LAWPUBL 422 Contemporary Tiriti Issues 2025

L Oh

Critically Analyse the Ngāi Tahu Settlement and Its Impact Using a Te Tiriti o Waitangi Analysis.

I Introduction

The Ngāi Tahu Claims Settlement Act 1998 is often regarded as an exemplar of the Crown's efforts to reconcile with Māori for historic Te Tiriti o Waitangi breaches.[1][2] However, critical scholarship has increasingly questioned whether such settlements truly restore *tino rangatiratanga* to iwi such as Ngāi Tahu, or merely reassert Crown sovereignty in a new form.[3] This essay uses Te Tiriti o Waitangi analysis to assess the Ngāi Tahu settlement, anchored in the Māori text of Te Tiriti and interpreted through tikanga Māori. In line with recent critiques from scholars such as Jane Kelsey[4] and Tiopira McDowell,[5] this essay argues that the Crown-constructed "Treaty principles" are an inappropriate basis for conducting Te Tiriti o Waitangi analysis of the treaty claim settlements process. Instead, it examines the extent to which the Ngāi Tahu settlement gives effect to the promises of Te Tiriti.

This essay follows the following structure. Part II explains the analytical framework (Te Tiriti & tikanga Māori) that this essay uses to analyse the Ngāi Tahu settlement. Part III describes the historical context of their claim (Te Kerēme) between 1840 and 1988. Part IV explains the treaty settlement process that is used for iwi claims. Part V conducts a critical evaluation by applying this essay's analytical framework to the Ngāi Tahu settlement.

II Analytical Framework: Te Tiriti & Tikanga Māori

---

[1] The Ngāi Tahu Claims Settlement Act 1998.

[2] "Ngāi Tahu settlement 'created a legacy that inspires us all': PM" Otago Daily Times (online ed, Queenstown, 7 February 2025) https://www.odt.co.nz/regions/queenstown/ng%C4%81i-tahu-settlement-%E2%80%98created-legacy-inspires-us-all%E2%80%99-pm.

[3] For example, see Tiopira McDowell, "Diverting the Sword of Damocles: Why Did the Crown Choose to Settle Māori Historical Treaty Claims?" (2018) 64(4) *Australian Journal of Politics and History* 592.

[4] "How the Treaty 'principles' evolved and why they don't stand up to scrutiny", The University of Auckland (https://www.auckland.ac.nz/en/news/2024/09/25/how-the-treaty--principles--evolved-and-why-they-don-t-stand-up-.html) (25 September 2024).

[5] Tiopira McDowell*, "Ngā Whakataunga Kerēme – Treaty Claims Settlements"* (lecture delivered at Māori 130/130G Te Ao Māori: The Māori World, University of Auckland, Auckland, 29 January 2025).

This essay adopts a Te Tiriti-centred analytical framework for analysing the Ngāi Tahu settlement and its impact. It deliberately rejects utilising the Crown-constructed "treaty principles" developed by way of legislation[6] and the courts[7] since the 1980s, as they arguably distort or redefine the original guarantees made in Te Tiriti and "maintain the status quo".[8]

The contingency of Crown-crafted principles is underscored by recent proposals, most prominently, the Treaty Principles Bill 2024.[9] This bill, which has since been voted down in Parliament,[10] sought to redefine what honouring Te Tiriti o Waitangi means for Aotearoa New Zealand through a Parliament-defined list of principles that omits tino rangatiratanga.[11] While the bill did not apply to the interpretation of a Treaty Settlement Act,[12] it is relevant here because it shows how readily the Crown can recalibrate its own interpretative yardstick, reinforcing this essay's choice to ground its analysis in the Māori text and tikanga Māori rather than politically pliable Crown principles.

Recent scholarship emphasises the critical distinction between the Māori and English texts of the Treaty. While some contemporary treaty scholarship has looked to reconcile the two versions of the Treaty,[13] substantial scholarship holds that the texts should be treated as two completely different documents.[14] As observed by Anne Salmond, these are "two very different documents, with divergent textual histories and political implications; and for that reason, it is a mistake to bracket them together".[15] Accordingly, this essay grounds its analysis in the Māori text of Te Tiriti.

