February 2023

THE NEW ZEALAND MĀORI "VOICE" TO PARLIAMENT AND WHAT WE CAN EXPECT FOR AUSTRALIA

John Storey, Research Fellow

Institute of Public Affairs

Contents

Executive Summary

Prime Minister Anthony Albanese has said he wants to follow the lead of New Zealand on reconciliation by implementing the Uluru Statement from the Heart. On 6 February 2020, he posted the following statement to Twitter:

> We can learn a lot from our mates across the ditch about reconciliation with First Nations people.
>
> New Zealand has led the way. It's time for Australia to follow.
>
> It's time to support the Uluru Statement from the Heart.

Indeed, Australia can learn a lot from New Zealand and its equivalent to Australia's proposed Indigenous-only Voice to Parliament—the Waitangi Tribunal. This research paper explores the practical consequences of following New Zealand's lead, through an extensive analysis of major Waitangi Tribunal decisions over recent decades.

In short, the decisions made in that time have been a smorgasbord of social justice activism, the results of which have been to divide New Zealanders by race. The research finds that the Voice, if it follows the precedent established through decades of Waitangi Tribunal cases, will suffer from serious flaws. The Waitangi Tribunal shows:

- the scope of the Voice will expand greatly over time;
- the Voice will possess a veto over certain legislation;
- the Voice will engage in divisive racial politics; and
- the Voice will create new types of Indigenous rights, which means extra rights for one group of Australians based on their race.

The analysis of the cases demonstrates that the implementation of these principles leads to significant practical consequences. Examples of these practical consequences include:

1. The Māori Voice to Parliament has driven policies which compromise community safety, through race-based policing which is soft on violent crime.

The Waitangi Tribunal has blamed the high incarceration and reoffending rate amongst Māori on the New Zealand government, and on policing and enforcement leading to disproportionate outcomes. The effect of the Tribunal's demand in its *Report on the Crown and Disproportionate Reoffending Rates 2017* for the Crown to meet fixed targets for the reduction of reoffending, and that these targets be different between Māori and non-Māori, can only be met by refusing to incarcerate violent convicted criminals.

2. The Māori Voice to Parliament has demanded preferential access to critical government resources for Māori, which has put race ahead of need.

The Waitangi Tribunal has a track record of using its power to advise the parliament in order to demand that critical government resources, such as health care resources, are distributed on the basis of the race of the recipient, and not who needs those resources most. The decision in the *Covid-19 Priority Report* that vaccines should have been

allocated based on race and not the age of recipients (on the basis that Māori are statistically younger than non-Māori New Zealanders), despite the elderly being most vulnerable to Covid-19, resulted in a change to government policy to prioritise Māori. The decision in *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* led to the creation of a Māori-only health system, with over a billion dollars in extra health and other funding.

3. The Māori Voice to Parliament has threatened the rights of New Zealanders to use and enjoy national cultural symbols.

The Waitangi Tribunal's approach to intellectual property rules undermines western legal norms which has the effect of restricting how New Zealanders are able to use and enjoy common national symbols, including depictions and use of the famous Haka, Māori tattoo art, Māori statues and famous historical Māori figures. In the *Report into Claims affecting Māori Culture and Identity 2011* the Tribunal recommended the government change the law to give Māori a near monopoly over certain symbols and native flora and fauna, to prevent 'offensive' usage. A similar outcome in Australia could mean the use of iconic Australian symbols like kangaroos, emus, Uluru/Ayers Rock or boomerangs would be limited to only Indigenous Australians, or that Indigenous Australians would have to approve of the use of such symbols. Even items common to Australian households, like tea towels with a depiction of Uluru/Ayers Rock, or boomerang fridge magnets, would become problematic, and it might even put in doubt the ongoing use of Australia's coat of arms and the southern cross depicted in the national flag.

4. The Māori Voice to Parliament decided that Māori's will have an explicit veto power over certain legislation, and that there are some laws that only Māori can even suggest reforms to.

The Waitangi Tribunal has conferred on Māori complainants an explicit formal veto power over a range of legislative matters that affect Māori (*Report on Claims about the Reform of Te Ture Whenua Māori Act 1993-2016*). This has meant that even laws intended to better manage competing Māori interests in Māori land, and the powers of the Māori Land Court, are now off-limits. The Tribunal has even held in its *Report on the Māori Community Development Act Claims* that reforms to certain existing legislation can only be proposed or initiated by Māori, rather than parliament. In Australia, this would be the equivalent to requiring Indigenous consent to amend existing native title laws or national parks legislation and preventing the Commonwealth parliament from even initiating amendments.

5. The Māori Voice to Parliament has an almost limitless scope in relation to issues it can be involved in.

The scope of the Waitangi Tribunal has expanded from its initial narrow focus on land issues, to being involved in nearly every aspect of New Zealand law, from pandemic policy (*The Covid-19 Priority Report 2021*) to the negotiation and interpretation of international treaties (*Report on the Trans-Pacific Partnership 2016*). In effect, any matter in which Māori can complain of a breach of the Treaty of Waitangi will be heard by the Waitangi Tribunal.

What is the Waitangi Tribunal?

The Waitangi Tribunal was established in 1975 by statute to investigate breaches of the Treaty of Waitangi, the agreement between the British Crown and Māori people entered into in 1840. Under the *Treaty of Waitangi Act 1975*, the Waitangi Tribunal can 'inquire into and make recommendations upon, in accordance with the Act, any claim submitted to the Tribunal.'[1] Thus, as is ostensibly claimed in respect to the Voice to Parliament, the Tribunal was only intended to have an advisory function, and its conclusions would be non-binding.

