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# The Treaty of Waitangi in New Zealand's Law and Constitution in 2015

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**Dr Matthew S R Palmer QC**

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E nga mana, e nga waka, e nga reo, tena koutou, tena koutou, tena koutou katoa.

It is my privilege to talk with you about the Treaty of Waitangi tonight, almost 175 years after it was first signed on 6 February 1840 at Waitangi.

I want to talk a bit about what happened 175 years ago and what that might mean today.

I also want to talk about what began to happen 20 years ago this year, when Doug Graham and Jim Bolger on behalf of the Crown, and Sir Robert Mahuta on behalf of and the Maori Queen Te Ata I rangi kaahu and Waikato Tainui, entered into the first settlement of a historical land claim – and what the Treaty settlement process means.

And I want to talk a little about what was put in place 40 years ago this year, when Parliament passed legislation to establish the Waitangi Tribunal – and how we might usefully change that now.

### **175 Years of the Treaty**

The events of 6<sup>th</sup> of February 1840 kicked off a process whereby the Crown hawked the Treaty around New Zealand like some do now with a modern day petition. Rangatira of some important iwi and hapu, including Te Arawa, Tuwharetoa and Tainui, refused to sign. Te Rauparaha signed twice. Eventually by 3 September 1840, some 530 rangatira, male and female, had signed 9 copies of the Treaty – only 39 signed the 1 English text; the others signed the other 8 written in Maori.<sup>1</sup> Captain William Hobson's signature is on 8 of them, though two of those are thought to be forgeries. Colonial Secretary Shortland signed the other.

Before this Treaty process, there was a settlement process. In late 1839, shiploads of New Zealand Company settlers had started arriving in Port Nicholson - Wellington. By March 1840, in a sort of petition competition, they had obtained signatures of local rangatira to a deed of ratification and confirmation of the Constitution of the Council of Colonists in Wellington. Complaints about their attempts to enforce that Constitution in mid April 1840 drew Captain Hobson's ire, despatch of a military force and of deployment of the ultimate British weapon of power – legal proclamations.

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<sup>1</sup> Matthew S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (VUP, Wellington, 2008) at 54. This and the next few paragraphs rely on chapter 2 of the book.

Hobson had originally intended to issue a proclamation of sovereignty over “the northern districts” of New Zealand, after the Treaty of Waitangi was signed, and then to extend the geographical limits by further proclamations as he proceeded southwards gaining signatures to the Treaty. However, the settlers’ activities in Wellington impelled rather more precipitate action. On 21 May 1840, and before he knew any signatures had been acquired in the South Island, Captain Hobson issued two proclamations noting that Maori chiefs had ceded to Britain all the rights and powers of sovereignty over the North Island, and declaring that the full sovereignty of both islands now vested in Her Majesty Queen Victoria. The North Island proclamation was made retrospective to 6 February 1840 – thus exhibiting an early if dubious New Zealand affection for retrospective legislation. The South Island proclamation took effect from 21 May, after being reissued to include the grounds assertion. For good measure, on 5 & 17 June 1840, Major Bunbury, declared sovereignty over the South (or Middle) Island, and Stewart Island.

But the year was not done. On 16 June 1840 the New South Wales Legislative Council passed an Act declaring that the laws of New South Wales now applied in New Zealand. On 7 August 1840 the Imperial Parliament passed an Act enabling New Zealand to be severed from New South Wales, happily.

On 2 October 1840 the Colonial Office officially published Hobson’s May proclamations in the London Gazette. On 15 October 1840 Hobson sent to London a “certified” copy of the Maori and English texts of the Treaty of Waitangi itself (the Maori on the left, the English on the right). This was subsequently printed by order of the House of Commons in 1841 with the Maori text labeled “Treaty.” and the English text labeled “(Translation.)”.

On 10 November 1840, in a carefully worded reply to Hobson’s despatch of 25 May, the Colonial Secretary said that “As far as it has been possible to form a judgement, your proceedings appear to have entitled you to the entire approbation of Her Majesty’s Government.” And on 16 November 1840 the first constitution of Britain’s colony of New Zealand was effected by Letters Patent known as the Charter and omitting any mention of the Treaty signed at Waitangi. This, with Royal Instructions and a covering Despatch, was sent to Governor Hobson on 9 December 1840.