---

[6] Treaty of Waitangi Act 1975, long title, preamble and s 6(1), where the phrase "principles of the Treaty of Waitangi" first appears in legislation.
[7] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA); (1987) 6 NZAR 353. This case marked the beginning of the common law development of the "principles" of the Treaty of Waitangi.
[8] "How the Treaty 'principles' evolved", above n 3.
[9] Treaty of Waitangi (Principles) Bill 2024 (94-1).
[10] "'Watch this space': Seymour on if voted down Treaty Principles Bill will return" RNZ (online ed, 10 April 2025) https://www.rnz.co.nz/news/political/557766/watch-this-space-seymour-on-if-voted-down-treaty-principles-bill-will-return.
[11] Treaty of Waitangi (Principles) Bill 2024 (94-1).
[12] Treaty of Waitangi (Principles) Bill 2024 (94-1) (explanatory note: General Policy Statement).
[13] Ned Fletcher, *The English Text of the Treaty of Waitangi* (Bridget Williams Books, 2022).
[14] See, for example, Ani Mikaere, *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) 73–86.
[15] Anne Salmond, *Brief of Evidence for the Waitangi Tribunal WAI 1040 Inquiry* (5 April 2010) at 1.

Crucially, the guarantees of Te Tiriti must be interpreted through the lens of tikanga Māori. Tikanga constituted the first law of Aotearoa and remains the authoritative system of norms and relational obligations that framed Māori expectations at the time of the signing of the Treaty.[16] As Justice Joe Williams articulated, concepts such as tino rangatiratanga, mana, taonga, and utu derive their meaning from within tikanga, not from English common law.[17] The Waitangi Tribunal has similarly recognised that tikanga conceptions of authority, relationship and reciprocity shaped the understandings underpinning Te Tiriti.[18] Without a tikanga-informed interpretation, the substantive guarantees of Te Tiriti risk being distorted through Crown-centric legal paradigms.

The Māori text of Te Tiriti o Waitangi contained the following key promises:[19]

- *The Preamble* established the agreement as an international agreement and a message of peace.
- *Article I* conferred kāwanatanga (the right to govern) on the Crown.
- *Article II* guaranteed Māori tino rangatiratanga (full authority) over their ‘wenua, kainga me o ratou taonga katoa’, while granting the Crown a right of pre-emption over land sales.
- *Article III* extended to Māori the Queen’s protection and rights of British subjects.

Crucially, Article II’s promise of tino rangatiratanga did not amount to a cession of sovereignty as conveyed in the English version of the Treaty. Instead, it affirmed the ongoing authority of Māori over their own affairs. These Articles must be interpreted through tikanga Māori concepts such as mana, whanaungatanga, utu and kaitiakitanga, which reflect the relational and restorative obligations inherent in the Treaty relationship.[20]

---

[16] Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 9.
[17] Justice Joseph Williams, *“Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law”* (2013) 21 Waikato Law Review 1 at 9.
[18] Waitangi Tribunal, *Te Paparahi o Te Raki (Wai 1040) Stage 1 Report* (Wai 1040, 2014–2015) at 19.
[19] Tracey Whare, *"Topic 1: Historical Context and the Texts of Te Tiriti o Waitangi and the Treaty of Waitangi"* (lecture delivered at LAWPUBL 422: Contemporary Te Tiriti/Treaty Issues, University of Auckland, Auckland, 7 March 2025), citing Te Tiriti o Waitangi 1840.
[20] *Te Paparahi o Te Raki Stage 1 Report*, above n 18, at 2 and 22.

The standard against which the Ngāi Tahu settlement must be assessed is therefore whether it restored the iwi's tino rangatiratanga and fulfilled the relational obligations imposed by Te Tiriti, rather than whether it complied with later Crown-derived treaty princinples.

III The Historical Context: Te Kerēme 1840-1988

This section of the essay explains the historical context of the Ngāi Tahu settlement claim.[21] The Ngāi Tahu claims settlement must be situated within the broader context of Te Kēreme, the iwi's long-standing pursuit of redress for the Crown breaches of Te Tiriti o Waitangi.

