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Principles of Te Tiriti o Waitangi: An Economics Perspective

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Glossary of Te Reo Words

The English translations of Te Reo words used in this research paper draw on definitions in the *Te Ake Māori Dictionary* available at https://maoridictionary.co.nz/. This glossary notes when a different source has been used.

Arawhiti: Bridge.

Hapū: Kinship group, clan, subtribe.

He Ara Waiora: A pathway towards wellbeing (O'Connell *et al*., 2018).

Hīkoi: Step, march, journey.

Hui: National gathering.

Hui-ā-motu: Gathering, meeting, assembly, seminar, conference.

Ira Tangata: The human domain (Treasury, 2024).

Iwi: Extended kinship group, tribe.

Kāinga: Home, residence, village, settlement.

Kāinga nohoanga: Places of residence (Waitangi Tribunal, 1991, Volume 1, p. 52).

Kaitiaki: Trustee, custodian, guardian, steward.

Kaiwhakahaere: Director, chairperson, boss.

Kara: Flag, banner, ensign, standard.

Katoa: All, every, totally, wholly, completely.

Kaupapa: Topic, policy, matter for discussion, agenda, theme.

Kāwanatanga: Government, dominion, rule, authority.

Komiti: Committee.

Kōrero: Speech, discussion, conversation.

Kīngitanga: Chieftainship, right to exercise authority, chiefly autonomy.

Kura kaupapa: Primary school operating under Māori custom and using Māori as the medium of instruction.

Mahinga Kai: Garden, cultivation, food-gathering place.

Mana: Prestige, authority, control, power, influence, status, spiritual power, charisma.

Mana motuhake: Mana through self-determination and control over one's own destiny.

Mana Tauutuutu: Having a sense of belonging within a community that involves reciprocal relationships of being valued and feeling a sense of responsibility (Treasury 2024).

Mana whenua: Territorial rights, power from the land, authority over land or territory, jurisdiction over land or territory – power associated with possession and occupation of tribal land.

Marae: The open area in front of a wharenui, where formal greetings and discussions take place. Often also used to include the complex of buildings around the marae.

Mātauranga: Knowledge, wisdom, understanding, skill.

Pākehā: New Zealander of European descent.

Poroporoaki: To take leave of, farewell.

Pou: Post, support, pole, pillar, column.

Pounamu: Greenstone, neophrite, jade.

Pouwhenua: Post marker of ownership, boundary marker, land-marker post.

Rangatahi: Youth.

Rangatira: Chief (male or female).

Rangatiratanga: Chieftainship, right to exercise authority, chiefly autonomy.

Raupatu: Confiscation, especially of land taken by force.

Reo: Language. Te Reo refers to the Māori language.

Ritenga: Customary practice, the normal way of doing things, ritual.

Rōpu: Group, committee.

Rūnanga: Council, tribal council, assembly.

Tā: Sir.

Take whenua: Māori land tenure (Tau, 2016).

Takiwā: District, area, territory, vicinity, region.

Tangata whenua: Local people, hosts, Indigenous people.

Taonga: Treasure, anything prized, property, possessions.

Tauutuutu: Reciprocity. An ethic in economic transactions that demands balance and reciprocation (Reid *et al*., 2021).

Te Ika-a-Māui: The North Island (literally, the Fish of Māui).

Te Moana-nui-a-Kiwa: The Pacific Ocean.

Tikanga: Correct procedure, custom, practice – the customary system of values and practices that have developed over time and are deeply embedded in the social context.

Tino rangatira: Absolute or true leaders.

Tino rangatiratanga: Self-determination, sovereignty, autonomy, fullness of control.

Tiriti: Treaty.

Tītī: Muttonbird, sooty shearwater.

Tuku: Handover, presentation, offering, release, submission.

Tūrangawaewae: Place where one has the right to stand; place where one has rights of residence and belonging through kinship and whakapapa.

Wai: Water.

Wairuatanga: Spirituality.

Wānanga: Seminar, conference, forum.

Whakapapa: Genealogy, genealogical table, lineage, descent.

Whakaputanga: Declaration.

Wharenui: Meeting house.

Whenua: Land.

Note: In the past, it was common practice to publish material that did not always take care to spell Māori words with macrons or double vowels. Where it does not interfere with the text, this paper corrects that practice (and other minor errors) without further comment. Two exceptions are He Whakaputanga o te Rangatiratanga o Nu Tireni (1835) and te Tiriti o Waitangi (1840), where the texts are reproduced as originally written.

Principles of Te Tiriti

Preamble	
Exchange	Māori and the Crown honour the tuku or gift exchange made in te Tiriti.
Partnership	Māori and the Crown act in an enduring relationship akin to a partnership.
Good Faith	Māori and the Crown act towards each other in utmost good faith.
Mutual Benefit	Māori and the Crown cooperate to create mutual benefits.
Article 1	
Kāwanatanga	Māori accept the Crown's kāwanatanga and good government.
Reciprocity	The Crown's authority is qualified by its reciprocal Tiriti obligations.
Redress	The Crown provides redress for breaches of its Tiriti obligations.
Informed Decisions	The Crown makes decisions that are informed by Māori experience.
Article 2	
Tino Rangatiratanga	Māori exercise tino rangatiratanga and self-determination.
Active Protection	The Crown actively protects the exercise of tino rangatiratanga by Māori.
Right to Development	The Crown supports Māori economic development.
Full Participation	The Crown ensures the full participation of Māori in society.
Article 3	
Mana Motuhake	Māori citizens exercise mana motuhake and succeed in society as Māori.
Options	The Crown provides options so all citizens can make authentic choices.
Equal Treatment	The Crown treats equally all citizens in similar circumstances.
Equity	The Crown ensures equitable outcomes for Māori and all citizens.

Chapter 1

Te Tiriti o Waitangi

1.1 Introduction

On 6 February 1840, more than 40 northern rangatira signed a treaty written on parchment in their Indigenous language. The treaty was with the British Crown. By the end of 1840, the number of Māori signatories exceeded 500. Ever since that year, Māori, settlers, politicians, judges and academics have debated what te Tiriti o Waitangi achieved, and what it means for ongoing relations between the Crown and the Indigenous peoples of Aotearoa New Zealand.[1]

This paper contributes to that debate from an economics perspective. Economics is relevant because Article 2 in the treaty confirms and guarantees important property rights held by Māori in 1840.[2] In the English text, these property rights are described as follows:[3]

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession."

The guarantee made by the Crown, extending to future generations, is not simply a promise about the *actions* or *intentions* of the Crown; it is a promise about the *outcome* for Māori chiefs, tribes, families and individuals; namely, the full, exclusive and undisturbed possession of their properties, collectively or individually. Consequently, the English text recognises the primacy of what the Māori text in te Tiriti terms 'tino rangatiratanga'.[4]

A Crown guarantee of this type imposes a strong qualification on the exercise of sovereignty, since it requires the Crown to deliver the specific outcome promised in the guarantee. Economists recognise, however, that a promise made in the interests of both parties at the time of an agreement may later become contrary to the interests of the party who made the

[1] For example, Buick (1914), Orange (1987, 2004, 2021, 2023), Kawharu (1989), Kelsey (1990), McHugh (1991a), Gardiner (1996), Graham (1997), Belgrave, Kawharu and Williams (2005), Palmer (2008), Mulholland and Tawhai (2010), Calman (2011), Tawhai and Gray-Sharp (2011), Williams (2011), Consedine and Consedine (2012), Waitangi Tribunal (2014), Wright (2019), Finlayson and Christmas (2021), Hēnare (2021), Fletcher (2022), Salmond (2022) and Turei, Wheen and Hayward (2024).

[2] This research paper follows the lead of Waitangi Tribunal (2014, p. 2) in referring to the Māori text as te Tiriti, the English text as the Treaty, and to both texts together as the treaty.

[3] The text is from https://www.archives.govt.nz/discover-our-stories/the-treaty-of-waitangi.

[4] See, for example, McHugh (1989, 1991b) and Fletcher (2022).

promise. After a Crown guarantee is agreed, for example, incentives might emerge for a future Parliament to disavow the agreed promises. This is called the issue of *time inconsistency*.[5]

Indeed, the convention of parliamentary sovereignty holds that no Parliament is bound by a decision made by a previous Parliament. Consequently, the holders of a Crown guarantee may find it impossible to enforce their rights if a new Parliament decides not to honour a promise made by the Crown in the past. As chapter 3 will describe, the dispossession of Māori land between 1840 and 1975 is an obvious example.

Mitigations are available. Reputation is an important consideration. A failure to honour an existing Crown guarantee diminishes the Crown's ability to make future guarantees that will be trusted. Further, property rights are foundational for the market economy, so a failure to honour a Crown guarantee has wider consequences. This has led to conventions such as the importance of maintaining the 'faith' or 'honour' of the Crown.[6]

Another mitigating mechanism is to embed a guarantee into legislation. A future Parliament can always amend the law, so this is no more than a partial solution. Nevertheless, a future law change requires greater levels of transparency and opportunity for public debate than a simple executive decision to depart from a Crown guarantee.

A further mitigation is to create an institution with some independence from Parliament and a strong mandate to deliver promises made in a Crown guarantee. The classic example in economics is an autonomous central bank with a mandate to maintain price stability. Another example in Aotearoa New Zealand is the Waitangi Tribunal.

The Waitangi Tribunal is a standing commission of inquiry established in 1975 "to make recommendations on claims relating to the practical application of the [Treaty of Waitangi] and to determine whether certain matters are inconsistent with the principles of the Treaty".[7] That last phrase, *principles of the Treaty*, has become an important concept in relations between the Crown and Māori.

Nevertheless, debates continue about what principles should be used when interpreting relevant legislation and how those principles should be written in legislation.[8] These debates raise again the issue of time inconsistency, since the Crown has an obvious incentive to draft principles that reflect its own interests rather than the intentions of the original agreement.

This research paper therefore explores from an economics perspective how the Waitangi Tribunal acts as a mechanism for addressing time inconsistency issues associated with the Crown guarantee in Article 2 of te Tiriti o Waitangi, paying particular attention to key treaty principles found in Tribunal reports.

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[5] See, for example, Kydland and Prescott (1977), Lucas and Stokey (1983) and Chari and Kehoe (2016).
[6] Lord Normanby's instructions to Hobson in 1839 refer to the faith of the British Crown (Normanby 1839a). References to the honour of the Crown include Waitangi Tribunal (1987a, p. 3) and New Zealand Government (1998).
[7] https://www.legislation.govt.nz/act/public/1975/0114/latest/DLM435368.html.
[8] https://www.legislation.govt.nz/bill/government/2024/0094/latest/LMS1003445.html.

1.2 Te Tiriti o Waitangi

This paper pays careful attention to the English text of the treaty, since the English text uses the specific language of a Crown guarantee. Nevertheless, there is "one treaty and two texts", and at least "considerable weight" should be given to the Māori text.[9] It was the Māori text that was transcribed onto parchment for the signing that took place on 6 February 1840. It was the Māori text that Hobson order to be printed on 17 February for wide circulation. It was the Māori text that was sent to different parts of the country for further signings that year.[10]

Further, the United Kingdom House of Commons in 1841 printed a copy of a dispatch from Governor Hobson to the Secretary of State for the Colonies, dated 15 October 1840. This included copies of the treaty texts in Māori and in English. The House of Commons headed the Māori text as Treaty and the English text as Translation.[11]

Before moving to the English text, therefore, consider Articles 1 and 2 in the Māori text. Article 2 contains the more important concept in its first sentence (reproduced here as written in te Tiriti, accompanied by the authoritative translation by Tā Hugh Kawharu):[12]

> Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.
>
> The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures.

In this Article, the key phrase is tino rangatiratanga, which states the exercise of chieftainship is *unqualified*. In notes to his translation, Tā Hugh comments that this "would emphasise to a chief the Queen's intention to give them complete control according to their customs". In contrast, Article 1 states the following:

---

[9] The statement about one treaty and two texts comes from Waitangi Tribunal (1991, Section 4.4.2, p. 222); see also Waitangi Tribunal (2014, p. 433). The phrase 'considerable weight' comes from Waitangi Tribunal (1987a, pp. 180, 181, 208); see also Waitangi Tribunal (2014, p. 435). Some scholars argue for the absolute primacy of the Māori text, including Ross (1972), Biggs (1989), Mutu (2010), Orange (2024) and McCreanor, Came and Berghan (2024).

[10] An exception was at Waikato Heads, where Rev. Robert Maunsell took advantage of a meeting of 1,500 Māori to record signatures on a printed copy of the Māori text and on a parchment containing the English text (the Waikato-Manukau sheet). When Captain William Symonds arrived with a Māori copy a few days later, he found Maunsell's signatures included most of the leading men of the district (http://nzetc.victoria.ac.nz/tm/scholarly/tei-TurEpit-t1-g1-t1-g1-t2-g1-t16-g1-t6.html). See also Buick (1914, pp. 188-190) and Bennett (2012, p. 283).

[11] Accessed 16 September 2024 as the copy presented on the University of Waikato O Neherā library website at https://onehera.waikato.ac.nz/nodes/view/2002. The dispatch and two texts of the treaty are reproduced at page 98 of the original document.

[12] See https://waitangitribunal.govt.nz/en/about/the-treaty/maori-and-english-versions. Article 2 goes on in its second sentence to establish the Crown's right to pre-emption in land purchases. This was in accordance with specific instructions from Lord Normanby (1839a). This research paper does not discuss this key instrument of colonisation; see, for example, Barber (2020) and Comyn (2022).

> Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.
>
> The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.

The key phrase in Article 1 is 'kāwanatanga katoa' or complete government. Influential scholars argue the Māori text does not reflect the English text, particularly because it does not include any Māori term equivalent to 'sovereignty' found in the English text.[13] Tā Hugh explains in his translation notes, for example: "There could be no possibility of the Māori signatories having any understanding of government in the sense of 'sovereignty': i.e., any understanding on the basis of experience or cultural precedent."

Much of the ongoing debate about sovereignty in the treaty has paid little attention to the Crown guarantee in Article 2 of the English text. This paper aims to correct that imbalance. Section 2.4, for example, argues that the Crown guarantee in Article 2 qualifies the exercise of sovereignty under Article 1, which means the English text, *taken as a whole*, does reflect the priority of tino rangatiratanga expressed in the Māori text.

1.3 Structure of the Paper

Chapter 2 provides context for the Crown guarantee in Article 2 of the English text. It begins with the first human arrivals some 800 years ago and introduces te Tiriti o Waitangi signed by rangatira in 1840. It explains how the Māori and English texts are comparable because the Article 2 Crown guarantee of the English text qualifies the Article 1 exercise of sovereignty.

Chapter 3 further analyses the Article 2 Crown guarantee. It compares that property right with a recent example where the New Zealand Government made a Crown guarantee during the global financial crisis in 2008. The chapter then applies the concept of time inconsistency to the dispossession of Māori land after 1840.

Chapter 4 focuses on three key events in 1975: (1) the Māori Land March of 14 September to 13 October; (2) the first reference in New Zealand legislation to 'principles of the Treaty', made in the Treaty of Waitangi Act 1975; and (3) the creation of the Waitangi Tribunal in the same Act. These are discussed as mitigations to the problem of time inconsistency.

Chapter 5 explores treaty principles drawn from publications of the Waitangi Tribunal and echoed by the Courts, Government policy and previous writers. It lists 16 principles organised into four categories based on connection to the treaty's preamble and three Articles.

Chapter 6 summarises the paper's main points, concluding that property rights confirmed in the Article 2 Crown guarantee continue to have important implications for shared authority. It suggests that the principles of te Tiriti provide a good framework for the ongoing work of designing a wellbeing economy.

[13] See, for example, Ross (1972), Walker (1989), Williams (1989, pp. 76-84) and Biggs (1989).

Chapter 2

The Article 2 Crown Guarantee

2.1 Introduction

This paper's key theme is that Article 2 of the English text of the Treaty of Waitangi confirmed and guaranteed strong property rights for Māori rangatira, tribes, families and individuals that remain valid to the present day. This chapter provides historical context for the Crown guarantee made in 1840.

Thus, Section 2.2 summarises human settlement of these islands, beginning with the first human arrivals some 800 years ago. It finishes with 34 northern rangatira on 28 October 1835 signing He Whakaputanga o te Rangatiratanga o Nu Tireni – The Declaration of Independence of the United Tribes of New Zealand. Section 2.3 begins with the arrival of William Hobson in January 1840 with instructions to invite rangatira to make a treaty with the British Crown. Te Tiriti o Waitangi was signed by northern rangatira on 6 February 1840, with further signatures made around the country that year. Section 2.4 explores how the English text of the treaty sits alongside the Māori text, focusing on how the Crown guarantee in Article 2 qualifies the exercise of sovereignty under Article 1. The chapter finishes with a brief conclusion.

2.2 He Whakaputanga o te Rangatiratanga o Nu Tireni

The first humans to arrive in Aotearoa New Zealand were Māori ancestors in the thirteenth century.[14] Creating the knowledge to traverse Te Moana-nui-a-Kiwa (the Pacific Ocean) was a major achievement made possible by deep observation and experimentation. This form of knowledge is part of what Māori call mātauranga and what Europeans call science.[15]

The first recorded encounter of Māori with Europeans occurred in December 1642, when two ships financed by the Dutch East India Company, captained by Abel Tasman, anchored in Taitapu (Golden Bay). Based on the expedition's map of the coastline it saw, a Dutch map maker named the territory as 'Zelandia Nova' in Latin, which in English became New Zealand.[16]

It was another century before the next visit. In October 1769, the *Endeavour* captained by Lieutenant James Cook landed at Tūranganui-a-Kiwa (Poverty Bay). Just two months later, the

[14] Matisoo-Smith and Daugherty (2012); Anderson, Binney and Harris (2014); Taylormade Media (2019). The material in this section draws on Dalziel, Scobie, Reid and Tau (2024).
[15] Durie (2005a); Broughton and McBreen (2015); Hikuroa (2017); Ruru and Nikora (2021); Popper (1983); Gluckman (2023).
[16] Salmond (1991, chapter 3), and King (2003, chapter 7); see also Anderson (2001, pp. 82-103).

French vessel *St Jean Baptiste* captained by Jean-François-Marie de Surville sailed into Tokerau (Doubtless Bay). By then, Māori had inhabited these islands for five centuries, developing a distinctive Indigenous culture intimately connected to whenua and wai (land and water).[17]

In legal traditions based on Roman law or English common law, this long habitation means Māori had clear property rights over the lands and natural resources of Aotearoa New Zealand under the fundamental legal principle of first possession. In a lecture delivered in 1999 on the Treaty of Waitangi, Professor Richard Epstein (University of Chicago) explained this principle as follows:[18]

> With these baselines, however, the rule of first possession serves one critical function: it generally gives clear guidance on how to organise the priority of title. It is first come, first served. Thus in any conflict between a first possessor and somebody who acquires the land later through force or machination, the law will regard prior in time as higher in right. A vast body of ancient and medieval law involves the implementation of that principle.

Beginning with Tasman's brief visit, early encounters between Māori and Europeans led to "puzzlement and perplexity experienced by both sides [that] proved frustrating and sometimes fatal".[19] Nevertheless, by the end of the century, Europeans were beginning to arrive to settle.

A new stage in the United Kingdom's relationship with Aotearoa New Zealand began in May 1833 when James Busby was sent as British Resident, stationed at the Bay of Islands. Busby brought with him the English Crown's response to a petition sent to King William IV in 1831 by thirteen northern rangatira, asking for the king's protection against the French and against lawless behaviour by British subjects. Busby offered his protection against acts of outrage by British subjects, although he had few resources for doing so.[20]

On 20 March 1834, Busby arranged for a gathering of northern rangatira at Waitangi to select a national flag, which was needed for international shipping. Mānuka Hēnare describes this as a key moment in the making of an Indigenous Māori nation, since the subsequent acceptance of Te Kara, the Flag of the Independent Tribes, was the first international acknowledgement of Māori sovereignty.[21]

The following year, Busby convened a second gathering of northern rangatira with an invitation to make a formal declaration of sovereignty. On 28 October 1835, 34 rangatira signed He Whakaputanga o te Rangatiratanga o Nu Tireni – the Declaration of Independence

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[17] Royal (2003); Selby, Moore and Mulholland (2010); Tau (2020); Reid (2021).
[18] Epstein (1999, pp. 4-5).
[19] Salmond (1991, p. 431).
[20] Anderson, Binney and Harris (2014, pp. 208-209).
[21] Hēnare (2021, p. 17); see also Belgrave (2024, pp. 63-64), who discusses the choice of the flag in a section entitled "Building a Māori nation". Hēnare (2021, p. 57) describes the process of Māori nation building in the following terms: "My argument is that the Māori nation was conceived in the womb of Māori metaphysics, born when necessity induced it, and grew in active involvement in transforming political, economic and social events in the early-mid nineteenth-century."

of the United Tribes of New Zealand. Busby prepared an initial draft in English, which Henry Williams, a prominent missionary, translated into te reo Māori. Eruera Pare Hongi transcribed the final Māori version that became the signed document.[22] A further 18 rangatira from other parts of the upper North Island had also signed by July 1839.

The first article identified the signatories as Tino Rangatira, which Mānuka Hēnare translates as 'absolute leaders' who hold authority and leadership (rangatiratanga).

The second article declared "all sovereign power and authority within the territories of the United Tribes of New Zealand" (Busby's original text) belongs solely to the Tino Rangatira. The beginning of the sentence is written in the signed text as "ko te Kingitanga ko te mana i te wenua", which Hēnare translates as "sovereignty/kingship and the mana from the land". The second article also allowed for the possibility of Kāwanatanga (Governorship), but only by persons appointed by the Confederation to carry out its laws.

The third Article recorded the Confederation's intention to meet every autumn and invited southern tribes to join the Confederation, although neither of these hopes were realised.

The fourth Article agreed to send a copy of He Whakaputanga to the King of England in appreciation for his approval of the national flag. It requested the King to remain as a protector of the rangatira in recognition of their "friendship and care for the Pākehā who live on our shores".

The British Crown accepted the declaration of Māori sovereignty in He Whakaputanga. In 1839, for example, the Secretary of State for the Colonies, Lord Normanby, wrote that Māori "title to the soil and to the sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government".[23]

Another important feature is that He Whakaputanga introduced the two concepts that are at the centre of the exchange in te Tiriti o Waitangi – tino rangatiratanga and kāwanatanga.

The phrase 'tino rangatira' appears three times in He Whakaputanga to describe the Māori signatories of the Declaration as the absolute and true leaders who are sole holders of sovereignty/kingship and the mana from the land of the Confederation of New Zealand.

The second Article states that 'kāwanatanga' (governorship) could be established in the lands of the Confederation only by the Tino Rangatira appointing persons to carry out the laws the Tino Rangatira had enacted in their assembly.

[22] Busby's original draft, the signed Whakaputanga and a translation of the latter back into English by Mānuka Hēnare can be accessed at https://nzhistory.govt.nz/media/interactive/the-declaration-of-independence. Further information is also at https://www.archives.govt.nz/discover-our-stories/the-declaration-of-independence-of-new-zealand.

[23] Normanby (1839a). Lord Normanby went on to say in the same document that the admission of the associated rights was "binding on the faith of the British Crown".

2.3 Signing Te Tiriti o Waitangi

By 1839, the number of "Pākehā who live on our shores" was about to increase sharply. The New Zealand Company led by Edward Gibbon Wakefield was completing arrangements for systematic colonisation. An advance party of company representatives arrived in August 1839. The first of its ships carrying colonists, the *Aurora*, departed Gravesend just a month later, on 18 September. The British Crown recognised "the spirit of adventure having thus been effectually roused it can be no longer doubted that an extensive settlement of British subjects will be rapidly established in New Zealand".[24]

It therefore appointed Captain William Hobson, "to treat with the aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any parts of those Islands which they may be willing to place under Her Majesty's dominion".[25] The *Aurora* had already been at Petone for seven days when Hobson sailed into the Bay of Islands on 29 January 1840. Busby immediately sent invitations to northern rangatira to gather for a meeting with Hobson at Waitangi on the next Wednesday, the 5th of February.[26]

Hobson and Busby prepared a draft for the proposed treaty, in English, which they completed during the afternoon of 4 February. They gave the draft to Henry Williams (translator of He Whakaputanga in 1835), who with his son Edward prepared a Māori text overnight. The English and Māori texts were read to the gathering the next day, followed by five hours of discussions. Rangatira retired for further deliberations into the night. Reverend Richard Taylor copied the Māori text onto a large sheet of parchment ready for signatures.

A late change was to replace 'huihuinga' (assembly) with 'wakaminenga', because He Whakaputanga used the later word to describe the Confederation.[27] As noted at the end of the previous section, there are strong echoes of He Whakaputanga to be found in te Tiriti.[28]

Thus, He Whakaputanga had finished with a request for the King of England to protect Māori rangatiratanga. In Article 2 of te Tiriti, his successor the Queen agreed to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their 'tino rangatiratanga'. In his translator's notes, Tā Hugh Kawharu explains that 'tino rangatiratanga' would "emphasise to a chief the Queen's intention to give them complete control according to their customs [where the word] 'tino' has the connotation of 'quintessential'".[29]

He Whakaputanga had allowed the Confederation to appoint persons to carry out its laws in an arrangement labelled as 'Kāwanatanga' (Governorship). The same word is used in Article 1 of te Tiriti, where rangatira gave to the Queen "te Kawanatanga katoa o o ratou wenua". Tā

[24] Normanby (1839a).
[25] Idem.
[26] Orange (2004, p. 25).
[27] Orange (1987, pp. 43-44).
[28] Mikaere (2005, p. 333). The Māori and English texts of the treaty can be accessed at https://waitangitribunal.govt.nz/en/about/the-treaty/maori-and-english-versions.
[29] See https://nzhistory.govt.nz/files/documents/treaty-kawharu-footnotes.pdf.

Hugh translates this as “complete government over their land”, noting “there could be no possibility of the Māori signatories having any understanding of government in the sense of ‘sovereignty’; i.e. any understanding on the basis of experience or cultural precedent”.

In contrast, te Tiriti makes no mention of ‘Kīngitanga’ or ‘mana i te whenua’, which were the terms He Whakaputanga used to translate ‘all sovereign power and authority’. Reinforced by analysis of the record of discussions at Waitangi on 5 February 1840, the following conclusion is inescapable: “Bay of Islands and Hokianga rangatira did not cede their sovereignty when they signed te Tiriti o Waitangi”.[30]

The rangatira regathered in the morning of the 6th of February. Henry Williams read aloud the Māori text from the prepared parchment (known today as the Waitangi sheet), which around 43 rangatira signed that afternoon. Events at Waimate and Mangungu the following week began the process of gathering further signatures around the country.[31] Although some rangatira declined to sign, and some rangatira were not given the opportunity, the total number of signatures made in 1840 amounted to about 540.[32]

2.4 Tino Rangatiratanga and Sovereignty

The protection of tino rangatiratanga in the Māori text leads to the long-standing controversy of how this sits with the English text, where Article 1 makes a clear and strong statement about sovereignty:

> The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

The language of Article 1 (“absolutely and without reservation all the rights and powers of Sovereignty”) indicates an absolute transfer of full sovereignty. Consequently, many authors have argued the Māori and English texts are inconsistent and priority belongs with the Māori text; a good example is the important article by Ruth Ross.[33]

Some commentators also use the legal doctrine of *contra proferentem* to support the primacy of tino rangatiratanga in the Māori text over sovereignty in the English text, since this doctrine requires any ambiguities to be interpreted against the party that drafted the treaty.[34]

[30] Waitangi Tribunal (2014, p. 527).
[31] https://nzhistory.govt.nz/politics/treaty/making-the-treaty/treaty-of-waitangi-signing-locations.
[32] https://natlib.govt.nz/he-tohu/about/te-tiriti-o-waitangi.
[33] Ross (1972).
[34] Windsor (2007, pp. 187-188).

