

Te Mata o te Tau: Academy for Māori Research and Scholarship

Te Pūmanawa Hauora: Māori Health Research Unit

The Treaty of Waitangi: 1800 - 2005

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Te Pūmanawa Hauora/Te Mata o te Tau

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Massey University

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Introduction

To begin with, I would like to thank the organisers for the invitation to speak today. It is not often that I'm able to visit this part of the country and in fact this is my first trip to Picton for many years. I was particularly keen to present today and for two main reasons. The first concerns the overall objective of this hui and its role in providing a forum for tauira Māori. Opportunities like this are far too infrequent and it was therefore with some enthusiasm that I accepted the invitation. The second reason concerns the topic I was asked to speak about and the opportunity I saw to at least reflect on and consider some of the issues associated with the Treaty of Waitangi. In my experience the Treaty is something that is often referred to, particularly in the media or within political debate, though is not well understood, often misinterpreted, or deliberately presented in order to polarise opinion. Individuals (both Māori and non-Māori) often have strong opinions on the Treaty, though these perspectives are not always based on sound information – and are frequently views that are derived from inaccurate media reports, political scare mongering, hearsay, innuendo, or a mate whose great uncle's second cousin was at the signing.

There are of course a number of reasons for this confusion. Explaining the Treaty in an accurate and unbiased way may not suit everyone – and in particular those that tend to get considerable mileage from deliberately mis-reporting Treaty related concerns. While to many this is the seminal reason for the confusion, another, and perhaps more valid issue, concerns the fact that Treaty arguments and perspectives are so complex - often depend on interpretation, and frequently relate to case law, tribunal decisions, policies or principles, provisions, historical understandings versus contemporary applications. For this reason many are confused about the Treaty and in fact prefer to remain blissfully unaware.

In this regard, I've attempted to put to rest some of the current myths associated with the Treaty and to provide a very broad overview of its history, interpretation, and application. This is of course an extremely difficult task in that summaries like this inevitably result in issues being lost or even worse not fully qualified or explained. To this end, and before I begin, I would like to again emphasise the point that this presentation is a very broad overview and that while it is impossible to cover every concern or perspective at least some major issues of interest will be examined. The only other introductory point I would like to make is actually more of an acknowledgement and that while this presentation is based on a Treaty course currently taught at Massey University, it is likewise derived from the work of the courses original designer – Professor Mason Durie.

Pre-Treaty

I guess a good place to start would be in the past. Most of you would know that the Treaty of Waitangi was signed on the 6th of February 1840. However, the genesis of the Treaty, or at least the factors which led up to it, can be traced to a numbers of years earlier and to number of associated and related events. By 1800, and while official statistics were not yet available, it was estimated that the Māori population was about 150,000. According to most reports, the people were vibrant and healthy with a life expectancy similar to many parts of Europe. However, and at least by the early 1830s, real concern was being expressed about Māori health, the impact of introduced diseases, warfare, and social change. In an 1837 report to his superiors in England, James Busby outlined some of these concerns and noted in particular the need for British intervention. At this time New Zealand was essentially an island of independent states (made up of sovereign tribes). It had not yet become a British colony and British interests were therefore centred on the few, though growing numbers of British settlers – mainly whalers and sealers.

However, Busby warned against this apparent ad-hoc approach to colonisation and the detrimental affect it was having on the native population. Other reports confirmed this and likewise cast a cautionary note against unmanaged European settlement. Of course British interests were not entirely humanitarian and it was no secret that New Zealand held great potential wealth, it could prove to be a solution to the population problems in Britain, and its position in the South Pacific was of some strategic importance.

Keen to have a relationship with New Zealand and the natives, though likewise aware of the need to avoid the mistakes of the past – particularly forced colonisation – some initial attempts at formalising a relationship were made. However, and when exploring the nature of these negotiations, it soon became obvious that this type of dialogue would be difficult. Perhaps not due to a lack of willingness or communication, but because there was no single group through which negotiations could take place. As mentioned, and during the early 1800s, New Zealand was not a single sovereign nation. More correctly, it was made up of numerous independent states (much like Europe) whose boundaries were defined along tribal lines. While chiefs were able to exert a degree of sovereignty within their own borders, there was no one individual with absolute control.

The Declaration of Independence

This certainly posed problems for the British in that a relationship was desired, but it was sometimes difficult to determine who this relationship should be with. For obvious reasons negotiations would be much simpler if there was such a thing as a Māori King or Queen or at least someone or group that could speak on behalf of all Māori. In 1835, a positive move toward Māori unification took place when the Declaration of Independence was signed. While this Declaration had a range of implications, there are at least two worth considering. First, it provided some formal recognition of fact that Māori had sovereign rights over New Zealand. As a

document, it therefore (in the eyes of the British at least) legitimised Māori ownership of the country. While this may seem somewhat bizarre, given the fact that several hundred years of settlement seemed evidence enough – the Declaration in many ways formalised these sovereign rights. The second important outcome of the Declaration concerned the group it was signed by. In this regard, reference is made to a confederation of tribes. Essentially a collective of Māori sovereign states, more importantly a single political entity.

