Anne Salmond, “Ideasroom, 2 & 4 November 2023.

What Anne Salmond Wrote

Why a referendum on Te Tiriti will backfire

A referendum on Te Tiriti o Waitangi would be corrosive and unfair, writes Dame Anne Salmond, but there is room for an inquiry into recent interpretations of the treaty

When the Treaty of Waitangi was signed at Waitangi in 1840 and elsewhere around the country, it was the Māori text that was discussed and signed almost everywhere.

The English text of the Treaty that was read out at Waitangi and elsewhere for the benefit of non-Māori speaking European officials and settlers is significant, but it is Te Tiriti o Waitangi that carries the moko marks and signatures of the various rangatira, and those who signed on behalf of Queen Victoria.

Ever since the English text of Te Tiriti was sent to Goveror Gipps in New South Wales and certified by the British missionary Henry Williams ‘as literal a translation of the Treaty of Waitangi as the idiom of the language will admit of,’ however, it is the English text that has often been cited as the official version of the Treaty of Waitangi.

Much of the scholarship, and official and legal commentaries on Te Tiriti have also been provided by scholars, officials and lawyers who are unable to read Te Tiriti o Waitangi in the original. Inevitably, like the English text of the Treaty itself, these draw upon British (or European) rather than ancestral Māori understandings.

The original gap between the understandings of the English officials who drew up the English draft of the Treaty of Waitangi, and those of the rangatira who debated and signed Te Tiriti o Waitangi in te reo was difficult to bridge, as Henry Williams and his son Edward found when they translated the English draft into Māori.

This led to fundamental differences in meaning between the English text of the Treaty and Te Tiriti o Waitangi itself, the document that was debated and signed around the country in 1840, and as interpreted since.

These fundamental differences were recognised from the beginning, hence the many ‘back translations’ of Te Tiriti into English, which do their best to capture its meaning as the rangatira understood it at the time, in an effort to clarify the promises that were exchanged with Queen Victoria and her representatives in 1840, and ratified with their signatures or moko marks.

According to the ‘contra proferentem’ rule (Latin: ‘against the offeror’; or ‘interpretation against the draftsman’) in interpreting contracts (including treaties), if an agreement is ambiguous, the preferred legal meaning is ‘the one that acts against the interests of the party who provided the wording.’

In the case of Te Tiriti o Waitangi, those who wrote the English draft of the Treaty and those who translated it into Te Tiriti did so on behalf of the British Crown. In that case, where its meaning is ambiguous, the preferred legal interpretation should be ‘one that acts against the interests of the party who provided the wording,’ while leaning towards those of the rangatira who signed Te Tiriti on behalf of their hapū, and their descendants.

There is no chance of a referendum on ‘the principles of the Treaty’ achieving this kind of outcome. First, like so many who have interpreted Te Tiriti in the past, most of those who would vote on the question would be unable to read Te Tiriti o Waitangi in the original. Their understandings of its ‘principles’ would inevitably be shaped by non-Māori understandings of Te Tiriti, and its translations into English, thus breaching the ‘contra proferentem’ rule.

Second, any referendum on ‘the principles of the Treaty’ would be initiated, framed and conducted by the Crown. That would give it a privilege and power in relation to the interests of the descendants of the rangatira who signed Te Tiriti that also violates the ‘contra proferentem’ doctrine.

Third, a referendum at a time when the descendants of the rangatira who signed Te Tiriti are a relatively small minority in the wider population would give them relatively little say in the matter. To marginalise their interests in this way would be another breach of the 'contra proferentem' rule. For these reasons, the idea of putting the 'principles of the Treaty' to a popular vote is unjust and unwise, and should not be entertained by any responsible government.

That being said, there are questions that can be fairly asked about more recent official interpretations of the Treaty.

These include the Treaty of Waitangi Act 1975, in which the government of the day defined the Treaty as a bi-lateral agreement 'between Her late Majesty Queen Victoria and the Maori people of New Zealand.' It added that in making appointments to the Waitangi Tribunal, 'the Minister of Maori Affairs shall have regard to the partnership between the two parties to the Treaty.'

This bi-lateral, 'two party' reading of the Treaty was taken further in the 1987 Lands Case, in which the judges of the Court of Appeal described Te Tiriti as a 'partnership between two races,' or between 'Maori and Pakeha' or 'the Crown and the Maori race.' Here, the colonial idea of 'race,' with its origins in social evolutionary theory and scientific racism, was imported into the translation. This is unfortunate, given the lack of scientific validity of this imperial concept and its association with slavery and other atrocities. It has fostered increasingly racialised readings of Te Tiriti, at a time when whakapapa lines in New Zealand are increasingly entangled.

