conducted through personal engagement between sovereign persons or their personal envoys, including at times of foreign threat and even war.

The Tribunal was clear in its Stage 1 report **He Whakaputanga me Te Tiriti** that the Crown’s actions in this international sphere were expected to operate to the benefit of rangatira by fostering and protecting their authority and the interests of their Hapū.⁴⁰

The Tribunal observed in its Stage 2 report **Rangatiratanga me Kāwanatanga** that 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.⁴¹ It quoted from the report **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”;⁴² which at the time was posed by Baron de Thierry from France. Critically, the Tribunal said

*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.*⁴³

International treaty making has arisen directly in two contemporary inquiries. The Tribunal’s report on Wai 262, **Ko Aotearoa Tēnei**, pre-dated the finding in Te Raki that there was no cession of sovereignty under Te Tiriti o Waitangi. Adopting the “principles of the Treaty” that had been developed in the (Crown’s) courts and tribunal since the *Lands* case in 1987, the Tribunal took the Crown’s treaty-making authority as given. That was subject to obligations to consult with Māori on a sliding scale, according to what an informed Crown considered important to Māori.⁴⁴ The Wai 262 Tribunal nevertheless suggested there would be some subjects on which decisions should be jointly made and some on which the Crown should consider delegating decision making or representation to Māori.⁴⁵

³⁹ Brief of Evidence of Moana Jackson, Wai 2522, 26 February 2016 at [72] – [73]

⁴⁰ Waitangi Tribunal, *He Whakaputanga me Te Tiriti. The Report on Stage 1 of the Te Paparahi o te Raki Inquiry* at p.528.

⁴¹ Waitangi Tribunal, *Tino Rangatiratanga me Te Kāwanatanga. The Report on Stage 2 of the Te Paparahi o te Raki Inquiry* Wai 1040, 2023, at p. 529.

⁴² Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims Vol. 1* (Wai 898), 2023 at p. xlv.

⁴³ Waitangi Tribunal, *Rangatiratanga me Kāwanatanga*, Wai 1040, at p.iv.

⁴⁴ *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641

⁴⁵ Waitangi Tribunal, *Ko Aotearoa Tenei. A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity*, Wai 262, 2011 at p.682

The question of treaty-making authority was also raised before the Wai 2522 Inquiry on the *Trans-Pacific Partnership Agreement* (TPPA). The Tribunal that heard the urgency stage of the claim said it had neither the time, expertise nor range of interested parties to address such “broad constitutional questions”.⁴⁶ In Stage 3 of that inquiry, dealing with the agreement’s digital trade chapter and impacts on data sovereignty, the Tribunal declined to apply the conclusion of *Te Raki Stage 1* that Māori signatories in the North did not cede sovereignty, saying Wai 1040 was largely concerned with historical matters, not contemporary agreements like the TPPA.⁴⁷ The Tribunal also said the reports on Stage 1 of *Te Raki* and *Wai 262* had both acknowledged the protective and representative capacity of *kāwanatanga* in international affairs.⁴⁸

Despite these comments, the Tribunal acknowledged that the question of treaty-making authority under *Te Tiriti o Waitangi* properly lay with Stage 2 of *Te Raki* and the then-pending Constitutional Kaupapa inquiry.⁴⁹

The *Constitutional Kaupapa/Tomokia Ngā Tatau o Matangireia* Inquiry (Wai 3300) began in December 2022, but was diverted into urgency hearings on the Treaty Principles Bill and the review of references to the Principles of the Treaty in legislation.

The Crown filed a Statement of Position on Principles of Constitutionalism in November 2024. That acknowledged the arguments filed by the claimants, but did not “address the challenges which will be canvassed in this inquiry, or comment on propositions for constitutional evolution and change outlined in claimant statements.”⁵⁰ Instead, it asserted that “The Executive is responsible for negotiating international agreements/treaties”, which it sought to justify by relying on policy statements, writings and judgements generated from within the Crown. As the main claimants with a mandate to ensure a *Tiriti*-based approach to international trade and investment agreements, Ngā Toki Whakarururanga filed a Statement in Reply that challenged “fundamental flaws” in the Crown’s position set out below.⁵¹

The hearings in the Constitutional Kaupapa inquiry will continue through 2025 and 2026.



November 2014 Māori Law Review

Waitangi Tribunal finds Treaty of Waitangi signatories did not cede sovereignty in February 1840

He Whakaputanga me te Tiriti: the Declaration and the Treaty

Waitangi Tribunal (2014, Wai 1040)

The Waitangi Tribunal has released its report *He Whakaputanga me te Tiriti: the Declaration and the Treaty* about the meaning of the Treaty of Waitangi in February 1840 when it was first signed. The Tribunal's report has been made as the first stage of its inquiry into claims made in its *Te Paparahi o te Raki* (the great land of the north) district inquiry.

Download *He Whakaputanga me te Tiriti: the Declaration and the Treaty* here.

⁴⁶ Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, Wai 2522, 2016 at pp. 7-8.

⁴⁷ Waitangi Tribunal, *The Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, Wai 2522, 2023 at pp. 19 and 23.

⁴⁸ Waitangi Tribunal, *Report on the CPTPP*, Wai 2522, at pp. 20-21

⁴⁹ Waitangi Tribunal, *Report on the CPTPP*, Wai 2522, at p. 22.

⁵⁰ ‘Crown Statement of Position on Principles of Constitutionalism’, Wai 3300, 25 November 2024.

⁵¹ Ngā Toki Whakarururanga, ‘Statement of Reply to Crown Statement of Position’, Wai 3300, 17 December 2024.

Te Paparahi O Te Raki

Stage 1: He Whakaputanga me Te Tiriti

The first report of the Te Paparahi o te Raki Inquiry, **He Whakaputanga me te Tiriti**, found that the rangatira of the Northern tribes did not cede their mana or authority to the Queen of England; they agreed to share power and authority with the Crown as equals while performing different roles with different spheres of influence.⁵² The Tribunal's interpretation of paragraph 4 of He Whakaputanga o te Rangatiratanga o Nu Tirenī, in te reo Rangatira, and the translation of that in English by Dr Mānuka Henare, set out that power-sharing arrangement, including in the international sphere:⁵³

4. Ka mea matou kia tuhituhia he pukapuka ki te ritenga o tenei o to matou wakaputanga nei ki te Kingi o Ingarani hei kawē atu i to matou aroha. nana hoki i wakaē ki te Kara mo matou. a no te mea ka atawai matou, ka tiaki i nga pakeha e noho nei i uta e rere mai ana ki te hokohoko, koia ka mea ai matou ki te Kingi kia waiho hei matua ki a matou i to matou Tamarikitanga kei wakakahoretia to matou Rangatiratanga.

4. We agree that a copy of our declaration should be written and sent to the King of England to express our appreciation (aroha) for this approval of our flag. And because we are showing friendship and care for the Pākehā who live on our shores, who have come here to trade (hokohoko), 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).

In discussing paragraph 4, the Tribunal said

*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 Maori authority but to foster it and protect it from foreign threat.*⁵⁴

Similarly, in relation to Te Tiriti o Waitangi, the purpose of the Crown exercising an international role was to ensure the Hapū and Rangatira retained their authority as contact increased:

*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.***⁵⁵

The Tribunal acknowledged

*that Māori had little capacity to exert any power in the international sphere, and were aware not only of Europe's material wealth but also of its martial strength. They appear to have feared France, and held Britain's power in awe. ... We do not think Māori were greatly cowed by this power; rather, they sought to engage with it preemptively and constructively.*⁵⁶

Those references in *Te Raki* to the Crown's authority in international affairs were made in the historical context of the personal powers that rangatira and monarchs exercised in the 1830s to conduct high diplomacy and levy war. This context was reinforced in 1840 in relation to Te Tiriti:

*Under that agreement, the rangatira welcomed Hobson and agreed to recognise the Queen's kāwanatanga. They regarded the Governor's presence as a further, significant step in their developing relationship with the Crown. In recognition of the changed circumstances since he Whakaputanga had been signed in 1835, they accepted an increased British authority in New Zealand. The authority that Britain explicitly asked for, and they accepted, allowed the Governor to control settlers and thereby keep the peace and protect Māori interests. **It also appears to have made Britain responsible for protecting New Zealand from foreign powers.***⁵⁷

⁵² Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, Wai 1040 at pp. xxii and 527.

⁵³ Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, Wai 1040 at pp.168-169.

⁵⁴ Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, Wai 1040, at p. 502.

⁵⁵ Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, Wai 1040, at p.xxii.

⁵⁶ Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, Wai 1040, at p.284.

⁵⁷ Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, Wai 1040, at pp. 527-8.

*They did not regard kāwanatanga as undermining their own status or authority. Rather, the treaty **was a means of protecting, or even enhancing, their rangatiratanga** as contact with Europeans increased.⁵⁸*

That explanation cannot support a claim that rangatira ceded to the Queen of England all their authority to negotiate, sign and ratify treaties with other polities – let alone, that they would do so for trade and investment agreements in their contemporary form, where the rules and enforcement mechanisms impact directly and indirectly on the responsibilities and rights of Māori and the obligations of the Crown under Te Tiriti o Waitangi.

Stage 2: Rangatiratanga me Kāwanatanga

This interpretation, that the rangatira sought in He Whakaputanga the protection of their independence by the English King, not a relinquishment of their mana, was reinforced in the Stage 2 report **Rangatiratanga me Kāwanatanga**:

During 1834 and 1835, Ngāpuhi leaders, following Busby’s advice, adopted a national flag so that Aotearoa vessels could trade internationally, and asserted their mana and sovereignty by signing he Whakaputanga, the Declaration of Independence. In turn, Britain responded with acknowledgement of the independence and nationhood of the northern tribes.⁵⁹

The Crown, in our view, had also promised to investigate pre-treaty land transactions and return any lands that

*had not been properly acquired from Māori; and the rangatira appeared to have agreed that **the Crown would protect them from foreign threats and represent them in international affairs.**⁶⁰*

The Stage 2 report then spells out the context for such representation:

*As we explained, rangatira believed they were aligning with a powerful empire which had guaranteed to protect them and their chiefly authority. Rangatira were aware, however, that there were risks from an alliance with an imperial power – they knew, for example, of the experiences of indigenous people in New South Wales and Tahiti, and feared they could face the same threats if settlement was not controlled. In their prior relationship with Britain, they had sought and received assurances that the monarch would protect them. 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.**⁶¹*

The Letter of Transmission from the Tribunal to Crown Ministers on December 2022 reiterated the point made in Stage 1 that, in the international space the intention of the signatory Rangatira **“was that Britain would protect their independence, not that they would relinquish their sovereignty”.**⁶²



Gil Hanly (6 Feb 1983). *Waitangi Protestors with ‘Boycott Waitangi’ banner and police on bridge.* Auckland War Memorial Museum Tāmaki Paenga Hira. PH-2015-2-GH330-1A.

⁵⁸ Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, Wai 1040, at p.528.

⁵⁹ Waitangi Tribunal, *Rangatiratanga me Kāwanatanga*, Wai 1040, at p.184.

⁶⁰ Waitangi Tribunal, *Rangatiratanga me Kāwanatanga*, Wai 1040, at p.181.

⁶¹ Waitangi Tribunal, *Rangatiratanga me Kāwanatanga*, Wai 1040, at p.192.

⁶² Waitangi Tribunal, *Rangatiratanga me Kāwanatanga*, Wai 1040, at p.iv.

Ko Aotearoa Tenei (Wai 262)

The Wai 262 claim was the Waitangi Tribunal's first consideration of international treaties and the treaty-making process as it impacts Māori, specifically on mātauranga and Te Taiao. Its report *Ko Aotearoa Tenei* recognised that international instruments have significant impacts on Māori:

*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.*⁶³

Given the growing significance of international law for Māori

*... 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. Whatever has occurred in the past, it will be important that future engagement occurs on a proper Treaty footing.*⁶⁴

Although the claimants did not address the legitimacy of the Crown's treaty-making power directly, they asserted their rangatiratanga, and their statement of claim spelt out clearly what rangatiratanga meant and required in the context of mātauranga, including authority over resources and decisions. Recommendations they sought included:

Ensuring the full and effective participation of Māori in all international fora dealing with issues relating to traditional knowledge and/or biological and genetic resources including, but not limited to, the CBD, dDRIP, WIPO, UNESCO and WTO. Such measures for participation to involve:

Independent representation of Māori in these fora;

Provision of adequate funding and resources to enable independent Māori representation;

Ensuring appropriate skilled Māori are included in New Zealand Government Delegations to these fora.

That the Crown undertake full and effective consultation with Māori prior to attending international meetings in order to arrive at agreed statements relating to New Zealand's interventions in these fora; ...

The Tribunal took a more limited approach. The Wai 262 hearings took place from 1997 to 2007. This was the heyday of "Treaty principles" that had their origins in the Crown's courts following the "Lands case" in 1987,⁶⁵ and the bureaucracy's massaging of those principles, both of which ensured the Crown's sovereignty was not questioned. Most of the Waitangi tribunals since then had fallen into line with that approach, although later Tribunals increasingly drew "principles" from Te Tiriti o Waitangi itself.

The Wai 262 report was released in 2011. The Tribunal therefore did not have the benefit of the Stage 1 findings in *Te Raki*, released in 2014, that there was no cession of sovereignty under Te Tiriti. Given that context, it was predictable that the Tribunal would accept that power to make international treaties rested exclusively with the Crown:

*In the Treaty of Waitangi, the Crown acquired kawanatanga, 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 tino rangatiratanga, or full Maori authority over their own affairs. In the modern international arena, this is no small obligation. International instruments affect the rights and lives of all New Zealanders in sometimes profound ways. Specifically, Maori interests in trade and economic development, culture, traditional knowledge, natural resources, and the environment are often at stake. When that is the case, the treaty obliged the Crown and Maori to engage with one another on the basis of good faith, reasonableness, and cooperation. 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.*⁶⁶

⁶³ Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262, at p.680.