While it should be remembered that this confederation was made-up of tribes largely from the northern parts of the country – the Declaration's significance was in that it recognised Māori sovereignty, illustrated that collective negotiations could take place, and also anticipated Māori governance.

The Possibility of a Treaty

Quite apart from the Declaration it was soon realised that more direct and sustained forms of British intervention or guidance were required. The Declaration had given some clarity to the issue of Māori sovereignty, though failed to adequately consider many of the changes that were taking place at the time. Increased British migration required more active measures as did the growing concerns over Māori health. The Treaty was of course the eventual outcome. However, it is important to remember that this was not the only, nor necessarily the preferred option. Busby for example had proposed a British “protectorate”. This would involve the crown administering affairs in the interest of all inhabitants. Chiefs would assist, while at the same time undergoing governance training.¹ Hobson on the other hand, favoured a “factory” plan. This would involve the establishment of European type settlement, clear geographical boundaries would be set within which English laws put in place.

¹ http://www.dnzb.govt.nz/dnzb/default.asp?Find_Quick.asp?PersonEssay=1B54

Despite this, the Colonial Office (who were largely responsible for issues of this nature) determined that the only way to protect Māori sovereignty and interests was to annex the country – transferring sovereignty (absolute control) to the Crown. This decision was based on three main considerations. First, was the understanding that Māori society was being seriously eroded by haphazard settlement, second were doubts concerning the ability of Māori to actually form an effective government, and third was the notion that Britain could only provide protection on the understanding that total control (annexation) was required. In order to do so neither a “factory plan” nor “protectorate” would suffice, the only remaining option therefore, was a Treaty of cessation.

Interest in Forming Relationships

It would be fairly inaccurate to suggest that interest in New Zealand was entirely humanitarian – indeed many are of the opinion that this was one of last considerations. As described the Crown had already noted New Zealand’s strategic position, trade potential, and a possible solution to the problem of overcrowding within Britain. As well, it is worth considering that Crown was not alone in its desire to forge more meaningful relationships with Māori.

In this regard, the settler population, who numbered about 2000 in 1830, were also keen to see some kind of British intervention. Though this was by no means a universal position. Many settlers were in fact quite happy with the status quo and knew that Britain would inevitably place constraints on their own, often unruly behaviour. Many had also adapted well to the country, had adopted aspects of Māori culture, had married, and were comfortable in their relationships with Māori. It is fair to say however, that the critical issue for most was land, and that if a Treaty facilitated increase access to this – then it would be welcomed as a positive step forward.

Another group which played a role in the development of the Treaty were the Missionaries. For the most part they supported Māori interests and aspirations, as long as these did not conflict with their own views on religion or morality. Like Busby, they had noted the all too apparent problems which had evolved as a consequence of ad-hoc settlement. They were therefore keen for intervention, and in particular the idea that a more selective approach to immigration would result. To this end, they viewed many of the settlers as undesirables who would ultimately hinder their own efforts.

The Missionaries were likewise concerned by the activities of private colonisation companies. The New Zealand Association for example was established to buy and sell land (at a profit). Of all the groups that influenced the Treaty these were least concerned with Māori welfare. In this regard, the Treaty was also viewed as a means through which the unscrupulous behaviour of these companies could be regulated – or at the very least bought into line.

A largely overstated issue was the influence that foreign powers (particularly the French) had in shaping the treaty. In the years prior to the Treaty various rumours were circulated about French interest in establishing a permanent settlement in New Zealand. And, while these were largely overstated, at the very least these rumours provided additional thrust for the Treaty, a sense of urgency and perhaps some rationale for complete annexation.

In any event, the main point is that while the Treaty was essentially an exchange between Māori and the Crown, other groups and individuals such as Busby, the settlers, the Missionaries, private colonisation schemes, the Colonial Office, and foreign powers, likewise played a not so insignificant role in influencing the shape and intent of the Treaty.

A Treaty is Forged

While the groups previously mentioned were important to the design of the Treaty, a set of instructions outlined by Lord Normanby, provided the actual template. These instructions, which considered many of the concerns already discussed, were then to be used by Lieutenant Governor William Hobson as key parameters. Essentially Hobson would use the instructions as a guide, and so as to design a Treaty. Indeed, and if you ever get a chance to examine Lord Normanby's instructions it is clear where much of the key provisions of the Treaty are derived from.