Article 1, however, is not the whole treaty. Dame Anne Salmond has long noticed with colleagues at the University of Auckland that te Tiriti is expressed as a series of tuku, or gift exchanges.[35] Hence, the gift offered in Article 1 of the English text must be read alongside the return exchange in Article 2, repeated here:

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

In these opening words of Article 2, the British Crown (personified as Queen Victoria, whose coronation had been less than two years earlier, on 28 June 1838) did three things.

First, the Crown *confirmed* property rights that were held by the chiefs and tribes of New Zealand, and by their respective families and individuals. Thus, just as He Whakaputanga acknowledged pre-existing Māori sovereignty in 1835, the Treaty of Waitangi acknowledged pre-existing Māori property rights in 1840.

These property rights do not depend on the treaty. As discussed in Section 2.2, the rights come from the fundamental legal principle of first possession under which ownership of property goes to the individual or group who possessed it first.[36] Hence, Article 2 confirms rights that already existed due to the full and exclusive possession of these islands by Māori for more than 600 years at the time te Tiriti was signed.

The Colonial Office recognised the significance of this aspect of the treaty. The New Zealand Company wanted to argue that Māori did not possess all the land and consequently colonists could claim for themselves large areas of 'waste lands'.[37] Lord Normanby's Instructions specifically recognised Māori property rights in the whole country, so that any such lands could be obtained only with the consent of Māori: "it will be your duty to obtain, by fair and equal contracts with the Natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to New Zealand".[38]

Second, Article 2 recognised that Māori may possess properties "collectively or individually". There is no disagreement that communal property rights in land and other assets have always been important for iwi and hapū. At least since Sir Keith Sinclair's 1956 article on the impact of the Native Land Court, however, New Zealand scholars have tended to treat all Māori property rights before 1840 as collective rights.[39] This is not correct.

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[35] Salmond (2022, p. 4). The colleagues mentioned by Dame Anne are Merimeri Penfold, Cleve Barlow, Mānuka Hēnare, Hōne Sadler and Tā Patu Hohepa. See also Browning (2023). Chapter 5 of this present paper describes the principle of exchange as the first principle of te Tiriti.
[36] Epstein (1999, p. 4).
[37] Adams (1977, chapter 6); Schmidt (2014).
[38] Normanby (1839a).
[39] Sinclair (1956).

Consistent with the language of Article 2, Te Maire Tau provides evidence "there was no contradiction in the idea of a tribe holding its territory as a collective while also having individual ownership of land and resources"; indeed "communal property and individual property were part of a rich quilt of take whenua [Māori land tenure]".[40] Michael Stevens also presents examples of collective and individual forms of ownership within Ngāi Tahu, focusing on pounamu (greenstone), podocarp forests and tītī (muttonbirds).[41]

The third achievement of Article 2 was to make a promise about the future. The Crown *guaranteed* that Māori collective and individual property rights would remain full, exclusive and undisturbed. This phrase expresses the formal language of a Crown guarantee, in which the Crown makes a promise to specified people in exchange for something valued by the Crown. In this case, the guarantee was granted not only to the rangatira who signed te Tiriti, but also to the tribes of New Zealand, their families and their individuals.

Consequently, the Crown guarantee in Article 2 qualifies the sovereignty ceded in Article 1 by guaranteeing Māori authority over Māori property rights (tino rangatiratanga in the Māori text).[42] As the courts have recognised, this promise in the treaty is "analogous to a fiduciary duty".[43] This illustrates that the offer of a Crown guarantee is a solemn undertaking. In the current day, for example, the ability of a Crown entity to give guarantees to any person outside its own organisation is strictly controlled.[44]

Considering the Treaty of Waitangi as a whole, therefore, the English text does not give the Crown "absolute, uncontrolled and indivisible power", which is one definition of sovereignty.[45] Instead, the authority ceded to the Crown is a qualified sovereignty, constrained by the Crown guarantee in Article 2.

Figures 1 and 2 draw on this discussion to illustrate unity in the Māori and English texts.

Figure 1 reflects the Māori text, te Tiriti. Article 2 contains the more important Māori concept, **tino rangatiratanga**. In this Article, the Crown agreed to protect the unqualified exercise of tino rangatiratanga over lands, villages and all their treasures, represented in Figure 1(a). Figure 1(b) shows how this was extended by granting kāwanatanga to the Crown in Article 1. The relative size of the two areas in the figure reflects that at the beginning of 1840 the Māori population was probably between 70,000 and 90,000 people while the European population was approximately 2,000.[46]

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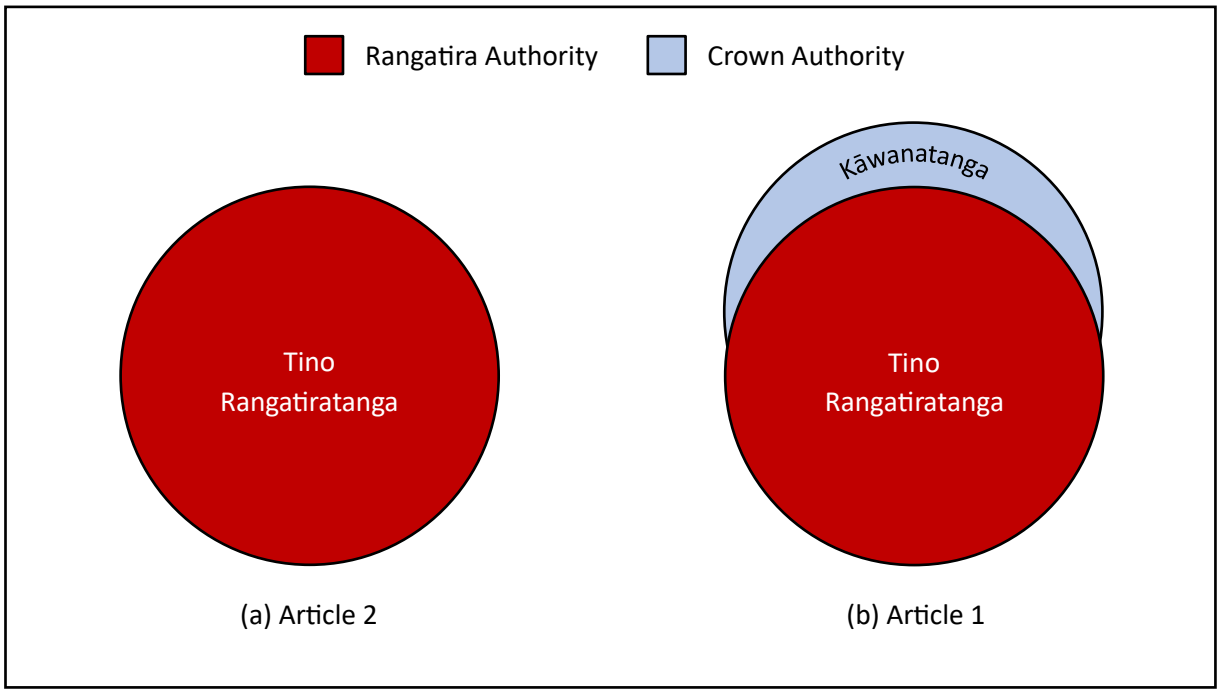
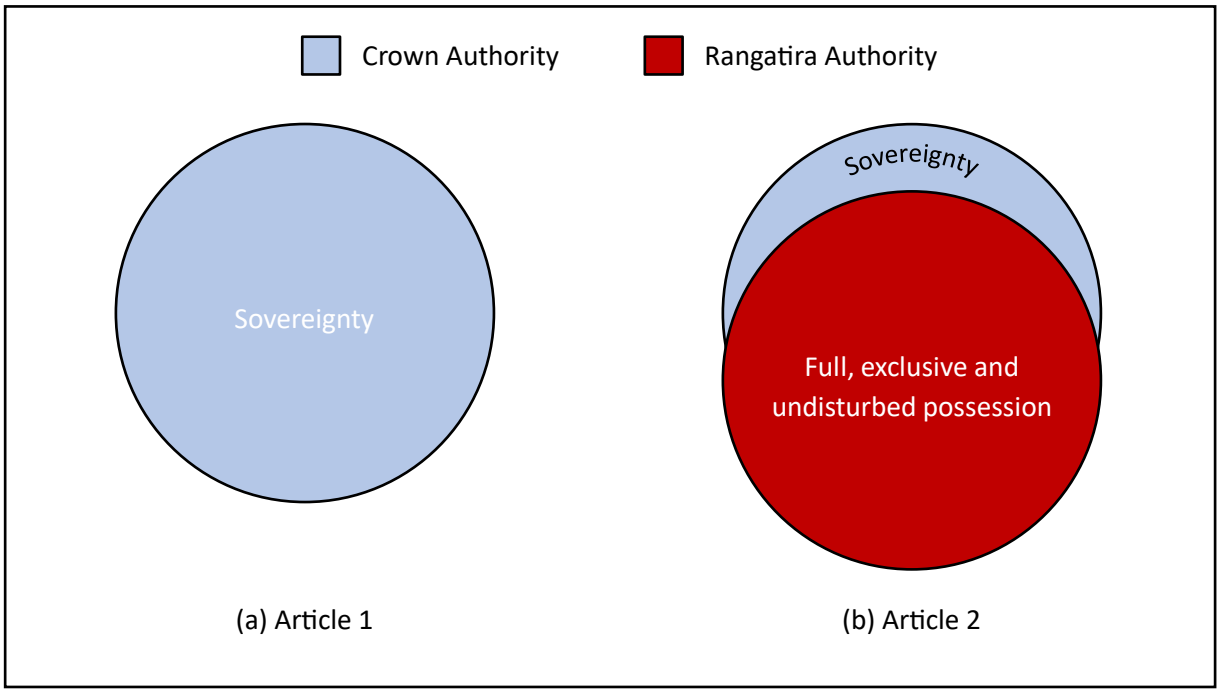
[40] Tau (2016, p. 678).
[41] Stevens (2012). For further discussions on individual and whānau property rights of 'muttonbirders', see Stevens (2006, 2013a, 2018).
[42] See Waitangi Tribunal (1991, pp. 236-237; 1996, p. 20) and Tau and Williams (2017, p. 140).
[43] Robin Cooke, President of the Court of Appeal, in *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641. See Lanning (1997) for further discussion.
[44] Crown Entities Act 2004, Section 163, https://www.legislation.govt.nz/act/public/2004/0115/latest/DLM330568.html.
[45] Fletcher (2022, p. 3).
[46] Anderson, Binney and Harris (2014, p. 200 and p. 213).

Figure 1: Shared Authority in te Tiriti (Māori Text)



Note: In te Tiriti, Article 2 guarantees the unqualified exercise of tino rangatiratanga by rangatira and Article 1 grants kāwanatanga to the Crown.

Figure 2: Shared Authority in the Treaty (English Text)



Note: In the Treaty, Article 1 cedes absolutely and without reservation sovereignty to the Crown and Article 2 qualifies that sovereignty by guaranteeing full, exclusive and undisturbed possession.

Figure 2 draws on the English text, the Treaty. Article 1 contains the more important British concept, **sovereignty**. In this Article, all the rights and powers of sovereignty are ceded to the Crown absolutely and without reservation, represented in Figure 2(a). Figure 2(b) shows how this was qualified in Article 2 by the Crown guarantee of full, exclusive and undisturbed possession of lands and estates, forests, fisheries and other properties. Again, the relative size of the two areas reflects the size of the two populations at the beginning of 1840.

Thus, the two texts, each taken as a whole, arrive at a comparable position, which the Waitangi Tribunal calls **shared power and authority**: "The rangatira agreed to share power and authority with Britain [with] the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Māori interests."[47] Dame Claudia Orange similarly concludes te Tiriti is an agreement for shared authority.[48] Ned Fletcher ends his comprehensive study of the English text with this summary:[49]

> Seen in this light, the Māori and English texts of the Treaty reconcile. The view taken here is that 'sovereignty' in the English text is to be understood according to the principal purpose of establishing government over British subjects for the protection of Māori. The effect of the Treaty in English was to set up an arrangement similar to a federation, in which the sovereign power did not supplant tribal government. … It was conceived, written and affirmed in good faith.

2.5 Conclusion

There is one treaty and two texts. As discussed in Section 1.2 of the previous chapter, the Māori text has considerable weight, indeed priority, since it was the text committed to parchment in 1840 and then sent around the country for further signatures. Nevertheless, in the decades that followed, the Crown typically paid little attention to either text. It was only in June 1986, for example, that a Cabinet Minute required Government departments to assess impacts of the treaty on future policies.[50]

On occasions when the Crown did acknowledge the treaty, frequently the English text was the only consideration. To illustrate, the Waitangi Day Act 1960 introduced New Zealand's annual commemoration of the signing of the treaty. A schedule to that Act described itself as a copy of the treaty signed at Waitangi but presented only the English text.[51] That error was repeated in the New Zealand Day Act 1973 making the commemoration a national holiday.[52] It was not until 1976 that the Māori text was added to the schedule, although placed after the English text.[53]

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[47] Waitangi Tribunal (2014, p. 529).
[48] Orange (2011, p. 89; 2023; 2024).
[49] Fletcher (2022, p. 529).
[50] McHugh (1991a, p. 283).
[51] https://www.nzlii.org/nz/legis/hist_act/wda19601960n46151/.
[52] https://www.nzlii.org/nz/legis/hist_act/nzda19731973n27170/.
[53] https://www.nzlii.org/nz/legis/hist_act/wda19761976n33151/.

In relying on the English text, the Crown has frequently focused on Article 1 to assert its right to exercise sovereignty without restraint.[54] In contrast, Article 2 in the English text has received little attention. Yet, Article 2 is necessary to reconcile the Māori and English texts. It is the Crown guarantee of full, exclusive and undisturbed possession by rangatira, tribes, families and individuals in Article 2 in the English text that qualifies the exercise of sovereignty ceded in Article 1.

The following chapter therefore examines in more detail the concept of a Crown guarantee. A key issue related to Crown guarantees is a concept that economists call *time inconsistency*. A party to an agreement may have strong incentives to break its side of the agreement once the other party honours its promises. The history of settler dispossession of Māori land after 1840 is a shameful illustration of time inconsistency.

[54] See, for example, McHugh (1991b) and Palmer (2008, pp. 168-169).

Chapter 3

Crown Guarantees and Time Inconsistency

> Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.
>
> The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures.
>
> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

3.1 Introduction

The above quotations are the first sentence in Article 2 of the Māori text in te Tiriti o Waitangi, its authoritative English translation by Tā Hugh Kawharu, and the English text in the Treaty of Waitangi, reproduced here for convenience.[55] As discussed in Section 1.2, the Māori text has the more substantial weight. Nevertheless, the previous chapter has shown that Article 2 in the English text is essential for understanding the consistency of the two texts.

The English text is also important because it explicitly confirms pre-existing Māori property rights of first possession and records the Crown guarantee that the rights will be undisturbed. This chapter discusses key characteristics of a Crown guarantee of this nature.

The discussion begins in Section 3.2 with an explanation of how a Crown guarantee is a valuable property right for recipients, illustrated with a New Zealand example from the global financial crisis of 2008. Section 3.3 provides an historical overview of the dispossession of Māori land holdings between 1840 and 1975, contrary to the Article 2 guarantee.

This failure to honour the Crown guarantee in Article 2 is an example of a wider issue known in economics as the issue of time inconsistency. Section 3.4 explores this issue and three mitigations – reputation, legislation and independent institutions. It explains that these mitigations were not made available to Māori in the period covered by this chapter, 1840 to 1975. Section 3.5 ends with a short conclusion.

[55] The texts come from https://waitangitribunal.govt.nz/en/about/the-treaty/maori-and-english-versions.

3.2 Crown Guarantees

Guarantees are important in law. To illustrate, consider the Consumer Guarantees Act 1993.[56] This legislation aims to contribute to a trading environment where consumers and businesses can participate with confidence (Section 1A). Consistent with that purpose, the Act declares that a supplier of goods to a consumer always makes certain guarantees, including the following examples listed in Section 5 of the Act:

(a) The supplier has a right to sell the goods.
(b) The goods are free from any undisclosed security.
(c) The consumer has the right to undisturbed possession of the goods (with a small number of specified exceptions).

Note the phrase 'undisturbed possession' in the third guarantee. Recall this is a key phrase in Article 2 of the Treaty (English text). If a sound trading environment requires that a purchaser must be able to rely on an implicit guarantee of undisturbed possession, how much more important is respect for an explicit guarantee of undisturbed possession stated in the nation's founding document?

Further, it is uncontroversial to observe that the State has a distinctive role as overall custodian of the market economy within its borders.[57] This imposes an additional weight of responsibility for fulfilling promises made in a Crown guarantee. A Government cannot dishonour a Crown guarantee without damaging its reputation as guardian of property rights more generally.

A recent example where a Crown guarantee was made and honoured in New Zealand occurred during the global financial crisis that began in the middle of 2007.[58] The crisis intensified on 15 September 2008 when Lehman Brothers failed in the United States. This fuelled a loss of confidence in financial institutions around the world. Many Governments responded by introducing or extending schemes that guaranteed certain financial deposits against the risk of institutional failure. Ireland was the first, on 30 September 2008.

In New Zealand, the Prime Minister announced the Crown Retail Deposit Guarantee Scheme on 12 October 2008. The scheme, with some adjustments, remained in place until 31 December 2011. The scheme involved a Crown guarantee for funds deposited in eligible financial institutions, up to a cap of $1 million per person. The total value of funds covered by this guarantee was $133 billion. The Auditor-General later reported that the scheme achieved its goal of retaining confidence in financial institutions. There was no run on deposits and no bank in New Zealand failed. Nevertheless, nine non-bank financial institutions did fail. The largest by a considerable margin was South Canterbury Finance Limited, hereafter referred to as SCF.

[56] https://www.legislation.govt.nz/act/public/1993/0091/latest/DLM311053.html.
[57] See, for example, Dalziel, Saunders and Saunders (2018, Proposition 19, p. 134).
[58] The material that follows, including cited values, draws on Auditor-General (2011).

A Crown guarantee is a valuable property right. In this case, depositors continued to receive a high interest rate although the risk of default had been transferred to the Crown. The value of the property right can be seen in the volume of funds that flowed into institutions covered by the guarantee; one institution saw its deposits grow from $800,000 to $8.3 million. In the case of SCF, deposits grew by 25 per cent in the four months after the guarantee was in place.

SCF went into receivership on 31 August 2010. Treasury officials were well prepared and immediately transferred funds to a trustee sufficient for meeting the Crown guarantee. By 30 June 2011, 30,404 depositors had received $1,580.3 million (an average of just under $52,000 each). This was a high proportion of the total payout for all nine failed institutions, estimated at that date to require $2 billion. The scale illustrates how a Crown guarantee can be a substantial liability to the Crown, even allowing that on this occasion about $0.9 billion was anticipated to be recovered from the sound assets in the failed institutions.

To place the scale of the total payout to SCF depositors into context, consider the payments the Crown has made in its treaty settlement negotiated with Ngāi Tahu, in whose takiwā or tribal region SCF was based.[59] The Ngāi Tahu claim led to one of the largest treaty settlements, which the Crown has agreed will be maintained at 16.1 per cent of all treaty settlements.[60] Between 1998 and 2020, the total redress paid to Ngāi Tahu under this agreement was $471 million, paid in eight transfers.[61]

The transfers must be adjusted for inflation to allow a valid comparison with the SCF payout. Measured at September 2010 prices, the total payment to Ngāi Tahu is equivalent to $500.2 million. That amount is one-third of the payout to SCF depositors. It is also less than the Crown's net liability from honouring the SCF guarantee, accounting for the recovery of some value from the sound assets of SCF.

The number of Ngāi Tahu registered members in July 2021 was 70,200.[62] Thus, the settlement per member has been $7,125 (at September 2010 prices); that is, 13.7 per cent of the average payment made to SCF depositors under the Crown Retail Deposit Guarantee. This comparison demonstrates that the payments made by the Crown to redress historical failures to honour the treaty are well within the range associated with other examples of Crown guarantees.

The following section turns to an overview of how the historical claims made by Ngāi Tahu and other iwi and hapū are the result of repeated failures by successive Parliaments to honour the Crown guarantee in Article 2 of the Treaty.

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[59] SCF was based in Timaru. This comparison was suggested by Scobie and Sturman (2024, footnote 31, p. 138).

[60] Taylor (2014). Waikato-Tainui has the largest claim, which the Crown has agreed will be 17 per cent of all settlements. See Fisher (2020) for an account of the Ngāi Tahu treaty settlement negotiations.

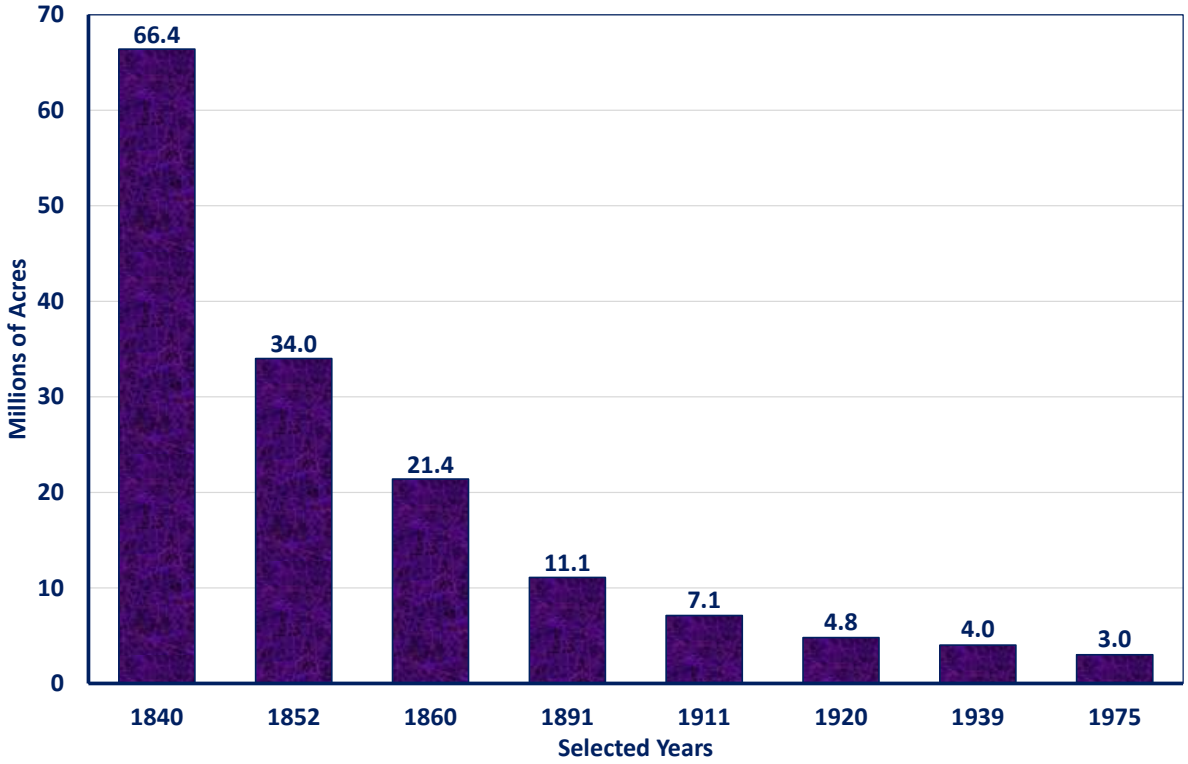
[61] The data on payments come from https://www.govt.nz/assets/Documents/OTS/Ngai-Tahu/2021-02-05-RM-payments-table-Ngai-Tahu.pdf. The calculation of the real value at September 2010 prices uses the consumers price index in the Infoshare database of Stats NZ, accessed 12 July 2024.

[62] Te Rūnanga o Ngāi Tahu (2021).

3.3 Dispossession of Lands and Estates after 1840

In Article 2, the Crown guaranteed to Māori the full, exclusive and undisturbed possession of their lands for "so long as it is their wish and desire to retain the same in their possession". Figure 3 records the *dispossession* of Māori lands that took place instead.[63] In little over a decade after 1840, the amount of land in Māori title had almost halved, to 34 million acres. By 1891, this was reduced by a further two-thirds. In 1975, only 3 million acres remained in Māori title, less than five per cent of the total land area of Aotearoa New Zealand.

Figure 3: Amount of Land in Māori Title, Selected Years, 1840 – 1975



Source: The data come from Asher and Naulls (1987, Appendix).

It is inconceivable that tangata whenua (people of the land) could "wish and desire" this scale of lost tino rangatiratanga.[64] Indeed, the historical record demonstrates that dispossession was imposed using the Crown's military and legal resources against organised resistance by Māori. This section describes three major dispossession mechanisms led by the Crown: (i) dishonoured conditions of land purchases; (ii) raupatu – armed invasion and confiscation; and (iii) the Native Land Court.

[63] This section draws on Dalziel, Scobie, Reid and Tau (2024), which presented, for example, Figure 3 on its page 23.
[64] Walker (1987a, p. 45); Durie (1998, chapter 5).

Dishonoured conditions of land purchases

The first large-scale dispossession of whenua from Māori took place in the South Island. By 1864, the Crown had made ten transactions with Ngāi Tahu rangatira to purchase in aggregate 34.5 million acres (1,375,930 hectares), more than half the country's total land area.[65] This included the Ōtākou Block around modern-day Dunedin, purchased by the New Zealand company in 1844 and transferred to the Crown after that company's collapse in 1858.[66]

The common practice in these transactions was to negotiate a deed of sale in which title to a large land area was transferred to the Crown, with a promise that the Crown would return reserves to ensure the sellers could prosper in the new settler economy. At the time, this was thought to require at least one-tenth of the purchased area to remain in Māori ownership.[67]

When it came time for the reserved land to be determined for Ngāi Tahu, allocations were "marginal and miniscule".[68] By the Crown's account, Kemp's purchase in June 1848 involved 20 million acres. The land set aside for reserves by Walter Mantell in the second half of 1848 was no more than 6,359 acres, or 0.032 per cent of the land area.[69]

Further, Kemp's Deed promised to reserve to Ngāi Tahu their places of residence (kāinga nohoanga) and places of food production or gathering (mahinga kai), for themselves and for their descendants. This promise was almost entirely ignored; instead, many natural eco-systems in the area, such as wetlands, forests, lakes and streams, were polluted or destroyed.

As the Waitangi Tribunal summarised:[70]

> The Crown, through its agents, rode roughshod over Ngāi Tahu's rangatiratanga, over their right to retain land they wished to keep, over their authority to maintain access to their mahinga kai.