⁶⁴ Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262, at p.670.

⁶⁵ *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641

⁶⁶ Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262, at p.684.

⁶⁷ Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262, at p.684.

⁶⁸ Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262, at p.682.

That set the bar low constitutionally, yet the Crown was still not reaching it:

*The Crown accepts that it must protect Māori interests in the international arena, and that it must engage with Māori about how to do so. To that extent, it complies with the Treaty. Its current policies and practices have the potential to become fully Treaty compliant but they are not yet so.*⁶⁷

The report endorsed an approach based on a “sliding scale” of Māori interests, rather than one-size-fits-all. The priority accorded to Māori interests would depend on the scale and importance of the matters, ascertained by a properly informed Crown and balanced against any valid interest of other New Zealanders and the nation as a whole, if those interests are in tension.⁶⁸ The Tribunal recognised the Crown’s application of this approach was deficient, but in its implementation rather than its design:

*[W]e did not receive any clear evidence of such a strategy nor of a consistent Crown approach in practice. The evidence of the various Government departments, including Te Puni Kōkiri, left us uncertain as to how the Crown decides what level of engagement is justified by the nature or strength of the Māori interest.*⁶⁹

From a Tiriti perspective, the Tribunal's approach rests on deeply problematic foundations that are incompatible with rangatiratanga and far exceed any powers conferred on kāwanatanga: all power remains with the Crown to recognise and prioritise Māori interests, decide what level of protection is required, what is “reasonable”, and how these weigh up against other valid interests.

There were several glimmers of space for the exercise of rangatiratanga, but they evaporated, at least in the trade context. While “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”, this would occur after the Crown had alerted them to pending developments and their implications.⁷⁰

With trade negotiations, which are usually conducted in secret, there would be no visibility of the Crown’s decisions until the agreement was signed, if at all, unless the Crown chose to raise it with Māori.

A second comment was more promising. The Tribunal said that

*limiting engagement to consultation cannot always do justice to the full nature, extent, or relative strength of the Māori interest. Such a policy does not give effect to the Treaty partnership and tino rangatiratanga guarantee.*⁷¹

And referring to the UNDRIP and the Convention on Biological Diversity, it said

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.⁷² Such instances will not be the norm, but they will occur. A decision-making framework that cannot accommodate such situations is not Treaty compliant.

Indeed ...

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 ...⁷³.

More than a decade later, the Crown had still not adopted the Wai 262 Tribunal’s limited recommendations, despite the commitment in kete 3 of Te Pae Tawhiti, the project to implement the Wai 262 recommendations, to examine international treaty issues.

⁶⁹ Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262, at p.684.

⁷⁰ Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262, at p. 11.

⁷¹ Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262, at p.683.

⁷² Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262, at p.683.

⁷³ Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262, at p.682.

The TPPA (Wai 2522)

The Wai 2522 claim on the Trans-Pacific Partnership Agreement (TPPA) was heard in three stages from 2015 to 2020. The initial hearing was held under urgency and was limited to the effectiveness of the Treaty of Waitangi Exception in the agreement and the process for engagement with Māori following the signing of the TPPA. The Tribunal kicked for touch on the constitutional question of treaty-making authority, considering

... that an urgent inquiry is not the appropriate forum to address broad constitutional questions, particularly those concerning the Crown-Māori relationship in respect of international instruments. We do not have the time, evidence, or range of interested parties to properly conduct such an inquiry.⁷⁴

The final Stage 3 of the inquiry (the "CPTPP report") was focused on the electronic commerce chapter in the successor agreement to the TPPA, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). As the Tribunal noted, the claimants had invoked Te Raki (Wai 1040) to challenge the

... orthodox Crown position ... that the prerogative power is part of the unitary and indivisible sovereignty held by the Crown and ceded under Article 1. Throughout this inquiry, the Claimants have argued that the Crown's assertion of exclusive authority to make international treaties is incompatible with te Tiriti/the Treaty.⁷⁵

The claimants urged the Tribunal to take up the invitation implied in Te Raki to apply its findings to the present day, when it said:

Today, the Crown has the power and capacity to recognise, respect and give effect to the treaty guarantee of rangatiratanga. It has had this power since it signed te Tiriti. Its duty to give effect to the guarantee of tino rangatiratanga is as important today as it was in 1840. That is the basis for te houruatanga, a partnership in which each party to the

treaty recognises the authority of the other, and together they decide how each will exercise that authority on matters in which both have important interests.⁷⁶

But the Tribunal declined to apply the finding that there was not a cession of sovereignty, noting the scope of Te Raki was largely limited to historical claims and it had made no conclusions about the Crown's exercise of sovereignty today.⁷⁷ The CPTPP report also claimed that the reports on Stage 1 of Te Raki and Wai 262 both

... acknowledge that kāwanatanga includes a protective and representative capacity in the conduct of international affairs⁷⁸

without noting the constraints on that in *Te Raki* or the conditions referred to in Wai 262.

The Tribunal did, nevertheless, recognise that the question of treaty-making authority was live and said it more properly lay with Stage 2 of *Te Raki* and the then-pending Constitutional Kaupapa inquiry:

Our concern remains that in this, our final report, we do not intrude into matters still under consideration in the Te Raki inquiry. We maintain the view that it is not appropriate in this final stage of inquiry to address broad constitutional questions concerning the Crown-Māori relationship in respect of international instruments, given the relatively limited evidence and range of parties before us. We also note that a kaupapa inquiry into the Constitution is pending.⁷⁹

⁷⁴ Waitangi Tribunal, *Report on the TPPA*, Wai 2522, 2016 at pp. 7-8.

⁷⁵ Waitangi Tribunal, *The Report on CPTPP*, Wai 2522, at pp. 17-18.

⁷⁶ Waitangi Tribunal, *Rangatiratanga me Kāwanatanga*, Wai 1040, at p.71.

⁷⁷ Waitangi Tribunal, *The Report on CPTPP*, Wai 2522, at pp. 19 and 23.

⁷⁸ Waitangi Tribunal, *Report on the CPTPP*, Wai 2522, at pp. 20-21

⁷⁹ Waitangi Tribunal, *Report on the CPTPP*, Wai 2522, at p. 22.



Te Waka Huia and Ngāti Whatua lead protest on Queen St against signing of TPPA, 3 February 2016.



Gil Hanly (1984). *Tuaiwa Hautai "Eva" Rickard leads protestors across the bridge at Waitangi, on Waitangi Day.*
Auckland War Memorial Museum Tāmaki Paenga Hira. PH-2015-2-GH538-33.

Constitutional Kaupapa/Tomokia Ngā Tatau o Matangireia Inquiry (Wai 3300)

The Inquiry into constitutional issues affecting Māori began in December 2022. Its broad mandate is to hear claims concerning grievances relating to the constitution, self-government, and the electoral system, including the identified themes of Tino Rangatiratanga, Mana Motuhake, Autonomy, and Self-governance; Kāwanatanga; and Constitutional Legitimacy and Sovereignty. Ngā Toki Whakarururanga is a party to the inquiry, focusing on the relationship of rangatiratanga and kāwanatanga, and questions of constitutional legitimacy and sovereignty, in the international treaty space.

The hearing is using a different methodology informed by a report from four pou tikanga and four pou ture Pākehā to develop a tikanga and Tiriti-compliant process. In October 2024 it began the first of six wānanga ā-rohe to hear from parties on their constitutional principles and the themes for the inquiry. However, the Tribunal was diverted into urgency hearings on the Treaty Principles Bill and the review of references to the Principles of the Treaty in legislation. In mid-2025 the process was back underway.

The Crown's Principles Of Constitutionalism

The Crown tabled a Statement of Position on Principles of Constitutionalism in the *Tomokia Ngā Tatau Matangireia/ Constitutional Kaupapa* (Wai 3300) inquiry in November 2024. It said it was not going to address the challenges that will be canvassed in the inquiry, nor the claimants' propositions for constitutional evolution and change. There was no substantive discussion of "Te Tiriti/The Treaty", which was then referred to only as "The Treaty" and largely ignored. So were the findings of Wai 1040 *He Whakaputanga me Te Tiriti*.

The Statement simply asserted the Crown's status as "a constitutional monarchy with a parliamentary system of government" under the Constitution Act 1986. A "constitution" defines the power of the state - it "describes and establishes the major institutions of government, states their principal powers, and broadly regulates the exercise of those powers."⁸⁰

"The Treaty" was reduced to "a" founding document and "one of" the sources of New Zealand's constitution, alongside legislation, the common law, constitutional conventions, and Parliamentary customs. Relative to the others, its role was left very vague - it "affects, in various ways and to varying extents, how public power is exercised in New Zealand" – matters which the Crown determines.

By contrast, representative democracy sourced in majority rule was described as "the underlying principle of New Zealand's key constitutional conventions". There was no historical context that acknowledged the central role played by "representative democracy and majority rule" in colonial dispossession and breaches of Te Tiriti, nor their selective form that was used first to disenfranchise Māori and ensure settler majority rule within Westminster institutions and then to marginalise Māori into Māori electorates until they became a minority in the system of universal franchise.



⁸⁰ "Crown Statement of Position on Principles of Constitutionalism", 25 November 2024, Wai 3300

Colonial Concepts Of “Equality” And “Human Rights”

At the request of the Tribunal, the Crown tabled an addendum to its Statement to address the “principle of equality”.⁸¹ It started with “fundamental human rights” whereby “all people are of equal value in dignity and rights” and “everyone is subject to the law and equal before the law”. This time there was a reference to Te Tiriti: the Crown claimed this is “consistent with Article 3 of the Treaty/te Tiriti, expressing Māori gained the same rights and duties as British subjects”. But it was only referring to the English draft, which includes the notion of “subject”, not to Te Tiriti that almost all the rangatira signed.

What may seem an uncontroversial principle becomes deeply problematic when its political and legal premises are deconstructed. Māori were never treated as equal, even within the Crown’s system. More fundamentally, liberal notions of equality mean the “sameness” of individuals under the system imposed by the Crown; the “doctrine of discovery” and legal imperialism would never allow true equality in the sense of parity, whereby each collective retains its own system as the Tiriti envisaged. The “law” to be applied could only be Western law whose tenets of individualism, private property rights and dominion over nature were and are antithetical to tikanga.

Ani Mikaere quotes from Moana Jackson that

*... the mind from which the definitions [of rights] have sprung has remained bound by its own particular view of the world, and by its own interests in relation to other people. ... There has been little recognition of collective rights, such as an indigenous peoples right to independent sovereignty, since such a right clearly challenges that dominance in a political, social and economic sense.*⁸²

She points out “that it is illogical for Māori to turn unquestioningly to Western legal concepts for the answers to problems which have been brought into our lives by the

*imposition of Western law”.*⁸³ Only from a position grounded in our own cultural legal norms should we consider whether the Western construct of human rights has any application to our circumstances.⁸⁴ ... The starting point for change is the recognition that Māori have collective rights to self-determination, to independent sovereignty. These rights are inherent in our status as tangata whenua and were reaffirmed in both the 1835 Declaration on Independence and the 1840 Treaty of Waitangi guarantee of tino rangatiratanga. These rights exist independently of the New Zealand government and are neither defined nor dictated by that government. They are certainly not bound up with principles of majority rule which only contemplate an indigenous people’s right to self-determination where they form a majority, rendering all colonised indigenous peoples who find themselves a minority in their own lands forever powerless, merely by accident of numbers.⁸⁵

The Crown’s further claim that equality means one-person one-vote and “through participation in democratic processes people are able to express the importance of equality, fairness and justice to elected decision-makers” perpetuates its historical and contemporary amnesia. The current government, and recent predecessors (eg, in the Seabed and Foreshore Act 2004) have shown how elected decision-makers treat “equality, fairness and justice” to Māori when it suits them.

The Statement also says that equality “allows affirmative action”; but the Crown that determines if, when and what that might involve and, as the current government has shown, the Crown can simply take it away for fiscal, political and/or racist ideological reasons.

In its closing comments, the Crown belatedly accepted that “equality is a concept that bears different meanings”; but it did not explain what that means for the legitimacy of its position.

⁸¹ “Addendum to Crown Statement of Position on Constitutional Principles”, 17 April 2025, Wai 3300

⁸² Quoted in Ani Mikaere, “Collective Rights and Gender Issues: A Maori Woman’s Perspective” in *Collective myths and Māori realities: He Rukuruku Whakaaro*, Huia, 2011, 179-204 at p.181

⁸³ Ani Mikaere, “Collective Rights and Gender Issues” at p. 82

⁸⁴ Ani Mikaere Collective Rights and Gender Issues” at p.83

⁸⁵ Ani Mikaere, “Collective Rights and Gender Issues” at p.82

The Crown's Self-Legitimising Narrative

The Crown's statement principally relies on Sir Kenneth Keith's introduction to the Crown's Cabinet Manual.⁸⁶ This talks only of The Treaty, never Te Tiriti. Updates to the Manual completely ignore the findings on rangatiratanga, mana Motuhake and Crown sovereignty in *Te Raki* and *Te Urewera*. Instead, it vaguely suggests that:

- The Treaty “may” indicate limits in our polity on majority decision-making;⁸⁷ but it does not suggest the nature of those limits, in what circumstances those limits might apply, and who decides.
- “Māori rights and interests” under Article 2 are “sometimes” accorded a special recognition;⁸⁸ again, there is no indication of what these rights and interests are, in what circumstances they may be recognised, and accorded by whom.
- In some situations autonomous Māori institutions have a role within the wider constitutional and political system”; but what kind of institutions, who decides, and how autonomous they are within a system of Crown sovereignty are not explained.
- “A balance has to be struck between majority power and minority right. ... Indeed, those with authority to make majority decisions often themselves recognize that their authority is limited by ... the Treaty of Waitangi”;⁸⁹ which means the Crown, having unilaterally claimed authority to exercise majority power, can legitimately determine what limits it will recognise, or not recognise, for the “minority” mana whenua.