In interpreting these instructions, Hobson considered that the Treaty ought to provide for three basic objectives – the cession of sovereignty, absolute control of land matters, and law and order equally for Māori and settlers.

Given the contemporary significance of the Treaty it may surprise you to know that it took a mere three days before a final version of the Treaty was produced. It contained five parts – a preamble, three articles, and a postscript. Drafted entirely in English, the next task was translation into Māori. This job was given to Henry Williams, who with the assistance of his son Edward, set about this on February 4. Neither were regarded as particularly good linguists and indeed there were others that were certainly more capable. Nevertheless, they were in-trusted with the job and it is perhaps not surprising that the Māori and English versions of the Treaty differ so much.

The Waitangi Debate

There is some debate as to whether or not the translation inaccuracies were accidental or deliberately included and so as to secure Māori agreement. In any event and when the Treaty was presented to Māori it was far from a done deal. Many of those who were invited to Waitangi were clearly against the Treaty and viewed it as an

unnecessary hindrance to their own tribal authority, others were more accepting and saw it as way in which the swift tide of change could be stayed. Debate on the Treaty lasted for five hours – with Hobson frequently emphasising the protective function of the Treaty, though avoided discussion on other clauses such as the pre-emptive rights of the Crown to purchase land.

It appeared however, that Māori were suspicious of the actually objectives of the document, and for good reason as past dealing had not always been conducted in good faith. The tide turned however, and when three prominent Chiefs (Heke, Nene, and Patuone) spoke in favour of the Treaty. It is doubtful that Māori fully understood the Treaty, it was not well translated, less well explained, and certainly insufficient time was set aside for debate. Nevertheless, and on the 6th of February 1840 (a day ahead of schedule) a signing ceremony was organised. But not before being interrupted by Bishop Pompallier who insisted that a further clause be added to the Treaty guaranteeing religious freedom. This has come to be referred to as the “protocol clause” or fourth article and was a verbal proclamation only ever read out at Waitangi.

Extending the Treaty

Hone Heke was first to sign the Treaty and was followed by 43-45 others. After each signing Hobson proclaimed “He iwi kotahi tatau” following which two blankets and a small quantity of tobacco were distributed to each signatory. Between February and September the Treaty was taken throughout New Zealand and signed in 43 separate locations. Not all tribes signed the Treaty and several paramount chiefs, including Te Wherowhero and Te Kani ā Takirau, refused to sign - though did not prevent other tribal members from doing so. Te Arawa and Tuwharetoa in particular refused to take part in the signing process.

On the 21st of May 1840 Hobson proclaimed sovereignty over New Zealand. This despite the fact that the signings had not yet been completed and no matter that some chiefs and major tribes were not part of this. In any event it didn't matter and by the end of the tour in September some 530 signatures had been collected with all but 39 having signed the Māori version.

The Five Parts of the Treaty

The Treaty is most commonly considered along-side its three main Articles. These are of course important, however, and in order to describe the broader implications of the Treaty it is worth considering, as well, both the Preamble and Postscript. The Preamble for example sets out the objectives and intentions of the Treaty. And, if it is read in conjunction with Lord Normanby's instructions, eight possible objectives are identified.

- The protection of Māori interests (“anxious to protect their rights and properties”)
- The promotion of Māori well-being (“the enjoyment of peace and good order”)
- The protection of settler interests (“in consequence of the great number of her Majesty's subjects”)
- The facilitation of further immigration (“the rapid extension of emigration”)
- The negotiation of a compact (“to treat with the Aborigines”)
- The establishment of government (“a settled form of government”)
- Law and order (“necessary laws and institutions”); and

- To make New Zealand a British dependency (“ceded to her Majesty”)

Article 1 makes reference to the Chiefs of the Confederation of tribes, it acknowledges Māori sovereignty and invite cession of that sovereignty to the Crown.

Articles 2 has two main themes: in the first part there is a guarantee that Māori rights, particularly for the properties named (“lands and estates, forests, fisheries and other properties”) will be protected. Secondly, the crown accepts the right of pre-emption over lands that may be alienated.

Article 3 links protection with civil rights. The protection of the Crown is extended to individual Māori who will also receive the same citizen rights as British subjects. Article 3 is about individuals in contrast to Article 2 which carries with it an emphasis on tribal rights and properties.

The final part of the Treaty is the Postscript which contains the signatures; Hobson on behalf of the Crown, and as mentioned 530-540 Māori chiefs on behalf of their tribes. Interestingly, the Postscript also notes that those who signed fully understood the significance of the Treaty.

Interpreting the Treaty

In this regard however, it is doubtful that most or in fact any of signatories completely understood the Treaty and from the outset it caused confusion. This was partly due to the quality of the translation, interpretive differences, as well as the fact that Māori

tended to value the Treaty, its obligations and provisions, more than the Crown. One of the major issues however, concerns the use of certain words and phrases and how these were translated into Māori.