In 1840, seven high-ranking Ngāi Tahu Rangatira chiefs signed Te Tiriti, anticipating that it would establish a relationship of convenience between equals. However, between 1844 and 1863, the Crown entered a series of ten major land purchase agreements with Ngāi Tahu, acquiring approximately 34.5 million acres under formal contracts, which is equivalent to about 80% of Te Waipounamu (the South Island).

The Crown failed to perform critical obligations under these agreements. In particular, it did not reserve one-tenth of the land for Ngāi Tahu as promised, nor did it establish schools and hospitals. In addition, the iwi was systematically deprived of access to mahinga kai (traditional food gathering areas) and wahi tapu (sacred areas) such as urupā (burial sites).

Ngāi Tahu lodged its first formal claim against the Crown in 1849, initiating a legal and political struggle that would persist for over a century. The injustice was compounded by the gross inadequacy of the consideration paid by the Crown: 34.5 million acres were acquired for £14,750, leaving the iwi with only 35,757 acres of land.

The Waitangi Tribunal later characterised the Crown's conduct as "unconscionable" in repeated breach of the Te Tiriti o Waitangi guarantees.[22]

IV The Treaty Settlement Process: The Crown Framework

[21] All information in Part III–V of this essay is sourced from "Claim History", Ngāi Tahu (https://ngaitahu.iwi.nz/ngai-tahu/creation-stories/the-settlement/claim-history/), unless otherwise stated.
[22] Waitangi Tribunal, *Ngāi Tahu Report 1991* (Wai 27, 1991) at [2.2.1].

Treaty claims settlements are negotiated between the Office of Treaty Settlements on behalf of the Crown and Iwi. The negotiated settlements are then turned into Deeds of Settlement, which are then passed through Parliament and implemented as settlement legislation. The Treaty claims settlements can be summarised into five elements:[23]

1. A Crown-authored historical account
2. Formal acknowledgements of Treaty breaches
3. An apology from the Crown
4. Financial and commercial redress
5. Cultural redress

As of May 2024, over 3000 claims have been registered with the Waitangi Tribunal.[24] However, the Crown has pursued direct negotiations with iwi, culminating in 118 settlements.[25] Only 86 settlements have been passed into law,[26] with the Crown aiming to settle the remainder in due course.[27] As of January 2023, it is estimated that the total value of finalised settlements is $2.6 billion.[28] In isolation, this figure seems substantial. However, this total value of Treaty settlements would only cover two months of superannuation payments.[29] The Ngāi Tahu Claims Settlement followed the Crown standardised Treaty settlement framework, which reflected the structural dynamics and constraints applied across all treaty settlements during this period.

V Critical Evaluation of the Ngāi Tahu Settlement

The Ngāi Tahu Claims Settlement Act 1998 was intended to resolve historical breaches of Te Tiriti o Waitangi. However, significant deficiencies become evident when measured against the framework of tino rangatiratanga and tikanga Māori values of mana, whanaungatanga, utu and kaitiakitanga. Although it delivered symbolic and material redress, this section concludes that it did not restore the constitutional relationship envisaged by Te Tiriti.

---

[23] McDowell, *"Ngā Whakataunga Kerēme – Treaty Claims Settlements"*, above n 5.
[24] Waitangi Tribunal *Annual Report 2023–24* (Waitangi Tribunal, Wellington, 2024) at 11.
[25] McDowell, *"Ngā Whakataunga Kerēme – Treaty Claims Settlements"*, above n 5.
[26] Te Ara – The Encyclopedia of New Zealand "What are Treaty settlements and why are they needed?" (Ministry for Culture and Heritage, 2018) https://teara.govt.nz/en/te-tai/about-treaty-settlements.
[27] McDowell, *"Ngā Whakataunga Kerēme – Treaty Claims Settlements"*, above n 5.
[28] Te Ara, above n 27.
[29] Te Ara, above n 27.

A A Colonial Foundation of the Settlement Process

The broader Treaty settlement process has been described as a continuation of colonial power structures under the guise of reconciliation. Margaret Kawharu notes that the process "entrenches norms and behaviours that comply with the institutional framework of the Crown, yet does not offer comparable power and resources to the settling group to effect major change to those legislative and bureaucratic institutions."[30] Despite the rhetoric about repairing the Treaty relationship, the Crown has retained complete control over all settlements' structure, content and legal effect.

