

7 Te Tiriti o Waitangi / The Treaty of Waitangi

Articles 72–74
and Appendix
to the
Constitution

This chapter looks at the place of the Treaty of Waitangi within a new constitution. We propose:

- to incorporate the Treaty within Constitution Aotearoa to make its status clear and certain:
- to prevent any amendment being made to the text of the Treaty itself:
- the courts will continue to have the power to give effect to it on a case by case basis, and the Government and Parliament should recognise and give effect to it in their day-to-day operations:
- the proposed Constitution sets out the whole text of the Treaty in both te reo and English and recognises the rights, duties and obligations of the Māori people under te Tiriti o Waitangi / the Treaty of Waitangi:
- all rights, duties and obligations, under te Tiriti o Waitangi / the Treaty of Waitangi and subsequent Treaty settlement agreements which were held by the Sovereign in right of New Zealand will now be held by the State:
- te Tiriti o Waitangi / the Treaty of Waitangi shall be considered as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit, intent and principles:
- the Constitution provides that where issues arise that relate to the Treaty or involve tikanga Māori, the courts and tribunals have the power to request an opinion from the Waitangi Tribunal or other experts:
- we also note that under this Constitution changing the Head of State will have no impact upon the Treaty, neither its substance nor the obligations of the State under it. The State will inherit all the obligations and responsibilities of the Crown that exist currently.

The status of the Treaty

The Treaty of Waitangi is an integral part of New Zealand's constitutional arrangements. The legitimacy of the system of government we have in New Zealand today owes much to the Treaty.¹ There has been some controversy surrounding the role of the Treaty and its place in our modern constitutional tapestry. It is generally agreed that the Treaty is an important historical document, and there is growing awareness that it has contemporary significance. What is not clear is the nature and extent of that significance.

The Treaty of Waitangi is not an ordinary law. It was given statutory recognition by the Treaty of Waitangi Act 1975, which created the Waitangi Tribunal. The Tribunal has jurisdiction to examine breaches of the Treaty back to the time of its signing in 1840. This is the basis on which the Waitangi Tribunal recommends and, in some cases, can order action by Government. While references to the Treaty have been included in more than a score of statutes, the Treaty does not operate through statute unless the statute refers to or incorporates the Treaty specifically. That said, the courts can and do use the Treaty when interpreting particular statutes but cannot enforce the Treaty as a general matter in New Zealand law.² Overall, its legal effect is inconsistent, incoherent and uncertain.

This book stresses that a constitution is about the exercise of power and that the present constitution is a complex and confusing mix of written and unwritten rules, structures and procedures. That is particularly true where the Treaty is

- 1 The Treaty of Waitangi was entered into between the British Crown and Māori in 1840. Māori and English versions of the Treaty were signed at Waitangi on 6 February 1840 and copies were then circulated through various areas of New Zealand for signature over the next few months. For accounts of the historical basis for the Treaty and the circumstances of its signing see in particular Waitangi Tribunal *He Whakaputanga me te Tiriti the Declaration of Independence and the Treaty: the Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (2014) and; Claudia Orange *The Treaty of Waitangi* (Allen and Unwin, Port Nicolson Press, Wellington, 1987) at 60-91.
- 2 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

concerned. Due to the jagged legal recognition of the Treaty itself, confusion is rife around when, how and in what situations to apply it. We suggest there should be certainty about the legal status and effect of the Treaty.

In our view the Treaty of Waitangi should be an essential part of any written constitution. It is essentially New Zealand's first constitutional document. The Treaty is a key source of the New Zealand Government's moral and political claim to legitimacy in governing the country. The Crown proclaims its intention to abide by the Treaty and to settle past breaches of it. In our view, any written constitution should recognise the Treaty's contemporary role within our constitutional order. For this reason we propose to recognise the rights, obligations and powers that flow from it, and provide that they should be considered as always speaking. The courts will continue to have the power to give effect to it on a case by case basis, and the Government and Parliament should be expected to recognise and give effect to it in their day-to-day operations.

Historical evolution of the Treaty

In order to understand our proposals, it is important to understand the context in which the Treaty exists in our constitutional arrangements today. The legal treatment of the Treaty has had a somewhat chequered history. It must be acknowledged that treatment of Māori by the Crown at various points in New Zealand's history has been egregious and cause for a number of legitimate grievances against the Crown. But judicial and social attitudes to the Treaty of Waitangi have undergone a remarkable transformation in New Zealand over 176 years. The Treaty started life in 1840 as something of a sacred compact, and was recognised as having legal effect in some early decisions of the colonial courts. However, it was dismissed in part by the then Chief Justice in 1877 as a "simple nullity"³ and denounced by Māori during the land marches of the 1970s as a fraud. Later still, the Treaty was described as the

3 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72, per Prendergast CJ.