This mechanism of dispossession has been called *conquest by contract*.[71] Ngāi Tahu protested continuously for more than a century, beginning with a letter from Matiaha Tiramōrehu to Lieutenant-Governor Edward Eyre in 1849.[72] Between the 1870s and the 1920s, at least eleven official inquiries were made into grievances submitted by Ngāi Tahu.[73]

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[65] This section draws on O'Regan (1989) and Fisher (2020, chapter 1); see also Waitangi Tribunal (1991) and Evison (1993, 2006). Tā Tipene O'Regan notes that each of the land deeds could be described as an additional treaty (O'Regan, 1989, p. 235; see also Tau, 2016, p. 679).
[66] See Burns (1989).
[67] This was the standard set by the New Zealand Company. Note Sir Donald McLean's considered view in 1859, however, that three-tenths of an area would meet Māori needs (Fargher, 2007, p. 192).
[68] Fisher (2020, p. 26).
[69] The land sizes come from Waitangi Tribunal (1991, p. 75), but note that Ngāi Tahu does not agree with the Crown's account of how much land was sold in Kemp's purchase.
[70] Waitangi Tribunal (1991, p. 502). See also Stevens (2013b) and Tau (2020) for analyses of disrespect for Ngāi Tahu freshwater rights.
[71] Banner (2000).
[72] Fisher (2020, p. 8 and p. 26).
[73] Waitangi Tribunal (1991, p. 172).

Dishonourable land purchases extended beyond Ngāi Tahu. A key person in the North Island was Sir Donald McLean, appointed by Governor Sir George Grey as Land Purchase Commissioner in 1851 and then as head of the Native Land Purchase Department in 1854.[74] Mclean was initially sensitive to the Crown's obligations under the Treaty of Waitangi, which he recognised required the free consent of Māori to land purchases.[75]

Nevertheless, as rangatira became unwilling to sell more land while the demand for land to support colonisation continued to rise, Maclean shifted from 'free consent' to 'engineered consent'.[76] This included stronger enforcement of laws prohibiting colonisers from leasing Māori land, so that Māori had no alternative but to sell.[77] It also involved a new practice of "making initial payments to favoured rangatira away from the eyes of other leaders and resident hapū".[78]

As in the South Island, there were promises of reserves that subsequently tended to be poorly defined, poorly protected and inadequate for the needs of Māori communities.[79] Rangatira protested and the Crown made some efforts to address some complaints, but these efforts "were too long delayed and too limited to mitigate the Treaty breaches".[80]

Raupatu – Armed invasion and confiscation

The practices introduced by McLean took a further turn in Taranaki, as the Waitangi Tribunal describes in *The Taranaki Report: Kaupapa Tuatahi*.[81] In November 1859, Governor Gore Browne accepted an offer made by a rangatira, Te Teira Mānuka, to sell land at Waitara, despite strong opposition by another rangatira, Wiremu Kingi. Kingi was living on the land, which had been previously cultivated by his father, with 200 followers. When Kingi and his followers resisted Crown surveyors coming onto the land, martial law was declared, military reinforcements were sent from Auckland, and war commenced in March 1860.

The first Taranaki War lasted until a ceasefire in April 1861, although this did not mark the end of military invasion and Māori resistance in Taranaki. Further periods of armed conflict took place between 1863 and 1869. The assault on Parihaka by a military force of 1,589 led by the Minister for Native Affairs, John Bryce, took place on 5 November 1881.[82]

Meanwhile, George Grey had returned to New Zealand in September 1861, replacing Browne as Governor. Almost immediately, Grey began preparations for war with the Waikato tribes.[83]

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[74] Information in this paragraph comes from Fargher (2007).
[75] See, especially, his written statements discussed by Fargher (2007) at p. 156 and pp. 189-193.
[76] Fargher (2007, p. 190).
[77] Waitangi Tribunal (2010a, p. 88).
[78] Waitangi Tribunal (2010a, p. 186).
[79] Waitangi Tribunal (2010a, pp. 219-267).
[80] Waitangi Tribunal (2010a, p. 263).
[81] Waitangi Tribunal (1996); see also Belich (1986) and O'Malley (2016, 2019).
[82] See also Scott (1975), Buchanan (2010, 2018), Keenan (2015) and Riseborough (2023).
[83] This account draws primarily on O'Malley (2016) and O'Malley (2024).

He issued an order for around 2,300 British soldiers to engage in extending the Great South Road to the Waikato River, completed in March 1863. This allowed quick movements of troops and supplies. The Waikato War began on 12 July 1863, when Lieutenant-General Duncan Cameron led 380 British imperial troops across the Mangatāwhiri River. It lasted nine months; Vincent O'Malley summarises the impact:[84]

> Following the Waikato War of July 1863 to April 1864, the once flourishing Waikato Māori economy stood in ruins – with villages destroyed, crops razed and livestock looted. An area that just a few years earlier had been a hub of colonial commerce, exporting produce to New South Wales, Victoria and even California, lay waste. Worse still, hundreds of Waikato Māori had been killed, and many more were left crippled or wounded.

After the Taranaki and Waikato wars, the settler Government confiscated some 3.2 million acres of Māori land – about 5 per cent of New Zealand's total land area and more than 15 per cent of the land still held in Māori customary ownership.[85] The legal basis for the confiscation (a practice which was then extended to other parts of the country) was the New Zealand Settlements Act 1863, reinforced by 21 further statutes in following years.[86]

The 1863 Act allowed the Governor to determine that a tribe, or a considerable number of Māori in an area, had been engaged in rebellion. The Governor in Council could then declare that a geographical area containing the lands of those determined to be in rebellion would be a District within the provisions of the Act. This made it lawful for the Government to confiscate anywhere within the District "eligible sites for settlements for colonisation". These eligible sites could be virtually the whole District, as happened in Taranaki.

The Act provided for financial compensation to be made to landowners who could show they had not taken up arms against the Crown. These owners still lost their lands, however, and had to apply to a Compensation Court to access funds. When the Crown did return some land reserves to original owners, it was in individualised titles. Further, the management of the returned lands could be vested in the Public Trustee who, without owner approval, could offer perpetual leases to settlers.[87] Proclamations were made under this Act until 1867.[88]

Māori clearly did not "wish and desire" raupatu. In August 1923, for example, a deputation of three Members of Parliament, a Member of the Legislative Council and 70 chiefs from the Bay of Plenty, Waikato and Taranaki met with the Government; their protests led to the Sim Royal Commission on confiscation claims, which sat between 1925 and 1928.[89] Māori voiced their grievances at the injustices of raupatu for decades and decades, to the present day.

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[84] O'Malley (2016, pp. 9-10).
[85] Gilling (2009, p. 13).
[86] Boast (2009, pp. 145-146). The New Zealand Settlements Act 1863 is available at https://www.nzlii.org/nz/legis/hist_act/nzsa186327v1863n8377/.
[87] Tuuta (2009).
[88] Boast (2009, p. 146).
[89] Hickford (2009).

The Native Land Court

Article 2 of the treaty created the system of Crown pre-emption, meaning rangatira could sell land to the Crown only. As the Crown moved away from that system, Parliament passed the Native Lands Act 1862. This created the Native Land Court to convert Māori customary titles into individualised Crown grants that the owners could sell to anyone.[90] The Court's functions were further strengthened three years later by the Native Lands Act 1865.[91]

David Williams describes the operations of the Compensation Court and the Native Land Court as two elements of the same policy, which was to impose individualisation upon tribal land.[92] Chief Justice Francis Fenton, for example, was head of both courts.[93] The Native Land Court held its first sittings in 1864, in the Kaipara region.[94] By June 1872, it had issued individualised titles to 5 million acres.[95] That figure passed 18 million acres by 1909.[96]

> In 1909 the vast majority of Māori people were utterly marginalised. Most were restricted to trying to eke out a subsistence living on the tiny remnant of non-leased native freehold land which was not designated as 'available for settlement'.

Recall the Treaty's guarantee of undisturbed possession of lands and other properties which Māori "may collectively or individually possess". The denial of any place for collective property rights in land was disastrous for Māori communities.

Indeed, Tā Hugh Kawharu famously described the Native Land Court as "a veritable engine of destruction for any tribe's tenure of land, anywhere". [97] Referring to a Crown agent statement made in 1867, Williams called the Native Land Court 'te Kooti tango whenua – the land-taking Court'.[98] In his foreword to Williams' study, Kawharu explains the dishonour to Article 2:[99]

> But investigation and award of title that allocated shares to individual members of a tribal group substituted in one operation the authority of the Court for the authority of the chiefs. In thus striking at the heart of the Māori political system the legislature committed perhaps the most serious breach of the Treaty since it had been signed in 1840. Moreover, as there is no economic merit per se in individualising communal title, justifying it would have required a massive programme of economic development for the Māori; a measure totally beyond the resources of the colony even if it had been desired. And the extent to which it was *not* desired is a major theme in Williams' analysis.

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[90] Boast (2008, p. 48).
[91] Gilling (1994, pp. 123-125); Durie (1998, pp. 121-123); Williams (1999, pp. 69-73).
[92] Williams (1999, p. 83); see also Mein Smith (2005, pp. 72-73). Dame Judith Binney described the Native Lands Act 1865 as "an act of war" (Binney, 1990, p. 143).
[93] Boast (2009, p. 166).
[94] Williams (1999, p. 11).
[95] Boast (2008, pp. 67-68).
[96] Williams (1999, p. 59). The following quote is from Williams (1999, p. 60).
[97] Kawharu (1977, p. 15).
[98] Williams (1999, p. 1 and p. 48); see also Mein Smith (2005, p. 73).
[99] Kawharu (1999, p. xvi).

Māori protested the resulting land losses "year in and year out", with an average of around thirty petitions per year between 1870 and 1900.[100] Hirini Rāwiri Taiwhanga, for example, travelled to London in 1882 with other northern rangatira to protest to Queen Victoria that there was no basis in the treaty for "the making of unauthorized laws relating to Māori lands – namely, the Land Acts of 1862, 1865, 1873, 1880 – which Acts were not assented to by the Native Chiefs in all parts of the Island."[101]

3.4 Time Inconsistency

Section 3.3 demonstrates how the Crown failed to honour its 1840 guarantee that Māori would have undisturbed possession of their lands and estates. This section explores this failure in the context of a wider issue known in economics as time inconsistency.

A key event in New Zealand's colonial history was the passing of the New Zealand Constitution Act by the British Parliament in 1852.[102] This allowed self-government in the colony, involving six Provincial Councils and a central Government. The rules on who could vote required voters to be male aged 21 years or older, who owned or leased property worth more than certain minimum values set out in the legislation. The property test meant most Māori were ineligible, producing a settler Government.

Consistent with the view that the treaty anticipated shared authority (see Section 2.4 above), Section 71 of the New Zealand Constitution Act made the following provision that remained in place until 1986.[103]

> And whereas it may be expedient that the laws, customs, and usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be observed: It shall be lawful for Her Majesty, by any Letter Patent to be issued under the Great Seal of the United Kingdom, from time to time to make provision for the purposes aforesaid ….

This provision to define districts in which Māori laws and customs would be observed was never used. The New Zealand Settlements Act 1863 instead made it lawful for the Governor in Council to define districts where the Crown could confiscate eligible sites for settlements for colonisation. The contrast between these two possibilities for defining a district illustrates the gulf between the Crown's promise in Article 2 and its subsequent practice.

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[100] Williams (1999, p. 96).
[101] Williams (1999, p. 84).
[102] A copy of the Act is available at https://ndhadeliver.natlib.govt.nz/webarchive/20210104000423/http://nzetc.victoria.ac.nz/downloads/GovCons.pdf. The Act replaced the New Zealand Constitution Act 1846, which was not fully implemented (Palmer and Palmer, 2004, p. 6).
[103] Tau and Williams (2017, p. 144).

In the economics literature, time inconsistency refers to a situation where there are clear incentives for the maker of a promise to dishonour that promise sometime in the future. In 2004, Finn Kydland and Edward Prescott were awarded the Nobel Prize in Economics for introducing this concept, among other related achievements.[104]

The classic example in economics concerns inflation. Suppose a government announces it will maintain price stability. If this is believed by the private sector, the government faces an incentive to break its promise by engineering monetary policy to create a mild inflation that stimulates economy activity, perhaps in the lead-up to an election. The private sector anticipates that incentive, however, and so the outcome is an equilibrium inflation rate that is higher than everyone's preference for price stability.[105]

The treaty has this feature of time inconsistency. Once the Crown is exercising sovereignty ceded in Article 1, it has strong incentives to ignore its Crown guarantee in Article 2. Indeed, Sir Douglas Graham (former Minister for Treaty of Waitangi Negotiations) has argued that breaches of Article 2 were so inevitable that the British Government in 1840 was at fault for not addressing the implications in advance:[106]

> Yet the British government had directed Lieutenant-Governor William Hobson to enter into a Treaty which was not justiciable in the courts; it knew, or ought to have known, that as a result there could be no realistic means of redress if the Crown breached its Treaty obligations, and that breaches were more likely than not, especially once the settler population had passed parity in numbers and needed increasing quantities of land.

The long-standing convention of parliamentary sovereignty makes it particularly difficult for the Crown to avoid time consistency issues when it enters long-term commitments. Parliamentary sovereignty means "Parliament cannot prevent a subsequent Parliament from repealing or amending existing legislation".[107] Consequently, the Crown is unable to make a guarantee that it can be sure will be honoured by future Parliaments.

Although there is no simple way to resolve issues of parliamentary sovereignty and time inconsistency in a Crown guarantee, some mitigations are available. This section considers three: reputation impacts, the rule of law and independent institutions.

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[104] https://www.nobelprize.org/prizes/economic-sciences/2004/summary/. Their original article on the topic is Kydland and Prescott (1977).

[105] See, for example, Smyth, Washburn and Dua (1989).

[106] Graham (2001, p. 22). Tā Āpirana Ngata similarly recognised that the ceding of sovereignty meant the Crown could pass laws without regard to its promises in the treaty, lamenting "our ancestors who gave away their rights in the days when they were powerful" (Ngata, 1922, p. 16). This is a good expression of the time inconsistency issue.

[107] Legislation Design and Advisory Committee (2021, p. 24). As discussed in Section 5.2 below, these *Legislation Guidelines* devote a chapter to the Treaty of Waitangi, treaty settlements and Māori interests. It advises that "the development process of policy and legislation, as well as the final product, should show appropriate respect for the spirit and principles of the Treaty" (idem, p. 28).

Reputation impacts

If the Crown fails to honour a guarantee, typically there are negative reputational impacts that impose costs on the Crown.[108] The incentive to avoid these costs may be sufficient to outweigh the short-term benefits from ignoring a promise. The Crown Retail Deposit Guarantee Scheme introduced by the New Zealand Government in October 2008 is an illustration (see Section 3.2). If the Government had decided not to reimburse the depositors of the failed institutions, this would have damaged the Government's credibility in financial markets and destroyed trust in future Crown guarantees.

It is possible, however, that the penalty faced by the Crown for dishonouring a guarantee may depend on who is harmed by the broken promise.[109] This possibility has been termed the dark side of social capital, in which the norms held by the dominant social group may accept that politicians should not be punished – indeed, might be rewarded – if public policy treats a minority group unfairly to the advantage of the privileged group.[110]

This played a large role in the policies of the Crown to dispossess Māori for the purpose of making land available to colonists. The armed invasion of Taranaki in March 1860, for example, was to enforce the disputed Waitara land purchase. In 1926, the Government established the Sim Commission to inquire into that and related events. The Commission confirmed Wiremu Kingi had rights in the land at Waitara, which could not be purchased without his consent. Thus, Kingi had been forced to fight in self-defence when attacked. Further:[111]

> When martial law was proclaimed in Taranaki. . . Wiremu Kingi and his people were not in rebellion against the Queen's sovereignty; and when they were driven from the land, their pas destroyed, their houses set fire to, and their cultivations laid waste they were not rebels, and they had not committed any crime.

It is inconceivable that an armed invasion by the Crown onto lands possessed by a settler community in similarly legal circumstances would have been tolerated in 1860, or at any time before or after. The same comment applies with equal force to the invasion and occupation of Parihaka on 5 November 1881.[112] The Waitangi Tribunal summarises as follows:[113]

> Images of a fuller picture escaped later to the public arena; images of assaults; rape; looting; pillage; theft; the destruction of homes; the burning of crops; the forced relocation of 1556 persons without money, food, or shelter; the introduction of passes for Māori to facilitate the military's control of movements in the area; and the suspension of trials and other legal safeguards when it appeared that lawful convictions might not be achieved.

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[108] Barro and Gordon (1983) provided an early explanation of this in the monetary policy literature.
[109] Dalziel, Saunders and Saunders (2018, pp. 77-80).
[110] See, for example, Waldinger (1995), Portes (1998, pp. 15-18), Gargiulo and Benassi (1999), Dasgupta (2005, p. S17), van Deth and Zmerli (2010), Coates (2015) and Eddo-Lodge (2017).
[111] Appendices to the Journals of the House of Representatives, 1928, G-27, pp. 1, 11, cited in Waitangi Tribunal (1996, p. 80). See also Reeves (1950, p. 196).
[112] Waitangi Tribunal (1996, chapter 8).
[113] Waitangi Tribunal (1996, p. 206).

> Parihaka provides a damning indictment of a government so freed of constitutional constraints as to be able to ignore with impunity the rule of law, make war on its own people, and turn its back on the principles on which the government of the country had been agreed.

Impunity to make war on a social minority illustrates the dark side of social capital. As Governor Grey observed on the eve of that assault, the Ministers of the Crown were "supported in their 'vigorous' action by nine tenths of the white population of the colony."[114]

The rule of law

A second mechanism for mitigating time inconsistency is for the Crown to make a guarantee enforceable by the courts. The general principle that the Crown should be bound by the rule of law is a very old idea in the English legal system. New Zealand's legislation guidelines, for example, lists the rule of law as the first of "the most important constitutional principles of New Zealand law", with three core elements:[115]

- Everyone is subject to the law, including the Government.
- The law should be clear, and clearly enforceable.
- There should be an independent, impartial judiciary.

The first element is forever associated with Magna Carta, first sealed in 1215, repudiated a few weeks later, resurrected in 1216 and 1217, reformulated in 1225 (when it first became a statute) and given royal confirmation in 1297, after which it became the first entry in England's official Statutes of the Realm.[116]

Article 1 in te Tiriti o Waitangi introduced English Law into the colony and Magna Carta has been part of New Zealand law since.[117] Indeed, the following sentences from the 1297 charter remain in New Zealand's present-day legislation:[118]

> NO freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

The New Zealand Bill of Rights Act 1990 also includes freedoms associated with Magna Carta.[119] To give two examples, Section 22 states everyone has the right not to be arbitrarily arrested or detained, and Section 25 states everyone charged with an offence has the right to a fair and public hearing by an independent and impartial court.

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[114] Cited in Waitangi Tribunal (1996, p. 206).
[115] Legislation Design and Advisory Committee (2021, p. 23).
[116] Baker (2017, chapter 1); see also Clark (2016, pp. 43-44) and Spigelman (2016, pp. 31-35). Spigelman writes that Magna Carta was the earliest written affirmation of the principal that the King was subject to the law (idem, p. 35).
[117] Kemp (2017, p. 115).
[118] https://www.legislation.govt.nz/act/imperial/1297/0029/latest/DLM10926.html.
[119] https://www.legislation.govt.nz/act/public/1990/0109/latest/DLM225527.html. This connection is also made by Collins (2016), Little (2016) and Breach (2017, pp. 164-165).

Although important, the rule of law cannot resolve all issues of time inconsistency in enforcing a Crown guarantee. Parliament is always able to excuse itself from any Act.[120] It can also change existing law under the doctrine of parliamentary sovereignty.[121] Finally, and relevant for this discussion, Parliament can exclude a matter from the courts' jurisdiction by choosing not to incorporate the matter into a statute.

In this context, the treaty as sometimes described as a Māori Magna Carta. David Williams refers to hundreds of published examples, beginning with speeches in 1841 by George Clarke, the first holder of the office of Protector of Aborigines.[122] This connection is not universally accepted. Ruth Ross, for example, wrote, "Is not this woolly-mindedness the real crux of the Waitangi problem?"[123] More recently, Te Maire Tau and Madi Williams argue "it would be wrong to equate the Magna Carta with the Treaty".[124]

Indeed, there is a fundamental difference between Magna Carta and te Tiriti o Waitangi. Magna Carta became a statute in English law in 1225, reaffirmed in 1297. There was no comparable step before 1975 to incorporate the Crown guarantee in Article 2 of te Tiriti into New Zealand legislation, with the partial exception of fisheries legislation.[125]

The implications of excluding a promise from the law are straightforward – the courts are unable to adjudicate on any subsequent dispute. With regard to the treaty, Sir Robert Stout, Chief Justice of the Supreme Court, observed in 1903:[126]

> It is an incorrect phrase to use to speak of the Treaty as a law. The terms of the Treaty were no doubt binding on the conscience of the Crown. The Courts of the Colony, however, had no jurisdiction or power to give effect to any Treaty obligations.

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[120] Section 22 of the Legislation Act 2019 states, "No Act or part of an Act binds the Crown unless the Act (or other legislation) expressly provides that the Crown is bound by the Act or part"; see https://www.legislation.govt.nz/act/public/2019/0058/latest/DLM7298125.html. Hence, the typical practice is New Zealand is for statutes to contain a provision saying, "This Act binds the Crown" (Legislation Design and Advisory Committee, 2021, p. 54).

[121] Legislation Design and Advisory Committee (2021, p. 24). Breach (2017, pp. 170-175) explains how parliamentary sovereignty prevails over principles of Magna Carta.

[122] Williams (2017, p. 45 and p. 46). Williams cites other examples, including from Henry Williams and from Robert FitzRoy (who succeeded Hobson as Governor). The first book on the treaty included a chapter entitled the Māori Magna Carta (Buick, 1914). More recently, Paul McHugh's book on New Zealand Law and the Treaty of Waitangi was entitled *The Māori Magna Carta* (McHugh, 1991a). Hikaka (2016) comments on similarities and differences between the Magna Carta and te Tiriti o Waitangi.

[123] Ross (1972, p. 153); see also Attwood (2023, pp. 14, 17, 25).

[124] Tau and Williams (2017, p. 133).

[125] Section 8 of the Fish Protection Act 1877 made this provision: "Nothing in this Act contained shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder"; see http://www.nzlii.org/nz/legis/hist_act/fpa187741v1877n45304/. From 1903, similar clauses in relevant Acts reduced this provision to: "Nothing in this Act shall affect any existing Māori fishing rights" (https://www.nzlii.org/nz/legis/hist_act/saa19033ev1903n32305/). Munro (1994) provides a further discussion, including the impact this provision had on the Sealord deal in 1992.

[126] *Wallis v Attorney-General Protest of Bench and Bar* [1903], NZPCC 370; see Williams (2011, p. 194).

In 1941, a leading Privy Council decision confirmed the treaty is not cognisable in New Zealand courts unless incorporated into municipal law.[127] More recently, Sir Douglas Graham added the following observation, resting on the status of the treaty as a treaty:[128]

> In fact the reason why the Treaty was not justiciable in the courts can be simply stated. It has long been a principal of law that the executive branch of government, that is to say the Cabinet and the departments of state, should not be able to make law: law-making is a matter for Parliament alone. Treaties normally involve international relations, and these are the preserve of the executive rather than of the Parliament. Accordingly, any treaty entered into by the executive of New Zealand has never been enforceable in the domestic courts unless and until its terms had statutory recognition.

Thus, Māori were not able to rely on the courts to enforce the Crown guarantee in Article 2 for as long as Parliament chose not to incorporate the associated property right into domestic legislation. Chapter 4 will discuss how this began to change after 1975.

Independent institutions

A third potential mitigation to address time inconsistency is to create institutions with some independence from Parliament. Parliamentary sovereignty prevents complete independence, but it may be possible to design an arms-length institution that offers a credible commitment to delivering the Crown guarantee. The classic example in economics is the creation of an autonomous central bank with a mandate to deliver price stability.[129]

New Zealand was one of the first countries to introduce this approach to monetary policy in 1989.[130] The Reserve Bank of New Zealand Act 2021 now states that the Bank's economic objective is "achieving and maintaining stability in the general level of prices over the medium term".[131] The role of the Minister of Finance is to issue a remit to the Reserve Bank's Monetary Policy Committee setting out a specific target for the price stability objective, for which the Reserve Bank Governor is accountable.[132]

In 1840, there were concerns among rangatira about whether the British could be trusted. At the Mangungu signing on 12 February, for example, Makoare Te Taonui reminded people how Pākehā treated Aborigines in Australia and another rangatira (perhaps Mohi Tawhai) said, "We think you are going to deceive us".[133] Key missionaries, the first of whom had been present in the country since 1814,[134] responded to those concerns.

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[127] *Te Heuheu Tukino v Aotea District Māori Land Board* [1941], NZLR 590; see Williams (2011, p. 232).
[128] Graham (2001, p. 21).
[129] See, for example, Blackburn and Christensen (1989), Bernanke et al. (1999) and Libich (2008).
[130] See, for example, Dawe (1990), Walsh (1995) and Dalziel (1997).
[131] https://www.legislation.govt.nz/act/public/2021/0031/latest/LMS287017.html; see Section 9.
[132] See https://www.rbnz.govt.nz/monetary-policy/about-monetary-policy/monetary-policy-framework#remit.
[133] Orange (2004, p. 36).
[134] Bell (2006).

Indeed, when rangatira retired to their camp on the evening of 5 February, Henry Williams joined them for further discussion. Williams later recorded, "We gave them but one version, explaining clause by clause, showing the advantage to them of being taken under the fostering care of the British Government, by which act they would become one people with the English, in the suppression of wars, and of every lawless act; under one Sovereign, and one Law, human and divine."[135]

John Hobbs was the head of the Wesleyan mission at Mangungu, which hosted the third signing of te Tiriti on 12 February 1840. Acting as interpreter for Hobson at that signing, Hobbs made a series of assurances on Hobson's behalf:[136]

> He [John Hobbs] had translated Hobson's 'repeated assurances … that the Queen did not want the land, but merely the sovereignty … . Hobbs also told Māori that the land would 'never be forcibly taken', and gave Hobson's '*most solemn assurance*' that the Queen's government would aways act with 'truth and justice'.

Missionaries then played important roles in obtaining signatures to te Tiriti around the county. Henry Williams took a copy of te Tiriti to the Cook Strait area, for example, where 132 rangatira signed. He also delivered a copy to his brother, William Williams, based at the Church Missionary Society station at Tūranga [Gisborne], who obtained the signatures of 41 rangatira.[137]

It is plausible, therefore, that some rangatira signed te Tiriti because they regarded missionaries as a credible institution, independent from the British Crown, whose assurances could be trusted. This was the view of Tā Hugh Kawharu, for example, which he included in evidence provided to the Waitangi Tribunal:[138]

> Customarily the Māori has had his options shaped almost as much by the impact of the oratory and the reputation of those whom he listens to on the marae as by the merits of the options themselves. This would certainly have been the case in 1840. Thus the missionaries' reputation as honest men, reasonably coherent in the Māori tongue and knowledgeable in the ways of the European enabled them to persuade the Māori to sign the Treaty with a degree of success far beyond that which any others, particularly Hobson, could ever have achieved.

Dame Claudia Orange agrees in a section she headed 'missionary advice'.[139]

> In agreeing to the Treaty, Māori leaders believed above all that the missionaries' advice was wise and could be trusted: the Treaty would be good for the country and the people. The missionaries had been careful to explain the Treaty as the personal wish of the Queen; it was her 'act of love' and thus a sacred bond, since she was head of both the English church and the state.