This concern is reinforced by a review of Cabinet minutes, which show that the Crown's private motivations in establishing the Treaty settlement process in the 1990s included limiting fiscal liability, reasserting parliamentary sovereignty and avoiding the risks posed by Waitangi Tribunal findings in the wake of the *Lands* case.[31][32] Māori strongly opposed the proposed "fiscal envelope" policy, expressing widespread rejection at nationwide hui and asserting that any redress should restore tino rangatiratanga, not merely offer compensation.[33] The Crown ignored these responses and proceeded with the current settlement regime.[34]

This origin in Crown-dominated priorities undermines the authenticity of the Treaty settlement process and calls into question whether any settlement reached under it can and will satisfy Te Tiriti obligations. The Ngāi Tahu settlement exemplifies this dynamic because while it provided financial redress and formal recognition, it was ultimately framed and constrained by the Crown's political imperatives, leaving foundational questions of authority and tino rangatiratanga unaddressed.

B Tino Rangatiratanga & The Question of Authority

---

[30] Victoria University of Wellington, "The Unsettledness of Treaty Settlements" (12 December 2024) https://www.wgtn.ac.nz/news/2024/12/the-unsettledness-of-treaty-settlements.
[31] Tiopira McDowell, "Treaty Settlements and the Politics of Recognition" (2020) 9(2) MAI Journal 93 at 598, citing Cabinet Strategy Committee (CSC) Memorandum *Ten Year Programme of Settling Māori Treaty Claims*, no identifier, undated (handwritten: 12 August 1992).
[32] McDowell, above n 29, at 598.
[33] McDowell, above n 29, at 600.
[34] McDowell, above n 29, at 601.

The guarantee of tino rangatiratanga in Article II of Te Tiriti required the Crown to affirm and protect Ngāi Tahu's independent authority over their lands, resources and decision-making process'. Instead, the settlement process was shaped by a Crown-driven negotiation framework that embedded Crown sovereignty as the unquestioned foundation of the settlement.

Ngāi Tahu was required to accept a "full and final" settlement through the settlement process, foreclosing any future claims regardless of evolving circumstances or Crown conduct. Section 5(1)-(2) of the Ngāi Tahu Claims Settlement Act 1998 explicitly declares that the settlement is "final" and intended to settle all historical claims of Ngāi Tahu against the Crown.[35] This statutory finality is fundamentally inconsistent with tikanga values of relational reciprocity and whanaungatanga (ongoing negotiation), and with the continuing obligations inherent in Te Tiriti. The settlement entrenched the Crown's control over the Treaty relationship by treating redress as a one-off extinguishment rather than an evolving duty.

Furthermore, although Ngāi Tahu regained ownership over specific cultural sites and received a financial settlement, the overarching political and legal authority structures remained firmly within the Crown's jurisdiction. True tino rangatiratanga envisages more than just ownership of property, but active and independent decision-making over taonga. In this sense, the settlement constituted a recognition of past wrongs, not a restoration of Ngāi Tahu's Te Tiriti guaranteed authority.

C Cultural Redress & the Incomplete Restoration of Katiakitanga

Cultural redress formed a key part of the Ngāi Tahu deed of settlement, involving the return of wāhi tapu, the provision of statutory acknowledgements over culturally significant sites and bespoke management arrangements such as Department of Conservation protocols. On a basic level, these measures acknowledge Ngāi Tahu's enduring connection to the land and waters of Te Waipounamu.

However, the cultural redress mechanisms typically fall short of restoring decision-making authority. Statutory acknowledgement under subpart 6 of Part 12 of the Act recognises Ngāi Tahu's association with specified sites but does not confer legal ownership or exclusive

[35] Ngāi Tahu Claims Settlement Act 1998, ss 5(1)–(2).

management control.[36] Similarly, the protocols established under this settlement require Crown agencies such as the Department of Conservation to consult with Ngāi Tahu. Still, the ultimate decision-making power remains with the Crown.[37] From a tikanga Māori perspective, particularly under the concept of kaitiakitanga, authority to protect and manage taonga must be exercised actively by the iwi themselves, not merely acknowledged in statute.