For example; while the English version of Article 1 confirms Māori sovereignty and also invites cessation of this. The Māori translation is less strongly worded. Kawanatanga (governorship) is equated with Sovereignty (absolute control). This in effect means that, within the Māori version at least, governorship was ceded, but not sovereignty or absolute control. Ngata (in 1922) suggested a more accurate word for sovereignty would have been “te mana rangatiratanga”. However, it is doubtful that Māori would have signed the treaty if this (more accurate word) was used. A possibility therefore, was that the inaccurate use of the word “Kawanatanga” or governorship was deliberate in that Māori would never actually cede mana and therefore sign the Treaty.

Other words are also ineffectively translated. Cession in English is a word that is fairly powerful and permanent, the Māori translation however is not as absolute. “Confirms and guarantees” in English is translated as “arranges and agrees”. The exclusive right of pre-emption is in Māori taken to mean first right of refusal. As well, the notion of “other properties” is given added meaning within the Māori version by the use of the word “taonga” or treasure. Certainly the word “taonga” is different than the notion of property and includes both physical and non-physical properties – that which is valued, tangible but also intangible.

The legalities of the Treaty

At the time of the Treaty’s signing and in the years immediately following this, one would expect that these key differences would have resulted in considerable

confusion – indeed it has sometimes been said that the translation of the Treaty was so bad that the two documents are complete opposites. However, these interpretive issues did not result in the type of problems one would expect – not because the problems were somehow resolved, but because the Crown at that stage largely viewed the Treaty and its provisions as irrelevant.

At its very heart, the Treaty can be seen as a simple exchange. This exchange provided a mechanism for immigration, land purchases, and Crown governance. However, and as part of the exchange Māori were guaranteed certain rights as well as other mechanisms for control or self-determination. And, while certain aspects of the Treaty were largely implemented, the provisions directly related to what Māori were promised were not or at the very least compromised. The issues connected to this are complex in that while the Treaty was directly linked to the establishment of many of the institutions that facilitated Crown rule, the obligations to Māori under the Treaty were not as enthusiastically applied.

As early as 1847, the legalities of the Treaty were considered in court and in the case *R vs Simons*. This case was largely contrived and designed to expose the Treaty to legal argument and opinion. For the purposes of this discussion the technicalities of it are not important – what is however, is the fact that it confirmed the Treaty as binding on the Crown and a “solemn document based on the principles of natural law and Doctrine of Aboriginal Title”. While this outcome may have been seen to aid Māori calls for Treaty recognition, it did in fact do little in this regard other than to placate potential conflict.

In 1877 however, and in what was to become known as the *Predegast* case (after one of the presiding judges) a different opinion on the Treaty was offered. In this case the Treaty was used as a basis for a legitimate land claim by Māori and in order to have a

certain block of land returned to its rightful owners. However, and in ruling on the legal position of the Treaty, judge Prendergast stated;

“The Treaty of Waitangi had no bearing on the case since treaties entered into with primitive barbarians lacked legal validity. The Treaty must be regarded as a simple nullity.”

This position was clearly inconsistent with both the intent of the Treaty as well as the previous case – nevertheless it served as the prevailing legal position on the Treaty for nearly 100 years. It persuaded successive governments and judges that the Treaty of Waitangi was of little consequence and certainly irrelevant to legal issues.

In 1938 however, a slight, though significant change in legal position occurred, and as part of the *Te Heuheu Tukino vs Aotea District Māori Land Board Case*. It was significant not because the Treaty had been successful in providing a basis for the case, but due to the fact that it had not been rejected outright as had been the convention. In this regard the Chief Judge stated that he could not rule on Treaty unless it was part of municipal law. The Treaty did not influence the outcome of the case, importantly however, the Treaty was not dismissed as irrelevant and was a significant move away from the Prendergast decision.

Insofar as clarifying the status of the Treaty within the courts, the outcomes for Māori have been poor. As noted its status has changed over time, though has largely been dismissed unless part of legislation – to this end, the Treaty is in very few pieces of legislation. However, and in 1987, a significant case took place that again redefined the legal position of the Treaty. Within this, the Treaty was not actually mentioned within the relevant piece of legislation. Though in considering the case Justice

Chilwell described the Treaty as “essential to the foundation of New Zealand” and “there can be no doubt that the Treaty is part of the fabric of New Zealand Society”. To this end the Judge was of the opinion that the Treaty was relevant despite the fact it was not part of the legislation. By identifying the Treaty as “part of the fabric of New Zealand society” he came close to regarding the Treaty as a constitutional document which could in affect influence all legislation. It was a major departure from the earlier views that a Treaty of cession, such as the Treaty of Waitangi, could only be enforced in Courts if it had been incorporated into municipal law.