The Treaty of Waitangi is a short document, constituting only three clauses, and the English version of the agreement is relatively simple. Much of the confusion and controversy arises from potential mismatches between the Māori and English translations of the Treaty. In summary, the English translation provides that the Māori people will cede sovereignty over their territories to the British Crown (Article 1), that Māori people will be allowed the right to retain possession and use of their land (Article 2), and the protection of the Crown and the rights and privileges of British subjects will be extended to the Māori people (Article 3).

In 1986 the New Zealand Parliament passed laws that would involve the transfer of public land to various statutory corporations. A claim was made to the Waitangi Tribunal that this breached the Treaty of Waitangi as it would interfere with the interests that Māori groups had in some of the land concerned. The Tribunal found in favour of the claimants and the matter came before New Zealand's highest court to determine the meaning of the Treaty. The court held in *New Zealand Māori Council v Attorney-General* (the "Lands Case") that there were various "principles" that could be discerned from the 'spirit' of the Treaty of Waitangi that were binding on the New Zealand government. One of these principles was the 'right to redress'. President of the Court of Appeal Robin Cooke held that 'If the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it – which would be only in very special circumstances, if ever.'[2]

In a Research Paper published by the Institute of Public Affairs in December 2022, *The Voice to Parliament – An Analysis of the New Zealand Experience and Australia's History of Judicial Activism*, the IPA undertook a legal analysis of the Voice to Parliament and made comparisons to the New Zealand experience of race based constitutional governance. The research found:

1. New Zealand's Waitangi Tribunal started out purely as an advisory body, but liberal interpretations of its role and the legal status of the Treaty of Waitangi by New Zealand's courts have meant that its decisions hold legal authority and the ability to influence or change government policy;

1 *Treaty of Waitangi Act 1975* (NZ) s 5(1)(a).

2 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

2. The same process by which this happened in New Zealand, in conjunction with Australia's history of judicial activism in respect to constitutional interpretation, means that the constitutional role of the Voice to Parliament will similarly be given a broad interpretation, and thus it will have an effective veto over Commonwealth legislation and key government decisions;
3. The manner in which the Voice is currently proposed to operate will ensure its capture by activists and political elites that will use the veto power of the Voice to push a divisive racial agenda.

What was intended to be a purely advisory body became, via some judicial contortions in interpreting a nineteenth century colonial agreement, a binding quasi-judicial authority. It is true that the Tribunal cannot dictate the exact form any redress offered by government must take, but the moral authority granted to the Tribunal by the Lands Case has, in the view of some scholars, accorded the Waitangi Tribunal the status of 'the second most important institution in the country, ranking only behind parliament itself.'[3] This is the precise trajectory many fear will take place in respect to the Voice to Parliament. The purpose of this research report is to analyse the key cases and decisions of the Waitangi Tribunal to determine whether the concerns about the Voice to Parliament are borne out in the New Zealand experience.

3 Andrew Sharp, *Justice and the Māori: Māori Claims in New Zealand Political Arguments in the 1980s* (Oxford University Press, 1990).

Concerns with the Voice to Parliament

The Uluru Statement from the Heart, the official statement provided by the Referendum Council after its convention on Indigenous constitutional recognition in May 2017, called for 'the establishment of a First Nations Voice enshrined in the Constitution.'[4] In his address to the 2022 Garma Festival, Prime Minster Anthony Albanese provided proposed wording to be added to the constitution via a referendum to implement this change. This included that the proposed Voice 'may make representations to Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander Peoples.'[5]

A number of concerns have been made regarding this concept (and the list of objections continues to grow). One concern is over the scope of the Voice, given it has the power to make representations in respect to 'matters relating to Aboriginal and Torres Strait Islander Peoples.' As has been said by Indigenous business leader and advocate Nyunggai Warren Mundine, 'The word [matters] means "everything". Indigenous Australians are Australian citizens. There is no law, regulation or policy, nor any act or decision of the Federal government or parliament, that doesn't relate to Aboriginal or Torres Strait Islander people.'[6] This might mean that the Voice can be involved in any and all items of Commonwealth legislation and government decision making, not simply matters of traditional Indigenous concern, such as land rights, cultural heritage, and housing and health policies in remote Indigenous communities.

If the Voice can involve itself in any legislation, this puts into stark relief one of the key concerns over the Voice: whether it will have a real or de facto veto over Commonwealth legislation. Such a veto might be a binding legal veto, should the High Court give an expansive meaning to the ability to make 'representations' and to the role and powers of the Voice. Or it could be a political or moral veto. In the words of Anthony Albanese 'it would be a very brave government' who ignored a representation put forward by the Voice.[7] Any government which went against the preferences of the Voice would be susceptible to allegations it was acting immorally. As Morgan Begg of the Institute of Public Affairs has written in the research essay *One Voice: Racial Equality in the Australian Constitution:*

> The power of the Voice would be its ability to pressure elected politicians into agreeing with its advice, or risk being seen to oppose the official opinion representing Indigenous Australians. The threat of being labelled akin to a racist would be a powerful incentive to heed the advice of the Voice.[8]

4 Uluru Statement from the Heart (National Constitutional Convention, 26 May 2017), <https://ulurustatemdev.wpengine.com/wp-content/uploads/2022/01/UluruStatementfromtheHeartPLAINTEXT.pdf>.

5 Anthony Albanese, 'Address to Garma Festival' (Speech delivered at the 2022 Garma Festival, East Arnhem Land, 31 July 2022).