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[135] Cited in Orange (2004, p. 31).
[136] Orange (2004, p. 37, emphasis in original).
[137] Department of Internal Affairs (2017); Fletcher (2022, p. 328).
[138] Cited in Waitangi Tribunal (1984, p. 13).
[139] Orange (2004, p. 45); see, also, Reese (2024, pp. 31-43).

Whatever influence the missionaries had in 1840, however, they could do little more than protest from the sideline when their assurances were not honoured by the settler Government.[140] Indeed, Alistair Reese points out that most of these voices became silent as the dispossession continued:[141]

> In short, the missionaries, and the Church in the main, abandoned Māori, and concentrated their efforts on the later immigrants from Europe and elsewhere. Apart from a few lone voices, the settler Church remained silent as Māori land was confiscated and lost, as the language became increasingly alienated, and as the mana of the rangatira was trampled upon. By their silence, the churches of Aotearoa New Zealand have been complicit in this betrayal.

3.5 Conclusion

The main point of this chapter is the dispossession of Māori land from 66 million acres in 1840 to 11 million acres by 1891 and to 3 million acres by 1975 (see Figure 3 on page 18). That dispossession is clearly contrary to the Crown guarantee in Article 2 of the English text of the treaty, which promises to Māori the full possession of their lands and estates for so long as this is their wish and desire.

The chapter has summarised three major policies used by the Crown to achieve dispossession: (i) dishonoured conditions of land purchases; (ii) raupatu – armed invasion and confiscation; and (iii) the Native Land Court. It has also shown how Māori continuously resisted those policies, underlining that the dispossessions took place against their wishes and desires.

This history of failure to keep a treaty promise is an example of a wider issue faced by Crown guarantees, known as the time inconsistency issue. Mitigations are available for addressing this issue, but the previous section has explained how three important mitigations were not available to Māori before 1975.

In 1975, this began to change. A new wave of public protest shamed the Government for the Crown's failures to honour the treaty and protect Māori lands. Parliament passed the Treaty of Waitangi Act 1975, which began a new practice of inserting references to the treaty in New Zealand legislation. This allowed Māori to access the judicial system for resolving disputes with the Crown about property rights that are confirmed and guaranteed in Article 2.

That 1975 Act also created a new institution, the Waitangi Tribunal as a standing commission of inquiry with a degree of independence from Parliament. The Tribunal is required to make practical applications of the principles of the treaty. Since an amendment in 1985, the Tribunal has been empowered to hear claims going back to 1840.

Chapter 4 explores these developments.

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[140] Williams (1868), cited by Orange (2011, p. 176); Carleton (1877, pp. 9-10). See also the speech by Bishop Whakahuihui Vercoe (1990) at the sesquicentennial celebrations at Waitangi.
[141] Reese (2024, p. 85).

Chapter 4

The Treaty of Waitangi Act 1975

4.1 Introduction

The previous chapter described three potential mitigations to the time inconsistency issue: (i) reputation impacts; (ii) the rule of law; and (iii) independent institutions. This chapter considers each possibility in turn, focusing on three profound changes in Crown-Māori relations that took place in 1975. These changes are introduced with a discussion in Section 4.2 of the legal status of te Tiriti, both as an international agreement unincorporated into domestic law and as the country's founding constitutional document.

Section 4.3 describes renewed Māori protest that began with the Māori Land March in September and October 1975. A series of public demonstrations and occupations led by Māori asserting mana motuhake (self-determination and control) shamed the Crown for its ongoing policies to dispossess Māori of land rights. This helped create support for new legislation that sought to honour the treaty.

Section 4.4 describes the introduction of references to "the principles of the Treaty" into New Zealand legislation. The first example was the Treaty of Waitangi Act 1975. Another prominent example was the State-Owned Enterprises Act 1986. This allowed the New Zealand Māori Council to argue successfully in the Court of Appeal that the Government could not transfer Crown-owned land to State-owned enterprises without first considering Crown obligations under the treaty.

Section 4.5 describes the Waitangi Tribunal, which is a standing commission of inquiry created by the Treaty of Waitangi Act 1975. The Tribunal is an autonomous institution with a statutory responsibility to investigate and make recommendations on claims brought by Māori relating to the practical application of the principles of the treaty.

Section 4.6 is a brief conclusion.

4.2 The Legal Status of Te Tiriti

Te Tiriti o Waitangi has different meanings for different iwi and hapū. Northern rangatira, for example, were the first to sign te Tiriti at Waitangi, Waimate and Mangungu in February 1840. The Waitangi Tribunal has summarised its status for northern iwi as follows:[142]

[142] Waitangi Tribunal (2014, pp. 527-528).

> 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.

On the British side, Te Tiriti o Waitangi has the status of a peacetime international treaty made between sovereign parties.[143] The first party was the British Crown, represented by Captain Hobson acting on Lord Normanby's instructions. The other treaty parties were the iwi and hapū whose rangatira, given the opportunity, chose to sign in 1840.[144]

The only objection to the status of te Tiriti as a valid international treaty has been from a claim that iwi and hapū did not have the capability to enter such a treaty. This was expressed, for example, by Chief Justice James Prendergast in a famous 1877 case:[145]

> On the foundation of the colony, the aborigines were found without any form of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognize the independent nationality of New Zealand. But the thing never existed nor at that time could be established. The Māori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilized community.

As Prendergast acknowledged, the importance of this question had been recognised by the British Crown before te Tiriti was signed. Lord Normanby's instructions to William Hobson in 1839, for example, recorded that New Zealand was a sovereign and independent state "so far at least as it is possible to make that acknowledgment in favour of a people composed of numerous dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act or even to deliberate in concert".[146]

Hobson replied to his instructions with some questions, including a concern that South Island Māori might be "incapable from their ignorance of entering intelligently into any treaties with the Crown". Lord Normanby left judgement on that possibility to Hobson, but added the following provision:[147]

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[143] Keith (1965, p. 138); Waitangi Tribunal (1991, Section 4.3.7); McHugh (1991, chapter 7); Epstein (1999, p. 8); Palmer (2008, pp. 154-168); McCreanor, Came and Berghan (2024, p. 12).

[144] The Waitangi Tribunal has considered tribes whose rangatira refused or who were not given the opportunity to sign te Tiriti. It concludes (Waitangi Tribunal 2008a, p. 207): "Whether a formal act of cession took place or not, all iwi are in the same position. That is, their tino rangatiratanga was preserved, guaranteed, and protected by the Treaty. It was not created by the Treaty, but is inherent in their tribal polities." See also Waitangi Tribunal (2001, pp. 29-31).

[145] *Wi Parata v The Bishop of Wellington & the Attorney-General* (1877) 3 NZJur (NS) 77. For discussions, see McHugh (1991, pp. 113-117), Morris (2004), Tate (2004) and Palmer (2008, pp. 169-172).

[146] Normanby (1839a).

[147] Normanby (1839b).

> The only chance of an effective protection will probably be found in the establishment by treaty, if that be possible, or if not, then in the assertion, on the ground of discovery, of Her Majesty's sovereign rights over the island.

Consistent with his instructions, Hobson made two proclamations when he formally declared British sovereignty on 21 May 1840.[148] The first claimed sovereignty over the Northern Island based on the treaty. The second claimed the Middle Island and Stewart's Island based on the grounds of discovery.

That second proclamation was made even as Major Thomas Bunbury, sailing on the *Herald*, was undertaking an official mission to collect signatures in the South Island on one of the Tiriti copies, now known as the Herald-Bunbury Sheet. Bunbury made two proclamations of his own. On 5 June, he claimed British sovereignty of Stewart Island by right of discovery. On 17 June, he claimed British sovereignty of the South Island by right of cession.[149]

Thus, representatives of the British Crown acted in 1840 on the basis that Māori did have the capability to enter an international treaty. The signing of te Tiriti gave benefits to the Crown, including the right to govern. It is a fundamental legal principle that, "having extracted the benefit of the Treaty, the Crown cannot turn around and reject its terms [by] denying the validity of the Treaty".[150]

Hobson's two proclamations were published in *The London Gazette* on 2 October 1840.[151] Provision had been made the previous year for the boundaries of the New South Wales colony to be extended to include any territory in New Zealand where the Crown had sovereignty.[152] This interim measure ended when New Zealand became its own separate colony through Letters Patent, known as the Charter for erecting the Colony of New Zealand, issued on 16 November 1840.[153]

The Charter created a Legislative Council in the colony to "make and ordain all such Laws and Ordinances as may be required for the Peace, Order, and good government of the said Colony of New Zealand".[154] The Charter recorded that:

> … nothing in these our Letters Patent contained shall affect or be construed to affect the rights of any aboriginal natives of the said Colony of New Zealand, to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any Lands in the said Colony now actually occupied or enjoyed by such natives.

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[148] Williams (1985); Orange (2011, chapter 4). See https://digitalnz.org/records/42812881 for a copy.
[149] The Herald-Bunbury copy of te Tiriti included two signatures from Akaroa, three from Ruapuke Island, two from Otago and nine from Cloudy Bay; see Te Rūnanga o Ngāi Tahu (2019).
[150] This is an example of the doctrine of estoppel; see McHugh (1991, p. 180). Palmer (2008, p. 170) points out that Prendergast in his 1877 judgement, having denied the validity of the treaty, nevertheless described the Crown's obligation as "in the nature of a treaty obligation".
[151] https://www.thegazette.co.uk/London/issue/19900/page/2179.
[152] https://nationdatesnz.org/wp-content/uploads/2020/11/Archives-New-Zealand-n.d.a-1.pdf.
[153] https://ndhadeliver.natlib.govt.nz/delivery/DeliveryManagerServlet?dps_pid=IE16734512.
[154] The two quotations come from the reprint in McIntyre and Gardner (1971, pp. 54-57).

This can be recognised as a clause to make the Charter consistent with the treaty, but the Charter did not mention the Treaty of Waitangi and did not require the Legislative Council to implement the promises guaranteed in Articles 2 and 3. These absences were repeated in the subsequent Royal Instructions to Hobson issued on 5 November 1840.[155]

Thus, the treaty became an *unincorporated* international treaty; that is, a signed international agreement that Parliament has chosen not to incorporate into domestic legislation.[156]

Unincorporated international agreements are not unusual. A recent example is the United Nations Declaration on the Rights of Indigenous Peoples. When the Declaration was adopted on 13 September 2007, New Zealand voted against the motion but later announced its endorsement on 19 April 2010. Despite that change of position, Government policy remains that the Declaration has no binding legal effect in New Zealand.[157]

Being unincorporated does not mean treaty provisions must be excluded from *any* influence in the Courts. If the intention of an Act is not clear, for example, "the courts will presume that Parliament intended to legislate consistently with the principles of the Treaty".[158] It does mean, however, provisions are not binding on Court judgements without the backing of a statute.

The Courts also recognise te Tiriti o Waitangi as standing apart from other unincorporated international instruments.[159] In particular, the treaty's position in the country's history makes it an important constitutional document: "it affects, in various ways and to various extents, how public power is exercised in New Zealand" and is part of the country's constitutional dialogue.[160] Te Tiriti is always speaking.[161] Sir Kenneth Keith explains in the Cabinet Manual that the treaty is one of several "major sources of the constitution":[162]

> **The Treaty of Waitangi**, which may indicate limits in our polity on majority decision-making. The law sometimes accords a special recognition to Māori rights and interests, particularly those covered by Article 2 of the Treaty. And in many other cases the law and its processes should be determined by the general recognition in Article 3 of the Treaty that Māori belong, as citizens, to the whole community. In some situations, autonomous Māori institutions have a role within the wider constitutional and political system. In other circumstances, the model provided by the Treaty of Waitangi, of two parties negotiating and agreeing with one another, is appropriate. Policy and procedure in this area continues to evolve.

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[155] Palmer (2008, pp. 58-59).
[156] Keith (1965, pp. 146-148); Sutton (1981); McHugh (1991, pp. 171-176); Bracegirdle (2005); Osman (2014); McCreanor, Came and Berghan (2024, p. 12).
[157] Seymour (2024, par. 50).
[158] Legislation Design and Advisory Committee (2021, Section 4.2); see also McSoriley (2005, p. 5) and Osman (2014).
[159] Osman (2014, p. 355).
[160] Palmer (2008, p. 234 and p. 244).
[161] In te reo Māori, the saying is *te reo o te Tiriti mai rā anō*; see Waitangi Tribunal (1987b, p. 40); Hēnare and Douglas (1988); Tawhai and Gray-Sharp (2011).
[162] Keith (2023, p. 2).

Similarly, New Zealand's *Legislation Guidelines* state that the spirit and principles of the Treaty of Waitangi is a fundamental constitutional consideration. They advise "legislation should be consistent with the principles of the Treaty of Waitangi".[163] The wording of that advice reflects a trend since 1975 for legislators to refer to principles of the treaty rather than to the treaty's two texts.

4.3 Māori Protest from 1975

On Sunday, 14 September 1975, a hīkoi (organised march) known as the Māori Land March set out from the Te Reo Mihi marae at Te Hāpua, the most northerly settlement in Aotearoa New Zealand. The hikoi was organised by Te Roopu Ote Matakite [the group with prophetic vision] and was led by Dame Whina Cooper in her 80th year.[164] Figure 4 shows the route of the hīkoi, which travelled the length of Te Ika-a-Māui (the North Island) to arrive in Wellington on 13 October.

The hīkoi marched under a slogan of *Not one more acre of Māori land*.[165] It carried a carved pouwhenua, or land-marker post, now on display in the Te Kōngahu Museum of Waitangi.[166] In the lead up to departure, Te Roopu Ote Matakite issued a statement on why they were marching.[167] Describing land as the very soul of a tribal people, the statement finished with a call to participate (emphasis in the original):

> If there is no land, we have no tūrangawaewae, no soul, no mana, no identity. We become a non-people in our own country. The march is on. Be part of it. Because the struggle is part of you – a part you cannot deny.

Participants were hosted by marae along the route, as shown in the Figure 4 map. The hīkoi carried two documents.[168] The first was the Memorial of Right, presented at each marae with an invitation for rangatira to add their signatures. About 200 did so.

The second was the Petition of Support, signed first by Dame Whina and then by about 60,000 people. The petition finished with the following paragraph.[169]

> Matakite wants to press for the abolition of monocultural laws pertaining to Māori Land, and establish new laws for Māori land based on their own cultural values. Matakite wants to establish communal ownership of land within the tribe as a legitimate title equal in status to the individual title.

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[163] Legislation Design and Advisory Committee (2021, Section 5.7). This requirement is elaborated in other sections of chapter 5 in the *Legislation Guidelines*.
[164] King (1983, chapter 11).
[165] Poata (2012, p. 134).
[166] See https://www.waitangi.org.nz/waitangi-blog/land-march-arrives-in-wellington1975.
[167] Te Roopu Ote Matakite (1975a). The quote below is from page 3.
[168] The number of signatures of each document comes from King (2000).
[169] Te Roopu Ote Matakite (1975b).

Figure 4: Route of the Māori Land March, 14 September – 13 October 1975

Source: Reproduced with the permission of *New Zealand Geographic* from Monk (2022).
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The number of marchers was just over 50 when it set out from Te Hāpua. People joining along the route increased the number to around 5,000 people when the hīkoi arrived in Wellington a month later.[170] A marshal for the hīkoi estimated over 30,000 people gathered outside Parliament on 13 October for the presentation to Government of the Memorial of Rights and the Petition of Support.[171]

The Māori Land March achieved a high profile, including a 60-minute documentary broadcast on television.[172] The hīkoi was a powerful and public display that the dispossession of Māori land is a matter of ongoing injustice and national shame.

Land occupations and further demonstrations followed.[173] Immediately after the march, for example, a tent embassy was established in Parliament grounds by a smaller group called Te Matakite o Aotearoa.[174]

In January 1977, the Ōrākei Māori Action Committee led by Joe Hawke mobilised support from most of Ngāti Whātua, and from trade unionists and the Matakite movement, as about 150 persons moved on to land at Bastion Point.[175] This followed a century of Ngāti Whātua petitions to Government about the loss of their lands through actions of the Native Land Court and through compulsory acquisition under the Public Works Act. The occupation remained until the protesters were forcibly evicted by police on 25 May 1978.[176]

In reaction to the eviction, Ranginui Walker wrote that the original dispossessions of the Ngāti Whātua land at Bastion Point had taken place over decades. He observed "no government would have the effrontery to take such a step, except in the case of a powerless minority".[177] Thus, that dispossession was another illustration of the dark side of social capital, discussed in Section 3.4.

On 12 February 1978, Eva Rickard, other members of Tainui Awhiro and supporters occupied land at Raglan. This land was originally taken by the Crown under the Public Works Act in 1940 for an airfield, after which some of the land had been sold for a golf course. These transactions all took place without any engagement with mana whenua.[178] The protestors were quickly arrested.

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[170] King (2000).
[171] Poata (2012, p. 139). Another source reports a crowd size of 40,000.
[172] The documentary was directed by Geoff Steven. It remains available for viewing on-line; see https://www.nzonscreen.com/title/te-matakite-o-aotearoa-1975/overview.
[173] Poata (2012).
[174] Walker (1990, p. 215).
[175] Waitangi Tribunal (1987b).
[176] There is a film on the eviction, entitled Bastion Point – Day 508, directed by Merata Mita, Leon Narbey and Gerd Pohlmann; see https://www.ngataonga.org.nz/search-use-collection/search/F9380/.
[177] Walker (1987b, p. 54).
[178] Buchanan (2022).

The Springbok tour in 1981 was another pivotal moment. In June 1977, a meeting of Commonwealth Heads of Government had issued the Gleneagles Agreement, in which the Heads accepted "the urgent duty of each of their Governments vigorously to combat the evil of apartheid by withholding any form of support for, and by taking every practical step to discourage contact or competition by their nationals with sporting organisations, teams or sportsmen from South Africa".[179]

Despite this, the New Zealand Rugby Football Union invited the South African Rugby Board to send their national team, the Springboks, to tour New Zealand in July to September 1981. Many New Zealanders strongly opposed the tour. The New Zealand History website records that "more than 150,000 people took part in over 200 demonstrations in 28 centres".[180] The same website (page 6) comments on the links that were made with domestic racism:

> Some people connected the plight of black South Africans with racism here. For generations New Zealand had prided itself on having the 'finest race relations in the world', but events during 1981 challenged this assertion. The protesters specifically attacked racism, and Māori increasingly joined the protests. As they did so, they confronted non-Māori New Zealanders with a question: 'If you campaign about race in South Africa, what about at home?'

Referring to the Bastion Point protest, Ranginui Walker observed that Joe Hawke's public stand "rested on the assumption that we have a moral society which will acquiesce to moral principle rather than to legal or political expedience".[181]

Walker's observation can be applied to all the protests against ongoing dispossession of Māori land. The protestors' appeal to moral principle achieved sufficient support for Parliament to respond, beginning with the Treaty of Waitangi Act 1975.[182] This Act was signed into law by the Governor-General on 10 October 1975, just three days before the Māori Land March arrived in Wellington.

4.4 Bringing the Treaty into New Zealand Law

The preamble to the Treaty of Waitangi Act 1975 explained the Act was "to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi".[183] This was the first reference in New Zealand legislation to the principles of the treaty, creating new opportunities for Māori to seek judicial review of failures by the Crown to honour Māori property rights in the Article 2 Crown guarantee.[184]

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[179] The text of the Gleneagles Agreement was accessed on 16 August 2024 at https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/inline/GleneaglesAgreement.pdf.
[180] See https://nzhistory.govt.nz/culture/1981-springbok-tour.
[181] Walker (1987b, p. 54).
[182] https://www.legislation.govt.nz/act/public/1975/0114/latest/DLM435368.html.
[183] http://www.nzlii.org/nz/legis/hist_act/towa19751975n114226/.
[184] See Hayward (2004), Ward, Hille and Jones (2023) and Wheen and Hayward (2024).

Previously, successive Parliaments had withheld the Article 2 Crown guarantee from New Zealand law (see Section 3.4). A partial exception was fisheries management legislation.[185] Section 8 of the Fish Protection Act 1877 stated that: "Nothing in this Act contained shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi,".[186] Later, Section 88(2) of the Fisheries Act 1983 stated, "Nothing in this Act shall affect any Māori fishing rights".[187]

This section became important in 1986 when Parliament sought to introduce the Quota Management System to regulate New Zealand's fisheries.[188] This assumed the Crown held property rights over this resource, despite the explicit guarantee in Article 2 of the English text that Māori would have full, exclusive and undisturbed possession of their fisheries.

Consequently, Māori interests sought a judicial review of the decision to allocate fishing quota under the Quota Management System. Applying Section 88(2) of the Act, the High Court granted an interim declaration that the Crown ought not to proceed. The Crown entered negotiations, although these were neither easy nor universally supported.[189] This led to the 'Sealord deal' and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.[190]

At about the same time, an important judgement by the Court of Appeal in 1987, commonly cited as the *Lands* case, illustrated the new opportunities created by incorporating references to the treaty in law.[191] The previous year, Parliament had passed the State-Owned Enterprises Act 1986 to reform commercial operations in the public sector.[192] As part of this reform, the Government proposed to pass about 10 million hectares of Crown land to the new enterprises. The implications were obvious:[193]

> The consequences of assets passing from the Crown, with which Māori had its Treaty compact, to state-owned enterprises … having the power to sell off its assets to the private sector, were both obvious and inevitable. The Crown was about to deprive itself of the capacity to honour by return of disputed assets the manifold breaches of its Treaty obligations. They would pass into the hands of third parties and be irrecoverable.

Section 9 in the Act stated, however, that "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".[194] Sir Graham Latimer and the New Zealand Māori Council used that clause to seek a judicial review in the High Court, where it was immediately advanced to the Court of Appeal.

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[185] This is described here as a *partial* exception because little attention was paid in practice to Māori property rights in fishing before 1986; see Munro (1994, pp. 399-400).
[186] http://www.nzlii.org/nz/legis/hist_act/fpa187741v1877n45304/.
[187] https://www.legislation.govt.nz/act/public/1983/0014/latest/DLM66582.html.
[188] Munro (1994).
[189] Jones (2005, pp. 27-28); Walker (2005, pp. 67-68).
[190] https://www.legislation.govt.nz/act/public/1992/0121/latest/DLM281433.html.
[191] See Ruru (2008).
[192] Duncan and Bollard (1992); Bernier, Massimo and Bance (2020).
[193] Baragwanath (2008, p. 26).
[194] https://www.legislation.govt.nz/act/public/1986/0124/latest/DLM97377.html.

The five Justices in the Court of Appeal were unanimous that a transfer of lands without establishing a system to consider whether this was consistent with the principles of the treaty would be unlawful under Section 9. Their decision recognised a treaty-based duty of utmost good faith:[195]

> The relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. The duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable. That duty is no light one and is infinitely more than a formality.

The Crown and the Māori Council therefore entered negotiations, resulting in the Treaty of Waitangi (State Enterprises) Act 1988 "to protect existing and likely future claims before the Waitangi Tribunal relating to land presently in Crown ownership".[196]

The fisheries case and the *Lands* case both illustrate the powerful consequences of including the treaty in legislation. It opens access by Māori to the judicial system for protecting property rights guaranteed by the Crown in the treaty, even when Parliament may find it convenient to overlook those property rights.

Sir Maurice Casey was one of the Justices who heard the *Lands* case. He insists the decision was not a special form of protection for a vulnerable minority, but demonstrates the role of the courts in providing remedies for citizens experiencing a gross injustice:[197]

> To me, the Māori perception of themselves was far from that of helpless victims requiring the court's special protection. They came to it with all the confidence of citizens in a powerful case seeking a remedy for what they saw as a gross injustice, and were proved right.

Since 2002, Parliament has often incorporated a more restricted version of the 'treaty principles clause' in new legislation.[198] The new form is called an 'elaborated clause' because it presents specific ways that people under the Act can have regard to, or give effect to, the principles of the treaty. This can include, for example, receiving advice from a designated Māori Advisory Committee or consulting affected iwi before a decision is made.

Nicola Wheen and Janine Hayward report that at the beginning of 2024, half of the clauses that refer to principles of the treaty in current legislation do so using the original broad form, while the remainder use elaborated clauses.[199]

4.5 The Waitangi Tribunal

As well as introducing the phrase 'principles of the treaty' into New Zealand law, the Treaty of Waitangi Act 1975 established the Waitangi Tribunal "to make recommendations on claims

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[195] New Zealand Māori Council v Attorney-General [1987] 1 NZLR, 641; the quote is from p. 642.
[196] https://www.legislation.govt.nz/act/public/1988/0105/latest/DLM132561.html.
[197] Casey (2008, p. 21).
[198] Palmer 2008, pp. 100-101, 183-184); Legislation Design and Advisory Committee (2021, pp. 31-32); Wheen and Hayward (2024).
[199] Wheen and Hayward (2024, p. 47).

relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty".[200]

The Waitangi Tribunal is a standing commission of inquiry.[201] It has a statutory responsibility to examine the evidence for claims brought by Māori that specified actions by the Crown were or are inconsistent with treaty principles. If it determines a claim is well-founded, the Tribunal can offer advice and make recommendations on practical remedies, which the Crown may choose to accept.

Little was achieved the Tribunal's early years, until Tā Edward Taihakurei Durie was appointed as Chair in 1980.[202] In March 1983, the *Motunui-Waitara* report set a new standard for inquiries. Forty years later, the Tribunal had published more than 125 reports covering more than 2000 individual claims.[203]

The original Act allowed claims about contemporary actions only of the Crown. In 1985, Parliament expanded the Tribunal's jurisdiction to allow it to consider historical claims concerning the Crown's actions since 1840.[204] This power remained in force until Parliament gave notice in 2006 that the Tribunal would not be permitted to accept further historical claims after 1 September 2008.[205]

In total, more than 2,000 historical claims were registered with the Tribunal. To cope with the workload, the Tribunal after 2001 grouped claims into 37 districts, so that it can research and hear claims in coordinated 'district inquiries'. By 2024, 82 per cent of the historical claims registered with the Tribunal had been fully addressed or were currently under inquiry, leaving 396 historical claims to progress.[206]

Alongside district inquiries into historical claims, the Tribunal also investigates contemporary claims, which relate to matters occurring after 21 September 1992, and kaupapa or theme inquiries, which deal with nationally significant issues affecting Māori as a whole.[207]

The Tribunal may recognise a claim is urgent, requiring immediate attention, especially when a proposed law or policy change is likely to have a prejudicial and irreversible impact on Māori contrary to treaty principles.[208] An example is the recent urgent inquiry on kura kaupapa.[209] Otherwise, claims are heard in a logical order within available resources.

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[200] https://www.legislation.govt.nz/act/public/1975/0114/latest/DLM435368.html.
[201] Melvin (2004).
[202] Hamer (2004, pp. 4-5). Only two short reports (14 pages and 10 pages respectively) were published before 1983. The first was not required to make a recommendation (Waitangi Tribunal 1978a), while the second did not find the submitted claim to have been well founded (Waitangi Tribunal 1978b).
[203] Waitangi Tribunal (2023a, p. 12).
[204] https://www.nzlii.org/nz/legis/hist_act/towaa19851985n148306/.
[205] https://www.legislation.govt.nz/act/public/2006/0077/latest/DLM398299.html.
[206] Waitangi Tribunal (2024b, pp. 11-12).
[207] https://www.waitangitribunal.govt.nz/inquiries/.
[208] https://www.waitangitribunal.govt.nz/claims-process/going-to-hearings/apply-for-urgency/.
[209] Waitangi Tribunal (2024c).