In Te Tiriti itself, however, the relationships between Queen Victoria and the various rangatira who signed the Treaty and their hapū and 'nga tangata maori o Nu Tirani' (the indigenous inhabitants of New Zealand) and the settlers are clearly multilateral, not bilateral – a network of relations (as in whakapapa, for instance), not a bi-racial split.

In Ture (Article) 1 of Te Tiriti, the rangatira give to the Queen of England absolutely and forever all the kawanatanga of their lands. As the Preamble explains, this gave her permission to send a Kawana or Governor to New Zealand as a mediator ('hei kai wakarite,' lit. one who makes things equal) to the indigenous persons of New Zealand ('ki nga tangata maori o Nu Tirani'), to bring laws, peace and tranquil living to all parts of the country ('ki nga wahikatoa o te wenua nei me nga motu'), where many members of her iwi were already living, or would be arriving.

Kāwanatanga thus involves a multilateral network of relations among the Queen, the Kāwana or Governor, the indigenous inhabitants of New Zealand and the incoming settlers. It was not purely a matter for the settlers, as is sometimes claimed. Nor was it a cession of sovereignty, although it did give the right to govern.

In Ture 2, the Queen agrees with the rangatira ('chiefs'), the hapu ('tribes') and 'nga tangata katoa o Nu Tirani' (all the persons of New Zealand) to the tino rangatiratanga of their lands, dwelling places and all of their taonga.

This upholds the mana of each rangatira, hapū and person in relation to their ancestral territories and taonga or treasures – again, a complex network of relationships with each other as well as the Queen. This reading echoes findings in Wai 2358, a recent inquiry into the parties to Te Tiriti in relation to RMA appointments.

Likewise in Ture 3, the Queen promises to care for 'nga tangata maori o Nu Tirani' (the normal, everyday, indigenous inhabitants of New Zealand) and gives to them 'nga tikanga katoa rite tahi' (all the tikanga – right ways of doing things - absolutely equal) to her subjects, 'nga tangata o Ingarani' (the inhabitants of England). Again, this is a network of relationships, with many different players.

In English, there is only one definite article (the), while in te reo there are two, singular (te) and plural (ngā). To define 'nga tangata maori' in the plural as 'the Maori people' in the singular, as in the 1975 Treaty of Waitangi Act, or 'the Maori race' in the 1987 Lands Case, is a translation error. This grammatical difference – at least in part - allows an interpretive slippage into a reading of Te Tiriti as a 'partnership between two races.'

Clearly, however, the Queen's promise of absolute equality in Ture 3 was given to 'tangata' in the plural, as persons or individuals, and their tikanga, not to two different 'races,' and this is also

unambiguous in the English draft of Article 3. Here, at least, there is no confusion between the two texts.
Nor is there any mention of 'race,' or anything like it, in Te Tiriti o Waitangi. It seems that the bi-racial reading of Te Tiriti in the 1987 Lands case was mistaken.
Questions like these about Te Tiriti are worth debating, since they bear on the compatibility between the promises that were exchanged in 1840, and a democratic society. At the same time, we must bear in mind that almost as soon as they were made, those promises were radically dishonoured.
For all of these reasons, a referendum on 'the principles of the Treaty,' given its populist appeal to the majority and its inflammatory potential, is not the right (tika) way to conduct this kind of discussion. It would be unjust and divisive, inciting extreme views in all directions and fostering misinformation, anger and ill-will.
Rather, this should be a mana-enhancing exercise that strengthens rather than divides the nation. If it wishes to clarify the meaning of Te Tiriti, rather than a referendum, the incoming government would be wise to think about a new kind of inquiry, one based on a spirit of equality among all the parties, and mutual respect.
This would be in keeping with Queen Victoria's promises to the rangatira, hapū, indigenous persons and settlers and their descendants, kia ora ai te iwi – so we can live together, and thrive.

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Bruce Moon's Response

Anne Salmond again! Bruce Moon

In "Ideasroom" for 2nd and 4th November 2023, Anne Salmond discusses and rejects the idea which has been mooted of a referendum on the Treaty of Waitangi. With that conclusion we agree, the Treaty having served its purpose in May 1840 when Hobson declared British sovereignty over all the islands of New Zealand. Nothing constructive would be served by such a move – but we find much at fault in her reasoning.

It is undoubtedly true that at Waitangi and elsewhere where the Treaty was signed by Maori chiefs, with possible rare exceptions, both the actual treaty wording in the Ngapuhi dialect and the text of Hobson's final English version were read out publicly. Certainly this was the case at Waitangi on 5th February where no evidence was recorded of any difference in their meaning.i Salmond's claim that there are "fundamental differences in meaning between the English text of the Treaty and Te Tiriti o Waitangi itself" is false, and her referral to the "contra proferentem" rule inapplicable.