6 Nyunggai Warren Mundine AO, 'The Indigenous Voice Does Not Speak For Country' in Peter Kurti and Warren Mundine, *Beyond Belief: Rethinking the Voice to Parliament* (Connor Court Publishing, 2022) 78.

7 Interview with Anthony Albanese, (David Speers, ABC News, 31 July 2022)

8 Morgan Begg, *One Voice: Racial Equality in the Australian Constitution* (Forthcoming, 2022) 16.

Former Senator Amanda Stoker has made a similar point. If the government 'were penalised politically for divergence with [the Voice's] findings, the effect will be identical to a veto.'[9]

Such a veto, whether strictly legal or merely moral, might be used to frustrate the passage of legislation, or wielded in order to extract concessions as a quid pro quo for the passage of legislation. Seeking input from the Voice, and for the Voice to make representations, will add an extra layer of bureaucracy and slow the already tortuous process for passing legislation. Whatever procedures become adopted to allow the Voice to make representations (whether provided in the eventual design of the Voice to be established by statute, or granted by the High Court) will further grind the gears of Commonwealth law making.[10]

A third concern is that the Voice will be captured by activists to push radical racial policies. This will mean more politics based on group identity at the expense of individual rights and responsibility, further promotion of the concepts of "equity", which judges fairness on the basis of whether outcomes are proportional between racial groups rather than on merit.

Finally, there is a concern as to whether the Voice could be used as a means to create new rights, a vehicle for asserting further Indigenous claims to land, over and above existing native title, or other rights. This might pose issues of sovereign risk, where, as Amanda Stoker again notes, 'The net effect would be to make Australia less desirable as a place to invest ... to make fewer the jobs, particularly in the mining sector, on which so many Indigenous communities depend.'[11]

There are other concerns with the Voice, such as the lack of detail to be provided before a referendum vote, preferential treatment by business and government of the "Yes" campaign, and how much the Voice will cost and how its members will be elected or appointed. However, these issues are beyond the scope of this paper.

Given some of the similarities between the Voice and the role of the Waitangi Tribunal (both ostensibly advisory bodies, both targeted at Indigenous grievances and concerns, both having a degree of constitutional power, however vague and ill-defined) then the decisions and recommendations made over the past few decades by the Waitangi Tribunal might shed some light on whether these concerns about the Voice are well-founded.

9 Amanda Stoker, 'Head Over Heart: The Legal, Democratic and Practical Problems Raised by the Uluru Statement' in Peter Kurti and Warren Mundine, *Beyond Belief: Rethinking the Voice to Parliament* (Connor Court Publishing, 2022) 97.

10 Morgan Begg, *One Voice: Racial Equality in the Australian Constitution* (Forthcoming 2022) 17.

11 Stoker, above n 9, 98.

The Waitangi Tribunal shows the scope of the Voice will expand over time

Article 2 of the Treaty of Waitangi largely deals with land rights, granting Māori 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.' Article 3 extends the 'Rights and Privileges' of being a British subject to all Māori people, so in theory grants no special rights that any other citizen of New Zealand might not enjoy and be able to enforce through the usual legal processes. Thus, land rights are the only special category of rights expressly granted by the Treaty. Accordingly, many of the decisions of the Waitangi Tribunal do deal with land rights, but the remit of the Tribunal has moved far beyond that sphere. The Tribunal has been involved in everything from COVID-19 health policy to the negotiation and interpretation of international treaties, with one behemoth of a case seemingly touching on all aspects of New Zealand politics, law and culture.

In Wai (that is "case") 2575[12] (the COVID-19 case) a grievance was lodged with the Tribunal in respect to the New Zealand government's COVID-19 vaccine rollout. Due to the scarcity of the vaccine, they were rationed and those over 65 years of age given priority. However, as Māori are on average younger than non-Māori New Zealanders, this was alleged to be in breach of the principles of the Treaty of Waitangi. The Tribunal agreed. In particular, it took issue with the government's rejection of health department advice that recommended the age limit be adjusted for Māori: 'Cabinet's decision to reject advice from its own officials to adopt an age adjustment for Māori in the age-based vaccine rollout breached the Treaty principles of active protection and equity.'[13] Thus health policy affecting all New Zealanders during a global pandemic, and the methods by which cabinet make decisions, are not matters beyond the purview of the Waitangi Tribunal. Its decision resulted in policy change to better reflect this call for 'equity'. By the time the decision was made the issue of vaccine scarcity for adults was largely irrelevant. However, in respect to the provision of vaccines to children, and access to COVID-19 testing, the government decided that Māori would get priority.[14]

Clearly the Treaty of Waitangi contains no such explicit requirement upon the New Zealand government to engage in 'active protection' or to promote 'equity'. Indeed, these concepts bring with them the notion that certain New Zealand citizens require special treatment, which would seem contrary to Article 3 of the Waitangi Treaty which involves treating Māori the same as all other Crown subjects, not as a special

12 Waitangi Tribunal, *Haumaru: The COVID-19 Priority Report* (Wai 2575, 2021).

13 Ibid, xvii.

14 Maxine Jacobs, 'Work under way to prioritise Māori children in paediatric vaccine roll-out, Waitangi Tribunal hears', *Stuff*, (online, 10 December, 2021) <https://www.stuff.co.nz/pou-tiaki/300474965/work-under-way-to-prioritise-mori-children-in-paediatric-vaccine-rollout-waitangi-tribunal-hears>.

class requiring special protection. Nonetheless, the 'principles' of the Treaty have been progressively interpreted to mean that any racial discrepancy in any field is a potential breach of the Treaty, and thus within the purview of the Tribunal. This has allowed the Tribunal to involve itself in almost any matter.