The Treaty Principles Bill 2024 shows how fragile these vague considerations are.

First over several decades the Crown constructed a set of “Treaty principles” that affirmed its sovereignty and its power to decide whether and how to consult Māori and protect their interests, on matters the Crown sees as important; Māori were required to be “reasonable” and “cooperative” in return.

The Bill showed that even those weak principles could be eliminated with the stroke of a legislative pen, knowing that would breach Te Tiriti o Waitangi. The Crown's public servants were told by Cabinet directive to implement a Coalition Agreement that is constitutionally unsound and breaches the Crown's Tiriti obligations.

Whether the Treaty Principles Bill was passed or not came down to a political calculation by parties that had a majority in the Crown's Parliament. Māori had no rangatiratanga and even Māori MPs participating within the system were severely censured for protesting the Tiriti breach with a haka.

⁸⁶ Sir Kenneth Keith 'On the Constitution of New Zealand: An introduction to the Foundations of the Current Form of Government', in the Cabinet Manual (2023), at p. 2.

⁸⁷ Sir Kenneth Keith, 'On the Constitution of New Zealand', at p 2.

⁸⁸ Sir Kenneth Keith, 'On the Constitution of New Zealand', at p 2.

⁸⁹ Sir Kenneth Keith, 'On the Constitution of New Zealand', at p 5.

A Sham Of Democratic Accountability

As part of its narrative, the Crown asserts that: *“The Executive is responsible for negotiating international agreements/ treaties”*. Then it seeks to portray a semblance of democracy and accountability by overstating Parliament’s role and understating the impact of international agreements, especially trade and investment treaties.

The suggestion that Parliament exercises oversight of treaties after they are signed through reviews at select committee and by requiring implementation through domestic law is simplistic and inaccurate. The Executive claims the power to negotiate and ratify such agreements, which means it can adopt binding and enforceable legal obligations that have direct domestic effects, including constraints on future action by Parliament and on policies and practices outside of legislation.

Sir Kenneth Keith concurred that more law is now made through international processes and the “powers of national governmental institutions are correspondingly reduced”.⁹⁰

As both the the Wai 2522 tribunal acknowledged,⁹¹ these agreements can impact directly on the Crown’s compliance with its Tiriti obligations and deny Māori the responsibilities, duties, rights and interests affirmed under Te Tiriti o Waitangi:

The consolidation of investment and trade provisions in an agreement of this scale makes the TPPA’s exceptional reach and significance difficult to dispute [and] its intertwining of investment, traditional trade, and services means its scope is very broad.⁹² ... Future New Zealand governments cannot act domestically in ways that contravene TPPA provisions. New Zealand’s policies, subsidiary legislation and exercise of Ministerial and regulatory authority discretions must align with the TPPA, even if changes to statutes are not required.⁹³ Such agreements impose obligations on the Crown which constrict domestic policy.⁹⁴

Other consequences of international treaties, including trade sanctions for breaches of agreements, and monetary awards in the case of breaches of investment treaties, also operate outside of any parliamentary scrutiny, let alone any exercise of rangatiratanga.

Parliament is rarely required to incorporate trade and investment treaties into statute, except to the limited extent that a treaty requires changes to existing law, often just changing tariff schedules.

Where Parliament does need to legislate, the executive can rely on its majority to ensure its passage.

Domestic bills are released publicly and subject to several stages of parliamentary debate and submissions that can result in recommended amendments. By contrast, international treaties can be kept secret throughout the negotiations until they are signed.

Select committees provide perfunctory parliamentary scrutiny of them after-the-fact of signature and currently allocate individuals 5 minutes and groups 10 minutes to speak to submissions on treaties that are 20 to 30 chapters long. Parliament has no authority to change those agreements.

⁹⁰ Sir Kenneth Keith *‘On the Constitution of New Zealand’*, at p.6.

⁹¹ Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262, at p.680;

⁹² Waitangi Tribunal, *Report on the TPPA*, Wai 2522, 2016, at p.15.

⁹³ Waitangi Tribunal, *Report on the TPPA*, Wai 2522, 2016, at p.17.

⁹⁴ Waitangi Tribunal, *Report on the TPPA*, Wai 2522, 2016, at p.44.

TENA KOE ARCHANUI ME TO HEKERETARI ME TO KOMITI WHAKAHABERE – NGA MIHI WHANUI
KIA KOUTOU NGA URI RANGATIRA NGA TAANGATA WHENUA O TE AO. NGA MEMA O NGA KAWANA,
IA KOE HOKI ERIHAPETI. TENA KOUTOU KATOA.

MADAM CHAIR,

I BRING THE GREETINGS OF NGATI TE ATA, NGA TAMARAWAHO, NGA MARAE TOOPU, THE
HUAKINA DEVELOPMENT TRUST, TE RUNANGA O NGATI AWA, TE RUNANGA O NGATI POROU AND
MANY OTHER MAORI REPRESENTATIVES WHOM YOU MET DURING YOUR VISIT TO AOTEAROA WITH MR
ALFREDSSON.

My name is Ngāneko Kaihau Minhinnick. I am a Maori and an indigenous of Aotearoa..
It is the practice of the New Zealand government to paint pictures of excellent
good record of respect of human rights and fundamental freedoms and harmonious
relationships within our country. The true position is very different.

The very fact that our people have had to travel for 3 days, 12000miles, from
across the other side of the world to speak of the long standing grievances, of
the cultural genocide that is imposed upon our people, shows the real situation.

Ngāneko Minhinnick addresses the 6th session of UN Working Group on Indigenous Populations, Geneva, 1988

Crown's Position: A Denial Of Te Tiriti

The prerogative of treaty making unilaterally assumed by the Crown, whereby it controls the entire process, far exceeds the limited authority that was conferred on kāwanatanga under Te Tiriti, and denies Hapū the right and ability to exercise self-determination in a manner consistent with Tikanga Maori. Māori have no decision-making power, or even a seat at the table when decisions are made on whether to negotiate a treaty, what to negotiate, with whom, what objectives to seek, what compromises to make, what exceptions to insist on and whether the process and deal are tika. As the Tribunal in *Te Raki* made clear, this was not the expectation of the rangatira when they entered into Te Tiriti. It therefore constitutes a fundamental breach of Te Tiriti.⁹⁵

As part of its prerogative, the Crown even claims the exclusive power to determine the status and impact of international treaties that specifically deal with Indigenous Peoples. It was one of four colonial states that voted against the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 and only adopted it quietly in 2010. In 2023 the National/ACT/NZ First coalition government announced it would not recognise the Declaration as having any binding legal effect on New Zealand, reducing it to purely symbolic value. The Crown has still not adopted the ILO's Indigenous and Tribal Peoples Convention 169 or the Nagoya Protocol that provides a legal framework for the fair and equitable sharing of benefits arising from the utilisation of genetic resources. The failure to reference the UNDRIP in the list of human rights instruments in Crown's Statement of Constitutional Principles⁹⁶ in Wai 3300 further highlights its ability to pick and choose which international instruments, and which Māori rights, it considers constitutionally significant.

The Tribunal in the Constitutional Kaupapa/Tomokia Ngā Tatau o Matangireia Inquiry will need to address and resolve these violations of He Whakaputanga me Te Tiriti through powerful recommendations on constitutional transformation, including in the international domain. It must be hoped that the current hostility to Māori and Te Tiriti within kāwanatanga is a passing phase and the Crown will embrace that opportunity to grow as a nation with a Tiriti-based polity, as envisaged in 1840.

⁹⁵ 'Statement of Position of Ngā Toki Whakarururanga on Constitutional Principles', Wai 3300, 9 December 2024.

⁹⁶ 'Crown Statement of Position on Principles of Constitutionalism', Wai 3300, 25 November 2024, at [20]

THE CROWN HAS NO TIRITI PRINCIPLES

When the Crown claims to be the sole judge of its own obligations, it invites bad faith actions to reverse hard-fought incremental gains made by Māori is what happens when the Crown claims to be the sole judge of its own obligations. The added insult occurs when that is targetted directly at Te Tiriti o Waitangi and treats it with contempt. During their negotiations with the National Party to form a coalition government in 2023 the ACT Party and NZ First seemed to be competing for which party could be more extreme in its attack on “Treaty principles”:

- The Principles of the Treaty of Waitangi Bill, endorsed in the National ACT Coalition Agreement, aimed to rewrite the Tiriti relationship agreed to in 1840, and literally Te Tiriti o Waitangi itself, by cementing into law an extreme version of “Treaty Principles” and eliminating rangatiratanga altogether for the purposes of the Crown’s exercise of its assumed rights of “government”.⁹⁷ There was no mention of Māori in the Bill; instead, it obliterated tangata whenua from Aotearoa. ACT’s three Treaty “principles” distorted the first three articles of Te Tiriti, and ignored the fourth, in an offensive and garbled text partly written in te Reo Rangatira. ACT’s version in the English language was not even consistent with whatever Professor Margaret Mutu termed “Hobson’s draft” of Te Tiriti in English.
- New Zealand First and National agreed to a review that would potentially purge the statute book of references to the “principles of the Treaty”, and potentially references to the Treaty or Te Tiriti, aside from Treaty settlement legislation.⁹⁸ That was a more complex and time-consuming process than the more simplistic Treaty Principles Bill, and was likely to involve omnibus legislation. In the meantime, several ad hoc Bills sought to achieve similar goals, for example ensuring there were no references to Te Tiriti o Waitangi in the Fast Track Approvals Bill that potentially opened up Te Taiao to barely-restrained exploitation.

This section of the paper focuses in particular on the Treaty Principles Bill and draws on the evidence and closing submissions of claimants on behalf of Ngā Toki Whakarururanga to the Waitangi Tribunal’s urgency hearing (Wai 3300), which were also presented as a submission on the consultation document on the proposed Bill.⁹⁹

IN CONFIDENCE

CAB-24-MIN-0348



Cabinet

Minute of Decision

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Policy Approvals for Progressing a Treaty Principles Bill

Portfolio Associate Justice (Hon David Seymour)

On 9 September 2024, Cabinet:

- 1 **noted** that a commitment to introduce a Treaty Principles Bill (the Bill) as soon as practicable and support it to a select committee is a commitment in the Coalition Agreement between the National Party and the ACT Party;

⁹⁹ References that are not provided should be sought from Joint Closing Submissions, Ngā Toki Whakarururanga, Wai 3300 Urgency Inquiry into the Treaty Principles Bill, 22 May 2024. Available at: <https://ngatoki.nz/wp-content/uploads/2024/04/Wai-3300-Closing-Submissions-dated-22-May-2024.pdf>

The Waitangi Tribunal Wai 3300 Inquiry

The *Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry* (Wai 3300) moved into urgency in 2024 to consider these two coalition policies. That was extended in 2025 to include another ACT-National coalition measure, the Regulatory Standards Bill.

All hearings were fraught with difficulties for the claimants and the Tribunal in securing adequate timely disclosure from the Crown of documents to show what policy development was happening. Without that information, claimants would struggle to substantiate arguments about Tiriti breaches and prejudice, and to complete the hearings before the Tribunal lost its jurisdiction because the legislation had been introduced to Parliament.

That timeline was achieved in the inquiry on the Treaty Principles Bill, which was introduced on 7 November 2024. Senior Crown officials themselves conceded in evidence that the proposed Treaty Bill would constitute a Treaty breach. Te Arawhiti's Deputy Chief Executive Warren Fraser was asked whether the Treaty Principles Bill in the coalition agreement and policy document is consistent with the Crown's Treaty of Waitangi obligations. He said simply: "No." Nor did the government's statement of the policy problem to justify the Bill.¹⁰⁰

The Tribunal prefaced its report in the letter of transmission to ministers on 15 August 2024 by observing that "*the Treaty / te Tiriti created a foundational relationship for this country founded on a partnership between Māori and the Crown. It recognised two spheres of authority – the tino rangatiratanga and kāwanatanga spheres,*" and that the Cabinet manual recognised its constitutional significance.

With respect to the Treaty Principles Bill policy, we have found that the Crown's agreement to pursue it unilaterally belies the existence of this partnership. Despite the constitutional significance of defining the Treaty principles in legislation and the importance of this to Māori, the Crown agreed to pursue the policy without any engagement or discussion with Māori. Māori did not want this policy

and in fact many have been strongly opposed to it from the beginning. We find in this report that the policy of a Treaty Principles Bill 'based on existing ACT policy', as the coalition agreement requires, is a solution to a problem that does not exist; there is no policy imperative that justifies it; it is 'novel' in its Treaty interpretations; it is fashioned upon a disingenuous historical narrative; its policy rationales are unsustainable; and its current text distorts the language of the Treaty / Te Tiriti. Logically that means it has been pursued without any consideration of the Crown's constitutional and Treaty / te Tiriti obligations to Māori. Senior officials gave clear advice to Ministers on this, also warning that it would damage the Māori-Crown relationship, and risk undermining social cohesion. ...