The return of Aoraki (Mt Cook) as a cultural symbol, followed by its immediate gift-back to the Crown, provides a poignant example.[38] Although deeply significant, the arrangement served more as a symbolic gesture of reconciliation than a restoration of autonomous authority. In this respect, cultural redress under the settlement partially recognised Ngāi Tahu's mana but ultimately preserved the Crown's jurisdiction over taonga katoa.

D Financial Redress & the Failure to Restore Balance (Utu)

The concept of utu in tikanga Māori requires addressing wrongs to restore balance and relational harmony between the parties.[39] In the case of Ngāi Tahu, the financial redress of $170 million must be assessed against the scale of the grievance. More specifically, the wrongful acquisition of approximately 34.5 million acres of land.

The financial redress quantum was based on the Deed of Settlement negotiated between the parties and given legislative effect through the Act. While the Act contains a Crown apology (as required),[40] and provides economic redress, this does not match the value of economic losses to Ngāi Tahu (estimated at over $20 billion),[41] nor the enduring consequences of Ngāi Tahu's dispossession.[42] Although the iwi has since developed a robust and diversified commercial base, this success arguably reflects the strategic acumen of Ngāi Tahu leadership rather than an adequate restoration provided by the Crown.[43] McDowell cautions that focusing on a few high-profile "successful" settlements risks reinforcing a narrative of closure and

[36] Ngāi Tahu Claims Settlement Act 1998, subpt 6 of pt 12.
[37] Ngāi Tahu Claims Settlement Act 1998, subpt 6 of pt 12.
[38] Te Rūnanga o Ngāi Tahu "Aoraki" (undated) https://ngaitahu.iwi.nz/ngai-tahu/creation-stories/the-settlement/settlement-offer/aoraki/.
[39] *Te Paparahi o Te Raki Stage 1 Report*, above n 18, at 25.
[40] Ngāi Tahu Claims Settlement Act 1998, ss 5–6.
[41] Te Rūnanga o Ngāi Tahu, "Economic Security – Settlement Offer" (1998) https://ngaitahu.iwi.nz/ngai-tahu/creation-stories/the-settlement/settlement-offer/economic-security/.
[42] Te Rūnanga o Ngāi Tahu, above n 41.
[43] Te Rūnanga o Ngāi Tahu, *Annual Report 2023–2024* (November 2024).

progress, while obscuring the structural inequities that persist and the reality that most settlements have failed to impact material inequality.[44]

Through a tikanga Māori lens, utu requires more than a nominal financial payment and demands restoring dignity, balance and reciprocal respect.[45] A settlement that leaves the aggrieved party to rebuild from a position of structural disadvantage, without complete restoration of lost taonga or relational authority, arguably does not fulfil the obligations of Te Tiriti.

III Conclusion

While the Ngāi Tahu settlement represents one of the largest and most celebrated Treaty settlements to date, it must be understood as a product of a Crown-defined framework that inherently limits the restoration of tino rangatiratanga under Article II of Te Tiriti. While the settlement provided some economic redress and symbolic recognition of historical grievances, it did not transfer authority, restructure power, or create a co-constitutional future.

The settlement process was crafted in response to the Crown's fear of undetermined legal liability, fiscal risk and loss of control. It was rejected by Māori at its inception and remains fundamentally shaped by colonial logic. It delivers what Kawharu labelled "unsettledness", in other words, redress that acknowledges harm but entrenches inequality.

From a Te Tiriti and tikanga Māori perspective, the settlement cannot be seen as the "full and final" restoration of Ngāi Tahu's rights, but only a partial recognition framed within the Crown's constitutional supremacy. Any future realisation of Te Tiriti obligations must involve restructuring of the Treaty relationship, not only through recognition, but through the return of power and restoration of authority.

---

[44] McDowell, *"Ngā Whakataunga Kerēme – Treaty Claims Settlements"*, above n 5.
[45] *Te Paparahi o Te Raki Stage 1 Report*, above n 18, at 25.