It is difficult to conceive of anything less likely to have been contemplated by the drafters to fall within the ambit of the Treaty of Waitangi, or less specifically relevant to Māori people (as distinct to having universal relevance to all New Zealanders) than the terms of a multi-nation trade agreement. But this is precisely what occurred when the Tribunal involved itself in a dispute concerning a free trade agreement to which New Zealand was a signatory. In Wai 2522[15] (the Trans-Pacific Partnership case) claims were made that New Zealand's entry into the Trans-Pacific Partnership Agreement (TPPA) might be a breach of the Treaty of Waitangi. Part of the TPPA The TPPA involved removing privileges that benefit local benefits at the expense of competitors from other signatory countries. Māori groups argued the privileges they enjoy would be at risk, such as special rights to access pharmaceutical medicines, and special intellectual property rights.

However, the TPPA already had a clause specifically protecting Māori privileges. Clause 29.6 of the TPPA states that 'nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.' But the Māori claimants asserted the TPPA would undermine New Zealand's sovereignty and thus potentially interfere with Māori rights of redress from the New Zealand government.

The Tribunal ultimately accepted that the exception in the TPPA for protecting Māori was sufficient, but was critical of the negotiation process adopted by the New Zealand government and its lack of consultation with Māori. The government changed its policies regarding international treaties to include Māori in future trade negotiations.[16] In a similar vein, the Commonwealth has created the role of Ambassador for First Nations People to 'lead the Government's efforts to embed Indigenous perspectives, experiences and interests across the Department and develop a First Nations Foreign Policy Strategy.'[17] If the Commonwealth government already considers a special Indigenous perspective is necessary to help fulfil Australia's international objectives, it is inconceivable that the Voice to Parliament will consider foreign policy beyond its jurisdiction.

It is not just the negotiation and entry into international agreements that the Waitangi Tribunal has considered, but the actual interpretation and enforcement of

15 Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, (Wai 2522, 2016), *The Report on the Crown's Review of the Plant Variety Rights Regime* (Wai 2522, 2020)

16 Moana Maniapoto, 'Artists have been using Māori images for all types of business deals', *The New Zealand Herald*, (online, 3 August 2022) <https://www.nzherald.co.nz/kahu/artists-have-been-using-maori-images-for-all-types-of-business-deals/SS6VDK6ISDGIQY5UFXFHUEW56A/>.

17 Department of Foreign Affairs and Trade (Cth), 'Expression of interest for the role of Ambassador for First Nations People', (21 September 2022) <https://www.dfat.gov.au/international-relations/themes/indigenous-peoples/expression-interest-role-ambassador-first-nations-people>.

international law. In Wai 2417[18] the Tribunal held that proposed amendments to the *Māori Community Development Act 1962* would be a breach of the United Nations Declaration on the Rights of Indigenous People. Given the UN declaration was made 167 years after the Treaty of Waitangi was signed, it is reasonable to question whether a body set up to advise on breaches of the Treaty ought to pass judgement on whether New Zealand is complying with this international instrument.

In Wai 262[19] (the Māori Culture and Identity case) a drawn-out, far-reaching review of nearly all aspects of New Zealand's laws and culture was performed by the Tribunal. The review involved no less than twenty government departments and recommendations as to reforms of 'laws, policies or practices relating to health, education, science, intellectual property, indigenous flora and fauna, resource management, conservation, the Māori language, arts and culture, heritage, and the involvement of Māori in the development of New Zealand's positions on international instruments affecting indigenous rights.'

Arguments that representations limited to 'matters relating to Aboriginal and Torres Strait Islander Peoples' is no limit at all, and that the Voice may involve itself in any or all legislation, government programs, or international agreements, is fully borne out by the experience of the Waitangi Tribunal. There is no piece of legislation beyond its purview, no policies it cannot influence, no aspect of New Zealand culture free from its gaze, and no international borders demarcating what might or might not constitute a breach of the Treaty of Waitangi. This should be of particular concern where expansive scope is combined with an effective veto power over legislation and government policy.

18 Waitangi Tribunal, *Whaia te Mana Motuhake / In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim,* (Wai 2417, 2015).

19 Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity,* (Wai 262, 2011).

The Waitangi Tribunal shows the Voice will possess a veto over certain legislation

The Waitangi Tribunal has been effective at blocking or delaying legislation and other government policies. This is regardless of whether doing so is consistent with the usual democratic process or the overall will of the New Zealand people. It has also been creative in establishing new ways to veto laws.

In Wai 2478[20] (the Māori Land Act case) the claimants took issue with government proposals to reform legislation governing the administration of certain Māori land. The laws almost exclusively concerned Māori affairs, and as such the Tribunal held that attempting to amend the laws without Māori consent was a breach of the Treaty of Waitangi:

> In terms of Treaty standards, we agreed with the claimants that the *'free, full and informed consent' of Māori* is required when a legislative change substantially affects or even controls a matter squarely under their authority... We found that the Crown will be in breach of Treaty principles *if it does not ensure that there is properly informed, broad-based support* for Te Ture Whenua Māori Bill to proceed. Māori landowners, and Māori whānau, hapū, and iwi generally, will be prejudiced if the 1993 Act is repealed *against their wishes.*"[21] [emphasis added]

So in effect, at least in respect to a certain category of laws that directly affect Māori land, Māori groups have a veto over government legislation, and legislative changes are only possible with their consent. The proposed changes were subsequently withdrawn, and the reforms abandoned. There could scarcely be a more fundamental infringement of parliamentary sovereignty than an unelected blocking laws that are supported by the majority of members of parliament.