As an aside, the Treaty is sometimes referred to as part of New Zealand’s unwritten constitution in that it provides the basic framework through which the laws of this country are derived. However, and in this regard New Zealand has no written constitution, as is the case in the United States for example, and instead relies on a set of loosely described constitutional conventions. Describing the Treaty as a constitutional document should therefore be done with some caution in that while it certainly provided the basis for the establishment of many structures and institutions, as we have seen it is not the ultimate source of law as would define a constitutional document. If it were, all laws within this country would be answerable to the Treaty - clearly not the case. Proposals to remove Treaty principles from legislation would further erode any notion that the Treaty has constitutional status.

The Waitangi Tribunal

Insofar as Māori have attempted to have Treaty issues heard, the Courts had often proved to be un-useful. Some positive outcomes had been achieved, but by-and-large the courts had been unsympathetic to Māori concerns. Some legislation had referenced the Treaty and provided a means through which the legalities of certain issues could be argued. However, the Treaty has infrequently been included within legislation, has often been difficult to interpret, more often than not constrained by

others parts of the legislation, or included within laws that have been of marginal interest to Māori.

For obvious reasons, this was an issue of considerable concern and frustration for Māori. For some tribes Treaty related issues had been ongoing for many decades with little or no relief. The position of the courts was clear and in this regard options for resolution were limited. This changed however and with the passing of the Treaty of Waitangi Act in 1975. The Act was introduced by the Labour Government and sponsored by the then Minister of Māori Affairs Matiu Rata. This in turn led to the establishment of the Waitangi Tribunal.

Within the Acts preamble it is noted that both the English and Māori versions of the Treaty differ and that a Tribunal will be established and “in order to make recommendations on claims relating to the practical application of the principles of the Treaty”. In terms of the Tribunals functions, it has the ability to;

- Inquire into and make recommendations regarding claims, and;
- Examine and report on proposed legislation that is referred to the Tribunal

In fulfilling these requirements both texts (Māori and English) are considered. The Act notes that the Tribunal has the exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them.

In terms of the Tribunal's jurisdiction – any Māori may bring a claim against:

- An Act of Parliament currently in force
- A Crown policy or practice
- Actions or omissions of the Crown if latter are inconsistent with the principles of the Treaty
- The Tribunal may also recommend compensatory action

Initially the Tribunal was somewhat constrained by the fact that it could only inquire into issues post-1975. That is, Treaty breaches which occurred prior to 1975 were beyond its jurisdiction. However, and in 1985, jurisdiction was extended back to 1840. This had an almost immediate impact on the Tribunal in that between the years 1975 and 1986 there were only 36 enquiries. However, and in 1987, there were more than 80 in a single year. In 2003, there were more than one thousand claims, creating a huge backlog and subsequent pressure on the Tribunal and its resources. While this is a very brief overview of the Tribunal and its function, there are a number of key issues to consider. First, the Tribunal is not a court, but rather a commission of inquiry. Second, the Tribunal can only make non-binding recommendations (that the government may implement or choose to ignore). Third, it cannot (except under certain circumstances) make recommendations regarding the return of private land. Fourth, while only Māori can bring a claim to the Tribunal, this claim must be against the Crown and not a third party. Fifth, the Tribunal has the discretion to not register a claim if it is beyond its jurisdiction, frivolous, or there are other options available for redress. Sixth, the Tribunal does not always find in favour of Māori. Seven, most large, historical, and land based Treaty claims are not negotiated through the Tribunal.

Treaty Principles and Provisions

Earlier on in this presentation it was noted that one of the key issues surrounding the Treaty, and from the outset, was the manner in which critical concepts were translated and how in fact two very different Treaties were produced. Awareness of these differences were fairly clear from the start and indeed a judgement from an 1847 court case noted that “The differences between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit”. As described however, the notion of Treaty principles (as part of legislation) was first introduced and as part of the Treaty of Waitangi Act 1975. Since then, reference to the Treaty within legislation has been linked to the principles rather than the Treaty itself. To this end the Treaty principles are protected in legislation, not the Treaty itself.

The obvious question is why refer to the principles rather than the provisions. As mentioned, and put simply, the provisions are fairly clear within the Treaty. The difficulty however is that the provisions are different within each version and therefore raises the question as to which version of the Treaty (and provisions) should take precedence. So as to avoid the obvious problems this would cause, the notion of Treaty principles was introduced and is a mechanism designed to consider the broader intent of the Treaty rather than focus on the actual wording of specific text. There are at least four major advantages to adopting a principles approach to the interpretation of the Treaty.