So we see that there that there is ample opportunity for commemorating 175 years since various Treaty and other historical events relating to New Zealand during most months of this year. Also, even in my dry legalistic bare bones outline just now, devoid of the rich colour that a historian would add, we see the confused complexity of events that defy subsequent attempts to paint them simplistically in black and white. There were complex political dynamics between different hapu and iwi, that were shifting and rebalancing in order to adjust to the arrival of a powerful new player. There were complex political dynamics between the Imperial Government in Westminster, its outpost in New South Wales and its emissaries in New Zealand. And there were social, cultural and political tensions between pakeha settlers and

local Maori as well as between settlers and the Crown which reflected and affected politics and social change in London and the United Kingdom.

## History and the Treaty Today

This brings me to my first key topic in tonight's lecture: how the history of the Treaty relates to the meaning we give it today.

The environment in which the Treaty of Waitangi was formed in 1840 was complex and reflected a variety of different streams, eddies and currents of aspiration and reality amongst both iwi and hapu and Crown officials. The recent release by the Waitangi Tribunal of the 10 chapters of Stage I of its Northland Inquiry – entitled *He Whakaputanga me te Tiriti: The Declaration and the Treaty* is the latest attempt to portray those streams and currents in their totality. But the complexity of the situation means we should not expect that these historical events to lend themselves to the sort of tidy abstraction that law strives for.

I do commend that report to you. It is a painstaking and well written sifting of the historical events of 1840 and their context. And it's a fascinating read. It has power politics, cultural tension and violence, though not much sex. It has come up with some conclusions which have startled some. In particular the Tribunal concludes that, by signing the Treaty, Maori rangatira did not mean that sovereignty should transfer from Maori to the British Crown. What did they mean? The Tribunal concludes:<sup>2</sup>

. . . to the extent we can generalise, we believe that the rangatira regarded the treaty as enhancing their authority, not detracting from it. On the evidence presented to us, the view put by the Crown at our inquiry – that the rangatira willingly handed full control of their territories to the British Crown – is not sustainable. Our view is that, in Maori eyes, the authority over New Zealand that the Governor would have – te kawanatanga katoa – was primarily the power to control British subjects and thereby keep the peace and protect Maori. This was the message conveyed by Hobson. He would be the Pakeha rangatira and a partner in the alliance that had been developing for decades between Bay of Islands and Hokianga rangatira and the Crown. The rangatira may also have understood kawanatanga as offering Britain's protection against foreign threats, as Williams had said. On the question of land transactions, some kind of relationship would be established between the British and the rangatira.

The Tribunal summarises its conclusions thus:<sup>3</sup>

1. The rangatira who signed te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain. That is, they did not cede authority to make and enforce law over their people or their territories.

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<sup>2</sup> *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o te Raki Inquiry (Wai 1040)* at 519.

<sup>3</sup> At 529.

2. The rangatira agreed to share power and authority with Britain. They agreed to the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Maori interests.
3. The rangatira consented to the treaty on the basis that they and the Governor were to be equals, though they were to have different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Maori and European populations intermingled, remained to be negotiated over time on a case-by-case basis.
4. The rangatira agreed to enter land transactions with the Crown, and the Crown promised to investigate pre-treaty land transactions and to return any land that had not been properly acquired from Maori.
5. The rangatira appear to have agreed that the Crown would protect them from foreign threats and represent them in international affairs, where that was necessary.

Though Britain went into the treaty negotiation intending to acquire sovereignty, and therefore the power to make and enforce law over both Maori and Pakeha, it did not explain this to the rangatira. Rather, in the explanations of the texts and in the verbal assurances given by Hobson and his agents, it sought the power to control British subjects and thereby to protect Maori. That is the essence of what the rangatira agreed to.

I agree with these conclusions. They are consistent with the conclusions of most of the academic historians who have studied these events. I came to the same view in 2008 in writing my book. It is not dissimilar to the view of New Zealand's first Attorney-General, William Swainson, writing in 1859.