In Wai 2417 (the Māori Community Development Act case referred to above), the Tribunal went even further and held that, in respect to a piece of legislation important to Māori, any attempts to reform it must be initiated by Māori. The claimants had argued that 'the process for the reform of that Act should be self-determining and *not Government-led*. It is therefore for *Māori to propose and Government to respond*.'[22] [emphasis add] The Tribunal dutifully agreed, holding that any reform to the Act be Māori-led. Thus, a mere desire to reform legislation was a breach of the Treaty, if initiated by parliament and not Māori.

It is not difficult to foresee that a similar focus on procedure will be the primary method by which the Voice to Parliament might overturn legislation or government policy, if minded to do so. If the views of the Voice were not sought by the government of the day, or if insufficient time were given before passing legislation, this might be fertile

20 Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Maori Act 1993*, (Wai 2478, 2016).

21 Ibid, 262.

22 Ibid, 383-384.

ground for striking down legislation. How could the Voice exercise its constitutional right to make "representations" if it is not given the time or opportunity to do so?

Even when unsuccessful, such legal challenges cause inordinate delay and cost. Wai 2358[23] (the Freshwater and Geothermal Resources case) involved government attempts to privatise state owned hydro and geothermal assets. The claimants asserted that privatisation would interfere with Māori water rights, and the Tribunal agreed calling for an immediate halt to the proposed sale of assets. The matter proceeded to court where it was ultimately found that the sale of assets could proceed, but not until after lengthy and costly delays.

Such delays are almost inevitable when adding an extra layer of bureaucratic oversight of government functions. Although the Waitangi Tribunal does not follow the strict rules of evidence and procedure of a court, the longer it has been entrenched into the New Zealand legal architecture, the more that lawyers and experts have taken over and the more bureaucratic it has become:

> Tribunal's mode of inquiring into cases is formal and judicialised... claimant counsel make opening and closing submissions, reading from elaborate written texts which bulge with legal citations and arguments. Much of the evidence is given by experts ... who read from or speak to elaborate written reports... cross-examination of witnesses by counsel is now standard practice. The cross-examination can be elaborate and lengthy, and can include challenges to the qualifications and expertise of the witness. Claims are tightly structured into claimant and Crown hearings and are concluded by the presentation of lengthy closing submissions by counsel. In short there is nothing about the conduct of the hearings which any lawyer would find especially baffling or unfamiliar. Furthermore the issues in some claims have become very complex and intractable, including such recondite matters as the geophysical nature of geothermal fields or the intentions of the Colonial Office with respect to land acquisitions by settlers on the imperial frontiers in the 1830s. One can only wonder what the claimants make of some of the increasingly esoteric and complex issues, comprehensible only to specialists, which occupy increasing amounts of the Tribunal's time.[24]

The ability to hold up crucial national mining, infrastructure and energy projects, veto legislation or frustrate the implementation of government policy not only threatens the prosperity of the country, but is a powerful tool for extracting concessions. If the Voice can hold up projects or legislation, whether by refusing to give its approval, exercising whatever veto powers it might attain, or simply by engaging in lawfare intended to cause delay, it might become more expedient for government to simply buy it off or grant other concessions to secure its support, such as acquiescing to modern racial politics.

---

23 Waitangi Tribunal, *The Report on the National Freshwater and Geothermal Resources Claim,* (Wai 2358, 2012).

24 Richard P Boast, 'The Waitangi Tribunal: 'Conscience of the Nation', or Just Another Court.' (1993) 16 *UNSW Law Journal* 234-235.

The Waitangi Tribunal shows the Voice will engage in divisive racial politics

Modern race activists have moved away from the Martin Luther King Jr conception of the civil rights movement—that men should be judged by the content of their character, not the colour of their skin—to a focus almost exclusively on skin colour. Social justice or 'equity' is achieved when outcomes (whether in terms of prosperity, income, employment, health, educational attainment, incarceration rates and much more) are proportionally equal between racial groups. If there are disparate outcomes between groups, then this is evidence of systemic racism and must be rectified by state intervention such as affirmative action policies, 'antiracism', reparations, or other legal preferences for some groups (at the expense of others).

Such ideas are controversial, highly divisive, and inconsistent with a liberal-democratic system of government subject to the rule of law. As author Douglas Murray has put it:

> If the problem in everything is racism and the answer to everything is to disrupt the racist system, it appears to produce only two verifiable outcomes: a lowering of standards in the name of antiracism and a rise in the need for racist policies in order to deal with a problem that is always said to be racism.[25]

Opportunities, positions and advancement are granted based on skin colour not abilities. Laws and rights must be administered differently between racial groups and punishments dispensed based on group identity rather than personal behaviour and individual choices.

The Waitangi Tribunal has been a powerful force for seeing such policies implemented in New Zealand. In its recent decision of the New Zealand health system Wai 2575[26] (the Māori Health Services case), the Tribunal was effusive about the virtues of racial equity, stating that 'a stand-alone commitment to achieving health equity should not be controversial. Achieving health equity should be among the ultimate purposes of any just health system.'[27] The claim that the concept of equity should not be controversial reveals a naivety among the Tribunal members, as the concept of equal outcomes creates perverse incentives. Health equity can be achieved as readily by lowering the health outcomes for non-Māori as improving the outcomes for Māori.

In Wai 2575 (the COVID-19 case referred to above), the Tribunal considered vaccine policies not on the basis of its effectiveness on the population as a whole, but on its impact on Māori as a group. It was argued that if Māori are statistically younger, then accommodations must be made for this. In the case of the allocation of a scarce medical resource, that means some older New Zealanders would be denied or

25 Douglas Murray, *The War on the West – How to Prevail in the Age of Unreason*. (Harper Collins, 2022), 201.

26 Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*, (Wai 2575, 2019)

27 Ibid, 194.

delayed access, thus leaving some in the most vulnerable age bracket exposed to a deadly virus.

