

Waitangi Tribunal 50th Anniversary Conference Presentation

Te Herenga Waka Mārae, Friday 10 October 2025.

Ngā mihi ki a koutou kua haere mai ki tā tātou hui i tēnei rā. Nō reira tēnā koutou.

Let me start off by saying that it would be naive to think, even in a Tribunal conference session entitled “Role of the Waitangi Tribunal into the Future” that we are part of an actual future planning process for the future of the Tribunal. We are not. Why? – because the Tribunal has already done it in its recently released 2025-2035 Strategic Planning Document in which it lays out a very clear work pathway through to 2035, the year of the 200th anniversary of He Whakaputanga. My reading of the new Strategic Plan is that is eminently sensible and, in fact, sets a platform for a future for the Tribunal well beyond 2035.

For its part, the Government is also tinkering with the future of the Tribunal through an Independent Technical Advisory Group (ITAG) examining a potential amendment to the Tribunal legislation. It is due any day soon. So, both parties, the Government and the Tribunal itself appear to be planning a future for the Tribunal that may end up being very different to each other.

And here we are today, in this conference session, also contemplating the role of the Tribunal into the future. But if the Tribunal has already done it in its Strategic Plan and the Government is likely doing it as well in the forthcoming ITAG report, what could we possibly add to what appears to be an already overloaded discussion?

As most of us in this wharenui today, I think, will be aware, all this future planning sits against a now virtually constant backdrop of hostility and opposition from some New Zealanders, including some politicians in the current government, that have more or less demanded constraining the Tribunal - some even calling for its disestablishment. Most, unfortunately, are oblivious to the constitutional ramifications of doing so. I am not sure that that these voices of opposition are getting significantly larger in New Zealand, but they are certainly getting louder - and more influential. They confidently assert that the country needs to move on and rid itself of the division between Māori and the Crown and that the Tribunal (ever so vaguely) represents some manifestation of that division. To get rid of the Tribunal, therefore, is to somehow get rid of the division, or perhaps cover up the problem. And politicians, of course, use these negative perceptions and rhetoric for political gain from time to time.

It wasn't always this way for the Tribunal. I am old enough to remember the late 1960s and early 1970s prior to the establishment of the Tribunal - dynamic decades in “modern” New Zealand race relations. The sixties in New Zealand was a decade characterised by economic prosperity, rapid social change and a developing new Māori political awareness. In it, Māori urbanisation was in full flight. This created competition between Māori and Pākehā in the job market; Māori watched the dissemination of world news on TV media. This included the Vietnam war; feminism; the hippie movement; Woodstock; the moon landing; black nationalism and militancy in the US and the UK, to name but a few. In the midst of all that, and against a

backdrop of assertion from our government, and certainly my schoolteachers, that we were lucky to live in this country because we had the best race relations of any country on the planet. Contrasted against this optimistic backdrop, we saw the sudden emergence of the so-called “Māori gang” phenomenon. This hit New Zealand like a ‘bolt out of the blue’ and middle Pākehā New Zealand wondered how gangs that were characterised as Māori had formed, especially, in the one place in the world where racial harmony supposedly prevailed. The country was largely incapable of processing this new development.

Then in about 1970 this was compounded by yet another phenomenon that also appeared to hit New Zealand suddenly, in the form of Māori political activism. By 1970 a number of activist groups appeared; Matakite; Te Kawariki, The Māori Organisation on Human rights and most famously perhaps, out of Auckland University, Ngā Tamatoa. These groups were confrontational; loud; “in your face” and were very much into blaming the New Zealand establishment and the Government in particular, for what they considered to be the ills of Māoridom at that time. And they were not shy about saying so. Amongst other things, and perhaps most importantly, the activists reintroduced the somewhat forgotten “Treaty” back into the national consciousness. They seemed to go on endlessly about it and graffiti about the Treaty appeared all over the country with slogans such as ‘Honour the Treaty Pākehā’ or ‘The Treaty is a fraud’.

Both the gangs and the activists frightened middle Pākehā New Zealand. Many people started to wonder how this was possible in our country. And indeed, a certain paranoia had started to develop as people wondered whether the gangs and the activists might actually team up and that the gangs might become a paramilitary front for the activist movement. I remember discussions around the dinner table with my Pākehā relations about this possibility. The activists, commonly referred to in the media as Māori “radicals” were very forthright in rejecting assimilationist policies that had existed from as far back as post WW1 and certainly the 1950s and 1960s. In these it was expected that New Zealand would be ‘brownd up’; that inter-marriage would take place between Māori and Pākehā and that the people of the country would all become “coffee coloured”. The activists firmly rejected the notion of assimilation which by then, had become a virtual government policy. The activists announced very firmly that Māori were not going to go away, that Māori had their own culture, their own language and that non-Māori people in New Zealand had better get used to it. Our government eventually reacted to all of this by developing a new rhetoric in the form of biculturalism to replace the rhetoric of assimilation.

In 1972, Ruth Ross, a Pākehā historian academic at Auckland University published an article in the New Zealand Journal of History that examined, in minute detail, the translation issues between the English and Māori versions of the Treaty of Waitangi. This was essentially the first scholarly article ever to do such a thing. It was groundbreaking because the vast majority of Pākehā in this country had no idea about the significance and details of the actual Treaty documents. Ross pointed out that the single English document, that few, if any, Māori could have read at that time because of the complexity of the English in it, is the only one that had Māori transferring their sovereignty to the Crown. The eight Māori documents said exactly the opposite, that in fact, Māori would retain their sovereignty, their tino rangatiratanga.