Māori Magna Carta.⁴ The then president of the Court of Appeal in 1990 stated “[i]t is simply the most important document in New Zealand’s history”.⁵ More recently there has been a variety of efforts focusing increasingly on pushing for more formal constitutional recognition of the Treaty.⁶

These describe just a few instances in the long and complicated history of the Treaty in New Zealand’s constitutional history. We should remember, however, the Treaty is not the only voice in this area; it is only part of the framework for Māori–Crown relations and for Māori–Pākehā relations.

Significant modern advances for the Treaty really began in 1975 with the establishment of the Waitangi Tribunal whose mandate was to investigate grievances arising under the Treaty of Waitangi from then onwards.⁷ A decade later its jurisdiction was widened to deal with claims for breaches of the Treaty back to 1840. References to the Treaty in legislation began to be made in 1986 followed by block-busting litigation in the state-owned enterprises case of 1987,⁸ where the Treaty began to be enforced in the courts—but only in cases where it was referred to by Parliament in legislation. Then followed direct negotiations with the Crown concerning Treaty grievances and the Māori Fisheries Settlements, which granted Māori control over one-third of New Zealand’s commercial fisheries in recognition of their historic fishing rights. Then there were the policies of devolving responsibility in social policy areas to Māori organisations and the implementation of measures to protect te reo Māori. These were, in their day, massive advances

4 Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991).

5 Robin Cooke “Introduction” (1990) 14 NZULR 1 at 1.

6 It was the initiative of the Māori Party that led to the 2013 Report of the Constitutional Advisory Panel, Bill English and Pita Sharples *New Zealand’s Constitution: A Report on a Conversation* (Constitutional Advisory Panel, November 2013).

7 Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008).

8 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA); Andrew S Butler “Taking the Treaty Seriously: New Zealand Māori Council v Attorney-General (1987)” in E O’Dell *Leading Cases of the Twentieth Century* (Round Hall Press, Dublin, 2000).

in protecting the interests of Māori under the Treaty. These advances happened under first-past-the-post (FPP) Parliaments and there was a significant measure of accord among the two main political parties of those days as to the essential components of the policy. Under the mixed-member-proportional system (MMP) these tendencies have increased. Over the past 30 years, significant resources have been handed back to Māori in redress of the breaches of the Treaty they have suffered, particularly under the settler governments of the 19th century with land confiscations and other injustices.

This is not to say that there have not been set-backs. The passage of the Foreshore and Seabed Act 2004 significantly curtailed the ability of Māori to seek to uphold their own property rights. It was a political reaction to a decision of the Court of Appeal upholding the possibility of the existence of customary native title rights in areas of the foreshore and seabed.⁹ The Act was a disproportionate response to the case, largely fuelled by misinformation and public outcry. The passage of the Act was surrounded by a political furore, which led to the Māori Party coming into existence when Tariana Turia, then a Labour MP, crossed the floor and voted against the legislation. When National became the leading party in government the legislation was changed to the Marine and Coastal Area (Takutai Moana) Act 2011, but Māori are still unable to take claims in the same way they would previously have been able to. This saga highlights the controversy that Māori rights can still elicit in New Zealand.

Apart from possibilities that future courts might find direct legal effect in the Treaty—something they have yet declined to do, preferring to use the Treaty as an interpretative tool in appropriate situations—the sleeping giant of legal implications lies in the common law doctrines of aboriginal title, irrespective of the Treaty. Paul McHugh and others have argued that aboriginal rights to use land and other resources are recognised by the common law of England and inherited by New Zealand's

9 *Attorney-General v Ngati Apa* [2002] 2 NZLR 661; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA). See also Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005).

legal system and expire only when explicitly extinguished by legislation.¹⁰ In 1986, the High Court gave credence to this in *Te Weehi v Regional Fisheries Officer*.¹¹ The Australian High Court decision in *Mabo* (1992)¹² adds weight to the potential relevance of that view in New Zealand. The potential of this doctrine became evident in the case Māori brought over the foreshore and seabed.¹³

Already a part of our constitution?