We have found that the Treaty Principles Bill policy is unfair, discriminatory, and inconsistent with the principles of partnership and reciprocity, active protection, good government, equity, and redress, and contrary to the article 2 guarantee of rangatiratanga. It is also in breach of the Crown's duty to act honourably and with the utmost good faith. For the Crown to entertain 'principles' that contain inaccurate representations of the text and spirit of the Treaty / te Tiriti and warped interpretations of te reo Māori from te Tiriti o Waitangi is a breach of the duty to act in good faith and to act reasonably.¹⁰¹

The Tribunal's findings were arrogantly dismissed by the ACT Party minister in charge of the Bill, David Seymour, who, having called for a national conversation, was not interested in hearing what was said to and by the Tribunal.

Similar timing manoeuvres were played out in the hearing on ACT's Regulatory Standards Bill, with the Tribunal reporting on 16 May 2025 with a call for an immediate halt to allow meaningful consultation with Māori,¹⁰² barely three days before the Bill was introduced to Parliament. It received a similar reception from the same Minister.¹⁰³

The review of Treaty Principles clauses was still proceeding at snails' pace before the Tribunal in mid-2025 as claimants and the Tribunal waited for policy documents to be provided with sufficient time before the Bill was introduced.

¹⁰⁰ Oral evidence of Warren Fraser, *Tomokia Ngā Tatau o Matangireia*, Wai 3300, 9 May 2024, p.48.

¹⁰¹ Waitangi Tribunal, *The Interim Report of the Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown's Treaty Principles Bill and Treaty Clause Review Policies*, 2024, Wai 3300, p.xvii.

¹⁰² Waitangi Tribunal, *Interim Regulatory Standards Bill Urgent Report*, 16 May 2025, Wai 3300.

¹⁰³ "Waitangi Tribunal recommends 'immediate halt' Regulatory Standards Bill for 'meaningful consultation' with Māori", *Radio NZ*, 16 May 2025. Available at: <https://www.nz.co.nz/news/te-manu-korihī/561265/waitangi-tribunal-recommends-immediate-halt-regulatory-standards-bill-for-meaningful-consultation-with-māori>

“Principles Of The Treaty”: An Instrument Of The Crown

Many legal witnesses and submitters responded to ACT’s Bill in 2024 by defending the concept of “Treaty Principles” as not needing reform. That was ironic, as those principles had been developed by the Crown’s courts, officials, some Waitangi Tribunals and academics over recent years in ways that cemented the Crown’s claim to sovereignty, rather than the limited *kāwanatanga* under Te Tiriti itself.

The contemporary concept of Treaty principles did not start off that way.¹⁰⁴ Significantly, the Treaty of Waitangi Act 1975 refers to both Te Tiriti o Waitangi and The Treaty of Waitangi, with the Crown’s actions to be judged against “principles” derived from both of the texts. When the legislation was before Parliament in 1974, several Māori MPs referred to “principles” as a way to restore the mana and the wairua to Te Tiriti and the mana motuhake of hapū and bypass the problem that courts and governments refused to recognise te Tiriti itself. Apparently Matiu Rata, the architect of the Tribunal’s legislation, drew the reference to the “principles” from Labour’s 1972 manifesto, which was in turn used in the earlier Ratana Party manifesto. This was a time when few talked in the public domain about Te Tiriti and before references to Māori sovereignty, let alone tino rangatiratanga, had become commonplace.

The early Tribunal reports on the *Motonui, Kaituna and Manukau Harbour* inquiries said there was no cession of sovereignty to the Crown. The Crown, especially Prime Minister Muldoon, was not happy. But they could live with Treaty “principles” being defined by the Waitangi Tribunal, because its powers were limited to recommendations on historical claims and could be ignored.

The Crown faced bigger problems in 1987 after the Labour government put the “principles of the Treaty” into legislation. The inclusion of section 9 in the State-owned Enterprises Act 1986 that “nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the Treaty of Waitangi” was intended as a token nod to Māori. The New Zealand Māori Council forced the courts to interpret it. The Court of Appeal gave the Māori Council an unprecedented victory with a catch:

far from recognising Te Tiriti and rangatiratanga it made up its own set of Treaty principles that had the sovereignty of the Crown at the core. Reference to the “spirit” of the Treaty, borrowed from rangatira in a very different context, was used to legitimate an unequal “partnership” where the Crown would govern and “actively protect” Māori rights as it saw them. Māori would be consulted where the Crown needed more information, would be loyal to the Queen of England/New Zealand and be reasonably cooperative.

After a flurry of court cases, the Crown asked officials to formally devise a set of “Principles for Crown Action on the Treaty of Waitangi/Te Tiriti o Waitangi”. These principles co-opted Māori terms – “*government (kāwanatanga)*”, “*self-management (rangatiratanga)*”, “*equality (all equal before the law)*”, “*reasonable co-operation*” that requires good faith, balance and common sense, the outcome of which would be partnership, and “redress”. They bore as little relationship to Te Tiriti o Waitangi as the ACT Party’s principles in the Treaty Principles Bill.

This prompted Bishop Whakahuihui Vercoe to lay down a wero to the Crown at the 150th commemoration of Te Tiriti at Waitangi:

Some of us have come here to remember what our tupuna said on this ground: that the treaty was a compact between two peoples. But since the signing of that treaty 150 years ago I want to remind our partners that you have marginalised us. You have not honoured the treaty. We have not honoured each other in the promises we made on this sacred ground. Since 1840 the partner that has been marginalised is me – the language of this land is yours, the custom is yours, the media by which we tell the world who we are are yours.

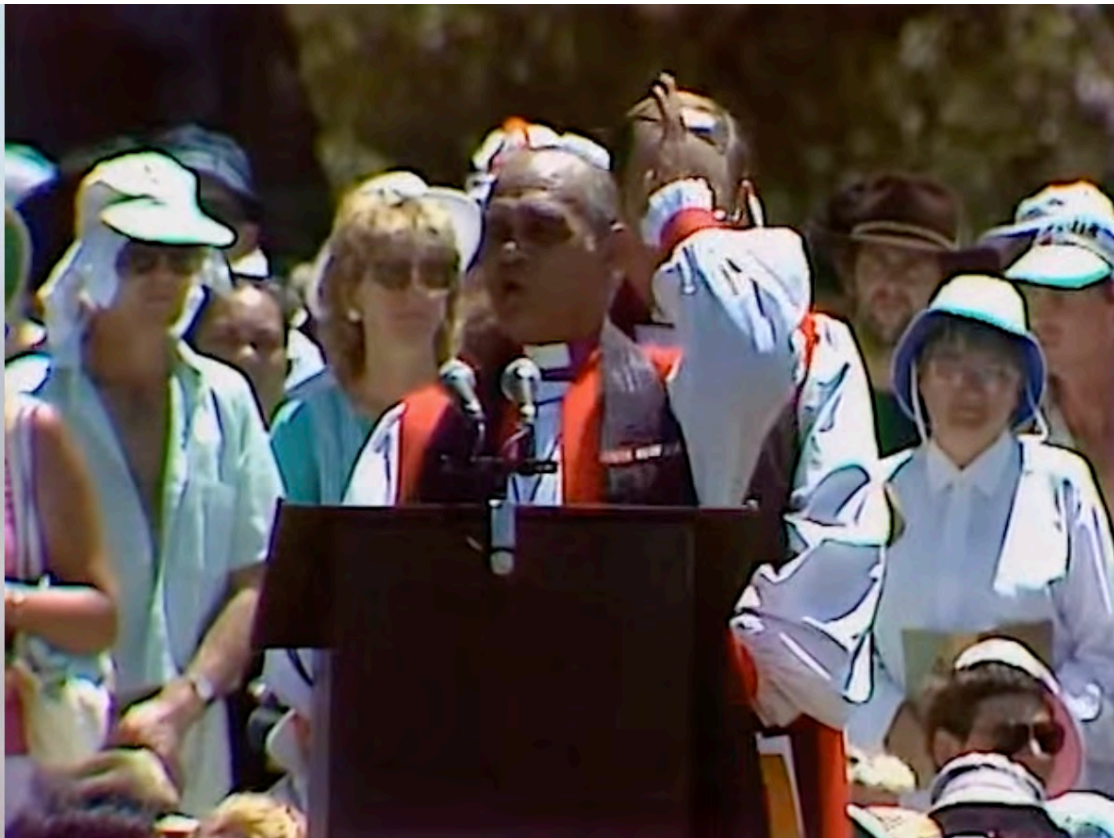
What I have come here for is to renew the ties that made us a nation in 1840. I don’t want to debate the treaty. I don’t want to renegotiate the treaty. I want the treaty to stand firmly as the unity, the means by which we are made one nation. ... The treaty is what we are celebrating. It is what we

¹⁰⁴ Jane Kelsey, “Rewriting history: How the Treaty ‘principles’ evolved and why they don’t stand up to scrutiny”, *The Conversation*, 9 September 2024. Available at: <https://theconversation.com/rewriting-history-how-the-treaty-principles-evolved-and-why-they-dont-stand-up-to-scrutiny-238406>

are trying to establish so that my tino rangatiratanga is the same as your tino rangatiratanga (absolute sovereignty). And so I have come to Waitangi to cry for the promises that you made and for the expectations of our tupunas made 150 years ago. ... I want to say to the Government don't produce principles of the Treaty – the treaty is already there.

That plea was ignored. Even the Waitangi Tribunal's reports abandoned the earlier position that Māori never ceded sovereignty, and adopted and adapted the Crown's principles. That approach prevailed until the findings in *Te Paparahi o te Raki*, *Te Urewera* and *Te Rohe Potae* that there were no cessions of sovereignty, although the Crown and some Tribunals continued to invoke the old principles. Those landmark recent reports had little effect on the Crown's "principles".

At the time of ACT's Bill, "Principles of the Treaty" produced by the courts, the Tribunal, the government agencies, and some academics, had been so refined over the years that Te Tiriti was reduced by the Crown to "four Ps": partnership, participation, protection, prosperity. These became embedded in the guidelines for state agencies, who then then claimed they were complying with the treaty. That was still not enough for ACT.



Bishop Whakahuihui Vercoe delivers his sermon at Waitangi in 1990.

Denigrating Te Tiriti O Waitangi

Evidence from rangatira in the tribunal hearing on the Treaty Principles Bill was crystal clear: Te Tiriti is regarded as a “kawenata tapu” or sacred covenant or compact, not to be broken or desecrated. As a sacrosanct marker of a relationship between two sovereign nations that established the limited terms for the Crown’s presence in Aotearoa it would never allow for unilateral changes to be imposed upon it, such as those of the coalition government that made it “barely recognisable”.

The evidence of tangata whenua experts Professor Margaret Mutu, Mr Hone Sadler, Mr Kipa Munro, Mr Pita Tipene and Ms Natalie Coates acknowledged Te Tiriti as such, and resisted any notion that it is a mere source of property rights, or just one of this nation’s founding documents.

In 1835 He Whakaputanga o te Rangatiratanga o Nu Tireni expressed the mana held by the rangatira individually and in a collective capacity “*that they were an independent and sovereign nation*”. Te Tiriti o Waitangi took that further and “*provided the framework in which the British and Māori would co-exist and apply rangatiratanga alongside kāwanatanga and grow as a nation*”.

The Crown’s limited authority of kāwanatanga under Te Tiriti sits alongside, not above, rangatiratanga. Through Te Tiriti, the Crown was granted the right to exercise authority over British subjects, and thereby keep the peace and protect Māori interests, within Aotearoa. Professor Mutu emphasised in her evidence the momentous honour of this very limited authority bestowed on Queen Victoria. The Crown has systematically abused that honour.

Each of the Coalition Government’s anti-Tiriti commitments did violence to these understandings. ACT’s proposed Bill did not even acknowledge the existence of Māori. The Rangatira spelt out the pain this insult had caused. The constitutional change that was being contemplated in those proposals disfigured Te Tiriti and Te Tiriti relationships; and it dishonoured the people, communities and work that contributed to He Whakaputanga and Te Tiriti, and all those who have worked tirelessly to uphold Te Tiriti.

Mr Kipa Munro’s testimony reminded the tribunal, the Crown and us all, how the process of defending Te Tiriti against racist

attacks and political assaults had aged his peoples of Te Tai Tokerau. These two coalition deals were more of the same and would set the country back decades if allowed to proceed. Whenever such laws are made, and Te Tiriti is not at the centre, Māori are losing. And each time the standard for honouring Te Tiriti is lowered even further, it is made even harder to get to the authentic, Te Tiriti-compliant position. Mr Pita Tipene likened it, in his oral evidence, to the 5th floor of a 20-floor building when the only way is down.

Mr Hone Sadler described the Coalition’s commitment as demeaning, debasing and trivialising Te Tiriti me He Whakaputanga, and ACT’s principles as contrived, disparaging and denigrating Ngāpuhi. Professor Mutu called out the gratuitous violence done to te Reo Rangatira by cutting and pasting from Te Tiriti into the ACT Bill and the insult to those who have carried the rākau of the language throughout colonisation. She described the “*slashing, hacking at the kawenata tapu covenant*” as “*very, very offensive, very hurtful, and very very harmful to our people ... who reel at this type of assault on something so tapu*” and asked the Crown, “*Why are you trying to hurt us so badly? What it is that you fear so much that you must attack us on something so important to us?*”

The Tribunal heard the same evidence from every direction. Mr Kipa Munro in his concluding remarks to the Tribunal at the urgent hearing, asserted:

Mātou me ērā atu o ngā kaikerēme e aru ana, e aru ana tēnā nohonga Taraipiunara ki tērā, ki tērā, ki tērā, ka piki ake tātou Ngāi Māori ka poro ō mātou waewae, ka piki ake anō ka poro ō mātou nei waewae. Tēnei pire he poro ūpoko, he poro ūpoko.