But one aspect of this story may appear surprising to those who have not studied these events: the Tribunal suggests that Maori did not intend to cede sovereignty. Britain may have intended to acquire sovereignty – as the Tribunal found it did. And no doubt, scrutinising the English translation of the text, the Colonial Office in London would have formed the understanding that the chiefs did intend to cede sovereignty under the Treaty. Certainly the British Crown asserted its sovereignty vigorously enough on that basis in 1840 – from May and June in New Zealand, from June in New South Wales and then from October 1840 in London.

But if Maori did not intend to cede sovereignty then what does that mean for contemporary interpretations of the Treaty? My answer to that is: not much.

It can be argued, and no doubt some will seek to argue, that because Maori did not cede sovereignty and the Treaty, particularly the Maori version, should not be interpreted as doing so. There is some risk to those making that argument. Whatever Maori intended in signing the Treaty in 1840, by 2015 it is clear that the Crown, the New Zealand Crown now, has and exercises sovereign power in New Zealand. Quite how and when that occurred is a bit murky. Some accounts would suggest that the Crown only achieved de facto control over the whole of New

Zealand, including Te Urewera, sometime in the 1920s. And it seems that, not unlike the rather messy and protracted process of proclaiming sovereignty, actual sovereignty was probably achieved via some combination of cession, conquest and settlement in various different places (also similarly to an opinion by Attorney-General Swainson in the early 1840s). If British sovereignty was effected by subsequent such means, then the enduring binding effect of the Treaty might be thrown into question.

For jurists and theoreticians, and extremists (probably at both ends of the spectrum of opinion on these issues) exploring these issues further will be a fascinating temptation.

But New Zealanders are a practical people and our constitution is quintessentially pragmatic. It seems to me that generations of legal scholars, with honourable exceptions such as Jock Brookfield, and certainly judges and law officers of the Crown, have averted their eyes from studying such matters too closely, perhaps in case they do not like what they find.

But for practical purposes – and for the purposes of determining what the Treaty of Waitangi means today, I don't think much needs to change. Both Maori and the Crown thought that, following the Treaty, they would have power of some sort. And they agreed in 1840 that they would share power in some way or other. Neither group could fully anticipate the changes that would occur in the country – particularly in terms of population composition – over the next 10 to 20 years. Implicitly, they agreed to exercise power but the terms of that exercise were unspecified. The balance between sovereignty and rangatiratanga would be struck on an ongoing basis in circumstances as they arise – as has been New Zealand's whole constitution ever since. The Treaty of Waitangi is the articulation of Maori and the Crown entering a relationship in relation to the exercise of power in New Zealand. And that relationship continues.

### **The Meaning of the Treaty**

In the same way that law reflects the confused tensions of historical events, we can expect that the task of interpreting the text which derived from such messy reality is no easy matter. Deciding what the Treaty of Waitangi means, and should mean, in contemporary New Zealand society is not a mechanistic application of the black letters of simple rules. It is the identification of principles which reach back in time to what commonalities did exist amongst the parties in 1840 which can then be projected forward to play a constructive role in the social, cultural, economic and political circumstances of today's New Zealand society.

Thankfully, that task has been undertaken. From 1973 to 1993 the institutions which exercise public power in New Zealand did exactly that. Parliament passed the Treaty of Waitangi Act 1975 and created the Waitangi Tribunal. Note that, while that was passed by the Labour government, in a little known episode, the previous National government had also considered whether to put the Treaty into law.

Then, in its first four substantive reports from 1983 to 1986 the Waitangi Tribunal developed the core of an interpretation of the meaning of the Treaty that could and should be applied in contemporary New Zealand. This was a forward looking constructive approach to enhancing relationships between the Crown and Maori. It was based on what Maori had believed and what the Crown had believed, and attempted to reconcile those views to find a way forward. From 1987 to 1993 the Court of Appeal and Judicial Committee of the Privy Council considered, specified more precisely, and affirmed that meaning in a series of judgments starting with the famous *SOEs* case in 1987. And Parliament passed more legislation affirming the judicial affirmation.

