NGĀ TOKI WHAKARURURANGA

A CROWN WITHOUT PRINCIPLES

THE ONGOING MANIPULATION OF THE PRINCIPLES OF TE TIRITI O WAITANGI

On 2 September Cabinet will consider a draft Treaty Principles Bill put forward by ACT's David Seymour through an expedited process that suggests they intend to rush it through.

From the time he kawenata tapū Te Tiriti o Waitangi was signed, the Crown has tried to rewrite it. The first, step was to deny the validity of the authenitic Tiriti by replacing it with what Professor Margaret Mutu calls "the text of the English draft of Hobson's that was never agreed to". The continuity from He Whakaputanga o te Rangatiratanga o Nu Tireni to Tiriti was eviscerated by Hobson's May 1840 proclamations of a treaty of cession and discovery of Te Wai Pounamu.

What the Crown, and the coalition of political parties that is now its government, are doing in proposing the Treaty Principles Bill perpetuates that contempt for the pact that was entered into by their and our tūpuna.

The first takeaway from this paper is that colonial history continues to repeat itself with the Crown rewriting Te Tiriti to maintain its own power.

Over many years the Crown's courts and its Parliament denied the application even of Hobson's draft, making the Crown the sole judge of its own obligations which it predictably reduced to zero. Incremental movements over time have always come in response to Māori resistance, from the four seats in the colonial Parliament to the Waitangi Tribunal's establishment in 1975 and expansion in 1985 back to 1840, the restoration of the name Waitangi Day in 1976 (after it had been insultingly renamed New Zealand Day in 1973), references to the principles of the Treaty, the Treaty of Waitangi and later Te Tiriti o Waitangi in statutes, the courts' recognition of historic Māori rights and obligations and tikanga Māori by the courts, the MACA (Marine and Coastal Area (Takutai Moana) Act 2011 to replace the Foreshore and Seabed Act 2004 that reversed the court's findings that traditional title endures in *Ngāti Apa*, and so much more.

The second takeaway is that Māori mobilisations have forced a reluctant Crown to create spaces for Māori within its New Zealand without fundamentally changing its colonial institutions and sources of power.

The concept of the "principles" had its origins in Māori references to the mana and the wairua of Te Tiriti and the mana motuhake of hapū. When the Treaty of Waitangi legislation was before parliament in 1974 several Māori MPs referred to "principles" explicitly as a way to bypass the refusal to recognise the Treaty itself. Significantly the Treaty of Waitangi Act refers to both Te Tiriti and The Treaty, with the Crown's actions to be judged against "principles" derived from both of the texts. Apparently Matiu Rata, the architect of the Tribunal's legislation, drew the reference to the "principles" from Labour's 1972 manifesto, which was in turn used in the earlier Ratana Party manifesto. This was a time when few talked in the public domain about Te Tiriti, before talk of Māori sovereignty became common, let alone tino rangatiratanga.

The third takeaway is that the Treaty "principles" were originally a Māori concept that conveyed the mana and wairua of Te Tiriti in place of the Crown's unilateral seizure of sovereignty, only to become co-opted by the Crown.

The Crown could live with Treaty "principles" being defined by the Waitangi Tribunal, even its findings in *Motonui, Kaituna and Manukau Harbour* that there was no cession of sovereignty, because its powers were limited to recommendations on historical claims. It could be ignored. Bigger problems came when the government put the "principles of the Treaty" into legislation. The reference in the State-owned Enterprises Act 1986 was intended as a token nod to Māori. The New Zealand Māori Council forced the courts to interpret it. Instead of recognising Te Tiriti and rangatiratanga, the Court of Appeal made up its own set of Treaty principles that had the sovereignty of the Crown at the core. Over time the "spirit" of the Treaty became an unequal "partnership" where the Crown would govern and the Crown would actively protect Māori rights as it saw them. Māori would be consulted where the Crown needed more information, would be loyal to the Queen of England/New Zealand and be reasonably cooperative. The Waitangi Tribunal then abandoned its position that Māori never ceded sovereignty and adopted and adapted these principles.

The fourth takeaway is that the Crown, including the courts and the Waitangi Tribunal, seized on the "principles" as a device to avoid the realities of Te Tiriti as they became more pressing and to maintain the status quo.

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

The fifth takeaway is that the Crown, through a Labour government, 25 years ago first deliberately rewrote te Tiriti into a formal set of "principles" to pretend it was honouring Te Tiriti.