Clearly, the Treaty has had a tumultuous and complicated history in New Zealand, but increasingly it is being recognised that it is of great contemporary significance. The best way of viewing the constitutional significance of the Treaty of Waitangi is by looking at where it sits in the operation of New Zealand's constitution in practice today.¹⁴

The Waitangi Tribunal said in 1983 that the Treaty gave “the right to make laws in return for the promise to do so so as to acknowledge and protect the interest of the indigenous inhabitants”.¹⁵ Whatever else the Treaty meant in 1840 it seems clear that both Māori and the Crown intended to enter some sort of power-sharing relationship with each other in New Zealand. In modern New Zealand the Treaty has gained increasing recognition in the courts and become significantly more important as a guide for legislative interpretation. In 1993, Sir Robin Cooke said of the state-owned enterprises case¹⁶ (over which he had also been a presiding judge) “[i]t was held unanimously by a Court of five judges, each delivering a separate judgment, that the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting

10 McHugh, above n 4.

11 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

12 66 ALJR 408.

13 *Attorney-General v Ngati Apa* [2002] 2 NZLR 661; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643(CA).

14 Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* above, n 7.

15 Waitangi Tribunal *Report of Waitangi Tribunal on the Motunui Waitara Claim* (Wai 6, 1989) at 11.3.

16 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*SOE's Case*].

a positive duty to act in good faith, fairly, reasonably and honourably towards the other”.¹⁷

Over the last 30 years the Treaty of Waitangi has become an important influence on decision-making in the executive branch of government. As with the New Zealand Bill of Rights Act 1990 we have become more accustomed to the Treaty and what it means as more and more of it has seeped into the political and legal system over time. The Cabinet Manual requires that Cabinet papers identify the implications of proposed policy recommendations in terms of the Treaty, and all executive proposals for legislation have to report on consistency with the principles of the Treaty. Some of the most sensitive and significant papers on the Cabinet agenda relate to the Treaty. In 2016, as there has been for 20 years, there is a special Cabinet committee that deals with Treaty of Waitangi negotiations. The very existence of some ministerial portfolios and some government agencies is also related to the Treaty.

Operationally, chief executives in the public service are required to ensure that their departments act consistently with the Treaty. A number of statutes require executive government agencies to act consistently with the Treaty, either generically or specifically. The Treaty of Waitangi can even be involved in that most executive of the executive branch’s responsibilities—the conduct of foreign affairs. A difficult aspect of the negotiation of the Closer Economic Partnership with Singapore, and free trade agreements since then, concerned how to recognise the New Zealand Government’s discretion to pursue Treaty of Waitangi objectives. A Treaty provision was ultimately included in that agreement, a provision which was also included in the recent Trans-Pacific Partnership agreement.

The Treaty is often relevant to the legislative process, whether through legislation implementing specific settlements, provisions in general legislation referring to the Treaty, or as the subject matter of parliamentary questions, petitions, select committee investigations regarding some aspect of Treaty settlements or Treaty policy. The advent of the MMP electoral

17 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 at 304.

system has only increased the political salience of the Treaty and of Māori issues. In 2013 the New Zealand Māori Council challenged the Government's partial privatisation of Mighty River Power which was a state-owned enterprise on the grounds that it would impede claims that Māori were in the process of bringing before the Tribunal relating to water rights.¹⁸ In a lengthy and exhaustive judgment the Supreme Court did not uphold the claim and the partial privatisation went ahead. But the Court made it clear that in an appropriate case, depending on how responsive the Executive was to Māori claims, relief was possible.

What we propose

There have been attempts in the past to give the Treaty more legal recognition by incorporating it directly into legislation; most notably, in the Labour government's 1985 White Paper proposal on the Bill of Rights.¹⁹ The proposed Bill of Rights would have recognised the Treaty of Waitangi as part of the supreme law of New Zealand by incorporating it into an enforceable Bill of Rights which could be upheld in the courts.

Interestingly, many Māori reacted negatively to the proposal, in part due to fears that incorporation of the text of the Treaty itself could open the way to amendments to that text and subsequent erosion of the spirit of the Treaty and the rights and obligations set forth in the text. It is not clear that Māori would reject such a proposal today. We are reviving that very proposal in this Constitution with some variations. In order to overcome the fear of the Treaty being amended we have included a provision that prevents any amendment being made to the text of the Treaty itself in an effort to preserve its essence, now and into the future.