In a tightly defined set of circumstances, the Waitangi Tribunal is empowered to make binding decisions on land transferred by the Crown to State-owned enterprises or tertiary education institutes, and on land under a Crown-owned exotic forest where the logging rights have been sold.[210] Otherwise, the Tribunal's authority is limited to determine whether a claim is well-founded and to offer recommendations for the Crown's consideration.

The Crown created the Treaty of Waitangi Policy Unit within the Department of Justice in 1988 to lead its work with the Waitangi Tribunal. This was renamed the Office of Treaty Settlements in 1995 and absorbed into the Office for Māori Crown Relations – Te Arawhiti in December 2018.[211] A summary of the Crown's policies and understandings related to treaty settlements is published in what is referred to as the Red Book.[212]

The Waitangi Tribunal illustrates how an autonomous institution operating in a transparent manner can mitigate time inconsistency issues associated with a Crown guarantee. In this example, Parliament has granted the Tribunal with sufficient independence to hear, research, evaluate and publish evidence, operating under its own legislation and under the Commissions of Inquiry Act 1908.[213]

Note that the Tribunal is a mitigation only; it cannot fully offset the Crown's incentives to avoid accountability for past or present breaches of its duties as a Tiriti partner. This has been noted by Holly Willson and Matthew Scobie as follows:[214]

> The Crown has resourced itself through breaches of te Tiriti, and it establishes and funds mechanisms to hold itself accountable as a partner to te Tiriti. To avoid accountability, it can disestablish and defund these mechanisms at any time.

Further, the Waitangi Tribunal is not a fully independent institution in the same sense as the Reserve Bank of New Zealand. Unlike the Reserve Bank, the Tribunal does not implement its decisions but is empowered to offer recommendations for the Crown to act upon, if the Crown chooses to do so.

This arrangement is not as strong as full independence would achieve. Nevertheless, there is an argument in the economics literature that such an arrangement can be reasonable in the absence of a clear consensus across political parties or among the general population that the hands of Parliament should be bound in a stronger way.[215]

The strength of an independent commission of inquiry is that it is empowered to draw on expertise to gather and validate evidence in a public setting, while leaving responsibility to Parliament for deciding what to do with conclusions drawn from that evidence.

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[210] Dawson (2004).
[211] https://www.tearawhiti.govt.nz/; see also Taylor (2014).
[212] Office of Treaty Settlements (2021).
[213] https://www.legislation.govt.nz/act/public/1908/0025/latest/DLM139131.html.
[214] Willson and Scobie (2024, p. 32).
[215] See, for example, Tucker (2018).

4.6 Conclusion

This chapter has explained how Parliaments after 1975 introduced legislation to mitigate the time inconsistency issues associated with the Crown guarantee in Article 2 of the Treaty of Waitangi. This laid the foundations for a transformational change in relations between the Crown and Māori, since it allowed Māori to seek redress through the Courts and the semi-independent Waitangi Tribunal.

This transformational change came after the Māori Land March in September and October 1975 highlighted the shame of successive Parliaments for failing to respect Māori property rights confirmed in the Article 2 Crown guarantee. These protests appealed to the honour of the Crown to act in good faith with its treaty partner.

The Treaty of Waitangi Act 1975 was a landmark piece of legislation. It introduced principles of the treaty into New Zealand law and created a standing commission of inquiry to investigate claims submitted by Māori that certain actions by the Crown are inconsistent with those principles.

It took time for this transformational change to begin to realise its potential. It was not until 1983, for example, that the *Motunui-Waitara* report demonstrated the authority of validated evidence analysed by the Waitangi Tribunal. It was not until 1985 that the Tribunal was empowered to examine historical claims going back to 1840. It was not until 1987 that the *Lands* case showed how the Courts could be used to obtain remedies for gross injustices arising from a failure to honour the principles of the treaty.

Since the mid-1980s, the Waitangi Tribunal has given practical effect to the principles of the treaty in a series of reports. The following chapter describes how those principles relate to the preamble and three Articles of te Tiriti o Waitangi. It also analyses the principles from an economics perspective.

Chapter 5

Principles of Te Tiriti o Waitangi

5.1 Introduction

When Parliament passed the Treaty of Waitangi Act 1975, it did not define the treaty principles confirmed by the Act. Instead, Section 5(2) of the Act gives the Waitangi Tribunal "exclusive authority to determine the meaning and effect of the treaty as embodied in the two texts" of the treaty. The Tribunal also decides on issues raised by the differences between the Māori and English texts.

The Tribunal fulfils these obligations in the reports it publishes on claims brought before it. Over five decades, these reports provide reasoned explanations of relevant principles, including their foundations in the Māori and English texts. The New Zealand Courts have also elaborated on treaty principles in their decisions on cases related to Acts that have clauses making specific reference to those principles.

From time to time, Government documents and academic authors have summarised key principles emerging from the Tribunal and the Courts while being careful to acknowledge the principles are not set in stone.[216] This chapter follows that tradition. It presents sixteen principles, not as a definitive list but as a reasoned guide to how the principles are connected to the treaty texts and how they relate to relevant concepts in the economics literature.

Section 5.2 begins by explaining the approach taken by the Waitangi Tribunal to articulating principles from the treaty texts. Table 1 presents the sixteen principles: exchange, partnership, good faith, mutual benefit, kāwanatanga, informed decisions, reciprocity, redress, tino rangatiratanga, active protection, right to development, full participation, mana motuhake, options, equal treatment and equity.

These principles are organised into four categories based on their connection to the treaty's preamble and three Articles. These groups are important. To illustrate, the Kaiwhakahaere of Te Rūnanga o Ngāi Tahu, Justin Tipa, has warned against the confusion that is created by the conflation of Article 2 and Article 3 rights:[217]

[216] See, for example, Parliamentary Commissioner for the Environment (1988), Palmer (1989), Crengle (1993), Hancock and Gover (2001), Office of Treaty Settlements (2002), Hayward (2004), Palmer (2008, pp. 112-120, 125-129), Office of Treaty Settlements (2021), Kohere (2023), Jones (2024), Wheen and Hayward (2024) and Abuse in Care Royal Commission of Inquiry (2024).
[217] Tipa (2025).

> There's a fundamental difference between the Article 2 rights of iwi Māori—which are concerned with particular sets of collective rights and the ability of iwi to exercise authority over those rights—and Article 3 rights – which are concerned with equal social and legal rights for individuals in a free and democratic society. It's simply not true that the rangatiratanga rights of iwi Māori are incompatible with the idea of 'equal rights for all' or democracy.

Section 5.3 begins with preamble principles. They rest on the principle of exchange, which is fundamental since there could have been no treaty in 1840 without the desire on both sides for an exchange of the responsibilities set out in the three Articles.

Section 5.4 discusses Article 1 principles beginning with the principle of kāwanatanga that defines the Crown's responsibility to govern. Section 5.5 then discusses Article 2 principles associated with tino rangatiratanga, defining Māori responsibilities to exercise authority in keeping with tikanga (values-based procedures, customs and practices).

Section 5.6 addresses Article 3 principles based on the equal rights, duties and privileges of citizenship guaranteed to Māori. There is no hint in the treaty that Māori must give up being Māori to enjoy these rights. Hence, the first principle under this heading is labelled mana motuhake, indicating the importance for all citizens of the prestige and status that comes from self-determination and control over one's own destiny.

In these discussions, each of the sixteen principles is considered using an economics lens. Section 5.7 finishes the chapter with a brief conclusion.

5.2 From Text to Principles

The Treaty of Waitangi Act 1975 created the Waitangi Tribunal "to determine whether certain matters are inconsistent with the principles of the Treaty".[218] It is important to acknowledge there is criticism of the Act's focus on treaty principles, since this may distract attention from the text of te Tiriti itself.

A good example is in the closing speech of Kiingi Tuheitia Pootatau Te Wherowhero VII at the hui-ā-motu (national gathering) hosted at Tuurangawaewae Marae on 20 January 2024. Kiingi Tuheitia affirmed the primacy of the Māori text and said, "There's no principles – the treaty is written, that's it."[219]

Some scholars describe principles as an "attempt to by-pass the original treaty" and argue that decisions founded on treaty principles "fall well short of upholding hapū and iwi sovereignty".[220] Merata Kawharu adds, "Principles are also largely Crown interpretations of the Treaty's intent, even if they are widely used by Crown and Māori alike."[221]

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[218] https://www.legislation.govt.nz/act/public/1975/0114/latest/DLM435368.html.
[219] Kiingi Tuheitia (2024, beginning at 2:05).
[220] Mutu (2019, p. 10). See also Williams (2005, pp. 369-370).
[221] Kawharu (2024, p. 160). See Waitangi Tribunal (2024a, Section 3.2) for an explanation of the origins of the term 'principles'.

Nevertheless, moving from an original text to principles is not unusual in a foundational document like te Tiriti. Consider the Magna Carta, first sealed in 1215. At the celebration in Australia of its 800th anniversary, Martin Krygier commented that its enduring value comes from its role in establishing the *principle* of the rule of law against the arbitrary exercise of power by the Crown, even though this was not a general thought among the barons but was manifest in many of the Charter's provisions.[222]

The University of Auckland hosted a Magna Carta Lecture Series to mark the same anniversary. In her lecture, Hon. Judith Collins made the following observation about the principles of Magna Carta:[223]

> Having been a senior Minister of the Crown for 6 years, I can assure you that Cabinet does not consider the exact wording of the Magna Carta, not once. Parliament doesn't either. They do, however, consider the principles of the Magna Carta, especially as they are provided for in the New Zealand Bill of Rights Act 1990.

Consequently, although the country may go beyond treaty principles in its constitutional future, the principles that have emerged in the work of the Waitangi Tribunal can be readily understood in their own context as a sound basis for further developments.[224]

The Tribunal has taken a careful approach to determining principles of the treaty, always paying attention to the Māori and English texts (as required by the Treaty of Waitangi Act). It provided an explanation of the connection between the principles and the treaty texts in its *Muriwhenua Land Report*:[225]

> Although the Act refers to the principles of the Treaty for assessing State action, not the Treaty's terms, this does not mean that the terms can be negated or reduced. As Justice Somers held in the Court of Appeal, 'a breach of a Treaty provision . . . must be a breach of the principles of the Treaty'. As we see it, the 'principles' enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time. …
>
> The Treaty cannot be read as a contract to build a house or buy a car. It was a political agreement to forge a working relationship between two peoples and it must be seen in light of the parties' objectives. The principles of the Treaty are ventilated by both the document itself and the surrounding experience.

Consequently, the Waitangi Tribunal always connects treaty principles to the original Māori and English texts as they were written, allowing guidance from historical documents of that period such as He Whakaputanga o te Rangatiratanga o Nu Tireni in 1835, Lord Normanby's instructions to William Hobson in 1839, and records of the discussions among Hobson, rangatira and missionaries at signings of te Tiriti in 1840.

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[222] Krygier (2016, p. 28).
[223] Collins (2016, p. 17).
[224] Jones (2013, p. 712); see also Kawharu (2024).
[225] Waitangi Tribunal (1997, p. 386). The quotation from Justice Somers comes from the *Lands* case: *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, p. 693.

Further, the Tribunal does not determine treaty principles as a separate exercise; rather, it reflects on what principles are relevant as part of each inquiry it conducts into submitted claims. Thus, the first report produced by the Tribunal after the appointment of Tā Edward Taihakurei Durie as Chair in 1980, the *Motunui-Waitara* report, devoted its chapter 10 to interpretation of the Treaty of Waitangi.[226] It included the following paragraphs:

> We consider that the Māori text of the Treaty would have conveyed to Māori people that amongst other things they were to be protected not only in the possession of their fishing grounds, but in the mana to control them and then in accordance with their own customs and having regard to their own cultural preferences. …
>
> That then was the exchange of gifts that the Treaty represented. The gift of the right to make laws, and the promise to do so so as to accord the Māori interest an appropriate priority.

The Tribunal found it unnecessary to move beyond the treaty text in that case and so did not discuss principles *per se*. Nevertheless, the two paragraphs cited above clearly echo what are now known as the principles of active protection, tino rangatiratanga, mana motuhake and kāwanatanga, as well as the principle of exchange (which the Tribunal later described as the fundamental concept to the compact or accord embodied in the treaty).[227]

The Tribunal began to articulate specific treaty principles from 1987, following the famous *Lands* Case in the Court of Appeal.[228] The *Ōrākei Claim* report considered that case, and used it to give its own statement of the principle of partnership and its associated principle of good faith:[229]

> The Treaty signifies a partnership between the Crown and the Māori people and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other.

The *Muriwhenua Fishing* report, which was published the following year, began the Tribunal's practice of identifying treaty principles relevant to a submitted claim. That report listed and explained three principles considered important for the Muriwhenua Fishing claim: the principle of protection; the principle of mutual benefit; and the principle of options.[230]

The preamble to the Treaty of Waitangi Act 1975 states that the Tribunal is "to make recommendations on claims relating to the *practical* application of the principles of the Treaty" (emphasis added).[231] The Tribunal is sensitive to this expectation of practicality.[232] In its *Manukau* report, for example, it made the following observation:[233]

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[226] Waitangi Tribunal (1983, pp. 45-52). The quotations that follow come from pages 51 and 52.
[227] Waitangi Tribunal (1991, p. 236).
[228] New Zealand Māori Council v Attorney-General [1987] 1 NZLR, 641.
[229] Waitangi Tribunal (1987c, p. 207).
[230] Waitangi Tribunal (1988, pp. 193-195).
[231] https://www.legislation.govt.nz/act/public/1975/0114/latest/DLM435371.html.
[232] Wheen and Hayward (2012, p. 17).
[233] Waitangi Tribunal (1985, p. 64).

> The jurisprudential point arising is that although a claim may be well founded according to our interpretation of the Treaty, we have still to consider whether in all the circumstances of the case it is practicable to apply the principles of the Treaty to it. If a tribe has Treaty rights to the exclusive ownership of certain fisheries the Waitangi Tribunal has still to consider the practicalities of awarding an exclusive ownership today.

A related application concerns the principle of redress. As the *Waiheke Island* report stated, "It is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party while creating another for another".[234]

Because the Tribunal determines principles as part of specific inquiries, the process is strong and transparent.[235] Hearings are public. The Crown and claimants have legal representation. The inquiry includes expert research, which is fully recorded and available to the public. Tribunal reports provide detailed explanations for every recommendation, which anyone can critique. As Richard Boast observed, "the Tribunal is, above all, a judicial body [that is] a product of New Zealand's legal and judicial style, which is common law to the core".[236]

In short, the treaty principles determined by the Waitangi Tribunal rest on solid judicial foundations. Table 1 therefore brings together 16 principles of Te Tiriti that the Waitangi Tribunal has presented in its reports.

As explained in this chapter's introduction, Table 1 groups the principles under four headings based on their respective associations with the treaty's preamble, Article 1, Article 2 and Article 3. This illustrates how the principles' legitimacy is drawn from their connections to the treaty text. It also reveals two significant patterns among the principles.

The first pattern concerns the first group of principles, collected under the heading of preamble principles. These are principles derived from the overall nature of the treaty agreed in 1840. Preamble principles are therefore statements about the joint responsibilities of Māori and the Crown.

The first is the principle of exchange, which the Waitangi Tribunal called in its *Ngāi Tahu Report* "fundamental to the compact or accord embodied in the Treaty".[237] The exchange recorded in Te Tiriti created an enduring relationship akin to a partnership that is based on utmost good faith with the purpose of creating mutual benefits for both sides of the exchange.

The second pattern concerns the groups of principles collected under each of the Articles. In all three groups, the first principle is a statement about Māori responsibilities under te Tiriti. The remaining three principles under each heading then describe implications for the Crown, outlining responsibilities of the Crown *to Māori* that are required to ensure Māori can meet their own responsibilities.

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[234] Waitangi Tribunal (1987b, p. 47).
[235] This paragraph is based on Waitangi Tribunal (2023c).
[236] Boast (2004, p. 55).
[237] Waitangi Tribunal (1991, p. 236). See also Waitangi Tribunal (1983, p. 52) which describes "the exchange of gifts that the Treaty represented". Hayward (2004, p. 33) provides a brief discussion.

Table 1: Principles of Te Tiriti

Preamble	
Exchange	Māori and the Crown honour the tuku or gift exchange made in te Tiriti.
Partnership	Māori and the Crown act in an enduring relationship akin to a partnership.
Good Faith	Māori and the Crown act towards each other in utmost good faith.
Mutual Benefit	Māori and the Crown cooperate to create mutual benefits.
Article 1	
Kāwanatanga	Māori accept the Crown's kāwanatanga and good government.
Reciprocity	The Crown's authority is qualified by its reciprocal Tiriti obligations.
Redress	The Crown provides redress for breaches of its Tiriti obligations.
Informed Decisions	The Crown makes decisions that are informed by Māori experience.
Article 2	
Tino Rangatiratanga	Māori exercise tino rangatiratanga and self-determination.
Active Protection	The Crown actively protects the exercise of tino rangatiratanga by Māori.
Right to Development	The Crown supports Māori economic development.
Full Participation	The Crown ensures the full participation of Māori in society.
Article 3	
Mana Motuhake	Māori citizens exercise mana motuhake and succeed in society as Māori.
Options	The Crown provides options so all citizens can make authentic choices.
Equal Treatment	The Crown treats equally all citizens in similar circumstances.
Equity	The Crown ensures equitable outcomes for Māori and all citizens.

Thus, Table 1 reflects an approach under which treaty principles are regarded as statements that define responsibilities, as expressed in 1994 by the Privy Council:[238]

> The 'principles' are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty.

The remainder of this chapter discusses the sixteen principles in turn.

5.3 Preamble Principles

The treaty begins with a Preamble that sets out the main intentions of the parties. The Preamble is lengthy compared to the three Articles and is not repeated here.[239] The Waitangi Tribunal summarises that the English text records three British intentions:[240]

- To protect Māori interests from the encroaching British settlement.
- To provide for British settlement.
- To establish a government to maintain peace and order.

The Tribunal further observes that the Māori text includes similar statements with a different emphasis on two main promises made by Queen Victoria to Māori:

- To secure tribal rangatiratanga.
- To secure Māori land ownership.

From these intentions, it is possible to derive some high-level principles that reflect the overall objectives of the treaty that motivated the British Crown and more than 500 rangatira to sign the agreement in 1840.

Principle of Exchange

Recall that Section 2.4 quoted Dame Anne Salmond that te Tiriti is expressed as a series of tuku, or gift exchanges.[241] As noted above, the Waitangi Tribunal has described the concept of exchange as "fundamental to the compact or accord embodied in the Treaty".[242] This is because if there had been no desire for an exchange in 1840, there was no reason for a treaty.

Te Tiriti o Waitangi was not a treaty made after a war, for example, when one side might make concessions in return for the cessation of hostilities. To the contrary, the British Crown had recognised Māori sovereignty in He Whakaputanga in 1835 and there was no armed conflict between the British Crown and Māori iwi and hapū in 1840.

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[238] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC), cited in Waitangi Tribunal (2003, p. 21).
[239] See https://waitangitribunal.govt.nz/en/about/the-treaty/maori-and-english-versions.
[240] See https://waitangitribunal.govt.nz/en/about/the-treaty/about-the-treaty.
[241] Salmond (2022, p. 4); Browning (2023).
[242] Waitangi Tribunal (1991, p. 236). See also Waitangi Tribunal (1983, p. 52) which describes "the exchange of gifts that the Treaty represented". Hayward (2004, p. 33) provides a brief discussion.

Thus, te Tiriti was a peacetime treaty in which both sides of the agreement, for their own reasons, decided to make a gift exchange recorded in the three Articles of te Tiriti:[243]

> When the Treaty of Waitangi was signed the Crown undertook to protect and preserve Māori rights in lands and resources in exchange for recognition as the legitimate government of the whole country in which Māori and Pākehā had equal rights and privileges as British subjects.

As Section 2.4 has discussed, the English text expressed the same exchange of 'sovereignty' in Article 1 for 'full, exclusive and undisturbed possession' in Article 2 (see Figures 1 and 2, page 12). Article 3 promised Māori would have the same rights and privileges as British citizens.

The principle of exchange holds that both sides of that exchange must always be considered. It is not legitimate to speak of the Crown's exercise of kāwanatanga or sovereignty, for example, without discussing at the same time the Crown's guarantee that Māori would exercise tino rangatiratanga or the full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties.

It scarcely needs saying that the principle of exchange is the foundation of all economics. As Adam Smith famously expressed in his book launching the modern discipline, "the propensity to truck, barter and exchange one thing for another" is a unique characteristic of the human species, giving rise to the division of labour, "from which so many advantages are derived".[244]

Principle of Partnership

The principle of partnership features in the Treaty of Waitangi Act 1975 itself, where Section 4(2A) requires that, in considering the suitability of persons for appointment to the Tribunal, the Minister "shall have regard to the partnership between the 2 parties to the Treaty".[245]

As already noted in Section 5.2, the Waitangi Tribunal explained the principle of partnership in its 1987 *Ōrākei Claim* report:[246]

> The Treaty signifies a partnership between the Crown and the Māori people and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other.

That principle was articulated after the famous *Lands* case, which was the first of ten relevant decisions in the Court of Appeal under the presidency of Lord Cooke.[247] Lord Cooke wrote in the *Lands* case that "the Treaty signified a partnership between races", while in another case he wrote (perhaps more carefully), "the Treaty created an enduring relationship of a fiduciary nature akin to a partnership".[248]

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[243] Waitangi Tribunal (1994, p. 68).
[244] Smith (1776, Book I, chapter 2, p. 15).
[245] https://www.legislation.govt.nz/act/public/1975/0114/latest/DLM435392.html.
[246] Waitangi Tribunal (1987c, p. 207).
[247] See Upton (1997).
[248] New Zealand Māori Council v Attorney-General [1987] 1 NZLR, 641, p. 664; Te Runanga o Wharekauri Rekohu Inc v Attorney-General [1993] 2 NZLR, 301, p. 304.

In July 1989, the Government published five principles for Crown action on the treaty. The list did not include a principle of partnership, but the fourth principle was termed 'reasonable cooperation'. The Deputy Prime Minister at the time, Sir Geoffrey Palmer, explained the Government's view of the principle in a way that emphasised how reasonable cooperation would produce partnership:[249]

> The Crown regards the principle of reasonable co-operation as residing at the very centre of the Treaty. Reasonable co-operation can only take place if there is consultation on major issues of common concern and if good faith, balance, and commonsense are shown on all sides. The outcome of reasonable co-operation will be partnership.

The Waitangi Tribunal's *Te Whānau o Waipareira Report* highlighted that partnership must reflect intentions of the treaty, which means the partners treat each other as equals:[250]

> Partnership thus serves to describe a relationship where one party is not subordinate to the other but where each must respect the other's status and authority in all walks of life. In this situation neither rights of autonomy nor rights of governance are absolute but each must be conditioned by the other's needs and the duties of mutual respect.

The *Whanganui Land Report* (*He Whiritaunoka*) illustrated this requirement by commenting, "Where there is an ethic of partnership, there is no room for one partner to impose changes on the other without participation and agreement."[251]

More recently, the *Hauora* report included partnership as one of five treaty principles recommended by the Tribunal for the primary health care system. This principle "requires the Crown and Māori to work in partnership in the governance, design, delivery, and monitoring of primary health services [and] Māori must be co-designers, with the Crown, of the primary health system for Māori".[252]

Partnerships are everywhere in public, private and commercial life. A contribution from economics is to pay attention to the incentives experienced by the different parties to a partnership as circumstances change. That approach underpins the economic analysis of time inconsistency that is a large theme in this research paper.

Some writers point out risks in the use of the word 'partnership' to describe treaty relationships, with further difficulties if the treaty is said to signify a partnership *between races* rather than between the Crown and Māori.[253] Lord Cooke himself explained the Court of Appeal judges knew the treaty parties did not intend to create a business partnership, but they thought 'partnership' was a helpful *analogy*:[254]

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[249] Palmer (1989, p. 342).
[250] Waitangi Tribunal (1998, p. xxvi). See also Hancock and Gover (2001, pp. 81-82).
[251] Waitangi Tribunal (2015a, p. 156).
[252] Waitangi Tribunal (2023b, p. 163-164).
[253] Frame (1990, 2008); Salmond (2022).
[254] Cooke (1990, pp. 5-6).

> In 1987 the Court of Appeal judges had found the analogy of partnership helpful in discovering the principles of the Treaty, because of the connotation of a continuing relationship between parties working together and owing each other duties of reasonable conduct and good faith. The analogy was of course not suggested to be perfect, but it was a natural one. It had been used often enough by historians and others in the past.

Consistent with Lord Cooke's emphasis on "a continuing relationship", it has been suggested that 'relationship' might be a better word than 'partnership'. In 1992, for example, the government approved a set of six principles for guiding the settlement of historic claims, which were revised in 2000. The second principle was labelled 'restoration of relationship'. It made no mention of 'partnership' but explained: "The strengthening of the relationship between the Crown and Māori is an integral part of the settlement process".[255]

Principle of Good Faith

In a speech at a symposium to reflect on the 20th anniversary of the *Lands* case in the Court of Appeal, the Minister of Justice, Hon Mark Burton, made the following comment:[256]

> While there has been much debate and angst (particularly political) about the principles of the Treaty, I suggest that it is not difficult to come to grips with what is meant by the principles of the Treaty. At their heart, I suggest they are quite simply about respect.

The *Lands* case judgements used the term 'good faith' to express this requirement for respect.[257] Justice Somers found "each party … owed to the other a duty of good faith". Justice Richardson found the treaty "rested on the premise that each party act reasonably and in good faith towards the other within their respective spheres". President Cooke found the Crown has a duty of "acting towards the Māori partner with the utmost good faith".

The Waitangi Tribunal has similarly stated, "Both Treaty partners owe each other a duty of good faith and cooperation, dialogue and negotiation of agreement on key issues."[258]

The Government's six key principles to guide negotiations of settlements of historical claims, approved in 1992 and updated in 2000, began with 'good faith', which it explained in a single sentence:[259]

> The negotiating process is to be conducted in good faith, based on mutual trust and cooperation towards a common goal.

'Good faith' is an important legal term. The objective of the Employment Relations Act 2000, for example, is "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship".[260]

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[255] Hancock and Gover (2001, Appendix 3, p. 114).
[256] Burton (2007), also cited in Kohere (2023).
[257] The quotations that follow are drawn from Frame (2008); see also Parliamentary Commissioner for the Environment (1988, Appendix K).
[258] Waitangi Tribunal (2008a, Volume 1, p. 207).
[259] Hancock and Gover (2001, Appendix 3, p. 114).
[260] https://www.legislation.govt.nz/act/public/2000/0024/latest/DLM58317.html, Section 3.

Section 4 of the Act gives guidance on what good faith involves. No party to an employment relationship can do anything that is likely to directly or indirectly mislead or deceive the other. Parties must be responsive and communicative. There is a duty to provide access to relevant information with an opportunity for comment before employment decisions are made.

Section 4 of the Act also explains that good faith implies obligations of trust and confidence. Trust in the economics literature is recognised as an important and beneficial aspect of a community's 'social capital'. Robert Putnam, for example, defined social capital as referring to "features of social organization such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit".[261]

The economics literature also recognises, however, that minority groups can be denied access to social capital, limiting opportunities for mutual benefit.[262] This paper has commented on this in the context of the violent invasion of Parihaka on 5 November 1881 and the forceful eviction of protestors at Bastion Point on 25 May 1978. Honouring the good faith principle is a way to build trust and so support Māori enterprise for mutual benefit.

