

Giving Modern Legal Effect to Te Tiriti o Waitangi

A text-based analysis of the three articles

Purpose and approach

The ACT party proposed redefining the legal “principles” of the Treaty.

Their Principles of the Treaty of Waitangi Bill, introduced in November 2024, expressly said that it did not amend the text of Te Tiriti/The Treaty. Instead, it would have enacted three statutory principles and required those principles, and no others, to be used when Treaty principles were relevant to interpreting legislation.

While ACT was not proposing to change the Treaty, it has been interpreted as changing the rights and privileges bestowed on Māori by the treaty.

The Māori party are proposing to entrench Te Tiriti as a constitutional foundation and make Crown obligations under it legally enforceable.

The purpose of this paper is not to formulate new “Treaty principles”. It asks a different question: if the commitments contained in the Māori text of Te Tiriti o Waitangi were to be stated directly in modern New Zealand law, what would they say?

The starting point is the Māori text signed at Waitangi and subsequently signed by the great majority of signatories. The inquiry proceeds in four stages for each article:

1. What does the Māori text say?
2. What was the effect of those words?
3. Is that interpretation supported by the historical context, the English text and other contemporary evidence?
4. How can that commitment reasonably be expressed in modern New Zealand law?

This approach necessarily distinguishes interpretation from modernisation. References to the Queen, chiefs and people of England belong to the circumstances of 1840. Their modern equivalents can be identified once the substance of the commitment has first been established.

The three articles must also be capable of operating together. An interpretation of Article 1 that deprives Article 2 of substantive effect is unlikely to be correct. Equally, an interpretation of Article 2 that leaves the governmental authority transferred by Article 1 without substantive effect is difficult to sustain.

We have deliberately based everything on the Māori text, but the English text is relevant evidence, particularly of what the British Crown intended to promise or obtain, but it is not used to replace the words of the Māori text.

Article 1 — Government

1. The Māori text

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.

This is the text contained in the first schedule to the Treaty of Waitangi Act 1975.^[1]

A close rendering is:

The chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England forever the complete government of their lands.

Sir Hugh Kawharu similarly translated the operative words as giving “absolutely to the Queen of England for ever the complete government over their land”.^[1]

2. The effect of this was ...

The effect of Article 1 was that the chiefs gave the Queen absolutely and forever the complete right to govern their lands.

Several parts of the Māori text are important. Ka tuku rawa atu makes this a transfer, and an emphatic one. Ake tonu atu makes it permanent. Kāwanatanga katoa makes the governmental authority complete rather than partial.

The critical point is therefore not to attach a different nineteenth-century constitutional label to kāwanatanga. It is to ask what it means to give someone the complete right to govern.

Government necessarily involves the authority to establish and administer laws, maintain order, resolve disputes and exercise the other functions necessary to govern a country. A supposed government whose laws applied only when individual chiefs or communities chose to accept them would not constitute kāwanatanga katoa.

Article 1 therefore established one general governmental authority.

3. Historical and contextual evidence

This interpretation is supported by the preamble to the Māori text. It says that the Queen wished to establish Kāwanatanga because Māori and Pākehā were living ture kore, without law, and so that harmful consequences would not arise. The purpose of the proposed government was therefore substantive: the establishment of law and order for the population living in New Zealand.^[1]

There is particularly useful evidence in He Whakaputanga, the 1835 Declaration of Independence. It was translated into Māori by Henry Williams, who five years later was principally responsible for the Māori text of Te Tiriti.

Article 2 of He Whakaputanga says that the chiefs would permit neither another group to frame laws nor another Kāwanatanga to be established in their territory except through persons appointed by them and acting under their laws. Article 3 says that the chiefs would assemble annually to make laws concerning justice, peace, wrongdoing and trade.^[2]

This is significant. In Williams’s Māori usage before Te Tiriti, kāwanatanga was plainly capable of describing the machinery and exercise of government. It was not confined to controlling Europeans.

The circumstances leading to the Treaty point in the same direction. Britain’s objective included establishing effective civil government in response to increasing settlement and the inadequacy of existing law and institutions.^[3]

The English Article 1 is considerably more elaborate than the Māori text. It nevertheless provides strong evidence that Hobson and the British Government understood the transaction as transferring the general governing authority of the chiefs to the Queen.^[1]

There is an important counterargument. Kāwanatanga was a relatively new term, and Māori experience of it included biblical governors and the Governor of New South Wales. It is consequently arguable that some chiefs envisaged a more limited governmental institution than Britain subsequently exercised. That uncertainty should not be dismissed. But neither should it result in deleting the emphatic words actually used in Article 1. Whatever the precise boundaries of kāwanatanga might have appeared to individual signatories, the written agreement was for all the kāwanatanga, transferred absolutely and forever.^[1]

4. Incorporation into modern New Zealand law

The Government of New Zealand has the complete authority to govern New Zealand.

This modernises the identity of the governing authority without enlarging the substantive commitment made in Article 1. The exercise of that authority must, however, be read together with Articles 2 and 3. “Complete” government does not mean government unconstrained by commitments contained elsewhere in the same agreement.