Just what was Hobson's final version is an issue that "Establishment historians" skate around today, since it upsets so many of their pretty little theories and speculations but with its provenance substantiated by the weight of evidence, the precise contemporary meaning of words in the actual Treaty, i.e. the Maori text, become established beyond doubt and many spurious arguments about it may be dismissed forever.

That final version is the document tabbed in recent times the "Littlewood Treaty", a gross misnomer since their is no contemporary evidence linking it to the Littlewood family, but solely to a descendant amongst whose relics it was found by chance in 1989, having been mislaid for many a decade. Written by Busby to Hobson's dictation at the home of American Consul, Clendon, it agrees precisely in essence with the version sent to the American Secretary of State by Clendon in his capacity as American Consul in his despatch No.6 of 20th February adjusted by references to subsequent events.ii

Both documents are written on paper from Clendon's private stock with a watermark "W Tucker 1833" not used by officialdom, some microfilm copies in the University of Auckland Library being carefully scrutinised by Martin Doutré and Brendon Harrison.iii

The so-called "Littlewood Treaty" being in fact Hobson's final text in English is correctly dated 4th February as one would expect and here is the "kicker".iv The very significant word "maori" probably intended to be in lower case, its contemporary meaning being "ordinary", was included by the Williams in Article Third of the actual treaty to specify the "native" people on whom the rights and privileges of British subjects were to be confirmed.v The word "maori" is <u>not</u> present in Hobson's English text: more solid evidence that it **preceded** the drafting of the actual treaty in the Ngapuhi dialect and is correctly dated 4th February.vi

Moreover, when in 2000, senior Ngapuhi elder, Graham Rankin, was shown the so-called "Littlewood treaty" by Allan Titfordvii, he commented immediately that its meaning was exactly the same as that of the actual Treaty in his own Maori dialect. In other words, Salmond's claim of "fundamental differences" is false and her discussion of the "contra proferendum" rule inapplicable.

We say unequivocally that the so-called "Littlewood treaty" is Hobson's text of 4th February 1840, and that the Williams, father and son, both fluent speakers of the Ngapuhi dialect of the native languageviii translated it competently to create the actual treaty document. In the words of Henry himself: "I certify that the above is as literal a translation of the Treaty of Waitangi as the Idiom of the Language will admit of."

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<u>AND SO TO THE PRESENT DAY</u>

The vital significance of the facts thus established is that all subsequent attempts to translate the Treaty of Waitangi or discuss the meaning of its wording are **redundant at best** and because of their potential to twist the treaty's actual meaning, in many cases, positively harmful.ix

One such example which is particularly damaging is the translation of the late Sir Hugh Kawharu since it is that used today by Cabinet. Kawharu, for example, did not employ the word "sovereignty", using instead "complete government", and he grossly distorts the meaning of the word "taonga", giving an alleged modern meaningx vastly different from its meaning immediately prior to 1840 of "nothing but timber, flax, pork and potatoes"xi - two of which we note that they owe to the wicked colonials!!

There is of course a multitude of other treaty-twisters today, too numerous to identify here. Typically they slip an alleged Maori word, often derived from English origins, into a document otherwise in plain English.xii All too frequent is the insert of "kawanatanga", the Williams' translation of "sovereignty"xiii to imply "governorship" something rather less..xiv

"Kawanatanga" is utterly obviously <u>derived</u> from a maorification of "governor" with a Maori suffix equivalent to +-ship", but its <u>meaning</u> is "sovereignty". Derivation is <u>not</u> the same as translation and many examples may be quoted.xv

In any case,

(i) the Governor was the Queen's representative and upholder of law and order and all things British
(ii) as their recorded words at Waitangi show beyond possibility of doubt, the chiefs at Waitangi understood that by signing the Treaty they would become subordinate to the Governor
(iii) "governor" was a known word to Maori.

And so to look in some detail at Salmond's latest effort.

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We agree with her of course that nothing is to be gained by a referendum on the Treaty at this late stage in history though her reasons undoubtedly differ from our own.

The Treaty of Waitangi, though not a treaty in the strict sense of the word,xvi was an honourable agreement between men of goodwill on both sides.xvii

But Salmond's claim that there are "fundamental differences in meaning between the English text of the Treaty and Te Tiriti o Waitangi itself" is false and indeed mischievous. We have Graham Rankin's word for that as well as the implicit agreement of those at Waitangi on that fateful day.

In essence what the Treaty said was that the chiefs ceded such sovereignty as each possessed unequivocally to the Queen, all Maoris (their many slaves included!) became entitled to the same rights as the people of England and the property rights of all the people of New Zealand (tangata katoa o Nu Tirani) were confirmed. This was remarkably generous and enlightened for its day. Note however hat it did not imply any additional rights, residual or otherwise, for any person of part-Maori descent, however attenuated by breeding.