Principle of Mutual Benefit

Lord Normanby's instructions to Captain Hobson in 1839 explicitly recognised the benefit that the treaty would bring to the United Kingdom: "There is probably no part of the earth in which colonization could be effected with a greater or surer prospect of national advantage."[263]

The instructions also emphasised the necessity of obtaining "the free and intelligent consent" of Māori, based on frank and unreserved explanations of "the reasons which should urge them to acquiesce in the proposals". Lord Normanby pointed specifically to the dangers to Māori of having settlers residing among them with no laws or tribunals of their own.

Consequently, the Waitangi Tribunal recognises that the British Crown and the rangatira who signed te Tiriti believed the treaty would reward all parties to the agreement. This gives rise to the principle of mutual benefit, sometimes termed common benefit, as the *Muriwhenua Fishing* report explained in the following paragraph:[264]

> Both parties expected to gain from the Treaty, the Māori from new technologies and markets, non-Māori from the acquisition of settlement rights and both from the cession of sovereignty to a supervisory state power. For Māori, access to new markets and technologies necessarily assumes a sharing with the settlers who provide them, and for non-Māori, a sharing in resources requires that Māori development be not constrained but perhaps even assisted where it can be. But neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit. It ought not to be forgotten that there were pledges on both sides.

[261] Putnam (1995, p. 67).
[262] See the discussion and references in Dalziel, Saunders and Saunders (2018, pp. 77-80).
[263] Normanby (1839a).
[264] Waitangi Tribunal (1988, pp. 194-195); see also Waitangi Tribunal (1992a, p. 273).

Tā Mason Durie observed that "the whole purpose of a treaty is to establish a basis for trust and to identify ways in which co-operation can proceed in order to deliver mutual benefits without extinguishing either customary experience or ambitions for a new social order".[265] His emphasis on co-operation is reflected in some Waitangi Tribunal reports that have referred to this principle as the principle of collaborative agreement.[266]

This is another fundamental concept in economics. To quote Adam Smith again, "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest".[267]

Thus, in the absence of coercion or deception, it is reasonable to presume that both parties to an exchange expect to receive benefits. Further, the principle of mutual benefit is invoked in the fundamental theorems of welfare economics that explain conditions under which market forces can be used to capture all possibilities for mutually beneficial exchanges.[268]

When there is no further opportunity to increase the benefit of any person without someone else becoming worse off, the outcome is called Pareto efficient after the Italian economist Vilfredo Pareto (1848-1923).[269] In policy advice, a proposal might be supported if economic analysis shows the value of extra benefits created by the proposed policy change would be sufficiently high to compensate all people disadvantaged by the change.[270]

Recently, a new concept introduced into the economics literature has itself been called the principle of mutual benefit.[271] It suggests there exists a norm in many market transactions that each party will have some regard to what will increase the benefits enjoyed by the other party: "the parties to a market transaction can intend to be useful to one another, and can find satisfaction in being so".[272] The norm is not universal, but the supporters of this theory argue it is non-negligible and a virtuous contribution to well-functioning markets.

5.4 Article 1 Principles

In the Māori text, Article 1 records that the rangatira who signed te Tiriti gave to the Crown, as part of the treaty's agreed exchange, te kāwanatanga katoa o o rātou whenua – the complete government over their land. In the English text, Article 1 refers to all the rights and powers of Sovereignty. The Article 1 principles describe responsibilities associated with this element in the treaty exchange.

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[265] Durie (2011, p. ix).
[266] See, for example, Waitangi Tribunal (2015b, p. 42 and p. 384).
[267] Smith (1776, Book 1, chapter 2, p. 16).
[268] Blaug (2007).
[269] Cirillo (1979).
[270] This holds even if compensation is not or cannot be paid in practice, invoking a criterion known as a Kaldor-Hicks improvement; see, for example, the survey article by Coleman (1984).
[271] See, for example, Sugden (2018, chapter 11), Gui (2021) and Isoni, Sugden and Zheng (2023).
[272] Sugden (2018, p. 279).

Principle of Kāwanatanga

The Waitangi Tribunal defines the principle of Kāwanatanga as follows:[273]

> Kāwanatanga is the right to govern and to make laws for the 'good order and security' of the country. Kāwanatanga must be exercised in accordance with the principle of good government and in a way that actively protects and does not diminish rangatiratanga.

Good government is another name for this principle. It requires the Crown "to ensure its laws and policies were just, fair, and equitable, and would adequately give effect to treaty rights and guarantees, notably those affecting hapū autonomy and tikanga and hapū retention and management of their lands and resources".[274]

The Tribunal does not doubt the Crown exercises sovereignty in the present day. This is made clear in the paragraph where the Tribunal reported its conclusion that sovereignty was not ceded by northern rangatira when they signed te Tiriti.[275]

> We have reached the conclusion that Bay of Islands and Hokianga Māori did not cede sovereignty in February 1840. In drawing this conclusion, we say nothing about how and when the Crown acquired the sovereignty that it exercises today.

This question of how the Crown acquired sovereignty de facto has been analysed by Matthew Palmer.[276] He concludes the British Crown believed the treaty gave legitimacy to its claim of sovereignty over New Zealand. This claim was formalised in Hobson's proclamations of 21 May 1840 and advertised to the world in *The London Gazette* on 2 October 1840.

Nevertheless, the Crown was not able to enforce sovereignty immediately over the whole territory and most inland areas continued to operate under Māori rangatiratanga. It took decades to establish full sovereignty, which the Crown achieved through armed conflict and other means (see Section 3.3). This was completed in some areas and for some purposes only in the early twentieth century.[277] State investment in railways made a major contribution:[278]

> The railways boom that began in the 1870s accelerated the alienation of Māori land generally by opening new districts to Pākehā settlement, strengthening the power of the state and fuelling immigration, as well as directly through the compulsory acquisition of land under the Public Works and Railways Act.

In this narrative, the signing of te Tiriti set in motion the sequence of events that led to the Crown's exercise of Parliamentary sovereignty today. Te Tiriti therefore remains "of vital constitutional importance" and "a moral imperative woven into the constitution".[279]

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[273] Waitangi Tribunal (2024a, p. 71).
[274] Waitangi Tribunal (2014, p. 64).
[275] Waitangi Tribunal (2014, p. 527).
[276] See especially Palmer (2008, pp. 165-168). Jones (2013, pp. 708-709) provides a commentary.
[277] Palmer (2008, p. 166).
[278] Atkinson (2007, p. 25).
[279] Legislation Design and Advisory Committee (2021, p. 24) and Harris (2018, p. 28) cited in Pirini (2024, p. 40).

The kāwanatanga principle requires that the Crown must not be unreasonably hindered in carrying out its responsibility to govern. This was explained by President Cooke in the *Lands* case:[280]

> The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try to shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other co-operation.

Further, the kāwanatanga principle means the Crown is entitled to expect its Tiriti partners will offer reasonable cooperation, as discussed above under the principle of partnership. Again, this was summarised by President Cooke in the *Lands* case:[281]

> It should be added, and again this appears to be consistent with the Tribunal's thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Māori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.

The principle of kāwanatanga and duty of reasonable cooperation are consistent with understandings of government in the economics literature. Governments make distinctive contributions to wellbeing that individuals and private enterprises cannot achieve on their own.[282] This includes managing the provision of certain types of goods and services, especially those with externalities or the characteristics of an economic public good.

Consequently, the ability to carry out the responsibilities of government, to make laws and to implement chosen policy for the common good, is important for economic wellbeing.

Principle of Reciprocity

Te Tiriti o Waitangi is an agreement where concessions were made on both sides in the expectation that the other side would honour its own commitments. The principle of reciprocity therefore holds that the Crown must honour the guarantees and promises made in Articles 2 and 3 when it exercises kāwanatanga under Article 1. This principle was explained in the Tribunal's *Ngāi Tahu Report*:[283]

> Each party to the Treaty gained, but not without making a major concession to the other. … This necessarily qualifies or limits the authority of the Crown to govern. In exercising its sovereignty it must respect, indeed guarantee, Māori rangatiratanga – mana Māori – in terms of Article 2.

[280] New Zealand Māori Council v Attorney-General [1987] 1 NZLR, 641; the quote is from pp. 666-667.
[281] New Zealand Māori Council v Attorney-General [1987] 1 NZLR, 641; the quote is from pp. 665-666.
[282] See, for example, Dalziel, Saunders and Saunders (2018, chapters 6 and 7).
[283] Waitangi Tribunal (1991, p. 236).

Article 2 also gave the Crown a valuable monopoly right to purchase land from Māori. The Waitangi Tribunal has found this imposed reciprocal duties on the Crown, in keeping with Lord Normanby's written instructions that Māori would retain lands "essential or highly conducive to their own comfort, safety or subsistence".[284]

> Māori also ceded the right of pre-emption over their lands on the basis that this would be exercised in a protective manner and in their own interests, so that the settlement of the country could proceed in a fair and mutually advantageous manner.

The reciprocity principle is based on the presumption discussed under the principle of partnership in the previous section that the Crown and Māori have equal status as treaty partners. A further responsibility associated with the principle is that the treaty partners are willing to seek compromise and balance in resolving disputes.[285]

An ethic of reciprocity and balance in economic transactions is an important element in Māori world views. This key concept is termed Tauutuutu in the literature.[286] It appears, for example, in the Treasury's He Ara Waiora framework, where Mana Tauutuutu is one of four determinants in Ira Tangata, the human domain.[287]

The Treasury defines Mana Tauutuutu as "having a sense of belonging within a community that involves reciprocal relationships of being valued and feeling a sense of responsibility".[288] This suggests there are potential overlaps between the concept of Tauutuutu and the principle of mutual benefit in relational market transactions discussed earlier.

Principle of Redress

In historical claims where the Tribunal finds the Crown failed to honour its responsibilities under the treaty, the Tribunal considers what redress might restore the mana and the economy of the iwi or hapū. John Dawson has summarised this approach to historical claims as follows:[289]

> Here, the Tribunal has declared its preference for a restorative rather than a strictly compensatory approach. The Tribunal is not a court, it says. It should not attempt to quantify historical tribal losses in the legalistic fashion in which damages are assessed in cases in contract or tort. Nor should it try to put the claimants in the same position they would have

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[284] Waitangi Tribunal (2015a, p. 156); see also Waitangi Tribunal (1987c, pp. 193-206; 1991, pp. 237-240).

[285] See Parliamentary Commissioner for the Environment (1988, pp. 105-107) and Hancock and Gover (2001, pp. 13-14). Compromise was a major theme in Waitangi Tribunal (1985), while balance was discussed in some detail in Waitangi Tribunal (2001, Section 3.4.7).

[286] John Reid, Mathew Rout, Jay Whitehead and Te Puoho Katene (2021, p. 33) state that the ethic of Tauutuutu "demands balance and reciprocation". Jason Mika, Kiri Dell, Jamie Newth and Carla Houkamau (2022, p. 444) define the practice of Tauutuutu as "reciprocity and balance".

[287] McMeeking, Kururangi and Kahi (2019); Treasury (2022, p. 19).

[288] Treasury (2024, p. 8).

[289] Dawson (2004, p. 130). The original quote has footnotes to relevant Tribunal reports that have not been reproduced here. Redress may include a formal apology from the Crown; see Hickey (2012).

> occupied if no breach of Treaty principles had occurred. The question of what might have happened otherwise is simply too speculative, it says; the sums involved are beyond the capacity of the Crown to pay; and that approach would deny any possibility that there had been benefits to Māori from colonisation.

The Government recognises the principle of redress. It was one of the five principles for Crown action on the treaty published by the Government in 1989, for example, acknowledging "the Crown's commitment to ensuring that a process is provided for resolution of grievances arising from the Treaty, be that through the courts, the Waitangi Tribunal or direct negotiation".[290]

More recently, the principle was confirmed in a Cabinet paper, which stated that the principle of redress "requires the Crown to redress the wrongs it has perpetrated against its Treaty co-signatory".[291]

In 1992, the Waitangi Tribunal published its report on the Te Roroa claim. It included a recommendation that the Crown take all steps to acquire certain reserves from private owners for return to their true hapū owners.[292] This was because native title to these reserves had never been extinguished, and the lands held particularly high cultural value to local tangata whenua. Following an occupation of the disputed land, the Crown purchased several farms in response to the Tribunal's recommendation, parts of which were selected by Te Roroa to be included in the redress made by the Crown.[293]

Parliament then passed the Treaty of Waitangi Amendment Act 1993. This introduced a new subsection to prevent the Tribunal from recommending: (a) the return to Māori ownership of any private land; or (b) the acquisition by the Crown of any private land.[294] As the Tribunal describes in a resource produced for schools on the *Te Roroa Report*, the land in private ownership had created difficulties because it meant there were two competing sets of property rights – those held by Te Roroa and those held by the private landowners:[295]

> Many people who were not Te Roroa became the owners of Te Roroa land. They bought their land in good faith. This means that they paid the market price for it and the sale was conducted according to the law. They probably did not know the history of the land they were buying or how it had been lost by the traditional owners, or that Te Roroa had had a grievance about it for many years. They were probably unaware that their land might have included a sacred site of special significance to the Te Roroa people.

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[290] Palmer (1989, p. 342).
[291] Seymour (2024, par. 10).
[292] Waitangi Tribunal (1992b). The recommendations are 8.2(a) and 8.2(b) on p. 292. An official inquiry by Judge Acheson in July 1939 had found, "The two reserves are theirs and should be returned to them, no matter what cost to the Crown this may involve" (see Section 7.7 of the report).
[293] Wheen and Hayward (2012, p. 19). A summary of the Deed of Settlement is at https://www.govt.nz/assets/Documents/OTS/Te-Roroa/Te-Roroa-Deed-of-Settlement-Summary-17-Dec-2005.pdf.
[294] https://www.nzlii.org/nz/legis/hist_act/towaa19931993n92306/. This is discussed by Campbell (2021, p. 132) and by Jones et al. (2024, pp. 87-88).
[295] https://www.waitangitribunal.govt.nz/en/education/education/new-resource-page-3.

More recently, protest actions led by ahi kā at Ihumātao highlight conflict at a site of historical, cultural and geological significance, where "the exclusion of private land from settlement negotiations has prevented some injustices from being addressed".[296]

Both cases illustrate the importance of clear property rights. The removal of Waitangi Tribunal jurisdiction does not resolve uncertainty when land of high cultural value is privately owned. Once the prior claim of tangata whenua is understood, this must impact on the value of the private landowner's property right, since the doctrine of parliamentary sovereignty means the Crown cannot unilaterally impose a *binding* resolution through legislation.

Conflicts of this nature involve two parties where the principle of redress applies – the Māori landowners whose native property rights were not extinguished and the current owners who purchased title to the land in good faith. The conflicting property rights will continue to create uncertainty and distress for both parties until proper negotiations find an enduring resolution.

The principle of redress is therefore important in economics. To giver another illustration, the principle of redress is fundamental in the Consumer Guarantees Act (already discussed at the beginning of Section 3.2 because of its guarantee of undisturbed possession). Part 2 of the Act "gives a consumer a right of redress against a supplier of goods where the goods fail to comply with any guarantee".[297] The principle of redress is a straightforward expectation when one of the parties to a contracted exchange does not honour a guarantee made in the exchange.

Principle of Informed Decisions

Good government requires a public service that offers advice and make decisions informed by validated knowledge.[298] Consequently, to implement its Tiriti responsibilities, the Waitangi Tribunal has found that the Crown must ensure its decisions are based on accurate information about Māori values and experiences.

The Waitangi Tribunal's *Napier Hospital and Health Services Report* summarised this as follows:[299]

> The active protection of Māori rangatiratanga, and of Māori people in general, requires the Crown to inform itself adequately in order to exercise its powers of sovereignty fairly and effectively. Partnership can scarcely proceed in ignorance of the views and wishes of the Māori partner. Ensuring equitable delivery of and outcomes from Government services requires information from the beneficiaries of those services, and often their direct involvement in generating that information. Finally, information and opinion from Māori is indispensable for the appropriate design of bicultural options.

[296] Jones et al. (2024, pp. 81); see also Hayden (2017). Scholars with settler farming backgrounds are beginning to explore the unsettled tensions created by histories of colonisation that have been deliberately forgotten or made invisible; see Campbell (2021, p. 132) and by Shaw (2021 and 2024).
[297] https://www.legislation.govt.nz/act/public/1993/0091/latest/DLM312818.html, Section 16.
[298] See, for example, Gluckman (2017) and Dalziel, Saunders and Saunders (2018, pp. 139-141).
[299] Waitangi Tribunal (2001, p. 65).

An important mechanism for informed decision-making is well-designed consultation. Thus, the Legislation Design and Advisory Committee advises that "public consultation is key to ensuring that the Government has all the information it requires to make good law".[300] Similarly, the Treasury describes benefits from effective consultation as follows:[301]

> Having a consultation process acknowledges that those who are going to be affected by regulation may have access to more and better information about the real-world impacts of proposals than the government officials who are developing them. This information can be critical to developing regulatory proposals that maximise the benefits, minimise the costs and avoid unintended consequences.

The Waitangi Tribunal also links an obligation to consult with the principle of partnership, citing a High Court case that found "the obligation of the decision-maker is to consult properly and with an open mind before making any final decision."[302] It has also supported a comment by Prime Minister James Bolger that "it would not suffice, in other words, simply to call a hui and explain the proposals".[303]

Some authorities suggest the duty to consult Māori on relevant policies is itself a treaty principle.[304] This paper follows the lead of Justice Richardson in the *Lands* case, who expressed a preference for treating the duty as part of a higher principle of informed decisions:[305]

> In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith.

This approach is also recommended by the Legislation Design and Advisory Committee:[306]

> The Treaty requires that the Government and Māori act towards each other reasonably and in good faith – akin to a partnership. Two important ways to achieve this are through informed decision making (which includes effective consultation by the Government) and through the active protection of Māori rights and interests under the Treaty by the Government.

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[300] Legislation Design and Advisory Committee (2021, p. 17).
[301] Treasury (2019, p. 2).
[302] Waitangi Tribunal (2024a, p. 75). The High Court case is *Wellington International Airport v Waka Kotahi* [2022] NZHC 954.
[303] Waitangi Tribunal (2001, p. 71).
[304] See, for example, Graham (1997, pp. 22-25, Waitangi Tribunal (2008a, Volume 4, p. 1236, and 2015b, pp. 30-31). The Parliamentary Commissioner for the Environment (1988, Table 2, p. 19) includes "the courtesy of early consultation" under the principle of partnership.
[305] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, p. 683.
[306] Legislation Design and Advisory Committee (2021, p. 28).

Informed decision-making puts demands on public service capabilities. Thus, Section 14 of the Public Service Act 2020 recognises that the public service supports the Crown in its relationships with Māori under the treaty, which requires "developing and maintaining the capability of the public service to engage with Māori and to understand Māori perspectives".[307]

In the economics literature, knowledge has a unique position in theories explaining sustained growth in living standards. Knowledge has the property of being non-rival in consumption, meaning that a piece of knowledge used for a particular purpose does not prevent the same knowledge being used by another person for the same or different purpose. This property means knowledge is the only factor of production that can satisfy the mathematical properties needed for sustained growth.[308]

Consequently, the principle of informed decisions has very wide application in economics.

5.5 Article 2 Principles

If the exchange recorded in the peacetime treaty offered in 1840 had not included a guarantee that Māori would continue to exercise tino rangatiratanga, there would have been no willing signatories on the Māori side of te Tiriti.[309] The principle of tino rangatiratanga is at the heart of the Tiriti o Waitangi relationship.

Principle of Tino Rangatiratanga

The Waitangi Tribunal has recently described the principle of tino rangatiratanga as follows:[310]

> Tino rangatiratanga is the mana or full chiefly authority over properties and people within a particular kinship group, all that is treasured, and access to resources. It involves pre-existing sovereign authority, expressed as self-government and autonomy and "extends to matters both tangible and intangible that [Māori] value". Rangatiratanga limits the Crown's right to govern and is itself limited by obligations to manage rights between hapū and with neighbouring iwi, obligations of kaitiakitanga, and obligations as partners to the Treaty/te Tiriti.

Another example of a Waitangi Tribunal discussion of tino rangatiratanga is the *Te Whānau o Waipareira Report*, where the Tribunal gave a summary definition of this principle:[311]

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[307] https://www.legislation.govt.nz/act/public/2020/0040/latest/LMS223351.html.

[308] Blakeley, Lewis and Mills (2005); Dalziel (2019); Saunders et al. (2023, pp. 209-210). This theory is known as endogenous growth theory, introduced by Paul Romer (1986, 1990). Romer received the 2018 Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel for this theory.

[309] Waitangi Tribunal (2014, chapters 9 and 10).

[310] Waitangi Tribunal (2024a, p. 70). The quote within the quote is from Waitangi Tribunal (2008a, Vol. 4, p. 1245) and a footnote refers the reader to Waitangi Tribunal (2008a, Vol. 1, pp. 172-174). See also the extended discussion in Waitangi Tribunal (2023d, Volume I, pp. 174-183).

[311] Waitangi Tribunal (1998, p. xxv); see also Waitangi Tribunal (1996, Section 2.1).

> The principle of rangatiratanga appears to be simply that Māori should control their own tikanga and taonga, including their social and political organisation, and, to the extent practicable and reasonable, fix their own policy and manage their own programmes.

That definition connects tino rangatiratanga to tikanga – the right way of doing things within a Māori world view. Thus the exercise of rangatiratanga is a responsibility, like all the treaty principles. The connection to tikanga has also been acknowledged by the Courts. To illustrate, Justice Matthew in the High Court has made the following observations:[312]

> There can be little doubt that article two of the Treaty of Waitangi encompasses the Crown's protection of tikanga. Tikanga is integrally woven with rangatiratanga; the two dimensions give life to each other. The Crown's undertaking to protect rangatira, hapū and tāngata katoa in the exercise of tino rangatiratanga in article two inherently extends to their operation of tikanga.

Thus, this principle is not in the first instance about the Crown; it is about the responsibility of rangatira, hapū and Māori citizens to exercise tino rangatiratanga with respect to their whenua, kainga and taonga in accordance with local tikanga. Thus, English expressions for this principle use words like self-management, self-determination and autonomy.[313]

The Crown recognises the principle of tino rangatiratanga. In the five principles for Crown action on the Treaty of Waitangi published by the Government in July 1989, the second principle was the principle of self-management or rangatiratanga. Sir Geoffrey Palmer explained the Government's view on what this principle means:[314]

> The Second Article of the Treaty guarantees to Iwi Māori the control and enjoyment of those resources, or *taonga*, which it is their wish to retain. The preservation of a resource base, restoration of iwi self-management and the active protection of *taonga*, both material and cultural, are necessary elements of the Crown's policy of recognising *rangatiratanga*. This is the price the Crown paid for what it obtained in the First Article.

The principle of tino rangatiratanga impacts on governance questions such as who makes decisions about Māori lands, villages and treasures?[315] Following two years of consultations, the New Zealand Māori Council issued a landmark report, *Kaupapa: Te wāhanga tuatahi*, in 1983. It addressed this governance question, founded on protection of rangatiratanga under the principle of exchange: "The purpose of the Treaty … was to secure an exchange of sovereignty for the protection of rangatiratanga". The opening sentence of the foreword by Tā Graham Latimer made the following declaration:[316]

> The New Zealand Māori Council stands by the view, upheld by the Treaty of Waitangi, that control over Māori land should be in Māori hands.

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[312] Ngāti Whātua Ōrākei Trust v Attorney-General [2022] NZHC 843 [28 April 2022], par. 66, p. 23. See also Mikaere (2005) for an analysis of tikanga as the first law of Aotearoa.
[313] Waitangi Tribunal (2008a, pp. 172-173). See also the section below on mana motuhake.
[314] Palmer (1989, p. 340).
[315] See also the principle of mana motuhake discussed in Section 5.6 below.
[316] Latimer (1983, p. 2). The previous quote was from New Zealand Māori Council (1983, p. 4).

In its discussion of the practice of rangatiratanga, the report emphasised the concept of trusteeship in the exercise of this responsibility:[317]

> However, while rangatiratanga may indeed mean 'possession', it also means much more than that, today, as in 1840. In its essence it is the working out of a moral contract between a leader, his people, and his god. It is a dynamic not static concept, emphasizing the reciprocity between the human, material and non-material worlds. In pragmatic terms, it means the wise administration of all the assets possessed by a group for that group's benefit: in a word, trusteeship.

Trusteeship is a key word. Indeed, Tā Hugh Kawharu observed in 2013 that Article 2 involves "a double trusteeship":[318]

> On the one hand there was the fiduciary role of the Crown towards the Māori people and their rangatiratanga, and on the other rangatira's fiduciary role towards his or her kin group.

The Waitangi Tribunal makes similar observations. In its *Te Whānau o Waipareira Report*, for example, the Tribunal comments:[319]

> Rangatiratanga, in this context, is that which is sourced to the reciprocal duties and responsibilities between leaders and their associated Māori community. It is a relationship fundamental to Māori culture and identity and describes a leadership acting not out of self-interest but in a caring and nurturing way with the people close at heart, fully accountable to them and enjoying their support.

Merata Kawharu argues the double trusteeship of te Tiriti offers a pathway forward beyond treaty principles. Using 'kāinga' to describe Māori kin communities, Kawharu summarises this argument as follows:[320]

> Although the ledger in Treaty relationships has been weighted towards Crown views, Crown–Māori relationships can be reconsidered from a kāinga perspective through which Māori determine the shape and form of their future vision-making, and the process seek Crown engagement and support.

Kāinga, of course, features in Article 2 of te Tiriti, where it is translated as villages. The double trusteeship concept recognises kāinga are not simply possessions to be managed but are also communities of people to whom rangatira make themselves accountable. Thus, kāinga are at the heart of Māori governance, as Paora Tapihana explains:[321]

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[317] New Zealand Māori Council (1983, p. 5). Although the pronouns in the following quote are male, the report also said that "what applies here to the male elder applies, mutatis mutandis, to the female elder whose own rangatiratanga is no less vital a force in Māori life today" (p. 6).
[318] Kawharu (2013, p. 92).
[319] Waitangi Tribunal (1998, p. xxv).
[320] Kawharu (2024, p. 159). Rūnanga and komiti are two other words that describe Māori community governance organisations; see, for example, O'Malley (2009).
[321] Tapihana (2021, p. 7).

> Kāinga represent the fundamental genealogically ordered relationship of belonging – anchoring tangata to whenua – in a universe organised by a system of ambilineal kinship and descent (whakapapa). Kāinga are not just villages occupied by tangata. They are symbolic statements of mana (ancestral authority) over the surrounding whenua.

Principle of Active Protection

The hopes held by northern rangatira that the King of England would offer protection predates te Tiriti o Waitangi. Section 2.2 has noted that thirteen northern rangatira sent a letter to King William IV in 1831 asking for the king's protection against the French and against lawless behaviour by British subjects.[322] That section also explained that in He Whakaputanga o te Rangatiratanga o Nu Tireni, 34 northern rangatira asked the King of England to remain as a protector of their authority and leadership.

On the English side, the instructions of Lord Normanby to Hobson in 1839 emphasised the value that "the benefits of British protection and of laws administered by British Judges would far more than compensate for the sacrifice by the natives of a national independence which they are no longer able to maintain".[323] The instructions specifically mentioned the need for protection and restraint by necessary laws and institutions to govern British settlers.