These principles produced by the courts, the Tribunal, the government agencies, and some academics, have been refined over the years to the point where te Tiriti is reduced to "four Ps": partnership, participation, protection, prosperity. These have become embedded in the guidelines for state agencies who can then claim they are complying with the treaty. Yet even that is not enough for ACT today.

The sixth takeaway is that the "principles of the Treaty" that currently inform the Crown's exercise of unitary power today is built on 25 years of manipulation and deceit to create an illusion of honoring the Treaty.

ACT and New Zealand First have fuelled a racist backlash, competing for who can be the most extreme. ACT's Treaty Principles Bill aims to cement into law the most extreme rewriting of te Tiriti so far. ACT's three "principles" distort the first three articles of te Tiriti, and ignore the fourth, in an offensive and garbled text in te Reo Rangatira. ACT's English version is not even consistent with Hobson's draft. There is no mention of Māori; instead, it obliterates tangata whenua from Aotearoa. New Zealand First is competing for the racist vote by promising a law to remove all references to Treaty principles from legislation. That has started by ensuring no references to Te Tiriti in its Fast Track Approvals Bill and other laws that are hostile to mana Māori and rangatiratanga, and kaitiakitanga over te Taiao.

The seventh takeaway is that incremental gains made through Māori over the past decades are fragile and being wound back by political opportunists competing for the racist vote.

Some Māori who bought into the Crown's "principles" as a means to secure some form of redress, where otherwise there was none, now face betrayal. Others have always asserted their rangatiraranga through various forms of protest and resisted the "principles" ploy. Kia Mohio Kia Marama Trust called it out during the 1980s and exposed what Labour was doing. At the 150th commemoration of Te Tiriti at Waitangi, Bishop Whakahuihui Vercoe laid down the wero to the Crown:

> *Some of us have come here to remember what our tupuna said on this ground: that the treaty was a compact between two peoples. But since the signing of that treaty 150 years ago I want to remind our partners that you have marginalised us. You have not honoured the treaty. We have not honoured each other in the promises we made on this sacred ground. Since 1840 the partner that has been marginalised is me – the language of this land is yours, the custom is yours, the media by which we tell the world who we are are yours.*
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> *What I have come here for is to renew the ties that made us a nation in 1840. I don't want to debate the treaty. I don't want to renegotiate the treaty. I want the treaty to stand firmly as the unity, the means by which we are made one nation. … The treaty is what we are celebrating. It is what we are trying to establish so that my tino rangatiratanga is the same as your tino rangatiratanga (absolute sovereignty). And*

so I have come to Waitangi to cry for the promises that you made and for the expectations of our tupunas made 150 years ago. … I want to say to the Government don't produce principles of the Treaty – the treaty is already there.

The eighth takeaway is that Māori have always seen through the façade of the Crown's Treaty principles and reasserted the mana, wairua and tapū of Te Tiriti.

Matike Mai brought together the multiple forms of endurance and resistance to reassert the genuine Tiriti relationship of tino rangatiratanga to kāwanatanga in their own spheres, and the debate on how to make this work in contemporary Aotearoa. No talk of "Treaty principles" there. Matike Mai's commitment to constitutional transformation underpinned the Waitangi Tribunal Constitutional Kaupapa inquiry. The first step, the urgency hearing on the Treaty Principles Bill and the Treaty clauses review, saw the Crown evade any accountability by refusing to release any information about the process, timeline and content.

The ninth takeaway is that Matike Mai helped propel the demand for constitutional transformation and underpins the challenge by hapū across the country to the Treaty Principles Bill in the Tribunal.

The Tribunal's interim report was due for embargoed release to claimants on 15 August. That morning the Crown disclosed that **on 2 September Cabinet would consider the draft bill put forward by ACT's David Seymour through an expedited process that suggests they intend to rush it through.** There has been no engagement with Māori on the draft, breaching even the Crown's own self-serving Treaty principles. The Waitangi Tribunal's interim report recommends the Bill is abandoned and it will keep a watching brief. We wait to see whether the Crown will continue to show contempt for Te Tiriti, and the toothlessness of the Waitangi Tribunal, by introducing the Bill to Parliament so the Tribunal no longer has jurisdiction to consider the Bill and complete that inquiry.

So, the final takeaway is the Crown has no intention of honouring Te Tiriti o Waitangi. To recover this lost ground and advance real constitutional transformation, Māori need to mobilise collectively to assert the exercise of rangatiratanga and to force the kāwanatanga to honour the mana of te Tiriti o Waitangi. Now.

Ngā Toki Whakarururanga is a party to the Constitutional Kaupapa Inquiry at the Waitangi Tribunal and to the urgency hearings on the Treaty Principles Bill as part of that claim.

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