Pita Tipene was equally forthright in response to a question from the Tribunal:

We need to be very clear that the threshold for engagement with Māori is not consultation, and even if it were, reducing Māori to submitters in a public process does not constitute consultation with Māori. For the Crown to provide tino rangatiratanga, there needs to be space for the exercise of rangatiratanga at every step of the policy design and process. This means first and foremost that Māori need to be able to make their own decisions about policies which affect them.



Hana-Rawhiti Maipi-Clarke leads Haka Ka Mate in parliamentary debate on Treaty Principles Bill, 14 Nov 2024

A Pākeha Lens

Giving evidence through a Pākeha legal lens, Dr Max Harris described how

... the Treaty Principles Bill and the Treaty clause review contort the very concept of the Treaty principles that is meant to be the touchstone for the Tribunal. One policy or act of the Crown's, the Treaty Principles Bill, reinterprets and redefines the principles in a way that shows no fidelity or respect for the original treaty. The other policy or act spreads a net across the landscape and aims to drag and catch all references to the principles, so that they can be lifted off that landscape. It is worth returning to Casey J's words about what the principles are: an account of the Treaty's "terms understood in the light of the fundamental concepts underlying them"; precepts that call for an assessment of the relationships the parties hoped to create by and reflect in Te Tiriti o Waitangi. It can hardly be said that Treaty or Te Tiriti relationship are being assessed, let alone respected, where one side is unilaterally seeking to redefine the terms of the Treaty. Where proposed principles lose any plausible or defensible connection to the terms of the text the Crown cannot be said to upholding the principles at all.¹⁰⁵

Dr Harris's oral evidence spelt out more specifically the violence being done to Te Tiriti by ACT's proposed "principles":¹⁰⁶

- a. Tino rangatiratanga is redefined by the Bill: the Bill, almost definitionally, contradicts tino rangatiratanga. It denies Māori voice, interfering with the right of Māori to continue to organise and live as Māori.*
- b. There is no active protection when tino rangatiratanga is expunged from New Zealand law and policy through the Bill and when no process for safeguarding Māori interests is flagged by the Treaty clause review.*
- c. There are clear breaches of principles of good faith and the duty of the Crown to be reasonably informed, including the failure by the Crown to inform itself in setting out its commitment to the Treaty Principles Bill.*

d. There is a breach of Te Tiriti's preamble, with its reference to the Crown being anxious to protect the just rights and property of Māori.

e. There is a structural breach of Te Tiriti o Waitangi in the sense that these initiatives reach into the heart of Te Tiriti itself. These initiatives involve the Government tampering with the foundation of its own legitimacy, a little like the mythical snake eating its own tail.¹⁰⁷

Dr Harris described these measures as unprecedentedly ill-informed and irreversible in their damaging effects. They presented a fork in our constitutional road, with generational decisions to be made about which route is taken. Growing awareness of Matike Mai, Te Tiriti o Waitangi, and He Whakaputanga, among at least some younger people and communities, showed that a positive route could lie ahead if people in Aotearoa resist taking a wrong turn. He urged the Tribunal to play a role in ensuring the right turn was taken.

From a western constitutional law perspective, Professor Andrew Geddis observed that a constitution is not a blank slate on which you can write just anything. ACT's Bill amounts to a legal fiction that would, by unilateral diktat, turn a compact between two authorities into a universal individualistic assertion of liberal rights that aims to allow the executive to escape its Tiriti obligations.¹⁰⁸

¹⁰⁵ Waitangi Tribunal, *The Interim Report of the Tomokia Ngā Tatau o Matangireia*, Wai 3300, p.185

¹⁰⁶ Opening Statement of Evidence by Dr Max Harris, *Tomokia Ngā Tatau o Matangireia*, Wai 3300, 9 May 2024.

¹⁰⁷ Opening Statement of Evidence by Dr Max Harris, *Tomokia Ngā Tatau o Matangireia*, Wai 3300, 9 May 2024.

¹⁰⁸ Oral evidence of Andrew Geddis, *Tomokia Ngā Tatau o Matangireia*, Wai 3300, 9 May 2024, Transcript, p.214.

The Crown’s Position

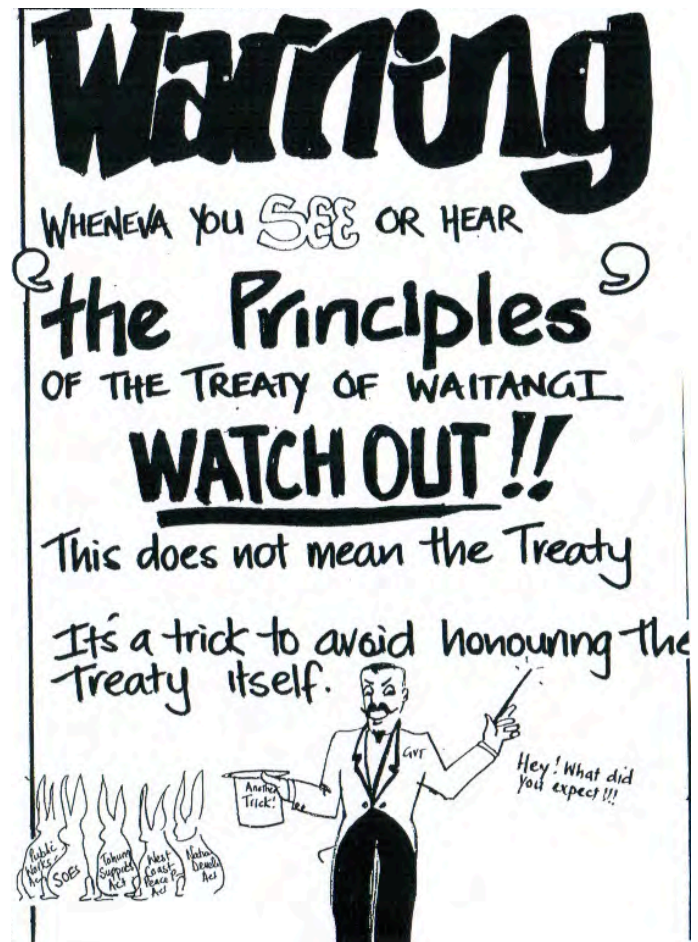
Crown officials were in an invidious position, instructed by a Cabinet directive of 25 March 2024 that their function was the implementation of the Coalition Agreement. A briefing from the Ministry of Justice on 14 December 2023 nevertheless warned of a “significant risk that the Bill could generate division that undermines social cohesion and the Crown-Māori relationship” and that:

Developing a Bill that purports to settle the Treaty principles without Māori participation could be seen as one partner attempting to define what the Treaty means and the obligations it creates. Failing to engage would be seen as failing to meet the obligation under the Treaty to act reasonably, honourably and in good faith.

The Ministry of Justice documents, and the oral evidence of senior officials, described ACT’s Treaty Principles as “novel” and not supported by cases, legislation or expert opinion. The briefing to incoming Associate Minister Seymour referred to the Bill of Rights Act, but contained no reference to Te Tiriti. When asked, the officials could not provide any description of the purpose for the Bill beyond reiterating the words in the Coalition Agreement.

Discussing the normal process of policy reforms to address an identified problem, the Secretary for Justice was asked his view of the policy problem the ACT Party’s Bill was seeking to address. His reply pointed to the value of a constitutional conversation in an appropriate way, but “that problem doesn’t necessarily lead you to the problem that the Treaty Principles Bill is offering”. Tribunal Chair, Judge Fox, asked “if you didn’t have the Coalition Agreement, what is the policy problem you would hope to identify that would need a bill of this type?”, to which he replied: “I don’t have a policy problem that would need a bill of this type to finish.”¹⁰⁹

So, the Crown was committed to pursuing this policy without any evaluation of its Tiriti implications, and contrary even to all of its own Treaty and “good regulatory practice” requirements - including that there was a problem that needed solving.



Source: Kia Mohio Kia Marama Trust

¹⁰⁹ Oral evidence of Andrew Kibblewhite, *Tomokia Ngā Tatau o Matangireia*, Wai 3300, 9 May 2024, Transcript, p. 113.

A Threat To The Future Of Aotearoa

Professor Jane Kelsey described the Bill as a constitutional moment:¹¹⁰ hostile political forces had been emboldened by international developments to seize the opportunities created by MMP and coalition negotiations to advance assaults on Te Tiriti that were more brutal than had been seen for many years. If allowed to succeed, they would open the door to more, even bolder assaults on Te Tiriti o Waitangi and Māori. This puts a heavy responsibility on the Tribunal, especially in the Constitutional Kaupapa inquiry, to make strong and definitive findings that reinforce the fundamental relationship of rangatiratanga to kāwanatanga and advance an approach to decision-making and law making in Aotearoa that genuinely reflects Te Tiriti and recognises the centrality of tikanga Māori as the first law of this land.

In concluding his contribution, Dr Harris sought to

... end just by underscoring the depth and gravity of what the Crown is doing. This disfigures Te Tiriti and Te Tiriti relationships; and it dishonours the people and work who contributed to He Whakaputanga and Te Tiriti, and who have worked tirelessly to uphold Te Tiriti. Defending Te Tiriti has aged people; it has sapped lives; and taken away time that people should have to live and thrive. These initiatives will do the same. They will set us back decades as a country if allowed to proceed. These initiatives are unprecedentedly ill-informed and irreversible in their damaging effects. The Tribunal should recommend that they are abandoned.¹¹¹

Professor Kelsey predicted a march that would dwarf the protest against the Seabed and Foreshore Act in 2004. And so it was, with hiko throughout Aotearoa and estimates of 40,000 to 50,000 Māori and Tauīwi taking to the streets just in Pōneke.¹¹² That was followed by a deluge of over 300,000 submissions to the select committee hearing the Bill, with only a small fraction being heard. Initially, not all of them were going to be read and placed on the record, which provoked sufficient outrage that the decision was reversed.¹¹³



Source: Te Ao with Moana

¹¹⁰ Oral evidence of Jane Kelsey, *Tomokia Ngā Tatau o Matangireia*, Wai 3300, 9 May 2024, Transcript, p. 252.

¹¹¹ Closing submissions from Max Harris, *Tomokia Ngā Tatau o Matangireia*, Wai 3300, 14 May 2024, Wai 3300, at [65].

¹¹² "Hiko to Parliament: Tens of thousands energised for change after protest against Treaty Bill", *NZ Herald*, 20 November 2024. Available at: <https://www.nzherald.co.nz/nz/hiko-to-parliament-tens-of-thousands-energised-for-change-after-protest-against-treaty-principles-bill/O2P5SGS2NJHXC2BXCYLTIQAQ/>

¹¹³ "All Treaty Bill submissions to be read as report set for release", *Stuff*, 3 April 2025. Available at: <https://www.stuff.co.nz/politics/360640167/all-treaty-bill-submissions-be-read-report-set-release>

A Dishonourable Crown

The Crown, in the form of ACT leader David Seymour and the parties to the coalition government in Cabinet, was in charge of the entire process of advancing this Bill and had the power to say “yes” or “no”. Mr Seymour knew what exactly what he was doing. For reasons that remained unclear, two months after the Government was formed and ministerial positions were allocated, David Seymour was appointed on 26 January 2024 as the Associate Minister in charge of the Bill. The Secretary for Justice described it as unusual to have an associate ministerial delegation with one responsibility. The terms of his delegation as an Associate Minister were matters within the Justice portfolio “relating to the **development and passage** of the Treaty Principles Bill and associated policy” (emphasis added).

Following that appointment, Associate Minister Seymour exercised unitary control of the process: he directed the preparation for the Bill, including the extent of engagement with Māori, and the details of the Cabinet paper. As the Associate Minister he explicitly asked for advice on the risks of *not* consulting at all, which suggests he was seriously considering that option. All this apparently occurred without any decision of Cabinet. Associate Minister Seymour displayed a single-minded determination to secure the implementation of the Bill and to rewrite Te Tiriti in a potentially irreversible way.

He had been empowered by decisions of Prime Minister Luxon, wearing a second hat as the leader of the National Party that depended on ACT to maintain its coalition government. The furore ensured that National and NZ First did not backtrack on the limited commitment in their coalition agreements but they then recommended against the Bill proceeding and voted it down at second reading. By then significant damage to Māori had already been done. Public statements showed that Associate Minister Seymour remained intent on the Bill proceeding to a binding referendum. It remains to be seen if that could yet happen.

Even though the Bill did not proceed to implementation, it caused great emotional harm to Māori and fostered a toxic environment in which hostile, anti-Tiriti and anti-Māori views are being legitimised, even normalised. It also deeply damaged relations between Māori and the Crown. Dr Harris had previously likened the Crown removing the foundation for its own legitimacy to the mythical snake eating its own tail. Now:

In departing even from its own requirements, the Crown has cast itself adrift from its own moorings and the potential for a good faith constitutional reconciliation. Both the Treaty Principles Bill and statutory review fail on their own terms: the policy problems that have been identified are either non-existent or not justified, or there is no logical connection between these initiatives and these policy problems. The initiatives violate other norms: from the Cabinet Manual, the Public Service Act, the United Nations Declaration on the Rights of Indigenous Peoples.¹¹⁴

The deliberately provocative breach of Te Tiriti has undermined the prospects for genuine Tiriti-based relationships and joint decision-making through the exercise of rangatiratanga and kāwanatanga. Such commitments between political parties in coalition agreements also set a precedent for future coalition deals to override even the Crown’s own constitutional processes. By advancing such ideologically-driven political commitments into Parliament, with requirements that the bureaucracy provides advice and supports on how to implement them, the Crown is conferring legitimacy on current and future moves to abrogate Te Tiriti o Waitangi. That provocation makes the path of constitutional transformation all the more imperative and urgent.