The constitutional place of the Treaty must also be seen in the context of other developments in domestic and international law.²⁰ The operation of the Race Relations Commissioner,

18 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6.

19 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6.

20 See W Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991).

Human Rights Commission and other such bodies is based on a view of the rights of individuals in New Zealand society. The Treaty of Waitangi can be seen as affecting the rights and obligations of collective groups. Are these differences important? How do they relate to the various international instruments regarding human rights to which New Zealand is a signatory, such as the International Covenant on Civil and Political Rights, which allows complaints to be taken to the United Nations? The tension between *kāwanatanga* and *tino rangatiratanga* that lies at the heart of the Treaty of Waitangi is similar to the tensions regarding the concept of self-determination advanced by indigenous peoples internationally. This is referred to in the Declaration of the Rights of Indigenous Peoples which has now been accepted by New Zealand.²¹

The prime reason for making the Treaty part of the Constitution is that it is already part of our informal constitutional arrangements but its legal and constitutional effect is currently contested and uncertain. It is one of New Zealand's founding documents and its status and effect needs to be clear and certain in a formal constitution. The courts have a lot of experience with Treaty issues at many different levels and they have demonstrated themselves capable of dealing with complex disputes in an even-handed and fair manner. Making the Treaty part of a superior law Constitution will not bring hidden dangers. The Executive Government will remain the major player in these issues. The new arrangements will act as something of a check upon temptations fuelled by short-term political expediency to reduce Māori rights.

It is true that there are differing versions of the Treaty depending upon the version in *te reo* and that in English. The differences have caused some of the past controversies in discussions of the future role of the Treaty. It is also true there are difficulties in deciding how the Treaty speaks in all situations or, indeed, whether it does. But we believe that enough significant jurisprudence has grown around the Treaty in the courts that enshrining the Treaty itself will not cause

²¹ *United Nations Declaration on the Rights of Indigenous People* GA Res 61/295, A/RES/61/295 (2007).

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significant changes in the day-to-day application of the Treaty in most cases. In 2008 Dr Matthew Palmer summarised the meaning of the Treaty as interpreted by government institutions, including the Courts, as follows:²²

The Treaty of Waitangi, and its principles, should be interpreted broadly, generously and practically, in new and changing circumstances as they arise.

As an agreement upholding the Crown's legitimacy, in governing New Zealand for the benefit of all New Zealanders, in exchange for the Crown's active protection of the rangatiratanga, or authority of hapū, iwi and Māori generally to use and control their own interests, especially in relation to land, fisheries, and te reo Māori and their other tangible and intangible taonga or valued possessions.

The Crown must also ensure that Māori enjoy the rights and privileges of Pākehā New Zealanders.

Since this agreement involves a continuing relationship akin to partnership between the Crown and Māori, the parties should act reasonably and in good faith towards each other, consulting with each other, compromising where appropriate, and reasonably redressing past breaches of the Treaty.

This summary is based on the established jurisprudence of the Treaty both in the courts and in the Waitangi Tribunal. The Supreme Court can further assist under the new, proposed Constitution and provide thoughtful analyses of how the Treaty fits into the modified constitutional framework we are proposing.

The change will bring much needed coherence and consistency to a legally untidy situation that carries the risk of unexpected, unplanned and unpopular lurches in any direction. At present the treatment of the Treaty within the New Zealand system of government presents as ungainly, unclear and untidy. The Constitution will make the changes clearer and more certain. It ought to stabilise things because the relationships between Māori and the State are vital to the peace, order and good government of New Zealand. These issues are going to have to

22 Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution*, above n 7, at 150.

be settled sometime and they may as well be settled in an overall constitutional document. Cultural diversity is important and the unique Māori culture is of interest and importance to many people who inhabit this nation, as Māori culture is a part of New Zealand's identity.

We have, in the proposed Constitution, set out the whole text of the Treaty in both te reo Māori and English. The suggested provisions ensure:

- 1 The rights, duties and obligations of the Māori people under te Tiriti o Waitangi/the Treaty of Waitangi are recognised and affirmed. Articles 72, 73, 74 and Appendix
- 2 All rights, duties and obligations, under te Tiriti o Waitangi/the Treaty of Waitangi and subsequent Treaty settlement agreements which were held by the Sovereign in right of New Zealand, will now be held by the State.
- 3 Te Tiriti o Waitangi/the Treaty of Waitangi shall be considered as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit, intent and principles.