Article 2 — Authority over land, homes and possessions

1. The Māori text

Ko te Kuini o Ingarani ka wakarite ka wakaee 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. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

The text above is from the first schedule to the Treaty of Waitangi Act 1975.^[1]

A deliberately close rendering of the first sentence is:

The Queen of England agrees to the chiefs, the hapū and all the people of New Zealand the full chieftainship of their lands, their homes or settlements, and all their treasures or valued possessions.

The awkwardness of “full chieftainship” is useful at this stage. It avoids deciding the meaning of tino rangatiratanga by replacing it with a modern political expression.

2. The effect of this was ...

The effect of Article 2 was that the Queen guaranteed the chiefs, hapū and people full authority over their own lands, homes or settlements, and possessions. That authority could be exercised individually or collectively and included the right to determine the possession, use and management of what was theirs. It did not establish a second general government, because the complete right to govern had been transferred to the Queen under Article 1.

This interpretation gives substantive meaning to tino rangatiratanga. It is more than a guarantee that a person’s name will remain on a title. A person cannot meaningfully possess full authority over property while another person is free to determine its ownership, disposal and use.

But tino rangatiratanga is not used in Article 2 without an object. The text identifies what the guaranteed rangatiratanga concerns: their whenua, their kāinga, and their taonga katoa. That qualification is important. Article 2 does not simply declare that the chiefs retain tino rangatiratanga generally. It guarantees it in relation to things belonging to them.

The second sentence provides a concrete demonstration of what this means. Land is not transferred merely because the Queen governs the country. The person whose land it is decides whether the land is to be sold, and the price is to be agreed with the purchaser.

The distinction is therefore between governing the country and having authority over what is yours.

3. Historical and contextual evidence

Again, He Whakaputanga is instructive. Its use of rangatiratanga demonstrates that the word conveyed genuine authority and status. It cannot safely be reduced to the modern English concept of registered property ownership. At the same time, He Whakaputanga distinguishes rangatiratanga from kāwanatanga and from the actual making of laws.^[2]

That distinction supports reading Articles 1 and 2 of Te Tiriti together. Kāwanatanga and rangatiratanga describe different forms or spheres of authority rather than being interchangeable words for the same governmental power.

Sir Hugh Kawharu gives tino rangatiratanga a strong interpretation, translating it as the “unqualified exercise” of chieftainship and explaining that it would convey complete control according to Māori custom.^[1]

There is nevertheless an important constraint on how far that argument can be taken. The English Article 2 contains no corresponding grant or reservation of a general legislative jurisdiction. Instead, the Queen guarantees “full exclusive and undisturbed possession” of lands, estates, forests, fisheries and other properties, held collectively or individually.^[1]

The English and Māori texts therefore converge more closely if tino rangatiratanga is understood as effective authority and control over what belongs to the protected person or group than if it is interpreted as a separate general power to govern people and territory.

Who receives the guarantee?

The Māori wording is notable: ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani — literally, the guarantee is made to chiefs, hapū and all the people of New Zealand.^[1]

There is a substantial historical argument that tangata o Nu Tirani in this context referred to Māori. The Treaty was being made with Māori, and the subject of Article 2 was principally the protection of their existing interests. That historical question need not, however, determine the form of a modern statutory right.

Article 3 places Māori under the Queen’s protection and accords them the same rights as the people of England. It would be anomalous to modernise Article 2 by creating a permanent difference in basic property protection based upon ancestry. The more coherent modern application is therefore universal, while continuing to recognise that property may be held individually or collectively.

Taonga

Taonga katoa should not be artificially narrowed to land. Kawharu translates it as “all their treasures” and interprets taonga broadly.^[1]

Conversely, a modern statute should be cautious about turning the word into an unlimited category of constitutional rights unrelated to possession, control or belonging. The grammar remains important: Article 2 concerns their lands, their kāinga and their taonga.

The strongest interpretation for present purposes is therefore protection of property, possessions and other things properly belonging to an individual or collective, rather than an unrestricted right to anything regarded as valuable.

4. Incorporation into modern New Zealand law

Subject to Article 1, every person and community has full authority over their own land, homes, property and possessions, whether held individually or collectively.

There is a deliberate choice here. “Subject to Article 1” recognises the governmental authority established by the first article without inserting the much broader qualification “subject to law”. The

latter could allow the Article 2 guarantee to be extinguished simply by passing an ordinary law, rendering the guarantee largely ineffective.

At the same time, Article 2 cannot reasonably be interpreted as preventing government from governing. Article 1 and Article 2 must operate together.

The precise statutory consequences of this protection — particularly for compulsory acquisition, taxation, planning controls and regulation of harmful uses of property — would require separate legislative drafting. They should not be resolved by weakening the statement of the underlying right itself.

Article 3 — Equality of rights

1. The Māori text

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.