¹¹⁴ Closing submissions from Max Harris, *Tomokia Ngā Tatau o Matangireia*, Wai 3300, 14 May 2024, Wai 3300 at [65].

THE CROWN'S SECRET REVIEW OF INTERNATIONAL TREATY MAKING

Almost two centuries after the Crown violated Te Tiriti o Waitangi by asserting its right to sovereignty over New Zealand and the “royal prerogative” for the Executive to negotiate, sign and ratify international treaties, nothing has changed. It underpins the limited examination of international treaties by the Parliament, after-the-fact, that was first introduced in 1998 and a more formal process set out in Standing Orders in 2000. That has only been tinkered with since, despite persistent calls from Māori, civil society, and even Members of Parliament and Crown entities to conduct fundamental reviews of the treaty-making process.

This came to a head in 2021 in response to the Waitangi Tribunal inquiries on Wai 262 (mātauranga Māori) from 1991 to 2011 and Wai 2522 (Trans-Pacific Partnership Agreement/TPPA) from 2015 to 2021, the ministerially-appointed Trade for All Advisory Board (TFAAB) that reported in 2021, and public protests against the TPPA from 2015 to 2019.

In March 2021 the Ministry of Foreign Affairs and Trade (MFAT) was instructed to “report back to the Minister of Foreign Affairs and other relevant ministers on the issues relating to New Zealand’s treaty making process”. This had the potential to be a fundamental review of international treaty making and the Tiriti relationship. Instead, it was reduced to an assessment of whether the current system works for the Crown, whether they should consider any changes, and if so what those might be – with the proviso that they did not question the Crown prerogative and Cabinet’s exclusive treaty making authority.

That review of the international treaty-making process was conducted in secret by MFAT between 2021 and 2023. Its existence was discovered incidentally from documents received under an initial Official Information Act (OIA) request in June 2024. It took about 8 months of requests and reconsiderations to gain enough information to piece together what was, and was not, considered during the review and the Cabinet paper that was signed off by Minister of Foreign Affairs Nanaia Mahuta in 2023 but never presented to the Cabinet. It remains unclear why this process was shrouded in secrecy, but it is obvious from the documents that the officials knew what they proposed fell far short of what had been recommended by the various bodies, let alone what Māori expected from a Tiriti-compliant process.



A Brief Timeline

In August 2019, the Minister for Māori Development Nanaia Mahuta, who was also the Minister for Foreign Affairs, established *Te Pae Tawhiti*¹¹⁵ under Te Puni Kokiri (TPK) to implement the decade-old Waitangi Tribunal report on the Wai 262 claim. Kete 3 of Te Pae Tawhiti centred on the international sphere, to consider how the Crown should work with Māori as its Tiriti partner when negotiating international instruments. As explained below, Te Pae Tawhiti was essentially subordinated to MFAT on this question and TPK struggled, and failed, to secure concrete changes that could make a significant difference for Māori to the treaty-making process.

The Trade for All Advisory Board (TFAAB) established in 2018 in the wake of the TPPA, reported to the Minister of Trade in November 2019 with a number of reform recommendations. Cabinet deferred action on the key elements of international treaty making and domestic review and accountability.

In March 2021 MFAT was initially instructed to report back to the Minister of Foreign Affairs and other relevant ministers by the end of March 2022 on the issues relating to New Zealand's treaty making process, following the TFAAB report.

In mid-July 2022 Minister Mahuta directed officials to prepare a Cabinet Paper, with

*a constructive and pragmatic package of changes that can be implemented via Executive action, Cabinet decision, through the Standing Orders review and completed within the current parliamentary term.*¹¹⁶

The resulting Cabinet paper was signed off by Minister Mahuta on 18 November 2022. Despite acknowledging the existing treaty-making process had come under scrutiny in recent years, including the TFAAB (2019), Wai 262 (2011) and Wai 2522 (2016-2021) reports, and the three-yearly Review of Standing Orders in 2020, it claimed to be taking *“the opportunity to **pro-actively** address related recommendations and issues from the Waitangi Tribunal”*.¹¹⁷

The proposed *“pragmatic”* and *“important incremental improvements to the existing process”* would not fundamentally alter the Executive's prerogative for foreign affairs, *“which would require a first principles review of current constitutional settings”*. Nor would it or seek to address all the recommendations of the Trade for All Advisory Board.¹¹⁸

The paper was to go to Cabinet's Economic Development Committee on 14 December 2022 and Cabinet a week later. But even those limited *“incremental”* proposals never reached the Cabinet, one can surmise because of political sensitivities within the Labour government over Māori and Tiriti policies in 2023.

The deeply flawed power for the Cabinet to make international treaties in secret and without any effective accountability therefore remains unchanged.

Even a recommendation in 2023 by the Standing Orders Committee for a limited review of the parliamentary process for examining treaties was rejected by the select committee that conducts those ex-post reviews. That followed advice from MFAT's lawyers that the current process is fit for purpose and does not need reform - without disclosing that they had spent over two years conducting a review of the process and developing the Cabinet paper behind closed doors.

¹¹⁵ Te Pae Tawhiti, Te Puni Kokiri. Available at: <https://www.tpk.govt.nz/en/a-matou-whakaarotau/te-ao-maori/te-pae-tawhiti>

¹¹⁶ Aide Memoire to Cabinet Paper, 18 November 2022 at p.2

¹¹⁷ MFAT to Minister of Foreign Affairs, *“International Treaty Making – Improvements to Aotearoa New Zealand's Processes”*, 18 November 2022 (*“Cabinet paper”*), at [4].

¹¹⁸ Cabinet paper.



Tāme Iti on the steps of Parliament in November 1972 as part of Ngā Tamatoa's Māori tent embassy.
(PHOTO: John M Miller)

Tent Embassy at Parliament 1975. Photo John Miller.

Te Tiriti o Waitangi

The Crown was well aware that Māori have repeatedly challenged the Crown's claim to exclusive treaty-making authority and their own exclusion from international negotiations and decisions, including on the UNDRIP and agreements like the Multilateral Agreement on Investment in the late 1990s and the TPPA in the 2010s. The MFAT officials also knew that claimants in recent Waitangi Tribunal inquiries have insisted that the Wai 1040 finding that there was no cession of sovereignty applies to international treaty making, and that the blanket assertion of Crown sovereignty and prerogative is untenable. The Constitutional Kaupapa inquiry was also hanging over them.

Faced with all this, the Crown was absolutely determined to close off any space to raise these constitutional issues during its review, in particular the relationship of rangatiratanga and kāwanatanga under Te Tiriti. It is unclear whether this was a political directive, a red line for the MFAT officials, or both. The Cabinet paper in November 2022 simply asserted that

[historically] treaty making is part of the Executive's foreign affairs prerogative. The foreign affairs prerogative is a core part of the Crown's kawanatanga under Te Tiriti o Waitangi as acknowledged in the Wai 262 and Wai 1040 reports. To substantively change this prerogative would be a significant constitutional step.¹¹⁹

¹¹⁹ Cabinet Paper, 18 November 2022 at [10].

¹²⁰ David McGee, *Treaties and the House of Representatives*, Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders Committee, 1996 AJHR I.18B, Annex D.

¹²¹ Law Commission, *The Treaty Making Process: Reform and the Role of Parliament*, Wellington, Law Commission, 1997, pp.60-64

¹²² The International Treaties Bill in the name of Green MP Keith Locke 2000 was voted down in 2003, but was supported by the ACT Party.

The Democratic Deficit

It is not just Māori who have opposed the executive's unaccountable power over treaties. Over the past three decades repeated challenges to the “democratic deficit” of treaty making have even come from within the Crown: reports from the Clerk of the House of Parliament in 1996¹²⁰ and the New Zealand Law Commission in 1997,¹²¹ Members Bills from Green MP Keith Locke in 2003¹²² (supported by the ACT party), from ACT MP Ken Shirley¹²³ and from Fletcher Tabuteau MP from NZ First,¹²⁴ petitions, and successful court action over the secrecy of the TPPA.¹²⁵ Through all of this, the Crown – Cabinet, parties in government and MFAT officials – have resisted change.

Most recently, the Trade for All Advisory Board, established in November 2018 by Labour's trade minister in the wake of the TPPA protests, endorsed a “triple bottom line” approach to trade policy of social, economic and environmental objectives, and partnership with Māori under te Tiriti o Waitangi/the Treaty of Waitangi. It recommended various improvements to transparency and participation in negotiations and called for Parliament to establish an expert select committee on treaties.¹²⁶

In an internal briefing, MFAT's legal officials admitted that the “so-called ‘democratic deficit’ had “not gone away” and has particular resonance with Māori over rights under the Treaty of Waitangi.

Even though all of this was acknowledged in MFAT's papers, officials said early in the process that their limited aim was “to consider **whether** there are any improvements that could be made in response to the concerns that have been raised” within their current constitutional settings.¹²⁷



Protest against TPPA

¹²³ Ken Shirley and Keith Locke's bills were in the ballot at the same time, but only Keith Locke's was drawn.

¹²⁴ International Transparent Treaties Bill 2017, voted down at introductory debate by 5 votes, including the Māori Party and ACT. First reading debate. Available at: https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20170607_20170607_36

¹²⁵ “New Zealanders protest the secrecy of the TPPA”, Pacific Scoop, 29 March 2014. Available at: <https://pmcarchive.aut.ac.nz/articles/pacific-scoop-new-zealanders-protest-over-secret-tpa-and-demand-release-text-2786.html>; *Kelsey v The Minister of Trade* [2015] NZHC 2497.

¹²⁶ Report of the Trade for All Advisory Board, November 2019. Available at: <https://www.mfat.govt.nz/assets/OIA/OIA-2025/OIA-29907-Trade-for-All-Advisory-Board-Report-5-February-2025.pdf>

¹²⁷ Stocktake of New Zealand's International Treaty Making Process: Scoping Paper, LEG-67-76 at [10]

Key Waitangi Tribunal Reports

These reports followed the claims, inquiry and hearing processes with findings and recommendations that are significant to Ngāti Hine and ngā iwi Māori.

He Whakaputanga me te Tiriti – The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry

The Wai 1040 Stage 1 report, *He Whakaputanga me te Tiriti*, concerns the 'meaning and effect' of the Treaty in February 1840, when the first signings of te Tiriti took place in the Bay of Islands and the Hokianga.

The Tribunal concluded that the rangatira who signed Te Tiriti o Waitangi in February 1840 did not cede sovereignty to the British Crown: "That is, they did not cede authority to make and enforce law over their people or their territories. The rangatira did, however, agree "to share power and authority with Britain." The Tribunal said they agreed to the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Māori interests.

The rangatira consented to the treaty on the basis that they and the Governor were to be equals, though they were to have different roles and spheres of influence. The details of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis.

Ngāti Hine summary of Wai 1040 Stage 1 report

Constitutional Questions Ruled Out Of Scope

From the start, the Crown prerogative was not to be questioned. A proposed stocktake of current approaches to treaty making said it would not address constitutional questions regarding treaty-making powers, because the Crown was not of a mind to do so:

*In light of the Cabinet mandate, our intention would be to stay within the framework of the existing constitutional balance of power for treaty making, including the maintenance of executive control to determine foreign policy. **There has been no indication that the Government is interested [in] significant constitutional reform, nor has the Foreign Affairs, Defence and Trade Committee (FADTC) suggested a change of this nature is warranted. In addition there are good practical and conceptual reasons for the executive to retain the power to enter into treaties.***¹²⁸

In other words, the Crown would not question its own exclusive powers to negotiate and enter into treaties through executive branch of government.

Likewise, the final Cabinet Paper in November 2022 said the changes proposed

*... do not seek to displace, or substantially change, the scope of that prerogative. In particular the paper **does not seek to 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.*¹²⁹

The briefing accompanying the paper reiterated the "risks" noted in earlier documents that

*... 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.*¹³⁰

¹²⁸ MFAT, Stocktake of New Zealand's International Treaty Making Process: Scoping Paper, LEG-67-76 at [11]

¹²⁹ Cabinet Paper, 18 November 2022 at [17]

¹³⁰ Cabinet Paper, 18 November 2022 at [16]

The Crown's Justifications

The officials offered five main justifications in defence of the status quo:

- **The need to speak with one voice:** but there is no reason why that voice should only be the Crown's, rather than a federal or dualist state as Te Tiriti envisaged. It also assumes there would not be agreement between the Crown and Māori, so the Crown's voice must prevail.
- **Not revealing negotiating positions:** that argument could apply to all international treaties, but only trade and investment treaties tend to be kept secret. In reality, previous agreements provide clear indications of the government's position. On the flip side, public pressure domestically is often used by other countries to strengthen their negotiators' hands. This rationale also leaves aside the democracy question - such secrecy would be untenable in domestic legislation.
- **Flexibility to respond to urgent issues,** without explaining why some process for jointly making rapid decisions cannot be achieved.
- **Confidence of other states that New Zealand can deliver;** yet other countries seem to achieve that confidence with much more complex processes that balance their domestic constitutional obligations with their international objectives; and
- **Need for targeted approaches given New Zealand's limited ability to influence** in multilateral negotiations; this again assumes the Crown should be the sole judge of appropriate compromises and outcomes that reflect its priorities.