The Tribunal's advocacy for racial equity has also had an impact on the application of criminal laws and prison policy, an area in which the fair application of the law is crucial given the stakes (community safety and the individual liberty of citizens) and where the legitimacy of the state can readily be undermined if applied unjustly. Wai 2540[28] (the Disproportionate Reoffending case) considered incarceration and reoffending rates in New Zealand. Māori make up 15 per cent of the New Zealand population but about 50 per cent of the prison population. Within two years of being released, 63.2 per cent of Māori and 49.2 per cent non-Māori return to prison. After five years the rates are 80.9 per cent and 49.5 per cent respectively.[29] The Waitangi Tribunal found that the failure to adequately address the disproportionate rate of Māori reoffending was a breach of the Treaty.

The Tribunal's answer to this was 'Treaty-awareness training' within the criminal justice system, as 'Treaty-based thinking in Crown Departments cannot be based on a fragmentary, ad hoc approach.' More funding was naturally needed so that the Justice Department could have a 'Māori-specific budget'. The Tribunal also ambiguously called for the *Corrections Act 2004* to be reformed, to 'state the Crown's relevant Treaty obligations to Māori'.[30] Most alarming was the recommendation that future 'targets' be set to reduce Māori reoffending: 'Measurable targets to reduce Māori reoffending must be included in any new strategic vision in order to hold the Department to account.' It was not sufficient to promote measures that aim to bring down the total rate of incarceration. There must be 'separate Māori targets.'[31] That is, the rate of reoffending must come down faster for Māori than non-Māori, to close the discrepancy. Arguments that this was infeasible because there were to many factors beyond the Crown's control were dismissed.

The parlance of compulsory 'awareness' training and fixed incarceration 'targets' is the language of a central state planning bureaucracy. It is reasonably foreseeable that a government department, once it received its 'Treaty-based thinking' training and became aware that it would be held 'accountable' for missing its targets, would be well motivated to ensure there was a fall in Māori reoffending rates. The Tribunal report reads as if Māori reoffending is the sole blame of the Crown, and that Māori individuals have no responsibility. But if the blame for Māori reoffending and incarceration rates generally is placed primarily on government, and targets are set to reduce it, then the only solution would be preferential treatment to Māori as a group compared to non-Māori New Zealanders. This is not only a fundamental infringement on the rule of law, but potentially dangerous.

28 Waitangi Tribunal, *Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017).

29 Ibid, 8.

30 Ibid, 67.

31 Ibid, 66.

Māori are 37 per cent of the people arrested by police in New Zealand, 45 per cent of people convicted, and 52 per cent of New Zealand prisoners.[32] Activists would no doubt claim this was evidence of a racist criminal justice system, but the government's own statistics show that Māori are particularly over-represented in violent offences:

> In 2006, nearly three times as many Māori were likely to be apprehended for robbery offences than NZ Europeans, and more Māori were likely to be apprehended for homicide, kidnapping and abduction, and grievous and serious assaults. More NZ Europeans than Māori were likely to be apprehended for minor assaults, intimidation and threats and group assemblies.[33]

Further, in the Disproportionate Reoffending case, the Tribunal was presented with evidence that the high reoffending rate for Māori was influenced by a high rate of Māori participation in violent gang activity.[34] Thus, one of the reasons for high Māori reoffending and incarceration rates is higher rates of violent and serious offenses amongst that group. Thus, a blind focus on outcomes, simply reducing group discrepancies in reoffending or incarceration rates, will not just involve being unfairly lenient on Māori compared to non-Māori New Zealanders that commit the same crimes, but being disproportionately lenient on the most dangerous and violent offenders. The Tribunal's preferred solution of setting rigid quotas for reducing reoffending, based almost exclusively on outcomes and not causes, could put community safety at risk.

The reasonably rapid descent of the Waitangi Tribunal into the thinking of modern racial politics is evidenced by the more reasoned approach to a similar issue just 12 years earlier. In Wai 1024[35] (the Parole case) the Tribunal considered New Zealand's parole system and found that while it was not in breach of the Treaty. It stated the rate of Māori incarceration was unacceptable but noted the issues were complex. 'In short, there are no simple answers.'[36]

Such sentiments have even had an impact on New Zealand's electoral system. Because of the higher Māori incarceration rate, Māori as a group are disproportionately affected by laws that prevent incarcerated prisoners from voting. In Wai 2870[37] (the Māori Prisoner Rights case) the Tribunal considered legislation passed in 2010 that prohibited all prisoners from voting in general elections. The claimants alleged this breached the Treaty of Waitangi by being unfairly discriminatory on Māori as they made up 51 per cent of the prison population at that time: 'By failing to ensure that potential consequences for Māori were recognised and taken into account ... the Crown has failed in its duty to actively protect the right of Māori to equitably

32 Ministry of Justice (New Zealand), 'Key Initiatives; Hāpaitia te Oranga Tangata', (16 July 2021) <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/hapaitia-te-oranga-tangata/>

33 Ministry of Justice (New Zealand), 'Strategic Policy Brief: Māori Over-representation in the Criminal Justice System', (March 2009), <https://www.beehive.govt.nz/sites/default/files/Strategic_Policy_Brief_Maori_over-rep_1.pdf>.