Consequently, both sides in 1840 valued the protector role of the British Crown. The preamble of te Tiriti begins, "Victoria, The Queen of England, in her concern to protect the chiefs and subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order…".[324] This is given force in Article 2: "The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures."

With such clear statements in te Tiriti, the principle of active protection is easy to define. It features widely in Waitangi Tribunal reports, since very often a claim to the Tribunal includes evidence that the Crown failed to protect, or even attacked, the exercise of tino rangatiratanga by Māori.

An early example was the *Motunui-Waitara* report on a claim concerning Te Atiawa fishing grounds, where the Tribunal made the following observations:[325]

> We consider that the Māori text of the Treaty would have conveyed to Māori people that amongst other things they were to be protected not only in the possession of their fishing grounds, but in the mana to control them and then in accordance with their own customs and having regard to their own cultural preferences.
>
> We consider that that is the proper interpretation to be given to the Treaty, because the Māori text is clearly persuasive in advancing that view, and because the English text, referring to a "full exclusive and undisturbed possession" also permits of it.

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[322] Hēnare (2021, pp. 40-42).
[323] Normanby (1839a).
[324] https://www.waitangitribunal.govt.nz/en/about/the-treaty/maori-and-english-versions.
[325] Waitangi Tribunal (1983, p. 51).

Forty years later, the *Hauora* report provided a detailed discussion of the principle of active protection, which included the following comments (containing footnotes to earlier reports not repeated here):[326]

> The Tribunal has affirmed that the Treaty guarantee of tino rangatiratanga was a promise of active protection of Māori autonomy. In encompassing autonomy and self-government to the fullest extent possible, tino rangatiratanga is an equivalent term to mana motuhake. Together, these statements provide clear indications of a Treaty-compliant partnership that recognises tino rangatiratanga adequately, including the Māori 'right to autonomy and self-government, and their right to manage the full range of their affairs in accordance with their own tikanga'.
>
> However, the guarantee of tino rangatiratanga is not absolute and unqualified. Whilst the obligation is consistent, the Crown is not required to go beyond what is reasonable in the prevailing circumstances. What is reasonable will change depending on the circumstances that exist at the time.

The principle of partnership has been strongly endorsed in the Court of Appeal, which has introduced the concept of fiduciary duties following similar cases in Canada, the United States and Australia.[327] In the *Lands* case of 1987, for example, the Court held the following:[328]

> The relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. The duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable. That duty is no light one and is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured.

In economics, the protection of individual and communal property rights is an essential component of economic development.[329] Typically, this is achieved in three steps. First, the Crown agrees to recognise the existence of a general property right. Second, Parliament incorporates the right into legislation. The Property Law Act 2007, for example, states and codifies the law in New Zealand relating to real and personal property.[330] Third, holders of a property right covered by the general legislation can then access the Courts to have their property right enforced.

In 1840, the Crown confirmed and guaranteed strong property rights, including rights of first possession, held by Māori (Chiefs, Tribes, families and individuals in the English text). Further, the Courts have demonstrated their willingness to enforce these property rights when permitted to do so, as just quoted from the Court of Appeal. Thus, steps 1 and 3 of the typical process are in place for Māori rights guaranteed under te Tiriti.

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[326] Waitangi Tribunal (2023b, p. 30). This research paper considers mana motuhake (and autonomy) as a separate principle under Article 3 below.
[327] Lanning (1997).
[328] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR, 641; the quote is from p. 642.
[329] See, for example, the reviews in Asoni (2008), La Porta, Lopez-de-Silanes and Shleifer (2008), Xu (2011) and Galiani and Sened (2014).
[330] https://www.legislation.govt.nz/act/public/2007/0091/latest/DLM968968.html.

The scandal associated with the principle of tino rangatiratanga is that Parliament has disrupted this core mechanism by refusing to incorporate into domestic legislation the full property rights recognised by the Crown in Article 2 of the treaty (see Section 4.2). Thus, step 2 is missing, or at least incomplete.

The economics literature predicts that this failure by successive Parliaments to protect the full range of Māori property rights confirmed in te Tiriti, contrary to the Crown's obligations to protect tino rangatiratanga, must damage Māori economic development. The Waitangi Tribunal has recognised this connection in the following treaty principle.

Principle of Right to Development

The principle of right to development holds "that all peoples have the right to retain their properties for so long as they like, and to develop them along either or both customary or modern lines".[331] This is a generic principle of global standing. The United Nations Declaration on the Rights of Indigenous Peoples, for example, states:[332]

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Thus, the Waitangi Tribunal observes: "It is the fundamental right of all aboriginal people, following the settlement of their country, to retain what they wish of their properties and industries, to be encouraged to develop them as they should desire, and not to be dispossessed or restricted in the full enjoyment of them without a beneficial agreement."[333]

In that same report, the Tribunal explains that this principle is embedded in Lord Normanby's 1839 instructions to Hobson:

> Clearly, Lord Normanby hoped and expected that from the sale of lands, Māori would profit from settlement in terms of their own progress, and from the development of those lands retained. He saw it as essential to that end, that sufficient properties would in fact be kept. That objective may be stated as a principle—that nothing would impair the tribal interest in maintaining personal livelihoods, communities, a way of life, and full economic opportunities. It was subject to the overriding principle of protecting Māori properties.

The Tribunal considered the right to development at length in its report on Central North Island claims, *He Maunga Rongo*, published in 2008. Volume 3 was devoted to a Treaty development right. It found that Central North Island Māori have a Treaty right of development which includes six aspects:[334]

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[331] Waitangi Tribunal (1988, p. xiii).
[332] United Nations (2007, Article 3).
[333] Waitangi Tribunal (1988, p. 220). The quote that follows is from page 216 of the same report. See also Waitangi Tribunal (2015b, p. 32).
[334] Waitangi Tribunal (2008a, Volume 3 (Part 4), p. 914).

- the right as property owners to develop their properties in accordance with new technology and uses, and to equal access to opportunities to develop them;
- the right to develop or profit from resources in which they have (and retain) a proprietary interest under Māori custom, even where the nature of that property right is not necessarily recognised, or has no equivalent, in British law;
- the right to positive assistance, where appropriate to the circumstances, including assistance to overcome unfair barriers to participation in development (especially barriers created by the Crown);
- the right of Māori to retain a sufficient land and resource base to develop in the new economy, and of their communities to decide how and when that base would be developed;
- the opportunity, after considering the relevant criteria, for Māori to participate in the development of Crown-owned or Crown-controlled property or resources or industries in their rohe, and to participate at all levels (such criteria include the existence of a customary right or an analogy to a customary right, the use of tribal taonga, and the need to redress past breaches or fulfil the promise of mutual benefit); and
- the right of Māori to develop as a people, in cultural, social, economic, and political senses.

The right to development has implications for public policy. It is a breach of treaty principles if the Crown prohibits Māori from certain commercial operations that are permitted for other operators. An early example was the Oyster Fisheries Act 1866, which, with its amendments, "prohibited Māori from continuing their lucrative trade in the sale of oysters to Auckland and under which Māori oyster beds were leased to non-Māori commercial interests".[335]

Further, the Crown often takes a lead role in assisting communities invest in opportunities for economic development, led in current times by the Ministers for Economic Development and for Regional Development.[336] It is a breach of treaty principles if the Crown excludes Māori communities from this assistance. An example was the Government Advances to Settlers Act 1894, which offered loans at low interest to assist farming development at the beginning of the twentieth century, but which was not intended to cover Māori land.[337]

In the modern day, a key issue is the way in which the Crown protects, or fails to protect, Māori cultural intellectual property rights. The United Nations Declaration on the Rights of Indigenous Peoples recognises this issue globally:[338]

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic

[335] Waitangi Tribunal (1988, p. 229).
[336] See, for example, Ministry of Business, Innovation and Employment (2023a, 2023b).
[337] Waitangi Tribunal (2008a, Volume 3, pp. 960-977).
[338] United Nations (2007, Article 31, Clause 1).

> resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions

The issue was considered by the Waitangi Tribunal in the indigenous flora and fauna Wai 262 claim. The claim was concerned with who owns or controls three things:[339]

- mātauranga Māori (which, as we said earlier, refers to the Māori world view, including traditional culture and knowledge);
- the tangible products of mātauranga Māori – traditional artistic and cultural expressions that we will call taonga works; and
- the things that are important contributors to mātauranga Māori such as the unique characteristics of indigenous flora and fauna – what we call taonga species – and the natural environment of this country more generally.

The letter of transmittal for the WAI 262 report observed, "it seems strange that the law provides for no particular recognition of the interests of iwi and hapū communities in their traditional knowledge and artistic works, or of the relationship between those communities and their culturally significant species of flora and fauna".[340] This lack of legal protection squanders Māori potential, to the detriment of the country's economic wellbeing.

Many scholars are identifying ways in which Māori enterprise is creating new approaches for successful business and economic development.[341] Although the right to development does not imply an exclusive focus on economic wellbeing, economic prosperity and independence can be important for expanding a community's capabilities for all forms of wellbeing.[342]

Principle of Full Participation

Social policy in Aotearoa New Zealand has long been guided by an often-stated norm of full participation. The Royal Commission on Social Security in 1972 famously stated:[343]

> The aims of the system should be to ensure that everyone is able to enjoy a standard of living much like that of the rest of the community, and thus is able to feel a sense of participation in and belonging to the community.

In October 1986, the Crown established a Royal Commission on Social Policy to enquire into social policy goals and actions for a more fair and just society. The Commission published its recommendations in April 1988. Volume II included a section on the Treaty/te Tiriti.

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[339] Waitangi Tribunal (2011, p. 17).
[340] Waitangi Tribunal (2011, p. xix).
[341] See, for example, Hēnare (2011, 2014), Awatere et al. (2017), Warren, Mika and Palmer (2017), Amoamo, Ruckstuhl and Ruwhiu (2018), Barr et al. (2018), Dell, Staniland and Nicholson (2018), Rout, Reid and Mika (2020), Spiller et al. (2021), Mika et al. (2022), Rout et al. (2022), Vunibola and Scobie (2022) and Scobie and Sturman (2024).
[342] Waitangi Tribunal (2008a, Volume 3, p. 883).
[343] Royal Commission on Social Security (1972, p. 65).

Chapter 4 was headed The Treaty of Waitangi and Principles for Social Policy (Te Tiriti o Waitangi me ngā Tikanga e pā ana ki te Kaupapa mō ngā Āhuatanga ā Iwi in the Māori version). The Commission addressed implications of the treaty for principles it confirmed were relevant for social policy, without wanting to suggest that these principles were themselves treaty principles. It therefore introduced its discussion of principles as follows: [344]

> This report does not seek to compile a definite list of Treaty principles, rather the focus will be on three principles – partnership, protection, participation – crucial to an understanding of social policy and upon which the Treaty of Waitangi impacts.

Thus, 'the three Ps' considered by the Commission – partnership, protection and participation – were generic principles for social policy, not principles derived from the treaty texts *per se*. Nevertheless, the three Ps have become widely used and are often presented as if drawn from the treaty, sometimes without reference to other treaty principles.[345]

The Waitangi Tribunal is critical about the exclusive use of the three Ps as a representation of treaty principles. In its kaupapa inquiry on health services and outcomes, for example, the *Hauora* report noted that the Crown had submitted to the inquiry that the three Ps could be regarded as a "reductionist view of Treaty principles". The Tribunal agreed:[346]

> Contemporary thinking on Treaty principles has moved on significantly from the 'three Ps' approach favoured in the health sector.

Further, the *Hauora* report observed that an exclusive focus on the three Ps can water down treaty principles. It insisted that partnership and protection must be interpreted in the context of the Crown's fundamental duty to provide for tino rangatiratanga or mana motuhake, and it rejected the principle of participation since "the focus on and framing of 'participation' and 'contribution' departs from the text and principles of the Treaty and does not capture the true dynamic expressed in the Treaty and its principles".[347]

Consider, for example, the 1972 vision of the Royal Commission on Social Security cited above. It refers to everyone "belonging to the community" as if society is comprised of just one community. Thus, the participation principle can fail to reflect the ambition of mana motuhake, in which Māori citizens participate and succeed in society *as Māori*.

Thus, although 'full participation' is important in many policy documents, there is a clear direction from the Tribunal that this principle does not adequately capture the principles associated with Article 3, discussed in the following section.

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[344] Royal Commission on Social Policy (1988, p. 49).

[345] For example: Ministry of Health (2002, p. 2; 2014, p. 12), Jennings (2004, Section 1.3), Ministry of Education (2012), National Ethics Advisory Committee (2019, p. 16), Sport New Zealand (2020, p. 8). The State Services Commission (2005, p. 15) described 'partnership' and 'active' protection as dominant concepts in the principles of the Treaty.

[346] Waitangi Tribunal (2023b, p. 80).

[347] Waitangi Tribunal (2023b, p. 78). The *Hauora* report did not include the participation in its list of five principles for primary health care policies and practices, which were tino rangatiratanga, equity, active protection, options and partnership.

5.6 Article 3 Principles

Article 3 from the Māori text, the English translation by Tā Hugh Kawharu, and Article 3 from the English text are as follows.[348]

> Hei wakaritenga mai hoki tenei mo te wakaaetanga 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.
>
> For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.
>
> In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

Article 3 promises that Māori have the same rights and duties of citizenship as English citizens (Māori text) or the same rights and privileges as British citizens (English text). Neither text states that Māori must become English or British citizens to enjoy these rights. The implication is that the agreement provides equal rights, duties and privileges to Māori participating and succeeding in society *as Māori*.

This reinforces the Article 2 principle of tino rangatiratanga and is named in this section as the principle of mana motuhake or authority and status that comes through self-determination and control over one's own destiny as Māori. Mana motuhake leads to the treaty principles of options, equal treatment and equity.

Principle of Mana Motuhake

The name for this principle comes from the 2015 Waitangi Tribunal report, *Whāia te Mana Motuhake - In Pursuit of Mana Motuhake*. Another name used for this principle is the principle of autonomy.[349] The two names are connected: autonomy refers to how the principle operates and mana motuhake refers to its purpose.

That 2015 report, *Whāia te Mana Motuhake*, focuses on the Māori Community Development Act 1962, which is "an Act to provide for the constitution of Māori Associations [and] to define their powers and functions".[350] The Act is an example of enabling legislation passed by the Crown to support civil society institutions self-governed by citizens to pursue their common goals and shared values.

There is a long history of Māori creating their own institutions or adapting European models according to Māori values and tikanga.[351] These institutions can operate at the local level, at

[348] https://waitangitribunal.govt.nz/en/about/the-treaty/maori-and-english-versions.
[349] Waitangi Tribunal (2004, Volume II, pp. 738-739; 2008b, p. 4; 2010b, pp. 22-23); see also Abuse in Care Royal Commission of Inquiry (2024, pp. 2-3).
[350] https://www.legislation.govt.nz/act/public/1962/0133/latest/DLM341045.html.
[351] See, for example, O'Malley (2009).

the national level or somewhere in between. The Māori Community Development Act 1962 covers institutions such as Māori Wardens, local Māori Committees, regional Māori Executive Committees, District Māori Councils and the New Zealand Māori Council. Its context is mana motuhake, as the report explains:[352]

> As we discussed in chapter 3, the Māori pursuit of mana motuhake (self-determination and autonomy) has been constant ever since the Crown agreed to recognise and protect their tino rangatiratanga on 6 February 1840. It has taken many institutional forms – such as komiti, rūnanga, councils, parliaments, trusts, incorporated societies – and it did not end with the creation of District Māori Councils (DMCs) and the New Zealand Māori Council (NZMC) over 1961 and 1962.

As that quote indicates, the Waitangi Tribunal typically places mana motuhake alongside the Article 2 principle of tino rangatiratanga.[353] As its report, *He Maunga Rongo*, commented:[354]

> Tino rangatiratanga, which is the term used in article 2 of the Treaty, and mana motuhake are equivalent terms for aboriginal autonomy and aboriginal self-government.

He Maunga Rongo also associated mana motuhake with Article 3, as this research paper does, on the basis that "article 3 gave Māori the rights of British subjects, which included both the right to self-government by appropriate representative institutions, and the principle that government must be by the consent of the governed".[355]

The opposite of mana motuhake is integration and assimilation, which were the basis of much public policy in the 1960s and 1970s. A key policy document from that period was the Hunn Report published in 1961.[356] Richard Hill observes that "although Hunn distinguished integration from assimilation, the goal of official policy remained assimilative in all but name".[357] In that approach, perpetuation of Māori culture was considered a private matter, while participation in public spaces was to be framed exclusively by Western values.

The principle of mana motuhake, in contrast, affirms the value of cultural diversity in the shared public life of citizens. This value is reflected in Article 1 of the UNESCO Universal Declaration on Cultural Diversity 2001:[358]

> Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.

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[352] Waitangi Tribunal (2015b, p. 129).
[353] Tā Mason Durie (2005b, p. 7) similarly describes mana motuhake Māori as one of three important signposts for the application of tino rangatiratanga in a modern society.
[354] Waitangi Tribunal (2008a, p. 172).
[355] Waitangi Tribunal (2008a, pp. 191).
[356] Hunn (1961).
[357] Hill (2009, p. 93) cited in Williams (2019); see also Biggs (1961) and Williams (2001).
[358] https://www.un.org/en/events/culturaldiversityday/pdf/127160m.pdf.

There are echoes with what is sometimes called the fourth article of te Tiriti o Waitangi.[359] Moments before te Tiriti was signed on 6 February 1840, the leader of the Catholic delegation, Bishop Jean Baptiste Pompallier, intervened to request a public statement that "free toleration will be allowed in matters of faith". Hobson agreed and so Henry Williams made a written record as follows:[360]

> E mea ana te Kawana, ko nga whakapono katoa, o Ingarani, o nga Weteriana, o Roma, me te ritenga Maori hoki, e tiakina ngatahitia e ia.
>
> The Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Māori custom, shall be alike protected by him.

The public affirmation of protection in matters of faith and te ritenga Māori [customary Māori practice] is a stronger affirmation than the tolerance of religious freedom in Section 20 of the Bill of Rights Act 1990: "A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority."[361] The protection of te ritenga Māori requires Māori autonomy or self-government founded on local Māori values.

The principle of mana motuhake is consistent with a development framework in economics known at the capabilities approach.[362] This influential framework was introduced by Nobel Laureate, Amartya Sen, who described its core idea in the following often-quoted sentences from his 1999 book, *Development as Freedom*:[363]

> The analysis of development presented in this book treats the freedoms of individuals as the basic building blocks. Attention is thus paid particularly to the expansion of the 'capabilities' of persons to lead the kinds of lives they value – and have reason to value.

Although Sen's descriptions in this quote speak of individuals and persons, the capabilities approach is readily applied to groups of people, including cultures that live by strong collective values. This is reflected in his final phrase "and have reason to value". It expresses Sen's view that values are determined communally through reasoned discussions. These discussions are part of the diversity and dynamism of cultures across generations.[364]

Sen's definition emphasises that it is for communities themselves to determine the kinds of lives *they* value. The key characteristic of self-governing or autonomous institutions is that they support communities to live according to their own values, rather than being forced to conform to values held by the dominant social group.

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[359] Orange (2011, pp. 58-59); Waitangi Tribunal (2014, p. 372); Reese (2022, 2024). McCreanor, Came and Berghan (2024, p. 14 and p. 21) call this the wairuatanga article.
[360] The Māori text and English translation are reproduced from Waitangi Tribunal (2014, p. 372).
[361] https://www.legislation.govt.nz/act/public/1990/0109/latest/DLM225521.html.
[362] For book length introductions, see Nussbaum (2000 and 2011), Alkire (2002), Robeyns (2017) and Dalziel, Saunders and Saunders (2018).
[363] Sen (1999, p. 18).
[364] Dalziel, Saunders and Savage (2019, p. 2).

An example of a self-governing Māori institution is the Kingitangi movement, founded in 1858.[365] The late Kiingi Tuheitia Pootatau Te Wherowhero VII placed high importance on mana motuhake. In his closing speech at the hui-ā-motu (national gathering) at Tuurangawaewae Marae on 20 January 2024, Kiingi Tuheitia affirmed:[366]

> Mana motuhake is ours. It will last forever. It lives in every iwi and hapū. Our tikanga shows us the way to keep us safe. …
>
> The best protest we can do right now is be Māori. Be who we are, live our values, speak our reo, care for our mokopuna, our awa, our maunga, just be Māori. Māori all day, every day. We are here. We are strong.

Principle of Options

The Tribunal has consistently applied a principle of options in its analysis of how Crown policy can meet the duty to ensure Māori have the same rights and privileges as other citizens. An early statement of the principle can be found in the *Muriwhenua Fishing* report:[367]

> Neither text prevents individual Māori from pursuing a direction of personal choice. The Treaty provided an effective option to Māori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds. That same option is open to all people, is currently much in vogue and may represent the ultimate in partnership. But these are options, that is to say, it was not intended that the partner's choices could be forced.

In 2001, the Tribunal explained that the principle of options assures Māori have the right to choose their social and cultural path, which means the Crown is not entitled to offer a mono-cultural health service:[368]

> In our view, the principle of options requires, at minimum, respect for the most important facets of tikanga Māori within the practice of public hospitals and other State services, subject to clinical safety. The provision of indigenous medical services is a more discretionary matter but would, depending on alternative practitioners and demand, commonly enhance Māori choice, and thereby the principle of options.

The *Hauora* report agreed, adding, "the principle of equity ensures that each of these options – culturally and medically responsive mainstream health services and properly resourced and supported kaupapa Māori health services – are equitably maintained and made available to Māori".[369] It concluded that the Crown must provide Māori with a real choice, rather than a choice only in name.

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[365] https://waikatotainui.com/about-us/kiingitanga/.
[366] Kiingi Tuheitia (2024, beginning at 3:03 and at 4:05).
[367] Waitangi Tribunal (1988, p. 195).
[368] Waitangi Tribunal (2001, p. 65).
[369] Waitangi Tribunal (2023b, p. 36).

It scarcely needs to be said that economics recognises options as important for wellbeing in a wide variety of contexts. Indeed, a branch of the economics literature devotes itself to *real options* analysis that identifies how firms can make optimal decisions to preserve valuable options in uncertain market environments.[370]

Principle of Equal Treatment

By 1840, Māori who had travelled to Australia had seen terrible treatment of Aboriginal people by British colonists. Their witness was reflected in speeches made by rangatira at the first signings of te Tiriti in February 1840.[371] The Article 3 promise that under the Queen's protection Māori would have the same rights and duties of citizenship as English people was therefore an important consideration.

In the present day, Section 21 of the Human Rights Act 1993 prohibits several grounds of discrimination.[372] Consistent with Article 3, these prohibited grounds include colour, race and ethnic or national origins. That statutory commitment to human rights is reinforced by Section 19 of the Bill of Rights Act 1990: "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993."[373]

The Waitangi Tribunal has described as axiomatic "that governments abide by the values of respect for the rule of law, fairness, and non-discrimination", reflecting the duty to be just and fair to all.[374] In a recent report, the Waitangi Tribunal has called this the 'principle of good government' (separate from the Article 1 principle of kāwanatanga):[375]

> The Treaty/te Tiriti principle of good government or 'good governance' applies to the Crown's exercise of kāwanatanga when proposing legislation that affects Māori interests. Deriving from article 3 of the Treaty/te Tiriti, this principle "requires the Crown to keep its own laws" and "holds the Crown wholly responsible for complying with its own laws, rules and standards". The Whanganui Land Tribunal (2015) has observed that the Crown's actions cannot be truly consistent with good government unless they are also just and fair.

The principle of equal treatment is based on these standards. It states, "the Crown could not unfairly advantage one group over another if they shared a broad range of circumstances, rights, and interests".[376] In the principles to guide the settlement negotiations of historical claims, for example, the government in 2000 confirmed the following principle:[377]

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[370] See, for example, Guthrie (2009).
[371] Orange (2004, p. 36).
[372] https://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html.
[373] https://www.legislation.govt.nz/act/public/1990/0109/latest/DLM225519.html.
[374] Waitangi Tribunal (2010b, Volume 1, p. 24).
[375] Waitangi Tribunal (2024a, p. 73). The quotes are from Waitangi Tribunal (2015a, Volume 1, p. 158).
[376] Waitangi Tribunal (2013, Volume 1, p. 17). See also p. 310.
[377] Hancock and Gover (2001, Appendix 3, p. 114).

Fairness between claims

There needs to be consistency in the treatment of claims. In particular "like should be treated as like" so that similar claims receive a similar level of fiscal redress.

The principle of equal treatment has been applied to claims where the Crown failed to deal even-handedly with different Māori groups. Equal treatment is not sufficient, however, if it leads to outcomes where Māori are clearly disadvantaged compared to other groups in the general population. This applies to outcomes in health, education, justice or any other area of government policy. Policies that do not address large statistical disparities between Māori and non-Māori in wellbeing outcomes are considered as breaches of the principle of equity.

Principle of Equity

If diverse communities within society have different circumstances and interests, providing 'equal treatment' in public services such as health and education can result in markedly unequal outcomes. This is reinforced if services are designed, consciously or unconsciously, to meet the circumstances and interests of a dominant social group. This can result in a stratified society with high levels of disparity and inequity.[378]

The Waitangi Tribunal's *Hauora* report, published as part of the Health Services and Outcomes Kaupapa Inquiry, explains this distinction.[379]

> A policy or a service that establishes equal standards of treatment or care across the whole population may still result in inequitable outcomes for Māori. This could be the case, for instance, if other barriers (such as cost, geography, or racism) prevent Māori from accessing services, treatment, or care. The Treaty principles of equity and active protection therefore require the Crown to make every reasonable effort to eliminate barriers to services that may contribute to inequitable health outcomes.

Article 3 affirms the same rights and privileges, which means Māori and non-Māori should experience similar outcomes in the major domains of personal and community wellbeing. The Waitangi Tribunal has therefore found that Article 3 obliges the Crown to positively promote equity.[380]

In the *Hauora* report, the Tribunal applied this principle to health policy.[381]

> We found that the dominant language in the legislation and policy framework is 'reducing disparities' or 'reducing inequality', rather than a commitment to achieving equity of health outcomes for Māori. We reiterate that including an expressly stated, stand-alone commitment to achieving health equity should not be controversial. Achieving health equity should be among the ultimate purposes of any just health system.

[378] See especially Darity (2022).
[379] Waitangi Tribunal (2023b, pp. 34-35). See also Waitangi Tribunal (2015b, pp. 31-32).
[380] See the references in Waitangi Tribunal (2023b, fn. 47, p. 33).
[381] Waitangi Tribunal (2023b, p. 164).

Equity of outcomes is an important policy objective in economics. The New Zealand Treasury, for example, is required to publish data on standards of wellbeing in the country every four years. Its first wellbeing report in 2022 monitored nine domains of wellbeing taken from the Treasury's Living Standards Framework.[382]

A higher percentage of the Māori participants in the survey reported a high level of cultural capability and belonging. Māori and non-Māori scored similar values for subjective (or self-evaluated) wellbeing. For the remaining seven domains, however, the percentage of Māori people who reported high wellbeing was below the percentage doing the same for the remainder of the population.

For health, the value for Māori was 41.7 per cent and for the rest of the population was 57.2 per cent. This supports the Tribunal's comment in the *Hauora* report that, "despite the Treaty's assurance of equitable protection and treatment, claimants have expressed in previous Tribunal inquiries, over time and across the country, that an inequity of health outcomes between Māori and non-Māori exists".[383] Hence, the report recommended that the Crown commit itself and the health sector to achieve equitable health outcomes for Māori.