These assertions remained unchallenged because the Crown was talking to itself. Excluding any consideration of constitutional matters, especially Te Tiriti, and conducting this review in secret, ensured that the flaws in the rationale would not be exposed.

Officials also told ministers that in New Zealand, "as in most countries" the power to negotiate and enter into treaties rests with the Executive branch. That is manifestly not true. The European Union, the United States, South Africa, many Asian

and Latin American countries have constitutional processes that require approval by legislatures, often through complex, multi-layered processes.

While New Zealand's system is a legacy of British colonialism, a number of former colonies have also abandoned that absolute Crown prerogative. They are far from accountable, especially in a Tiriti sense, but they are worlds away from what the Crown insists on maintaining here.

The Australian Parliament created a specialist international treaty committee with powers to conduct inquiries during the course of negotiations back in 1996. A review of the Australian government's approach to trade and investment negotiations by the Parliament's specialist Joint Standing Committee on Trade and Investment Growth, with 10-point terms of reference, released an interim 78-page report in February 2024. It recommended *inter alia* the establishment of a legislative framework for negotiating trade and investment agreements¹³¹ that covered both the process of negotiations and the content of agreements. The final report in April 2024 *Strengthening Australia's Approach to Trade Negotiations* ran to 141 pages, and focused on assessing a broader concept of the national interest.¹³²

While trade brings substantial benefits to many Australians, it has the potential to have widespread impacts across the economy, society, and the environment, with some experiencing costs and being disadvantaged. Further, an important element of the national interest is to ensure that trade commitments do not unduly weaken domestic policy objectives or the ability of the Australian Government to make decisions in the interests of its citizens.

Hence, impact assessments "should consider the implications of Australia's trade commitments in areas such as health, gender, labour, and human rights as well as for regional communities and First Nations people."

¹³¹ "A briefing on the international treaty making process", New Zealand Parliamentary Library, 5 April 2024

¹³² "Strengthening Australia's Approach to Trade Negotiations", Parliament of Australia, April 2024. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Joint_Standing_Committee_on_Trade_and_Investment_Growth/Approachtotrade/Report

Source: Dylan Owen Collection, Alexander Turnbull Library



No Engagement With Māori Or Generally

The Crown recognised that power to make international treaties is a matter of fundamental importance to Māori, but at no stage in the documentation is there any proposal to open the review to consultation with Māori (or others). A paper in December 2021 “acknowledged” that some engagement beyond government departments was likely to be necessary, “but this can be calibrated as necessary over time”. It never happened.¹³³

A Māori advisor in MFAT raised this question when commenting on the draft Cabinet Paper: “Given it is essentially a paper on consultation, we wondered if Māori had been consulted, and, if not, whether there was scope to do so.”¹³⁴ The answer on both counts was apparently “no”. MFAT even kept it secret from Māori entities it is obliged to engage with over the process for negotiating trade and investment treaties. The Mediation Agreement between the Crown (via MFAT) and Ngā Toki Whakarururanga under the Wai 2522 claim on the TPPA says they will:¹³⁵

Discuss and develop processes of engagement that enable Māori as the Tiriti/ Treaty partner to exercise genuine influence over trade policy, broadly defined, including at various stages of decision making in negotiations for international trade and investment agreements [and] Ensure transparency of process, [including] the need for, and opportunities for, input into, and the method of engagement appropriate for, each stage/matter ...

In effect, the Crown only consulted itself, with MFAT determining what made the final cut in the Cabinet paper.



¹³³ “International Treaty Making Process: Meeting with DS MLG, DS TEG, DCE”, 20 December 2021

¹³⁴ Internal email, “Re: Cabinet Paper Review – Improvements to International Treaty Making Process”, 14 November 2022.

¹³⁵ Mediation Agreement between Wai 2522 Claimants and the Crown, dated 2 October 2020. Available at: <https://ngatoki.nz/document-library/mediation-agreement/>

Te Puni Kokiri, Te Pae Tawhiti And Interagency Responses

MFAT developed an initial paper for the Minister, which it put out for inter-agency consultation from late February 2022 to a “select group of agencies”, including TPK and Te Arawhiti. A draft Cabinet paper was then prepared by MFAT and circulated to other Crown agencies for comment on 8 November 2022.

As noted, there was overlap between the MFAT review and kete 3 of Te Pae Tawhiti. An early paper to MFAT’s Strategy and Policy Committee summarised its take on the inter-related review:

There have been increasing calls to improve Government’s engagement with Māori during the negotiation of international treaties, including through the Wai 262 and Wai 2522 Inquiries by the Waitangi Tribunal which have been critical of the Crown’s engagement and made related recommendations for action. As part of the Government’s approach to addressing issues raised in Wai 262 it has agreed through te Pae Tawhiti to consider how the Crown should work with Māori as its treaty partner to identify Māori interests, and the nature and strength of those interests, when negotiating international instruments. The scope of this work includes the implementation of the 2001 Strategy also in the context of broader questions of how the Government should engage with Māori when representing New Zealand and how Māori should be represented in international fora. The development of Māori Crown engagement frameworks by Te Arawhiti also informs the contact through a more contemporary interpretation of how the Treaty of Waitangi partnership is represented in Crown and Māori decision-making.

Although TPK was formally the lead agency for the review of international instruments and forums under Kete 3 of Te Pae Tawhiti, officials from MFAT said “the Ministry has positioned itself within the inter-agency Te Pae Tawhiti/wai 262 process”¹³⁶ and their “constitutional” responsibility to lead work on international treaties meant it might be expected to lead that process too.¹³⁷ It would “consider how the Crown should engage with Māori as its treaty partner in international fora and when we negotiate international instruments.”

Te Pae Tawhiti continued in parallel while the Cabinet paper was being finalised, but this work stream was essentially run by MFAT. Documents eventually released under the OIA showed that MFAT sought to shut down TPK’s calls for a more immediate and concrete review of the Crown’s engagement strategy with Māori, presumably because it would have opened the door to constitutional debates that threatened the Crown’s absolute control of the treaty making process.

Te Arawhiti supported “improved procedural requirements for engagement with Māori and mandating assessment of Treaty interests through [National Interest Assessments]”, but also wanted the paper

to explore options for accountability mechanism/s to ensure these interests are effectively recognised (i.e. reporting to iwi and Māori organisations, and Parliament’s Māori affairs select committee – as identified by the WT in Ko Aotearoa Tenei).¹³⁸

The Ministry of Justice suggested “a stronger explanation on the treaty implications. It’s invoked a few times and there’s reference to Tribunal reports. Those reports, I understand, comment on why the issue is an important one”, again to no avail.¹³⁹

¹³⁶ “International Treaty Making Process: Meeting with DS MLG, DS TEG, DCE”, 20 December 2021

¹³⁷ “Stocktake of New Zealand’s International Treaty Making Process”, Meeting Paper, Strategy and Policy Committee, 5 October 2021 at [24]

¹³⁸ Email Te Arawhiti to MFAT, “Cabinet Paper Review – Improvements to International Treaty Making Process”, 17 November 2022.

¹³⁹ Email Justice to MFAT, “Cabinet Paper Review – Improvements to International Treaty Making Process”, 15 November 2022.

The 2001 Strategy For Engagement With Māori On International Treaties

The flash point between TPK and MFAT was the Strategy for Engagement with Māori on International Treaties adopted by Cabinet in 2001. It had been prepared by MFAT in response to Māori objections over several international treaties in the late 1990s.

The Strategy makes the Crown agency that is leading on a treaty responsible for consultation with Māori, including determining the nature of the issues and the degree of that engagement. The “sliding scale” approach to engagement leaves the Crown to decide what is important to Māori and what level of engagement is required, if any. All power lies with the Crown to recognise and prioritise Māori interests, decide what level of protection is required, what is “reasonable”, and how these weigh up against other valid interests. That assumes the Crown understands what the issues are, has the political will to raise them with Māori, and is prepared to act on what Māori identify as issues and solutions.

The 2001 Strategy was criticised in both the Wai 262 Ko Aotearoa Tenei and Wai 2522 TPPA reports, especially on the Crown’s lack of understanding of what matters to Māori. The urgency report in Wai 2522 was especially critical of the Crown’s failure to the Tiriti issues:

We do have a concern that the Crown has misjudged or mischaracterised the nature, extent, and relative strength of Māori interests put in issue under the TPPA. ... Claimants can and do point to a number of matters that go to the heart of the Crown-Māori relationship, and Māori Treaty interests, [which are] matters of high importance to Māori, and any potential adverse impact under the TPPA would be likely to cause significant prejudice.¹⁴⁰

... It seems to us that, contrary to the findings of the Wai 262 Tribunal, the Crown did not seek or provide a realistic opportunity for Māori to identify their interests in the TPPA as a Treaty partner. The secrecy or confidentiality of the development of Crown policy in relation to the TPPA and its negotiating positions compounded this difficulty, and is likely to have been a factor in low levels of engagement

between the Crown and Māori (whether initiated by either party) prior to the lodging of these claims.¹⁴¹

In the Tribunal’s view, it had become clear “that the Crown has not shown that it has understood the nature and extent of Māori interests affected by the TPPA.”¹⁴² But having reached that conclusion, the Tribunal then followed a similar path to Wai 262 and retreated into the zone of ‘reasonableness’, remarking that

engagement with Māori is not always going to be perfect. But, as we have said, Māori are not just another interest group; Māori are the Crown’s Treaty partner and their interests are always entitled to active protection, to the extent reasonable in all the circumstances.¹⁴³

That fallback was critically important, because the Tribunal then adopted the ‘balancing’ approach from the Wai 262 report that vests all power in the Crown, including decisions on appropriate engagement, and allows Māori interests to be subordinated to a general national interest.¹⁴⁴

The TPK’s response to the inter-agency consultation on the draft Cabinet paper wanted to change that. They pressed for a substantive review of this twenty year-old strategy, by

strengthening the commitment towards the redesign of the 2001 Strategy mahi and Te Puni Kokiri’s role. As discussed previously, we consider that the redesign of the 2001 Strategy should be the main priority, with the redesigned Strategy implemented by mid next year. The timing would align with the end of the first phase of te Pae Tawhiti work programme. This view is formed from the need to promptly address the ad hoc and inconsistent approaches to Māori involvement in international mahi across government by driving a strategic approach.

Rather than simply “improving implementation” of the 2001 Strategy, TPK proposed to work jointly with MFAT to redesign the Strategy and improve implementation, as aligned with the Te Pae Tawhiti work stream, and consider extending it to major non-binding instruments (such as the UNDRIP).

¹⁴⁰ Waitangi Tribunal, *Report on the TPPA*, Wai 2522, 2016, at p.54.

¹⁴¹ Waitangi Tribunal, *Report on the TPPA*, Wai 2522, 2016, at pp.54-55.

¹⁴² Waitangi Tribunal, *Report on the TPPA*, Wai 2522, 2016, p.6.

¹⁴³ Waitangi Tribunal, *Report on the TPPA*, Wai 2522, 2016, at p.12.

¹⁴⁴ Waitangi Tribunal, *Report on the TPPA*, Wai 2522, 2016, at p.57.

MFAT rejected this, insisting it was more appropriate to review the Strategy after its current proposals had been implemented. The Cabinet paper merely proposed a stocktake of policy practice in international engagement, including how the 2001 Strategy was being implemented and taking into account any Cabinet decisions on Te Pae Tawhiti. That potentially deferred the review of the 2001 Strategy indefinitely:

*In addition, when the wider proposals in the paper are implemented, and a renewed picture of the broader international treaty-making process is clear, I consider that **the ongoing role of the 2001 Strategy and its fitness for purpose should be considered**. Any comprehensive review of the 2001 Strategy will necessarily involve Māori as Tiriti partner, consideration of the outcomes of the Standing Orders Review, and a recognition of changes and improvements in Government practice since 2001. This will require careful consideration to ensure an appropriate engagement process is followed and relevant interests appropriately considered.¹⁴⁵*

A review of the 2001 Strategy proposed by TPK would necessarily involve Māori as Tiriti partner

*and is likely (and reasonably so) to engage with constitutional issues about the Government's role in negotiating, concluding and implementing international treaties. **This type of discussion is beyond the scope of what this paper seeks to achieve at this time.**¹⁴⁶*

Because the Cabinet Paper was never adopted, the 2001 Strategy remains unchanged and is nowhere close to being reviewed, nor is there any commitment to “appropriate engagement” with the “relevant interests”.¹⁴⁷

Options Considered And Proposals To Cabinet

A submission setting out three options to respond to the TFAAB recommendations was prepared by MFAT in late March 2022:

Option 1: Maintain the status quo;

Option 2: A staged approach of a package of adjustments with further changes considered over time, with targeted consultation;

Option 3: Conduct a first principles review of New Zealand's treaty making process with a full public consultation process.¹⁴⁸

MFAT recommended Option 2 as:

*best balancing 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.***

The blunt feedback from TPK described the approach as a “missed opportunity” to approach the problem in a “holistic way” based on learnings from recent developments. There was a “lack of policy rationale” for the options offered, which themselves were vague, and it was unclear why MFAT preferred Option 2.¹⁴⁹

¹⁴⁵ Cabinet Paper, 18 November 2022, at [32]–[34]

¹⁴⁶ “Draft International Treaty Making – Improvements to Aotearoa New Zealand's Processes” at [42] to [44]

¹⁴⁷ Cabinet paper, 18 November 2022.