It is nonsense to claim, as some do, that the modern principles or content of the Treaty are nebulous and cannot be identified or defined. In my 2008 book on *The Treaty of Waitangi in New Zealand's Law and Constitution* I detailed this process of the contemporary reinterpretation of the meaning of the Treaty of Waitangi. I outlined the key aspects of the resulting meaning of the Treaty that were contributed by each official institution. And I further boiled that down to a statement that I consider still captures the essence of its contemporary meaning:<sup>4</sup>

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

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

*The Crown must also ensure that Maori enjoy the rights and privileges of Pakeha New Zealanders.*

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

To me, this still makes sense. The objective that we strive for is healthy relationships between the Crown, Maori and other New Zealanders. None of us are going anywhere. And others are coming. Like in any family, it is in all our interests to

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<sup>4</sup> At 150.

ensure that we rub along well enough together. That dysfunction, alienation, abuse and domestic violence do not arise. That we boost each other rather than grind each other down. And like in any family, if we fall out we know that at some point we ought to confront a serious breakdown, acknowledge it, make amends and move on. Of course, this gets easier as we mature.

In New Zealand in 2015, the Treaty serves a useful function if it reminds us of that objective and gives us ways of achieving it. I see increasing signs that it does just that. Viewing the Treaty as symbolising healthy relationships seemed slightly avant-garde, even within Government, in the 1990s. But since then successive administrations of both the National and Labour varieties have been assiduous in progressing Treaty settlements – in cleaning up the residue of historical bitterness and freeing an important sector of our society and economy to look forward and embrace their own destiny. It is easier to see the underlying and ongoing relationships now – between Ngai Tahu and pakeha in the South Island, between Tainui and Hamilton City. And we see iwi who have genuinely settled moving into a new, constructive, forward looking frame of mind – which exercise increased power and responsibility with long term values that contribute to the nation as a whole.

## **20 Years of Treaty Settlements**

I do want to say something else about Treaty settlements. In addition to it being 175 years since the Treaty was signed, it is also 20 years since the first settlement of a historical land claim was negotiated, with Waikato Tainui in a process with which I was privileged to be involved.

I've always thought it's important to be really clear about what is actually being settled and why. I heard on a commentator on the radio recently refer to settlements of the Treaty. And people often talk about when the Treaty will be over. I have difficulty with both statements.

If the Treaty is about ongoing relationships then we must recognise that occasionally those relationships will break down to a greater or lesser extent. And principles of good relationship management suggest that effort must go into repairing such breakdowns. So it is with the many historical instances of breakdown in the relationships between different Maori iwi and hapu and the Crown. Some breakdowns were worse than others – such as when the Crown invaded and confiscated land, raupatu without justification, or imprisoned and murdered, or tricked land out of Maori through deceit and fraud, or developed sophisticated legal systems such as the Native Land Court to individuate and alienate title to Maori land.

But where there has been an unjustified breakdown in the relationship between a Maori group and the Crown the breakdown needs to be resolved – the unjustified action needs to be identified, addressed, acknowledged, and something needs to be done that both side feels will put it right. This is the process that is generally known as the Treaty settlement process. It is not a settlement of the Treaty – which symbolises the ongoing relationship. It is a settlement of a breach of the Treaty; a



settlement to ensure that the breach in the relationship – the breach of the Treaty – is repaired and all concerned can move forward without resentment.

That means that it is not the Treaty that is “settled” and that the “settlement” process does not end – unless breaches in these relationships end. The Treaty itself does not end.

Neither does it mean, in my view, that either Maori or the Crown can legitimately sign up to a settlement and simultaneously criticize it as not fair or not final. If a settlement is not regarded as fair or it is final by one of the parties then it does not resolve the breach of the Treaty and in the relationship. It does nothing to move us forward and it should not be agreed. The point of settling a breach of the Treaty is if the alienation, resentment and sense of injustice can be left behind. If we forget that – if we forget why settlements are undertaken we risk wasting public funds and making things worse rather than better.