5.7 Conclusion

Te Tiriti o Waitangi is a peacetime international treaty made in 1840 between the British Crown and the iwi and hapū whose rangatira, given the opportunity, chose to sign. Apart from some clauses in fishery laws, the treaty's provisions were not put into domestic legislation; hence te Tiriti is described as an unincorporated international treaty.

There is general recognition that te Tiriti o Waitangi stands apart from other unincorporated international instruments. This is because its place in the history of New Zealand's colonisation makes it an important constitutional document. Consequently, te Tiriti is always speaking.

In 1975, Parliament created the Waitangi Tribunal with the task of determining whether matters placed before the Tribunal are inconsistent with the 'principles of the Treaty'. Some authorities criticise that focus on treaty *principles*, concerned that this focus waters down the *text* of te Tiriti. Nevertheless, 'principles of the Treaty' is a regular phrase in legislation and in government documents.

This chapter has discussed sixteen key principles identified by the authors from Waitangi Tribunal reports, reinforced by Court decisions, Government policy documents and previous summaries by researchers. They are listed in Table 1 on page 50. The table groups the sixteen principles under four headings reflecting their connections to the preamble and the three Articles of Te Tiriti.

[382] Treasury (2022, Box M, p. 63) using data from the 2018 General Social Survey.
[383] Waitangi Tribunal (2023b, p. 34). The resulting recommendation is found on page 164.

Many of these principles are generic statements with wide application beyond te Tiriti. The four Preamble principles, for example, are exchange, partnership, good faith and mutual benefit. The concept of an agreement that involves an exchange between parties that creates a relationship akin to a partnership requiring good faith on both sides for mutual benefit is a fundamental idea in economic analysis and in contract law.

The fundamental elements in the exchange have been summarised by the Waitangi Tribunal in the following words:[384]

> When the Treaty of Waitangi was signed the Crown undertook to protect and preserve Māori rights in lands and resources in exchange for recognition as the legitimate government of the whole country in which Māori and Pākehā had equal rights and privileges as British subjects.

This is reflected in the principles of kāwanatanga, tino rangatiratanga and mana motuhake that state the responsibilities of Māori under Te Tiriti: to accept the Crown's kāwanatanga and good government; to exercise tino rangatiratanga and self-determination; and to exercise mana motuhake and succeed in society as Māori.

The remaining principles describe responsibilities of the Crown, needed to ensure Māori can exercise their responsibilities. These are the principles of reciprocity, redress, informed decisions, active protection, right to development, full participation, options, equal treatment and equity. None of these principles are unusual in economic analyses of good government practice.

These sixteen principles as articulated by the Waitangi Tribunal are strongly connected. Just as it is unwise to consider one Article of the treaty without considering the other Articles (see Section 2.4 above), it is a mistake to consider one principle in isolation from the others. Kāwanatanga, tino rangatiratanga and mana motuhake, for example, reinforce each other within the exchange agreed in te Tiriti.

Parliament in 1975 gave the Waitangi Tribunal exclusive authority to determine the meaning and effect of the treaty.[385] The analysis of this chapter confirms the Tribunal has fulfilled this duty with intelligence and integrity. It has developed a cohesive set of treaty principles carefully founded on the words in the two texts of te Tiriti and the Treaty.

Chapter 6 concludes this paper with a summary of the study's main points and a discussion of possible future directions.

[384] Waitangi Tribunal (1994, p. 68).
[385] https://www.legislation.govt.nz/act/public/1975/0114/latest/DLM435510.html.

Chapter 6

Conclusion

6.1 Introduction

This chapter begins by summarising the main points of the paper in Section 6.2, including the sixteen treaty principles set out in Table 1 of chapter 5. It then set outs some future directions, in two parts. First, Section 6.3 discusses the recent vision for shared authority to reflect the treaty's principle of exchange, based on recognising three spheres of influence: the kāwanatanga sphere, the rangatiratanga sphere and the relational sphere. Second, Section 6.4 concludes the paper's economic analysis by considering the sixteen treaty principles as potential foundations for a wellbeing economy.

6.2 Summary of the Paper

The first humans to set foot on the islands of Aotearoa New Zealand were Māori ancestors in the thirteenth century. Four centuries later, two ships captained by Abel Tasman anchored in Taitapu (Golden Bay) in December 1642. The crews remained on board, but a Dutch map maker named the territory as Zelandia Nova.

More than a further century was to pass before the *Endeavour* captained by James Cook landed at Tūranganui-a-Kiwa (Poverty Bay) in October 1769, shortly before the French vessel *St Jean Baptiste* sailed into Tokerau (Doubtless Bay) two months later. By the end of the century, Europeans were arriving to settle and in May 1833, James Busby arrived as British Resident, stationed at the Bay of Islands.

On 28 October 1835, Busby convened a meeting of northern rangatira, inviting them to sign He Whakaputanga o te Rangatiratanga o Nu Tireni – the Declaration of Independence of the United Tribes of New Zealand.[386] This was agreed by 34 rangatira at Waitangi that day, and by a further 18 rangatira from other parts of the upper North Island by July 1839.

The fourth Article in He Whakaputanga expressed a vision for peaceful relations between rangatira, pākehā and the King of England. It recorded the friendship and care of rangatira for pākehā and asked the King to be a protector in return. That vision was reproduced in te Tiriti o Waitangi, when the English translation by Tā Hugh Kawharu of the Māori text preamble begins with the following statement:[387]

[386] See https://nzhistory.govt.nz/media/interactive/the-declaration-of-independence.
[387] See https://waitangitribunal.govt.nz/en/about/the-treaty/maori-and-english-versions.

> Victoria, the Queen of England, in her concern to protect the chiefs and the subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order considers it just to appoint an administrator one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands and also because there are many of her subjects already living on this land and others yet to come.

In Article 2 of the Māori text, the Queen agreed to protect the Chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. This is the promise of tino rangatiratanga. In Article 1, the Chiefs gave absolutely to the Queen of England for ever the complete government over their land. This is the exchange of kāwanatanga.

Tino rangatiratanga and kāwanatanga are drawn from He Whakaputanga o te Rangatiratanga o Nu Tireni. There is no doubt in that document that kāwanatanga serves tino rangatiratanga.

This research paper has also drawn on the English text of the Treaty, to understand the intentions of the British Crown in 1840. It contains the same principle of exchange. The Chiefs ceded absolutely and without reservation all the rights and powers of sovereignty in exchange for the Queen's confirmation and guarantee of their full, exclusive and undisturbed possession of lands and estates, forests fisheries and other properties for so long as they wished and desired to retain them.

Thus, Article 2 *confirmed* Māori property rights already in existence, held collectively or individually. This reflects the 'first possession' principle in property law. Strongly grounded in Roman law and common law, this important legal principle holds that ownership of a property goes to the individual or group who possessed it first.

Article 2 then *guaranteed* full, exclusive and undisturbed possession. Because this promise was made in the Queen's name, it is an example of a *Crown guarantee*. The historical record is clear, however, that the guarantee was not honoured. Figure 3 on page 18 records the land in Māori title had almost halved by 1852, from 66 million to 34 million acres. By 1891, it was reduced by a further two-thirds. In 1975, only 3 million acres remained in Māori title, less than five per cent of the total land area of Aotearoa New Zealand.

The Crown led this dispossession of Māori land. This paper has focused on three major mechanisms: dishonoured conditions of land purchases; raupatu – armed invasion and confiscation; and the operations of the Native Land Court. The paper observes that the failure of successive Parliaments to honour the Crown guarantee in Article 2 of the Treaty of Waitangi is an example of what economists call time inconsistency.

Time inconsistency refers to any situation where there are clear incentives for the maker of a promise in an agreement to dishonour that promise sometime in the future. In this example, once the Crown is exercising sovereignty, it has strong incentives to ignore the Crown guarantee promised in the original treaty exchange.

The Crown always finds it difficult to avoid time consistency issues when it enters any long-term commitment. This is because the convention of parliamentary sovereignty means no Parliament is able to prevent a subsequent Parliament from repealing or amending legislation. Hence, the Crown cannot make a guarantee it can be sure will be honoured by future Parliaments.

This paper has considered three possible mitigations: reputation impacts; the rule of law; and independent institutions. Chapter 4 applied these potential mitigations to discuss three events in the 1970s that led to profound changes in Crown-Māori relations after 1975.

The first was renewed Māori public protest, beginning with the Māori Land March in September and October 1975. The second was the introduction of references to 'principles of the Treaty' into New Zealand legislation, beginning with the Treaty of Waitangi Act 1975. The third was the creation of the Waitangi Tribunal as a standing commission of inquiry, also introduced by the Treaty of Waitangi Act 1975.

Since the mid-1980s, the Waitangi Tribunal has articulated principles of the treaty in its reports, reinforced by key decisions by New Zealand courts. Chapter 5 organised sixteen principles under four headings related to the preamble and three Articles of te Tiriti. The summary table is reproduced on the following page for convenience.

Chapter 5 acknowledged there are concerns about focusing on treaty principles, rather than concentrating on the text of te Tiriti itself. The Tribunal's approach has been to explain principles that it considers relevant to each claim put before it. In doing this, the Tribunal pays careful attention to the Māori and English texts of the treaty, as explained in the Tribunal's *Muriwhenua Land Report*:[388]

> Although the Act refers to the principles of the Treaty for assessing State action, not the Treaty's terms, this does not mean that the terms can be negated or reduced. As Justice Somers held in the Court of Appeal, 'a breach of a Treaty provision . . . must be a breach of the principles of the Treaty'. As we see it, the 'principles' enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time. …
>
> The Treaty cannot be read as a contract to build a house or buy a car. It was a political agreement to forge a working relationship between two peoples and it must be seen in light of the parties' objectives. The principles of the Treaty are ventilated by both the document itself and the surrounding experience.

Thus, the Waitangi Tribunal is careful to connect principles to the Māori and English texts as they were written, allowing guidance from historical documents of that period such as He Whakaputanga o te Rangatiratanga o Nu Tireni in 1835, Lord Normanby's instructions to William Hobson in 1839, and records of the discussions among Hobson, rangatira and missionaries at signings of te Tiriti in 1840. This paper takes the view that the principles that have emerged over the last five decades are readily understood in their own context and provide a sound basis for further developments.

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[388] Waitangi Tribunal (1997, p. 386).

Principles of Te Tiriti

Preamble	
Exchange	Māori and the Crown honour the tuku or gift exchange made in te Tiriti.
Partnership	Māori and the Crown act in an enduring relationship akin to a partnership.
Good Faith	Māori and the Crown act towards each other in utmost good faith.
Mutual Benefit	Māori and the Crown cooperate to create mutual benefits.
Article 1	
Kāwanatanga	Māori accept the Crown's kāwanatanga and good government.
Reciprocity	The Crown's authority is qualified by its reciprocal Tiriti obligations.
Redress	The Crown provides redress for breaches of its Tiriti obligations.
Informed Decisions	The Crown makes decisions that are informed by Māori experience.
Article 2	
Tino Rangatiratanga	Māori exercise tino rangatiratanga and self-determination.
Active Protection	The Crown actively protects the exercise of tino rangatiratanga by Māori.
Right to Development	The Crown supports Māori economic development.
Full Participation	The Crown ensures the full participation of Māori in society.
Article 3	
Mana Motuhake	Māori citizens exercise mana motuhake and succeed in society as Māori.
Options	The Crown provides options so all citizens can make authentic choices.
Equal Treatment	The Crown treats equally all citizens in similar circumstances.
Equity	The Crown ensures equitable outcomes for Māori and all citizens.

Chapter 5 discussed each of the sixteen principles, supplemented with a brief analysis using an economics lens. The four Preamble principles, for example, describe an exchange between parties that creates a relationship akin to a partnership requiring good faith on both sides for mutual benefit, which is a fundamental idea in economic analysis and in contract law. None of the principles are unusual in economic analyses of good government practice.

6.3 Mechanisms for Shared Authority

Chapter 2 of this paper agreed with the Waitangi Tribunal and some previous scholars that the Māori and English texts of the treaty, each taken as a whole, agreed for **shared power and authority** between rangatira and the Crown (see Figures 1 and 2 on page 12).

In the nineteenth century, expectations for the distribution of this shared authority were based primarily on geography. To illustrate, Section 71 of the New Zealand Constitution Act of 1852 allowed for the creation of geographic districts where Māori would govern themselves (see Section 3.4 of this paper):[389]

> And whereas it may be expedient that the laws, customs, and usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be observed: It shall be lawful for Her Majesty, by any Letter Patent to be issued under the Great Seal of the United Kingdom, from time to time to make provision for the purposes aforesaid ….

That section was not used. Instead, the Crown gradually extended its sovereignty over all parts of the country, assisted by large investment in railways.[390] Geography might still be applicable as a basis for shared authority; nevertheless, it is sensible to enquire if an alternative mechanism could be developed to give effect to that aspect of the Tiriti agreement.

In its report on its Te Paparahi o Te Raki inquiry, the Waitangi Tribunal concluded from the evidence presented to it by the claimants and representatives of the Crown that rangatira in February 1840 did not cede their sovereignty or authority to make and enforce law over their people and within their territories. The Tribunal continued (emphasis added):[391]

> Rather, they agreed to share power and authority with the Governor. They and Hobson were to be equal, although of course they had different roles and *different spheres of influence*. The detail 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.

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[389] https://ndhadeliver.natlib.govt.nz/webarchive/20210104000423/http://nzetc.victoria.ac.nz/tm/scholarly/tei-GovCons-t1-body-d1-d1.html. Section 71 was never used.
[390] Palmer (2008, pp. 165-168), Jones (2013, pp. 708-709).
[391] Waitangi Tribunal (2014, p. 527).

Matike Mai Aotearoa is an independent working group on constitutional transformation that was formed at a meeting of the Iwi Chairs' Forum in February 2010.[392] Led by Professor Margaret Mutu and Dr Moana Jackson, Matike Mai Aotearoa facilitated 252 hui between 2012 and 2015 and convened a rōpū rangatahi that presented 70 wānanga.

In 2016, Matike Mai Aotearoa published its report *He Whakaaro Here Whakaumu mō Aotearoa*. The report picked up the phrase introduced in 2014 by the Waitangi Tribunal as italicised in the above quote:[393]

> We have found especially useful the Tribunal's use of the phrase "different spheres of influence" to describe how Māori agreed in Te Tiriti to acknowledge a Crown role. It has helped us conceptualise the Tiriti relationship in constitutional terms and to translate the people's emphasis on the values of constitutionalism into a number of indicative constitutional models.

The emphasis on values in this quote came from the participants in the 252 hui. The working group described the values discussed by those participants as "whakapapa values, which overlap and influence each other just as the relationships in a whakapapa always do", and grouped them under seven broad headings:[394]

1. *The value of tikanga* – that is the need for a constitution to relate to or incorporate the core ideals and the "ought to be" of living in Aotearoa.
2. *The value of community* – that is the need for a constitution to facilitate the fair representation and good relationships between all peoples.
3. *The value of belonging* – that is the need for a constitution to foster a sense of belonging for everyone in the community.
4. *The value of place* – that is the need for a constitution to promote relationships with, and ensure the protection of Papatūānuku.
5. *The value of balance* – that is the need for a constitution to ensure respect for the authority of rangatiratanga and kāwanatanga within the different and relational spheres of influence.
6. *The value of conciliation* – that is the need for a constitution to have an underlying jurisdictional base and a means of resolution to guarantee a conciliatory and consensual democracy.
7. *The value of structure* – that is the need for a constitution to have structural conventions that promote basic democratic ideals of fair representation, openness and transparency.

The rōpū rangatahi also devoted a great deal of time in the wānanga to kōrero about values and relationships. They identified five core values as the base for other values that should be provided for in a constitution:[395]

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[392] See https://matikemai.maori.nz/.
[393] Matike Mai Aotearoa (2016, p. 28).
[394] Matike Mai Aotearoa (2016, p. 69).
[395] Matike Mai Aotearoa (2016, pp. 94-98).

1. The health and wellbeing of Ranginui and Papatūānuku.
2. The mana motuhake of tangata whenua.
3. Traditional knowledges and institutions.
4. Peace and mutual respect – kotahi aroha.
5. Education, health and well-being.

The report presented six potential models for a constitutional transformation, drawing on the above sets of values and on the Waitangi Tribunal's concept of different spheres of influence. Thus, the models imagined the possibility of a rangatiratanga sphere (led by a Māori-determined Assembly), a kāwanatanga sphere (led by the Crown in Parliament) and a relational sphere (involving a joint deliberative body or bodies).

Three years later, in March 2019, Cabinet established a Declaration Working Group (DWG) chaired by Dr Claire Charters, tasked with developing proposals for a plan articulating New Zealand's commitment to the United Nations Declaration on the Rights of Indigenous Peoples. The DWG delivered its report, *He Puapua*, to the Minister in November 2019. It acknowledged a debt to the report by Matike Mai Aotearoa:[396]

> Drawing on the *Matike Mai* report, we have found it helpful to conceptualise this using a visual model based around 'spheres of authority'. This conceptual framework seeks to reorient the balance between the rangatiratanga and kāwanatanga spheres, and broaden the joint (or relational) sphere as part of our Vision 2040.
>
> The rangatiratanga sphere reflects Māori governance over people and places. The kāwanatanga sphere represents Crown governance. In line with one of the models posited by *Matike Mai*, we envision a key feature of a Declaration-compliant future to be a larger 'joint sphere', in which Māori and the Crown share governance over issues of mutual concern. This sphere is effectively the intersection of Articles 1 (kāwanatanga) and 2 (rangatiratanga), with an overlay of Article 3 (equity). The Crown's right to kāwanatanga (Article 1) itself is informed by rights to self-determination in the Declaration. If they choose, Māori must be able to participate in Crown governance. This is reinforced by Article 3 of te Tiriti, which confirms Māori equity and equality with other citizens.

The report presented a diagram showing the report's conceptual basis as summarised in the above quotation. This described the Kāwanatanga sphere as dominant in 2019 and therefore presented a vision for a balance reoriented towards equality by 2040. This vision is reproduced in Figure 5 below.

Figure 5 can be seen as a development of the model of shared authority depicted in Figures 1 and 2 drawn in Section 2.4 of this present report. Figure 5 introduces the third space into that model – the joint or relational sphere where rangatiratanga and kāwanatanga overlap and must therefore collaborate in good faith to promote the principle of mutual benefit.

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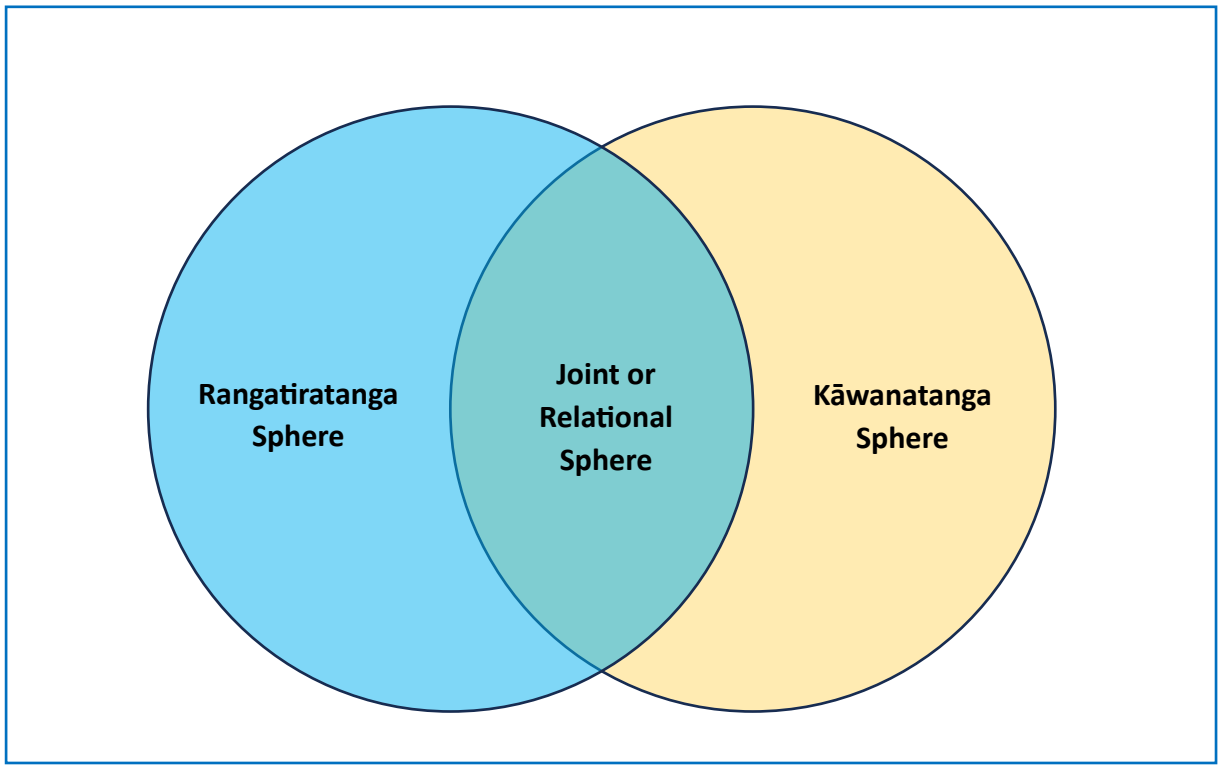
[396] Charters et al. (2019, p. 11). See also Ahi Kaa and Tangata Whenua Caucus of the National Anti-Racism Taskforce (2022, chapter 8).

Figure 5: Vision for the Spheres of Influence by 2040



Note: The diagram in the source names the shared space as the joint sphere, although the text also notes the alternative name of relational sphere. This figure therefore uses both names.

Source: Charters et al. (2019, Diagram 1, p. 11).

Consequently, the model in Figure 5 offers a constitutional frame for the practical implementation of the sixteen principles of te Tiriti discussed in this research paper. Those principles are also relevant for the design of a wellbeing economy, as the final section explores.

6.4 Foundations for a Wellbeing Economy

Alfred Marshall (1842-1924) was Professor of Economics at Cambridge University, where he wrote a famous textbook that introduced neoclassical economics for a generation. The opening sentence of the eighth edition stated Marshall's view that economics "examines that part of individual and social action which is most closely connected with the attainment and with the use of the material requisites of well-being".[397] Building on Marshall's view, wellbeing economics is a modern branch of the discipline that begins with the proposition that "the primary purpose of economics is to contribute to enhanced wellbeing of persons."[398]

[397] Marshall (1920, p. 1), cited in Dalziel, Saunders and Saunders (2023, p. 16).
[398] Dalziel, Saunders and Saunders (2018, Proposition 1, p. 3).

The 16 principles in Table 1 are relevant to that purpose. It is easiest to start with the first principle under each of the three Articles in reverse order.

Mana motuhake is an Indigenous concept that can be translated into English as the authority and status that comes through self-determination and control over one's own destiny as Māori. This paper has noted in Section 5.6 that the principle of mana motuhake is consistent with the capabilities approach introduced by Amartya Sen, including in his 1999 book, *Development as Freedom*:[399]

> The analysis of development presented in this book treats the freedoms of individuals as the basic building blocks. Attention is thus paid particularly to the expansion of the 'capabilities' of persons to lead the kinds of lives they value – and have reason to value.

Sen's approach leads to another proposition in wellbeing economics: "Wellbeing can be enhanced by expanding the capabilities of persons to lead the kinds of lives they value, and have reason to value."[400] Like the principle of mana motuhake, this proposition emphasises the self-determination of communities.

Another name used to label the principle of mana motuhake is the principle of autonomy, emphasising how communities must be free to create their own institutions to advance their own interests. Again this is consistent with a principle in wellbeing economics: "Persons can access enhanced capabilities for wellbeing by participating in institutions of civil society to collaborate with others in the pursuit of common interests and shared values."[401]

The principle of tino rangatiratanga repeats the emphasis on self-determination and control, referring not so much to autonomy as citizens but claiming "the unqualified exercise of their chieftainship over their lands, villages and all their treasures" or "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties" (as te Tiriti o Waitangi and the Treaty of Waitangi recorded in 1840).

The principle of kāwanatanga recognises the need for good government. This is consistent with another proposition of wellbeing economics: "The Nation State can contribute to expanded capabilities for wellbeing by acting on behalf of citizens as wise custodian of the market economy and welfare state within its borders."[402] The kāwanatanga principle requires that the government must not be unreasonably hindered in carrying out its responsibilities.

Figure 5 then offers a model of how kāwanatanga and rangatiratanga relate to each with two separate spheres of influence and a third sphere of overlap. In that third sphere, the preamble principles of the treaty are relevant. They describe an exchange between government and communities that creates a relationship akin to a partnership requiring good faith on both sides for mutual benefit. As this paper has noted, the concept of such an exchange is a fundamental idea in economic analysis and contract law.

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[399] Sen (1999, p. 18).
[400] Dalziel, Saunders and Saunders (2018, Proposition 2, p. 9).
[401] Dalziel, Saunders and Saunders (2018, Proposition 10, p. 69); see also Scobie, Lee and Smyth (2023).
[402] Dalziel, Saunders and Saunders (2018, Proposition 19, p. 134).

The remaining principles are statements about government should behave to foster tino rangatiratanga and mana motuhake. The Article 1 principles emphasise reciprocity, redress and informed decisions. The Article 2 principles emphasise active protection, the right to development and full participation. The Article 3 principles emphasise options, equal treatment and equity. As noted at the end of Section 6.2, none of these principles are unusual in economic analyses of good government practice.

Wellbeing economics can also contribute to developing the model in Figure 5. An important issue, for example, is how communities can fund their exercise of tino rangatiratanga.[403] The exercise of kāwanatanga is funded out of general taxation, but this mechanism is not available for funding rangatiratanga.

6.5 Poroporoaki

Poroporaki in te reo Māori means to farewell or take leave. One of the features of te Tiriti o Waitangi is that te Tiriti was intended to be enduring. Article 1 in the Māori text gave kāwanatanga to the Queen of England "for ever". Article 2 in the English text guaranteed undisturbed possession to Māori for "so long as it is their wish and desire".

The enduring nature of te Tiriti is why it is common now to reflect on te Tiriti o Waitangi *relationships*.[404] It is also a reason for the saying in te reo Māori that *te reo o te Tiriti mai rā anō*; te Tiriti is always speaking.[405]

This research paper therefore concludes with the first words of te Tiriti that were recorded on the parchment signed on 6 February 1840, which speak to the hopes and intentions of the enduring agreement.[406]

> Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua …
>
> Victoria, the Queen of England, in her concern to protect the chiefs and the subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order …

[403] See, for example, Scobie and Love (2019), Scobie, Heyes, Evans and Fukofuka (2023), Scobie, Lee and Smyth (2023), Scobie, Willson, Evans and Williams (2023) and Willson and Scobie (2024).
[404] See, for example, Williams (2005) and Turei, Wheen and Hayward (2024). As noted at the end of the discussion on the principle of partnership, the set of principles approved by the Crown for guiding the settlement of historical claims labelled its second principle 'restoration of relationship' with no mention of partnership; see Hancock and Gover (2001, Appendix 3).
[405] Waitangi Tribunal (1987b, p. 40); Hēnare and Douglas (1988); Tawhai and Gray-Sharp (2011).
[406] https://www.waitangitribunal.govt.nz/en/about/the-treaty/maori-and-english-versions.

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