First come, first served?

Where to from here for the Treaty of Waitangi? asks **Bob Keall**

The Treaty of Waitangi established the formal terms of the relationship between New Zealand's Maori people and the British colonists. The Treaty was signed on 6th February 1840 and since has been the basis for mediating competing claims for land and natural resources between 'indigenous' groups and the country's European 'settlers'. In September 2008 the standing Waitangi Tribunal closed its doors to new historic claims. In November the country's general election brought in a new multi-party government with ministerial positions for the Maori Party. So, where now for Waitangi?

THE TREATY of Waitangi is regarded as New Zealand's founding document. Still, over the years since its signing, the Treaty has proven contentious. A permanent government commission—the Waitangi Tribunal—was established in 1975 to mediate competing claims over New Zealand's land and resources, so far as they relate to breaches of promise made in the Treaty. The Tribunal's work has been problematic. Many argue that the Treaty does not serve its function. Difficulties have arisen not least because the Treaty's Maori and English language versions differ greatly in their meanings: significantly, the British Crown claimed (in English) 'sovereignty', while the Maori ceded (in Maori) 'governance'. These different notions are key to any formulation of a future Waitangi.

In 1840, through the Treaty, the Maori engaged the British to govern or administer the country that they had occupied for a thousand years (see box). The Maori placed law and order foremost in their purposes: with the arrival of the settlers the country was descending into lawlessness. The Maori of 1840 were predominant among the islands' population—with 125,000 individuals, to only 2,000 Europeans.

Unsurprisingly the Maori presumed to retain sovereignty. In the treaty to which they put their names they in fact specifically retained possession or ownership of the land. It was the Maori language version of the Treaty that was signed both by the Maori chiefs and (for the Crown) by William Hobson, Consul & Lieutenant Governor. That version (here translated by Hon. Sir Apirana Ngata) ceded to the British Crown "the shadow of the land but the soil remained"—which is interpreted as 'governance'. But the official English translation of the Treaty from the time said something quite different, with the Maori to cede "all the rights and powers of sovereignty" over their territories. Critically it has been this English language version which has held sway among the authorities. What do its differences mean?

There are many inside and outside Parliament who understand the problem. What they cannot conceive, however, is how to address the implications of the problems that are inherent in the Treaty and its interpretation. These people attempt to settle with *koha* (the New Zealand Maori custom of gift-giving), and with token mollifications (apart from contractual settlements).

Other parties (who may also understand the issue), nevertheless persist in asserting the English translation. For 'translation'—or mis-translation—is what the English-language Treaty is. To assert the English language document is wrong in British law: the document signed and understood—the Maori version—is the one that takes precedence. The motivation for any persistence in doing otherwise has to be questioned.

Then there are others again who certainly understand the differences in the Treaty versions, but see the significance only when land or resources are sold to *overseas* interests—for example Auckland's publicly owned foreshore marinas. And many simply are unaware or uncaring of the differences, and legitimately ask: "So what? and where to from here? There is no way back!"

Generally the public is encouraged to think of the ownership of land and natural resources (and the gain therefrom) as unimportant. We are encouraged to think that far more important is the minutiae of infinite regulation that attempt to rectify the imbalance and disparity caused by, say, private rather than public ownership of things. We are encouraged to think that native concerns are misplaced. At the same time we vaunt the attraction of real estate investment, even to cult status.

The Treaty of Waitangi included an exclusive right of pre-emption providing for any alienation of land or resources to be to the Crown. Circumvention of that provision by confiscation or breach of contract, including non payment (being addressed by the Waitangi Tribunal), or private deals by both Maori and Pakeha (New Zealanders of European descent), is irrelevant to the status of the two parties to the Treaty. Their status remains unchanged and is the basis of the Maori claim to sovereignty. That sovereignty could not apply to authentically alienated land after the Governorship was ceded to the British.

With the passage of time, and with events and changes in population, the 'administrators' have become predominant and the majority; and the parties racially mixed, frequently more Pakeha than Maori. That the small part Maori child of mixed parents of this generation could somehow be more sovereignly *tangata whenua* (see box) than the equally indigenous non-Maori parent, is nearly as absurd as the conflict of interest within the child itself.

What incenses the descendants of the original *tangata whenua*—as well as others—is seeing 'their' natural resources privatised and sold off. Such things are seen as being not "in the full spirit and meaning" required of the deal to which their forefathers signed.

The Treaty of Waitangi was essentially a device for peaceful co-existence at that time: and for the British it provided a constitutional framework for the early colonial development of the country. But in a rapidly shrinking and changing world, the Treaty cannot possibly be considered a blueprint for all time. Nor, in justice, can any generation bind posterity irrevocably. Yet the Treaty of Waitangi, in spite of its doubtfully understood terms, is defended as immutable.

There seem to be three options now for the future of the Treaty— ratification, abrogation or renegotiation. The changes of time, population and circumstances make ratification impossible even if desirable. Recent affirmation and the acknowledgement of current Tribunal claims preclude abrogation now as an option for Pakeha: yet at the same time failure by Maori to recognise the laws of the land effectively repudiates the Treaty and releases the other party. So the only solution for the Treaty of Waitangi seems to be its renegotiation.

There is a unique way to satisfy the ongoing interest of the *tangata whenua*, both old and new. That way is the renegotiation of the Treaty enlightened by a full sense of environmental, economic and social justice. There must be two conditions to any renegotiation: that private enterprise must not include private ownership of the elements of life; and that free trade in land and resources must not include the freedom to 'invest' in owning others' natural resources that are rightfully their source of revenue.

All *de facto* present-day tenures of lands and resources must be secured by the obligation to periodically compensate the whole of New Zealand for the privilege received. So the unique solution to the problem of renegotiating the Treaty of Waitangi is to collect a market rental for all natural resources on behalf of all New Zealanders of all ethnicities—so we all are *tangata whenua*. Ownership in common now has to be recognised, and joint administration arranged accordingly, and the public collection of resource rentals for revenue does exactly that.

Such a renegotiation would be entirely consistent with Maori lore. It would also be consistent with British law as expressed in the original meaning of 'fee simple'—that is, a holding 'in fief' or on trust from the Crown (on behalf of the whole community) and on payment of the required fee or rent.

(That original and natural law was forgotten when the obligation was replaced by taxes on the serfs, and the baronial privilege was fragmented and sold as freehold title: yet successful governance and well established sovereignty are contingent on it.)

On the rediscovery of that law, and the reversal of that tort, depends the future of the Treaty of Waitangi, and the resolution of a current impasse. L&L

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The Maori and the populating of New Zealand

New Zealand is one of the world's most recently populated land masses. The Maori are the 'indigenous' Polynesian people of Aotearoa (New Zealand). It is thought people arrived on the islands—a final destination for a saga of island-hopping sea voyages—in several landings between about 800 and 1300. The settlers spread throughout the islands and developed their own distinct identity and culture.

The Maori use the term *tangata whenua* to describe themselves. The term means literally 'the people of the land'. By naming themselves in this way they can emphasise their relationship with a particular locality or with all New Zealand.

The islands seem to have come to the attention of Europeans first in 1645. But it was only after Captain Cook's first voyage of 1768-71—and his mapping of the coastline—that trading with the islands began in earnest. European settlement, from the early 19th century, was led by Christian missionaries.

But soon an increasingly lawless condition developed in the country. The Treaty of Waitangi and formal British colonial dominion sought to regularise the situation. The Treaty resulted in an influx of settlers, particularly from Britain. However the particulars of settlement and the acquisition of Maori land have always remained controversial.

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