34 Waitangi Tribunal, *Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017). Page 31.

35 Waitangi Tribunal, *The Offender Assessment Policies Report*, (Wai 1024 2005).

36 Ibid, 153.

37 Waitangi Tribunal, *He Aha I Pera Ai? Māori Prisoners' voting rights*, (Wai 2870, 2019).

participate in the electoral process and to exercise their tino rangatiratanga[38] individually and collectively.'[39] In response to the report, the government amended the electoral laws so that any prisoner serving less than three years jail time may vote.

The question from a public policy perspective should be what is fair for all prisoners or potential future prisoners, and what is in the best interests of the community as a whole, when it comes to electoral rights. What universal principles should apply to such decisions? If it is just and fair that a prisoner forfeits their right to vote (at least during their time of incarceration) then, in effect, this moral standard was lowered to improve the electoral participation of one racial group.

There is little doubt that such sentiments could find a fertile home in Australia. In Victoria the state government has recently abolished laws that allow police to arrest people a person for public drunkenness, without replacing the laws with any "move along" laws or other rules to protect the public.[40] Most people affected by the laws are drunk white males, but 30 to 40 Aboriginal people a month continue to be arrested in the state for being drunk in public, which is disproportionate compared to the state population as a whole. So the standards must be lowered to be "equitable", to the endangerment of all Victorians.

In *Roach v Electoral Commissioner*, the High Court of Australia ruled that laws preventing all prisoners from voting (whereas the previous law only prevented those serving sentences of greater than three years) were unconstitutional.[41] It held that the restrictions on voting infringed on the principled implied in sections 7 and 24 of the Constitution, which require Senators and Members of the House of Representatives to be 'chosen by the people'. In other words, it is unconstitutional to ban voting for a prisoner serving less than three years, but not if they are serving more than three years, none of which of course is set out anywhere in the Constitution. The claimant in that case was an Aboriginal woman who was intoxicated when robbing a milk bar and driving the getaway car whilst being pursued by police. She struck another car stopped at a traffic light causing extensive injuries to the 21-year-old driver.

It appears likely the Voice to Parliament is situated to be a forum for promoting theories that will lower overall community standards or preference certain groups in the enforcement of criminal laws, regardless of the individual behaviour. The Uluru Statement from the Heart, perhaps to be seen in the future as the founding document for the Voice, devotes an entire paragraph of the one-page statement to the need for criminal law reform:

38 Broadly meaning "political control by Māori people over Māori affairs." As with many official New Zealand legal documents, and certainly anything dealing with Māori issues, Tribunal reports are sprinkled with Māori words and phrases that are frequently undefined and often used interchangeably with English terms with subtle but important differences in meaning.

39 Waitangi Tribunal (n 33) 33.

40 Benita Kolovos and Adeshola Ore, 'Victoria to end public drunkenness laws with no new arrest powers for police', *The Guardian*, (online, 17 January 2023), <https://www.theguardian.com/australia-news/2023/jan/17/victoria-ignores-police-calls-for-offence-to-replace-public-drunkenness#:~:text=The%20government%20on%20Tuesday%20confirmed,is%20decriminalised%20in%20November%202023>.

41 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

> Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

Addressing these issues should be a priority. However, the arguments based in 'equity' focus on outcomes, not the causes. Thus, a constitutionally enshrined body set up to promote equity is likely to make matters worse.

Similarly problematic ideas promoted by activists include concepts of shared sovereignty between Indigenous and non-Indigenous groups within a single nation. In New Zealand this is today called 'co-governance'; in Australia, prominent Indigenous academic and public intellectual Dr Anthony Dillon calls it 'separatism'.[42] It is based partly on concepts of equity, in that Indigenous people should get a proportionate (or greater) role in key government decision making, but is fundamentally founded on a denial that such groups ever ceded sovereignty over their land in the first place, and as such sharing sovereignty today is a means to redress that. These ideas have, or are intended to be, implemented by giving control over certain parts of the country exclusively to Indigenous people, creating specific institutions (such as hospitals or schools) controlled exclusively by Indigenous people to exclusively service Indigenous people, joint and equal control of various government decisions or departments between Indigenous and non-Indigenous people, and compulsory Indigenous representation on government agencies, panels, and other decision-making bodies.

It is clearly destructive of national unity to have shared sovereignty within a single polity, and creates an 'us and them' mentality. As Dillon notes:

> Not only is separatism founded on the mistruth that Aboriginal people are fundamentally different from non-Aboriginal people, but the separatist paradigm runs the risk of generating differences that don't exist. This can happen as people who identify as Aboriginal suddenly start behaving in ways or adopt attitudes that validate their claim of Aboriginality (for example, declaring, "I'm upset by Australia Day" or "I need a culturally safe space"). We observe this behaviour, and then the government and organisations rush to generate policies in response – the Voice for example.[43]

Co-governance is well advanced in New Zealand, with substantial landholdings governed by Māori, public services being provided by Māori organisation, and Māori representation on government decision making agencies, often with an equal say to non-Māori New Zealanders. This two-countries-in-one approach New Zealand finds itself in would be almost inconceivable without the Waitangi Tribunal.

---

42 Anthony Dillon, 'The Voice: Self-Determination or Separatism?' in Peter Kurti and Warren Mundine, *Beyond Belief: Rethinking the Voice to Parliament* (Connor Court Publishing, 2022) 13-27.