¹⁴⁸ MFAT, “Responding to the Trade for All Advisory Board's recommendations concerning Aotearoa New Zealand's Treaty Making Process”, pp. 3 and 10.

¹⁴⁹ Email TPK to MFAT, “Draft Treaty Making Process papers – Te Pae Tawhiti's initial feedback”, 1 March 2022

No Seat At The Table

The TFAAB Report had recommended the government

*review, in conjunction with stakeholders, the composition of delegations to trade rounds, to ensure appropriate representation from outside Government, including Māori as its Tiriti/Treaty partner.*¹⁵⁰

The final Cabinet report said these limited proposals aimed to allow for greater Māori and stakeholder participation in the international treaty making process, “including participation in international delegations, where appropriate”.¹⁵¹ The actual proposal included a new template when seeking a negotiating mandate for a new treaty which required Ministers to advise Cabinet on the composition of the delegation, including on Māori as Tiriti partner (and consider if they would seek the consent of the other parties to the release of the text during negotiations). Further, recognition of Māori as Tiriti partner for consideration as part of international delegations would be added to the Cabinet Office circular on procedures for including non-official representatives on official delegations to international meetings.¹⁵²

An internal comment from a Māori official described Māori participation in delegations as

*an important point, and we see value in this happening in appropriate situations. It is a common request for Māori to participate in trade negotiations (to have a seat at the table) – something that needs careful consideration. I’m comfortable, however, that what’s in the paper does not commit the government or officials to a certain position, but rather for officials to develop processes including for Ministers to advise Cabinet on delegate composition.*¹⁵³

So, again the Crown would determine what, if any, Māori involvement there was. And again, there appears to have been no change since the review.

KO AOTEAROA TĒNEI

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consultation and discussion is required. There will also be occasions in which the Māori Treaty interest is so central and compelling that engagement should go beyond consultation to negotiation aimed at achieving consensus, acquiescence or consent. DRIP would seem to be one such example. 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; negotiations over the repatriation of taonga might be an example.

¹⁵⁰ Report of the Trade for All Advisory Board, November 2019, p.21, Rec 13.

¹⁵¹ Cabinet Paper, 18 November 2022, at [6.4]

¹⁵² Cabinet Paper, 18 November 2022, at [26]

¹⁵³ Internal email chain, “Re: Cabinet Paper Review – Improvements to International Treaty Making Process”, 14 November 2022.

POLITICS / COMMENT & ANALYSIS

He Puapua report bogged down in 'swamp of politics'

3:00 pm on 9 May 2021

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 **Meriana Johnsen**, Political Reporter

Power Play - It was supposed to chart a new way forward but *He Puapua*, a report on how the government can uphold tangata whenua rights by giving affect to tino rangatiratanga, has become bogged down in the swamp of politics.

POLITICS

Minister Nanaia Mahuta offers three waters co-governance defence

9:13 am on 10 June 2022

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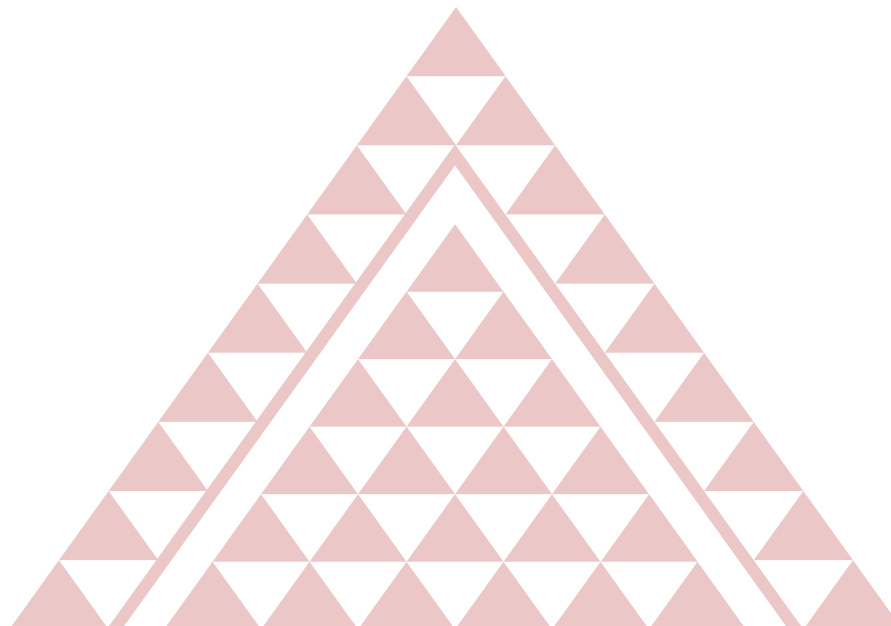
 **Russell Palmer**, Political Reporter
[@russellpalm](#) russell.palmer@rnz.co.nz

Co-governance in three waters is about the Crown meeting treaty obligations, and maintaining relationships between councils and mana whenua, Local Government Minister Nanaia Mahuta says.

The Cabinet Paper Was Never Presented

The original submission to inform the Cabinet paper was signed off by Minister Mahuta in July 2022. In late November 2022 the Minister approved the Cabinet paper, but her office had not yet identified a Cabinet Committee to slot it into.¹⁵⁴ The final Cabinet paper proposed submission to Cabinet Economic Development Committee on 14 December and Cabinet on 19 December 2022. The paper then went into limbo, “effectively in holding mode pending political decision ...”.¹⁵⁵

The underlying reason for the delay, according to various sources, was an aversion within the Labour Cabinet and the Parliamentary party to new Māori initiatives. This was in response to the backlash over Te Tiriti o Waitangi in relation to the He Puapua report for a work plan on the UNDRIP and the “Three Waters” review that recognised some Māori rights in relation to water, which Minister Mahuta was also leading.



¹⁵⁴ Email Minister’s Office to MFAT, “Re: Cabinet Paper: International Treaty Making – Improvements to Aotearoa New Zealand’s Processes”, 30 November 2022

¹⁵⁵ Internal MFAT email chain, 7 February 2023.

Parliament's Select Committee Rejected A Recommended Review

The Standing Orders Committee conducts a review of Standing Orders during the later stage of every Parliament. The Crown's reforms on treaty making as they relate to the parliamentary process were meant to feed into that review. Nothing ever reached it from MFAT or Cabinet. However, the issue came before the committee through a private submission seeking an inquiry into Standing Orders that apply to the treaty making process and the establishment of a specialist treaty committee.

The Standing Orders Committee report in August 2023 endorsed an inquiry “into international treaty processes, including both how treaties are made and the parliamentary procedure for examining them”, but put it in the hands of the Foreign Affairs, Defence and Trade (FADT) Committee being reviewed.

That Committee convened in late 2023 under the new Coalition Government to consider the recommendation. It did not seek independent advice on terms of reference, did not seek any submissions from outside the Crown, and did not initiate an inquiry.

The briefing paper from MFAT to the Committee was a bare 3 substantive pages, mostly describing the existing process. Oral evidence from MFAT's legal officials was scheduled for 20 minutes, but was over in seven.¹⁵⁶ Asked by one committee member: “Fundamentally, is the process broken?”, the official replied that MFAT's view is that it “works well” and is “fit for purpose”.

There was no disclosure to the committee that MFAT had spent almost three years working on reforms to the process following the reports of the FTAAB and Waitangi Tribunal.

In stark contrast to the 78 page interim report and 141 page final report of the Australian Joint Standing Committee on Treaties, the FADT Committee's report was just over 2 substantive pages and said:

We initiated a briefing to consider this matter, with a view to familiarising ourselves with the issues and identifying the scope and terms of a possible inquiry. In the course of our consideration, we have determined that a full inquiry on the matter is not necessary at this time. However, as set out in this report, we are mindful of the concerns that led to the recommendation in the Review of Standing Orders 2023, and will keep this issue in mind during the term of Parliament. ...

The FADT Committee claimed to have considered the processes used by the Australia, Canadian and United Kingdom Parliaments, and how they compared with New Zealand's, and the reports of those countries' parliamentary committees on the treaty making process. If it did, it clearly did not take them on board.

Not only did the committee not review the matter at all - it adopted a practice that routinely allocated 5 minutes for individuals, and 10 minutes for groups, to speak to their submissions on long and complex international treaties.

¹⁵⁶ Oral evidence can be viewed at <https://vimeo.com/941746411> at approx 28 minutes.

TIRITI-BASED AOTEAROA IN THE INTERNATIONAL SPHERE

The Waitangi Tribunal in Stage 2 of Te Raki was very clear that:

Kāwanatanga, the authority granted to the Crown was not a superior authority, an overarching power, albeit “qualified” by the right of Māori to exercise tino rangatiratanga. Rather, the Crown’s authority was expressly limited ... to its own sphere. Alongside and equal to it, was that of tino rangatiratanga. ...

*Negotiating and managing their respective spheres of authority, as well as shared spheres as the two populations intermingled, was the key issue for the treaty partners in the years after Te Tiriti was signed. **The Crown could not unilaterally decide what Māori interests were or what the sphere of tino rangatiratanga encompassed; that was for [Māori] to negotiate with the Crown. The Crown’s duty was and is to engage actively with [Māori] on how it should recognise ... tino rangatiratanga and, where agreed, give effect to it in New Zealand law. Partnership was and is the framework for governance in New Zealand; both parties must act honourably and in good faith.***¹⁵⁷

In relation to those who did not sign Te Tiriti, the Tribunal in *Te Urewera* likewise stressed that any co-existence cannot be unilaterally determined by the Crown, but requires negotiation in good faith to reach a principled conclusion and tailored to the circumstances at hand.¹⁵⁸

The Crown has consistently failed to recognise the value of that co-existence. Instead, as the Tribunal recognised in its Report on Stage 2 of *Te Raki*, it has systematically and deliberately exceeded the clear limitations on the authority conferred on kāwanatanga:

*As the treaty relationship unfolded ... it was characterised by the Crown overstepping the bounds of kāwanatanga, in conjunction with continual erosion of Māori tino rangatiratanga.*¹⁵⁹

For almost two centuries since the Crown’s unilateral assertion of sovereignty, colonial institutions have been used consistently to suppress the legitimate constitutional authority affirmed to Hapū in Te Tiriti and the accompanying application of tikanga Māori. That has resulted in a compounding loss of political, economic, and social power for Māori. That applies as much in the international sphere as it does within Aotearoa.

As we have seen, the self-justification for that action was grounded in imperialist ideologies, colonial legal doctrine and international law concepts of statehood and sovereignty that were developed by imperial powers to justify colonisation. In particular, the Catholic Church’s Papal Bulls and the Christian Doctrine of Discovery granted the monarchies of Britain and Europe the right to conquer and claim lands, and to convert or kill the native inhabitants of those lands.¹⁶⁰

Even in the Constitutional Kaupapa Inquiry, the Crown has remained silent about what it considers the source of legitimacy for its treaty-making authority with reference to He Whakaputanga me Te Tiriti. That silence seeks to both ignore, and to capitalise on, a history of dishonour that breached the Crown’s foundational commitments and obligations. The passage of time does not and cannot make legitimate the unilateral assumption of power in violation of the foundational treaty between sovereign treaty-making nations that permitted the Crown’s presence here in the first place.

In the recent secret review of international treaty making, the Crown has been visibly bunkering down to defend absolute sovereignty and circling the wagons around the Crown prerogative, to the point of even resisting the “pragmatic” and “incremental” changes proposed in the review, which never even reached the Labour Cabinet.

That is denying Aotearoa, and the world, the opportunity of a world-leading alternative that is values-based, seeks creative solutions to the many crises confronting us internationally, and offers alternatives to a model that has certainly not delivered for Māori, and arguably not for the rest of the nation either.

¹⁵⁷ Waitangi Tribunal, *Tino Rangatiratanga me Te Kāwanatanga. The Report on Stage 2 of Te Paparahi o te Raki Inquiry* (Wai 1040), 2023, p. 85. Emphasis added

¹⁵⁸ *Report of the Waitangi Tribunal: Te Tono Ture Tikanga a Tuhoe – The Treaty and the Tuhoe Constitutional Claim, 1840–65* (Wai 894), Volume 1, p. 134

¹⁵⁹ As summarised by the Tribunal in *Te Paparahi o te Raki* Stage 2, p. xxiv

¹⁶⁰ Tina Ngata, *Kia Mau: Resisting Colonial Fictions*, Rebel Press, 2019, and Claimants’ Statement of Claim, paragraphs [133] to [139].

It is true that Aotearoa New Zealand needs to be represented, and to act, as a single entity in the international space. But there is nothing that requires that entity to be the Crown. A Tiriti-based form of constitutional governance within Aotearoa, based on the plurality that was envisaged in Te Tiriti o Waitangi, can speak as one in the international arena.

It is time for genuine constitutional transformation to achieve that long-promised but elusive goal. As the world encounters chaos in international relations, and especially in trade, it is time for Aotearoa to take the lead and bring Indigenous values of whanaungatanga, manaakitanga, kaitiakitanga, kotahitanga sourced in tikanga Māori to the fore.



Robyn Kahukiwa, *Māori Never Ceded Sovereignty to the Crown*, 2023. Sovereign series.

Acrylic on cotton canvas in custom sapele frame, 700 x 900mm. Collection of Christchurch Art Gallery Te Puna o Waiwhetū, Purchased 2023.

Photograph by Samuel Hartnett, courtesy of the estate of Robyn Kahukiwa.

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