#### **40 Years of the Waitangi Tribunal**

In the early years of the Treaty settlement process the Waitangi Tribunal played a pivotal role. Not only in elucidating the contemporary meaning of the Treaty as I have already mentioned, but in providing a forum for facts to be aired – a truth and reconciliation process, if you like. This has played an important role regarding settlement of historical grievances since 1985. Indeed, in addition to the 175 years since the Treaty and 20 years since the first Treaty settlement, 2015 also marks 40 years since the Waitangi Tribunal was created and 30 years since it was given its historical jurisdiction.

In preparing this lecture I note, and welcome, Gareth Morgan’s recent contribution to debates about the Treaty of Waitangi. He launches his book later this week and I will leave him and it to speak for itself. I agree with much of what he says; but not everything. But I entirely applaud his willingness to think, write and talk independently about such an important set of issues.

Also, his work has prompted me to revisit my own proposals in my 2008 book in relation to the Waitangi Tribunal. In that book I identified a source of uncertainty for New Zealanders about the Treaty – that is that we don’t know whose job it is to resolve disputes about the application of the Treaty. Sometimes, most of the time, its politicians. And politicians largely means the Crown – which is one of the parties to the dispute. But sometimes the Waitangi Tribunal gets involved. And sometimes the Court, as did the Supreme Court in the Maori Council’s challenge to the partial privatisation of Mighty River Power in 2013.

In 2008 I suggested that we now know enough about how the Courts approach the Treaty – there is enough Treaty jurisprudence – that we should be able to entrust the resolution of disputes about the Treaty to the courts.

I suggested that the contemporary jurisdiction of the Tribunal should be removed – so that it remains only to deal with historical grievances. And if there are disputes about the application of the Treaty to contemporary disputes between the Crown and Maori their resolution should be left to the institution that usually resolves disputes in New Zealand and which is independent of both parties – that is, the judiciary. I suggested that, in the first instance, a High Court judge could sit with a Waitangi Tribunal member to ensure sufficient expertise. Appeals could lie to the Court of Appeal and Supreme Court as in the usual way.

Now, eight years later, and with more experience of how both the Tribunal and the courts deal with the Treaty matters, I am further confirmed in this view. I do I think New Zealand Treaty jurisprudence is now mature enough now that certainty and clarity about the meaning and enforceability of the Treaty of Waitangi would be enhanced by abolition of the Tribunal’s contemporary jurisdiction and its transfer to the Courts of general jurisdiction.

The Waitangi Tribunal is oriented to historical grievances which it deals with impressively. In my view it doesn’t deal very well with contemporary claims – which, with their tensions and complexities most closely resemble, and sometimes take the form of, court proceedings. The Courts now have a reasonable contingent of judges who have had some contact with Treaty matters in their practice as lawyers, and some sensitivity to the issues. I’m not so sure about whether a Tribunal member is needed to sit with the High Court. And, if there were political nervousness, the Court might initially be given only declaratory jurisdiction, as it has under the Bill of Rights Act.

At the highest judicial level, in my view, the sophisticated nature of the Supreme Court’s 2013 *Water* judgment demonstrates that the judiciary can handle the complex social, political and economic implications of Treaty issues at their most constitutional.<sup>5</sup> In that judgment the Court found that the legal basis that underpinning the 1987 *SOEs* judgment<sup>6</sup> still existed. It also effectively found that the progress that the Crown had made with Treaty settlements in the intervening period entitled the Crown to more latitude in demonstrating imaginative ways to settle water claims. And it gave fair warning to the Crown that it would take its Ministers’ statements at their word in their intentions to do so. Thus the Court avoided perceptions that would otherwise have inevitably formed of an illegitimate challenge to a key plank of the Government’s platform on which it was elected; but it confirmed existing Treaty jurisprudence and set down a marker that it must continue to be followed.

The Treaty is already often in our law – but for some purposes and not others, in relation to some matters and not others. Its current place is incoherent. In my view, putting the Treaty properly into law so that’s interpreted by our courts would stabilise its place in our law and constitution. It would avoid straining the resources

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<sup>5</sup> *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.

<sup>6</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

and expertise of a body, the Waitangi Tribunal, that has performed an honourable function in relation to historical claims. And it would enable us to move forward.

No reira, that is what I propose to do here now tonight. These issues are too important to be left to lawyers to talk at people. They need debate and discussion. And I would like to open up our forum tonight to that now.