She is also gravely at fault in referring to Maoris as "the indigenous inhabitants of New Zealand". We know within reasonable accuracy when, whence and how they got here.xviii They are disqualified as "indigenous" on all counts! They slaughtered most of the people who preceded them, even into historic times, very few truly indigenous people surviving to the present day.xix

We note that, in common with many other commentators of her ilk, from time to time she slips into a text essentially in English, a presumed word Maori, "kawanatanga" being a favourite!

Thus. In Salmond's words: "In Ture (Article) 1 of Te Tiriti, the rangatira give to the Queen of England absolutely and forever all the kawanatanga of their lands. As the Preamble explains, this gave her permission to send a Kawana or Governor to New Zealand as a mediator ('hei kai wakarite,' lit. one who makes things equal) to the indigenous persons of New Zealand ('ki nga tangata maori o Nu Tirani') ... Nor was kawanatanga a cession of sovereignty"

WELL, FANCY THAT!! Note the common trick of slipping in the alleged Maori word, "kawanatanga" where the real word is "sovereignty". And fancy a bunch of petty chiefs giving the most powerful sovereign on earth "permission" to send a Governor here. And note her fake, but common claim that Maoris are indigenous in her flagrant mistranslation of 'nga tangata maori o Nu Tirani". And her blithe assertion that there was no cession of sovereignty!

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It must be accepted *prima facie* that this person who was once "New Zealander of the Year" was not mischievous and that something she wrote was a not deliberate deviation from the truth. It must nevertheless be a matter of profound concern that such a person would peddle the litany of falsehoods and fake history as those which are revealed in Salmond's article.

Bruce Moon, Nelson 7 November 2023

Extract from Salmond's article below is for easy reference but not to be included in my critique.

In Ture (Article) 1 of Te Tiriti, the rangatira give to the Queen of England absolutely and forever all the kawanatanga of their lands. As the Preamble explains, this gave her permission to send a Kawana or Governor to New Zealand as a mediator ('hei kai wakarite,' lit. one who makes things

equal) to the indigenous persons of New Zealand (‘ki nga tangata maori o Nu Tirani’), to bring laws, peace and tranquil living to all parts of the country (‘ki nga wahikatoa o te wenua nei me nga motu’), where many members of her iwi were already living, or would be arriving. Kāwanatanga thus involves a multilateral network of relations among the Queen, the Kāwana or Governor, the indigenous inhabitants of New Zealand and the incoming settlers. It was not purely a matter for the settlers, as is sometimes claimed. Nor was it a cession of sovereignty, although it did give the right to govern.

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[i]The proceedings at Waitangi carefully minuted by Colenso and checked at the time by Busby.(Reference available)

[ii]See M.Doutré, “The Littlewood Treaty ... Found”, De Danaan Publishers, 2005, ISBN 0-437-10140-8, p.85

[iii]M. Doutré, private communication, 14 May 2023

[iv]“Informal North American term: an unexpected and unwelcome discovery or turn of events.” (Oxford) An observation by Doutré.

[v]Existing resident British subjects had those rights already and it was not desired to confer them gratuitously on foreigners – French, Spanish and American!

[vi]This insight may again be attributed to Doutré

[vii]Currently serving a lengthy prison term for what many people consider a gross miscarriage of justice. (We do not pursue this topic further in this essay.)

[viii]Edward was a scholar “facile princeps” in the Ngapuhi dialect in the judgment of his brother-in law, Hugh Carleton.

[ix]With due respect to the official translation of 1869 by T.E.Young of the Native Department

[x]“all dimensions of a tribal group’s estate, material and non-material – heirlooms and wahi tapu (sacred places), ancestral lore and whakapapa (genealogies) etc.”

[xi]Letter from 13 Ngapuhi chiefs to King William, 16 November 1831

[xii]A gross example is the “Treaty of Waitangi Act 1975” whose repeal by the incoming government must be considered an urgent necessity.

[xiii] Actually “sovreignty”, Busby’s egregious spelling mistake which need not concern us since it is well-established that minor drafting errors do not invalidate the substance of a document.

[xiv]At a seminar in Nelson in October 2022, Graeme Ball, charged with introducing the Labour Government’s revised history into schools, drew a diagram on his blackboard quite falsely showing the governor and chiefs as having equal status under the Queen. (I attended in person, BM)

[xv]B.Moon, “NEW ZEALAND The Fair Colony”, 2nd ed,, August 2020, pp.68ff , ISBN 978-0-473-53728-9

[xvi]“Treaty: a contract between states”, Shorter OED, 1954, p. 2354. There was no Maori “state”.

[xvii]About a dozen women, Maoris of high rank, are said to be amongst those who signed it.

[xviii]We even know the names of the vessels they arrived in!!

[xix]Ngati Hotu may well be some such. “DNA to rock the nation”, elocal Mini Book Series, 2016,ISBN 978-0-473-38851-6