First, principles overcome to some extent the difficulty of trying to understand the intended and current meaning of some specific words within the Treaty, which in today’s language are archaic, infrequently used, and difficult to accurately interpret. Second, principles can take into account both the intentions and the provisions of the Treaty, so that the text does not form the entire basis of the debate. Third, principles allow for change over time. And lastly, principles allow the Treaty’s relevance to particular situations to be determined in a more comprehensive manner.

As with most situations, advantages need to be balanced against what potential disadvantages there might be. In this regard a reliance or tendency towards principles could possibly lead to new meanings that do not reflect opinions of either Treaty partner. Many Māori also have a particular regard for the actual words of the Treaty, that is, the significance of the Treaty lies in the texts themselves. Principles may likewise be applied in isolation from the Treaty or from other identified and agreed upon principles. As well, principles may become fixed and detract from evolving understandings of the Treaty.

Contrary to what some people have come to believe, the principles are not mentioned anywhere within the Treaty and are really a contemporary mechanism which allows the Treaty to be applied, but without the obvious distractions caused by textual differences. In essence therefore, the principles attempt to merge the two versions of the Treaty, forgoing what differences exists, and in order to arrive at some common understanding.

The Development of Treaty Principles

In considering the development of Treaty principles, I often get the impression (from my students at least), that they are of the opinion that the principles are somehow located (explicitly) within the Treaty itself and that by-and-large there is only one set of principles. Most, I suspect, would be familiar with the principles of “partnership” “protection” and “participation”. These were first introduced by the Royal Commission on Social Policy in 1988 and are certainly the most frequently referred to and widely accepted Treaty principles.

However, others have similarly developed Treaty principles and have likewise drawn from the objectives, spirit, or overall intent of the Treaty – rather than the differing texts. For example, the Waitangi Tribunal, the New Zealand Māori Council, the Crown, the Court of Appeal, and the New Zealand Government, have all developed their own set of principles – all different, though all designed to better elucidate the main objectives, spirit, and overall intent of the Treaty.

Two seminal questions arise from this. The first is obvious and concerns which set of principles are applied – those as described by the Royal Commission, the others previously mentioned, or perhaps a set of additional principles, not yet described, and which potentially sit within the two texts. The other question concerns the application of these principles and how fundamentally the principles are intended to provide a way in which the Treaty (with all its confusion) can be applied in a more useful and practical way.

The answer to both questions is difficult and can be influenced by any number of variables. Certainly the three “P’s” are describe by the Royal Commission on Social Policy are favoured by the majority and is quite likely linked to their simplicity and the fact that they are not as rigid as other principles. To this end, the other advantage of the principles of partnership, protection, and participation is that they can be used in a range of diverse environments and setting.

Despite this, applying Treaty principles (regardless of what these are) is problematic due to the fact that they ultimately rely on interpretation and are shaped by a particular context – be it health, education, welfare, internal operations, or external relationships. Because of this, and while principles are useful, it is in their application and interpretation where the most difficulty and confusion lie’s. In this regard there are no hard-and-fast answers, suffice to say that an assessment of objectives,

parameters, outcomes or constraints must inform the way in which Treaty principles are applied in any given situation.

The Contra Proferentum Rule

A final point concerning the use of Treaty principles relates to their proposed removal from legislation. There are a number of potential reasons behind this, though some relates to the fact that the principles have been so difficult to define, are in fact not mentioned in the Treaty, causes confusion, often unwanted debate, and overall an atmosphere of uncertainty and conflict. The solution therefore, as proposed by at least one member of parliament, has been to focus on the provisions as opposed to these rather abstract principles. This makes sense on one hand, however, it raises the obvious question as to which provisions should be used – those in the Māori version or the English. It appears that those proposing the change have a clear preference toward applying the provisions that sit within the English version and loosely base this assumption on the fact that English is the prime language of this country.

However, this fails to recognise the fact that the vast majority of those who signed the Treaty were not speakers of English and the fact that all but a very few signed the Māori version. This would suggest to me at least that it is the provisions within the Māori version that should take precedence. In further support of this, there is at least one, though significant, international convention of law which supports this view. The contra proferentum principle states that where ambiguities or differences exist the indigenous text must take preference over the language of those that drew up the contract. These are guiding principles in both natural law and in the English legal system. To this end, and if the provisions are to be introduced at the expense of the principles, then the provisions as dictated by the Māori version of the Treaty must be introduced. One of the most significant implications of this, if introduced, is that Māori sovereignty (tino rangatiratanga) was never ceded.

Treaty Breaches

The presentation thus far has focused on rather pragmatic concerns – the history of the Treaty, some of the major interpretive difficulties, and the manner in which these differences have been considered. For the most however, the history of the Treaty has not been so clear-cut and in fact there is a considerable amount of tension associated with the Treaty. As described previously, this is in some part due to the level of misinformation which is provided and a reluctance by some to have the real issues and facts presented.