The text above is from the first schedule to the Treaty of Waitangi Act 1975.^[1]

A close rendering is:

In consideration of the agreement to the Queen’s Government, the Queen of England will protect all the Māori people of New Zealand and will give them all the same tikanga as the people of England.

The difficulty is tikanga, which has a range of meanings and should not be translated in isolation.

2. The effect of this was ...

The effect of Article 3 was that the Queen undertook to protect Māori and to accord them the same rights and privileges as the people of England.

The crucial words are rite tahi: the things being given are to be the same or equal to those enjoyed by the people of England.

Article 3 is therefore fundamentally a guarantee of equality of legal status and protection. It does not say that Māori cease to possess the particular interests protected by Article 2. Equality under Article 3 and the protection of particular existing property interests under Article 2 can operate simultaneously.

3. Historical and contextual evidence

The English text is particularly powerful corroborating evidence here. It says that the Queen “extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects”.^[1]

Unlike the differences surrounding Articles 1 and 2, the basic purpose of the two Article 3 texts is consequently quite close: Māori were to receive the Queen’s protection and parity with her existing subjects.

Kawharu translates the Māori provision as giving Māori the same “rights and duties of citizenship” as the people of England. He also notes a broader possible meaning of tikanga. But there are reasons not to make that the principal meaning of Article 3.^[1]

First, the grammatical comparison is explicit: tikanga katoa rite tahi ... ki nga tangata o Ingarani. The things being given to Māori are measured against what the people of England possess. Second, these are things the Queen gives (ka tukua ki a ratou), whereas existing Māori lands, kāinga and taonga are protected separately in Article 2. Third, the English text tells us clearly what the Queen understood herself to be giving: the rights and privileges of British subjects.

The stronger interpretation is therefore that Article 3 concerns equality of rights and protection. Existing Māori interests requiring preservation are principally the concern of Article 2.

4. Incorporation into modern New Zealand law

All New Zealanders are equal before the law and are entitled to the equal protection and benefit of the law.

This universalises rather than alters the Article 3 promise. A guarantee originally necessary to ensure that Māori received the rights enjoyed by the Queen's existing subjects becomes a guarantee that every New Zealander enjoys the same legal status and protection.

It does not require identical treatment in every conceivable circumstance. Nor does it extinguish particular property or other rights legitimately held by individuals or groups. It means that legal rights and protections are not determined by a person's ancestry.

The three articles read together

The resulting structure is comparatively simple.

- Article 1 establishes government.
- Article 2 protects the authority of people over what is theirs.
- Article 3 establishes equality of legal rights and protection.

The government governs. People retain authority over what belongs to them. Everyone enjoys the same legal rights and protection.

That interpretation gives substantive effect to every article. Article 1 cannot be reduced to a limited power that exists only when those governed agree with its exercise, because the chiefs transferred Kāwanatanga katoa absolutely and forever. Article 2 cannot be reduced to a promise that government may disregard whenever convenient, because the Queen expressly guaranteed tino rangatiratanga over the specified interests. Article 3 prevents the resulting constitutional order from becoming one in which basic legal rights depend upon ethnicity or ancestry.

A possible modern statutory statement

Article 1 — Government

The Government of New Zealand has the complete authority to govern New Zealand.

Article 2 — Property and possessions

Subject to Article 1, every person and community has full authority over their own land, homes, property and possessions, whether held individually or collectively.

Article 3 — Equality

All New Zealanders are equal before the law and are entitled to the equal protection and benefit of the law.

These formulations are not offered as literal translations of Te Tiriti. They are proposed as modern legal expressions of the commitments identified from the Māori text. That distinction is important. The historical inquiry asks what was agreed in 1840. The legislative inquiry asks how that agreement can be given coherent and universal effect in New Zealand today.

The principal area requiring further work is Article 2. In particular, legislation would eventually need to determine the legal meaning of “full authority”, the boundary between Article 2 rights and the Article 1 power to govern, and the treatment of taonga that are not conventional property. Those questions are important, but they should be addressed after the underlying guarantee has been identified rather than being used to redefine it at the outset.

References

The numbered citations in the text refer to the sources below. URLs are written out so they remain usable in Word even if hyperlink formatting is lost.

[1] Waitangi Tribunal, “Māori and English texts”, including the Treaty text and Sir Hugh Kawharu’s contemporary translation.

<https://waitangitribunal.govt.nz/en/about/the-treaty/maori-and-english-versions>

[2] NZ History, “He Whakaputanga — Declaration of Independence, 1835”.

<https://nzhistory.govt.nz/media/interactive/he-whakaputanga-declaration-independence-1835>

[3] Archives New Zealand, “The Treaty of Waitangi and how it happened”.

<https://www.archives.govt.nz/discover-our-stories/the-treaty-of-waitangi/the-treaty-of-waitangi-and-how-it-happened>

[4] Archives New Zealand, “What Te Tiriti o Waitangi says in English and te reo Māori”.

<https://www.archives.govt.nz/discover-our-stories/the-treaty-of-waitangi/what-te-tiriti-o-waitangi-says-in-english-and-te-reo-maori>