Te Tiriti o Waitangi/the Treaty of Waitangi means the Treaty as set out in Māori and English in the Constitution.

In addition, we believe the role of the Waitangi Tribunal has been valuable and think the Supreme Court may derive help from it in appropriate cases and other experts in tikanga Māori. So the Constitution provides that where issues arise that relate to te Tiriti o Waitangi/the Treaty of Waitangi or involve tikanga Māori, the courts and tribunals have the power to request an opinion from the Waitangi Tribunal or other experts who the court considers can assist it on the matter before it.

Does the Treaty depend upon the monarchy?

Under this Constitution, changing the Head of State will have no impact on the Treaty, neither its substance nor the obligations of the State under it. The State will inherit all the obligations and responsibilities of the Crown that exist currently. The severing of the relationship with the British monarchy makes no legal difference and in fact the constitutional status of the Treaty is

enhanced under this Constitution, not reduced.

There has already been a similar transfer in the Crown's responsibilities under the Treaty. When New Zealand patriated the monarchy (created a Queen in right of New Zealand rather than accepting the Queen of the United Kingdom), the obligations of the Crown under the Treaty were transferred with little or no fuss from the Queen in right of the United Kingdom (who had inherited the obligations as heir of Queen Victoria) to the Queen in right of New Zealand.²³ If they have been transferred once, they can be transferred again.

As Dr Dean Knight commented “[t]he reality is that New Zealand’s executive government is nowadays responsible for discharging Queen Victoria’s original compact with iwi and hapū. That will continue under a republic, with the State assuming those responsibilities”.²⁴ To dispel any possible misunderstanding, we have included an express provision in the Constitution that makes explicit the legal reality: that the obligations formerly held by the Crown are now held by the State. The proposed Constitution provides in Article 72(2):

On the commencement of this Constitution, all rights, duties and obligations under te Tiriti o Waitangi/the Treaty of Waitangi and under Treaty settlement agreements previously vested in the Crown in right of New Zealand, vest in and are assumed by, the State.

This provision is intended to make clear that both formal and informal rights, duties and obligations, including the concept of the “honour of the Crown”, are to transfer to the State.

Conclusion

The constitutional position of the Treaty of Waitangi deserves extensive debate and dialogue throughout New Zealand. We have not had the opportunity to consult with Māori to the extent necessary before proposing our draft Constitution. The issues need to be addressed systematically, and we hope to have the chance to engage in much wider consultation through the

23 Dean Knight “Patriating Our Head of State: A Simpler Path?” in Caroline Morris, Jonathan Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, Berlin, 2011) 107 at 115.

24 Knight, above n 23.

next phase of the project. This is why the Royal Commission on the Electoral System recommended, in 1986, that “Parliament and Government should enter into consultation and discussion with a wide range of representatives of the Māori people about the definition and protection of the rights of the Māori people and the recognition of their constitutional position under the Treaty of Waitangi”.²⁵

We have examined the thorough and careful investigations Māori have been conducting on constitutional transformation. A working group on the subject has been consulting widely under broad terms of reference promoted first in 2010 “[t]o develop and implement a model for an inclusive Constitution for Aotearoa based on tikanga and kawa, He Whakaputanga o te Rangatiratanga o Niu Tirenī of 1835, te Tiriti o Waitangi of 1840, and other indigenous human rights instruments which enjoy a wide degree of international recognition”.²⁶ Professor Margaret Mutu was the working group chair and Moana Jackson the convenor.

In a long and thoughtful report the working group made seven recommendations, which included another five years for formal and informal discussions and a Māori Constitutional Convention called for 2021 to further the discussion and develop a comprehensive engagement strategy across the country. At an appropriate time there will be dialogue with other communities and the Crown. The group thought 2040 would be a good year for a goal of some form of constitutional transformation.

We think it is time that the Government took a leadership role in encouraging or funding a responsible and constructive national debate on these issues. We think that, in order to canvass properly the Māori side of the Constitution, what the Royal Commission recommended in 1986 should be done now.

25 Royal Commission on the Electoral System “Towards a Better Democracy” [1986–1987] IX AJHR H3 at 112.

26 He Whakaaro Here Whakaumu Mō Aotearoa *The Report of Matike Mai Aotearoa, The Independent Working Group on Constitutional Transformation* (2016) at 7. The report covers 129 pages, reports on views expressed at many hui and includes six indicative models that were discussed.