However, one of the main reasons why conflict has arisen and continues to shape our perception of the Treaty, concerns Treaty breaches. These inevitably resulting in conflict between Māori and the Crown. While it is impossible to describe every situation where a Treaty breach has occurred, they typically took place because legislation was required and in order to promote policies which:

- Accelerated the process of assimilation;
- Hastened alienation of Māori land;
- Consolidated the power of the government;
- Increased European immigration and settlement;
- Removed burgeoning Māori nationalism;
- Established British systems and lifestyles;

These broad headings are often linked to historical injustices, though it is not difficult to see how more contemporary Treaty issues also align. The Foreshore and Seabed Act for example is not inconsistent with historical legislation designed to hasten

Māori land alienation. Policies which seek to undermine Māori language or cultural expression are likewise designed to speed-up the process of assimilation. Consolidating the power of the government is obviously at odds with any notion of Tino Rangatiratanga. And proposed adjustments to immigration criteria is likely to benefit one group at the expense of another and further add weight to the idea that there is only one acceptable system or lifestyle. Of particular concern is the proposed removal of the Māori seats and the relationship this obviously has to the idea a burgeoning Māori nationalism – or at the very least a Māori political consciousness. I do not have any particular view on this, however, any moves in this direction should at the very least be derived from a binding referendum of Māori constituents.

The word referendum is deliberate in this case and in that consultation has seldom, if at all, benefited Māori. In the case of the Foreshore and Seabed, and Fiscal Envelope in particular, Māori consultation resulted in a clear position, which in the end was entirely ignored by the government. A binding referendum however would bring some clarity to the issue of Māori seats, and I suspect there would be a strong preference by Māori to have them retained. While the need for this approach can be linked to a fundamental Treaty right and notions of Tino Rangatiratanga, it should be remembered that Māori rights are not solely derived from the Treaty. To this end all issue of significance to Māori should be informed if not guided by Māori. This is a fundamental right that too often has been denied Māori. Therefore, my position here is not directly linked to the Treaty, but are more clearly derived from moral, ethical, humanistic, and indeed democratic principles. The fundamental right we all have to shape our own destiny.

Treaty Settlements

While Treaty breaches have led to a certain degree of conflict, the issue of Treaty settlements is perhaps the single most significant issue to polarise Māori and non-Māori opinion. Again, and in my view, this is partly due to the huge amount of

misinformation which is provided. It is sometimes said that some information is better than none – however, and where Treaty settlements are concerned, providing some information (at the expense of the full picture) will likely result in opinions that are biased, ill-informed, or misguided.

As described previously, and for the most part, the Waitangi Tribunal has played a somewhat secondary role with regard to the settlement of large, tribal based, land claims or settlements. As noted, the Tribunal (except in rare circumstances) can only make recommendations. Therefore, and in situations where the Tribunal has found a land claim to be valid, they typically refer the claimants toward direct negotiation. The benefits of this are that whatever outcome is agreed upon, these are in fact binding – unlike Tribunal recommendations. It is extremely difficult to provide an overview of the Treaty claims process and outcomes in that each claim is different and is often negotiated according to individual criteria. However, and in order to give an impression of this, there are a number of points that can be made.

The first has already been discussed and concerns the fact that most land settlements are negotiated between tribes and the Office of Treaty Settlements. There has been considerable debate with regard to the speed at which claims are settled. However, many claims consider issues that have been ongoing for generations, will be considered full and final, and reflect issues of fundamental importance to Māori – land. It therefore stands to reason that they must be debated in a considered way and in a manner that allows each tribe to describe the often devastating impact land loss has had. It should also be noted that with any negotiations there are a least two parties – settlement delays therefore are not solely due to Māori inaction but likewise reflect a reluctance by the Crown to negotiate on acceptable terms.

The second point I would like to make is that land in private ownership is almost never part of tribal settlements. In this regard it has been impossible for tribes to have returned what was initially taken. As a consequence, settlements are typically made up of returned Crown land plus compensation (monies) for lands taken but unable to be returned. Of some significance is the fact that this compensation is but a small percentage of what it would cost to purchase the alienated lands. Apart from monies and land, settlements often include an apology, co-management of certain sites, and sometimes (as in the case of Mt Taranaki and Aoraki) place-name changes.

The third point concerns the fact that these land settlements (or at least the compensation which is offered) are based on an established and finite fiscal framework. There is not an endless pool of money which is used to settle claims and in fact the amount the Crown is willing to spend on claims (in terms of compensation) is very limited. The formula or the exact numbers are not known, however, and again it is but a small fraction of what is required in order to be fair. To this end, the assessment of compensation has little to do with fairness or what is right – but determined by the Crown's own assessment of what is affordable and acceptable to the wider public. There is a real misconception that tribes are generously compensated for what are acknowledged as unfair, significant, and devastating land acquisitions – however, simple comparisons tend to suggest otherwise.