The published article of course, directly challenged government rhetoric about the intent of the Treaty documents. The 'official' view, the sanitised 'national narrative' asserted that Māori had willingly and consciously signed their Sovereignty away to the Crown in 1840. To believe this, following Ross's article, would rely on having to believe that the single English document is the authoritative and official document. However, the vast bulk of the analyses of the documents to date, with the possible exception of Ned Fletcher's recent Ph.D. thesis and book, reject this assertion. The analysts, and the lawyers in particular, rely on interpretations from contract law which assert that contracts can only be valid if the signatories understand what they are signing. If this is true, could the 39 Māori people that signed the one English document in March and April of 1840, understand what they were signing? The consensus is that those 39 people would not have understood that document in English because they could not read and write in English at that time and especially the style of English that is used in it, which is verging on quite complex legal jargon. For that reason alone, the English document is not valid from a contract perspective. Further, the lawyers say, there is another legal concept that also applies in the case of ambiguous contracts, such as the ambiguity around the sovereignty issue between the English and Māori versions of the Treaty documents. The concept, with the Latin name *contra proferentem* asserts that in the event of a contract being ambiguous in any shape or form, the party that drafted the ambiguous document should always be interpreted against when it comes to understanding the contract. Therefore, because the Crown drafted all of the Treaty documents in both English and Māori we are supposed to interpret against the Crown when it comes to understanding the documents. However, do we do this in New Zealand today?

The lawyers who had read that Ross article suddenly realised the important constitutional dilemma that arose from the translation issue. The Government necessarily relied on the English Treaty document to govern because they assert that Māori gave them permission to do so in Article One in a constructed version of Treaty history. The fact that Māori sovereignty was taken from Māori through an act of violence perpetrated in the New Zealand wars was an inconvenient truth. The government preferred and needed a non-violent explanation for why it was governing and why Māori were not, despite the wording of the eight extant Tiriti documents.

The problem for the Government after the Ruth Ross publication, therefore, was how to keep the English version of the Treaty current when it was clear it should not be used in the first place. The solution was brilliantly elegant, and it was to not use the documents at all, and instead, rely on their intent and their spirit, or as it was eventually framed, the principles that underpinned the documents. This solution became more and more important in the early 1970s as mounting pressure from Māori activist groups and others to honour the Treaty became more assertive and pervasive. By 1975, the government was forced to act in relation to the mounting pressure and created the Waitangi Tribunal, not just "to make recommendations on claims relating to the practical application of the Treaty" but more important arguably "to determine whether certain matters are inconsistent with the principles of the Treaty". The Tribunal was and still is required to take account of the two texts of the Treaty in determining consistency or not with the Treaty Principles.

So, by 1975, the Crown has established an official body to generate Treaty principles. It was a way for the government to keep the peace, to maintain the current political hegemony in which the government controls everything. The Tribunal is thus complicit in maintaining the currency of the invalid English Treaty document for the Crown. And since 1986, in the findings in the Lands case the Courts have now also become involved in defining and refining Treaty principles as well. Now, the idea of Treaty principles is so embedded in the national consciousness that most New Zealanders think that they are the right and proper way to interpret the Tiriti/Treaty relationship, rather than just relying on the text of the Māori Tiriti documents. But, of course, to have Treaty principles at all, is to rely on the English version of the Treaty. If we did not have to rely on the English version of the Treaty, like we are not supposed to because the 39 people that signed it almost certainly did not understand what they were signing and because *contra proferentem* dictates that we are supposed to interpret against the drafter of the ambiguous documents, we would not need Treaty principles. They exist only to maintain the currency of the English document because the Crown relies on that for its explanation as to why it gets to govern.

Now, ironically, the Crown or at least some sections of it seem to have completely forgotten that or they misunderstand it. The ACT Party and certainly David Seymour do seem to be somewhat of an exception to this in that the recent Treaty Principles Bill had them wanting to entrench only the English version by defining principles very narrowly based only on the English version of the Treaty. New Zealand First were even more ambitious when they actively campaigned in the early 2000s to get rid of the Treaty in New Zealand legislation altogether. Some will remember their 2006 private members bill, the Principles of the Treaty of Waitangi Deletion Bill, which sought to remove every reference to the Treaty of Waitangi from New Zealand legislation. Like the Treaty Principles Bill, it failed to reach or pass its final reading in the house.

Through all of these constitutional ructions Māori have maintained their dignity by very generously accepting the notion of Treaty principles to maintain the stability of the nation. There has never been a significant Māori protest about maintaining Treaty principles and thus the English version of the Treaty, despite the fact that they have good cause to do so. They have apparently been prepared to run with the Crown around the maintenance of Treaty principles for the greater good of the country. This is a profound act of generosity on the part of Māori that they are rarely, if ever, given credit for.

Finally, in considering the role of the Tribunal into the future, apart from the on-going need to deal with the Crown's incessant contemporary Treaty breaches, and whether it knows it or not, the Crown needs the Tribunal to continue the crucially important role of generating Treaty principles in relation to issues affecting the country. The constitutional stability of the country relies on this in no small way.