For example, the recently settled Ngati Awa claim extends back to 1866 and the confiscation of some 245,000 acres of tribal land. The first petition to the Crown (in order to have the land returned) was in 1867 and continued for the next 130 years and over five generations. During this time letters, petitions, and numerous delegations were sent to Wellington. The loss of land (as with most tribes) had a detrimental and long standing effect on Ngati Awa's social, economic, spiritual, and cultural position. The final settlement package took more than 20 years to negotiate and was probably the best that could have been agreed upon. However, it was still less than half of what

the Army will spend this year on new trucks. The two largest Treaty settlements (Tainui and Ngai Tahu) were significant for a number of reasons. However, and again placing them in perspective – both combined would be less than what was unexpectedly found last month for new roading projects. In 2003 a fairly significant claim was settled and again involved issues that had been ongoing for generations. Compensation however, was only slightly more than what a single individual won on first division lotto last month.

These simple examples are not designed to debate or relitigate the negotiations process, and as I mentioned these settlements were more than likely the best that could have been achieved. Nor for that matter are they used to question the need for military transport or roading development. The main point however, is that of perspective, and that while it appears that vast amounts of money are being given to tribes, this is not actually the case – at least when compared to other spending. The final point is that we unfortunately tend to focus on Treaty settlements and in order to itemise and fiscally account for the cost of each package. More balance is required I think and to also consider what was taken as compared to what was given back.

Conclusions

It has been somewhat difficult to describe more than 165 years of history within such a short presentation and to do so in a balanced and accurate way. I made the point earlier that some information can be worse than no information and if a balanced view is not provided – however, and while I have only touched on a range of issues, I hope at least these are accurate and kept in perspective. Given more time, I would have liked to have examined these issues in greater detail and to further explore Māori fishing claims, the environment, land transactions, social policy, and non-resource Treaty claims. Perhaps another time however.

At the beginning of this presentation (and throughout) I have made reference to the fact that there are many misconceptions associated with the Treaty and which have likewise lead to a degree of tension and conflict. I have therefore decided to select five major points of misunderstanding and to likewise offer them as a final summary.

The first point is that the Treaty was never designed to be an historical document or something that should be archived immediately following its signing. Fundamentally, it was a blueprint for development, a plan that would enable two cultures to live together in a sustainable and mutually beneficial way.

The second point is that Treaty issues, concerns, or conflicts, are largely associated with Treaty breaches. A consequence of broken promises - or at the very least an agreement that was not met in satisfactory manner.

As issues of race and ethnicity are increasingly applied as a platform for political gain the Treaty has subsequently been used as a preferred weapon of attack. It is somewhat disturbing to see the Treaty viewed or at least presented as a means through which Māori are in constant conflict with non-Māori and which has likewise lead to much unfavourable comment on Māori. However, perhaps the greatest Treaty misconception is the idea that Māori somehow blame non-Māori for Treaty related injustices and further that Māori protest are likewise directed at non-Māori. The third point therefore, concerns the misconception that the Treaty and Treaty related issues are somehow directed at non-Māori.

This is of course a view that many would have us believe and in order to further divide opinion. However, three significant events clearly highlight the fallacy of this. In this regard there have arguably been three major Māori protests which have served to highlight Māori concerns. They all had much in common – each were connected to land issues, and likewise concerned Māori rights under the Treaty, all three were widely critiqued within the media and similarly led to massive Māori protest. I am of course talking about the land march lead by Whina Cooper, Bastion point, and more recently the Foreshore and Seabed hikoi. The main issue of resonance however, consistent across all three, is the fact that they were all directed squarely at the Crown and not non-Māori. To this end, non-Māori have nothing to fear from the Treaty.

The fourth point concerns a frequently used phrase and that Māori have for too long been in grievance mode and that as a people we should move on. While there is certainly a need to look toward future development, we as a people are inseparable from our past and it is a fact that our current predicaments are in many ways linked to past injustices. In this regard, I don't think we have ever been in grievance mode – more correctly, and since 1840, we have simply been in justice mode.

The fifth and final point I would like to make is related to the sense of optimism I have with regard to the Treaty. This optimism has nothing to do with Treaty settlements or the resolution of Treaty claims, but is linked to something John Tamihere said on his radio programme a couple of weeks ago. I'm sure he will forgive me for not getting his statement absolutely correct, but he expressed some confidence that in the years to come, and as we mature as a nation, issues associated with race, ethnicity, and arguably the Treaty would become less challenging. In my opinion, maturity, appreciation, and acceptance are all linked to same thing – greater knowledge and improved understanding. To this end, I trust you have found this presentation informative and interesting, but most of all something which has allowed you to form your own opinions on the Treaty and in a balanced and considered way.