43 Ibid, 20.

In a seminal Tribunal case, Wai 1040 [44] (the Māori Sovereignty case) the Tribunal held that the Māori version of the Treaty of Waitangi had a different meaning to the English translation. In English, Article 1 involves Māori ceding sovereignty, but the Tribunal found that based on the meaning of the Māori words used in the Treaty, 'Māori did not cede their sovereignty to Britain. That is, they did not cede authority to make and enforce law over their people or their territories... they agreed to share power and authority with Britain.'[45] Thus the Tribunal has provided the legal framework underpinning the notion of co-governance, the notion that Māori never ceded sovereignty in the first place.

Of course, logically the Tribunal decision should be self-defeating. Under English common law, the contractual doctrine of mistake applies when there is a mistake as to the intention of the parties to an agreement, when they are at cross purposes. If party A thought they were agreeing to contract X, and party B thought they were agreeing to contract Y, then there is no binding contract, and the doctrine of mistake absolves either A or B from any obligations to each other. If the parties to the Treaty of Waitangi were at cross purposes, then a logical conclusion should be that it is void. In that case not only would Māori not have ceded sovereignty, but the British Crown would similarly have no obligations to Māori. In that case there could be no Waitangi principles, and no jurisdiction of the Waitangi Tribunal to interpret those principles. Instead, the Tribunal continues to act as if all the obligations imposed on the Crown under the Māori version of the treaty remain in place, whilst the obligation on Māori to cede sovereignty under the English version is invalid.

The Tribunal has been instrumental in implementing other aspects of co-governance also. In Wai 2575[46] (the Health Services case referred to above) the Tribunal undertook a review of the health system after claims it was failing to deliver outcomes for Māori people. These poor health outcomes were largely attributed to a lack of participation by Māori in the health sector. What the claimants said was needed was new structures and services that are 'by Māori, for Māori'. The Tribunal agreed and recommended the formation of a stand-alone Māori primary health authority. The New Zealand government has responded by setting up a new Māori-only health system, the Māori Health Authority.

Although the proponents of this new agency are no doubt hopeful it might achieve better health outcomes for Māori, the goal of co-governance and joint sovereignty is clearly a key driver, regardless of the health outcomes. The Tribunal was critical of the previous system: 'In the governance sphere, we found that Māori members of district health boards are always in the minority ... Accordingly, we found that the district health board model does not reflect a true partnership relationship.'[47] The supposed

44 Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, (Wai 1040, 2014).

45 Ibid, 529.

46 Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*, (Wai 2575, 2019).

47 Ibid, 169.

problem of a minority group only getting a minority say on the nation's health system is rectified by creating an entirely new system, duplicating costs and bureaucracy. As if to pre-emptively argue against criticisms of this new body, the Tribunal was at pains to denounce the old system. Its final recommendation was to insist that the Crown accept blame for the past, 'that the Crown acknowledge the overall failure of the legislative and policy framework of the New Zealand primary health system to improve Māori health outcomes since the commencement of the New Zealand Public Health and Disability Act 2000.'[48] What possible benefit there could be in terms of future outcomes by such an acknowledgement is not explained.

And with new agencies come new funding. Last year, the same year the Māori Health Authority became active, the government announced 'the highest Māori budget in history',[49] $1.2 billion in Māori only funding, mainly on health, over and above existing funding which must be shared between Māori and non-Māori.

The Māori Health Authority is just one of several new Māori-only agencies set up by the current Labour government in New Zealand, or new agencies in which Māori (15 per cent of the population) get a 50 per cent say. For example, four new Māori-only agencies have been set up to govern New Zealand's water resources under the Three Waters reform program, under which Māori will get an equal (that is unfairly disproportionate) say. The Waitangi Tribunal has played a key role in creating the current two-nations-in-one approach that prevails in New Zealand today.

The very concept of an Indigenous Voice to Parliament is a step down the road of separatism and co-governance. A constitutional body set up for indigenous people, made up of indigenous people, to promote Indigenous affairs by advising parliament and the government. The next step will be to set up other Indigenous-only institutions, an equal Indigenous say over government policy, and compulsory quotas for Indigenous representation in various government bodies. If the Waitangi Tribunal is any guide, the veto powers and influence of the Voice will be used to facilitate just such an approach.

48 Ibid, 170.

49 1News, 'Govt delivers $1.2b for Māori in Budget 2022', *1News* (online, 19 May 2022), <https://www.1news.co.nz/2022/05/19/govt-delivers-12b-for-maori-in-budget-2022/>.

The Waitangi Tribunal shows the Voice will create new Indigenous rights

The Waitangi Tribunal has been a forum for promoting Māori land rights and related claims. As we have seen, cases such as Wai 2358 (the Freshwater and Geothermal Resources case) was used to delay the privatisation of assets on the basis of land rights claims, and in Wai 2660 (the Marine and Coastal Area Act case) the Tribunal upheld the rights of Māori land right claims to various coastal areas. However, the Tribunal's liberal interpretation of what constitutes the principles of the Treaty of Waitangi has facilitated the creation of entirely new rights that fundamentally undermine conventional western intellectual property law.

In Wai 26/150[50] (the Radio Frequencies case) the claimants argued that Article 2 of the Treaty of Waitangi guarantees the protection of the Māori language. They claimed that the predominance of English in the media has an adverse impact on the Māori language. The Tribunal found that the Crown had an obligation under the Treaty to protect Māori language and thus the Treaty gives Māori a greater right of access to radio waves than the general population: 'The Treaty accords to Māori access to resources in priority to any others, not only because they are the only people who are party to a solemn treaty with the Crown, but also because that Treaty affords iwi the continuing protection of a right of access to broadcasting resources.'[51] The Tribunal found for the claimants, and in response the government granted five Māori-only radio licences.

The Crown had argued that neither party to the Treaty was aware of radio waves when signing it and therefore no special rights should exist. In contrast, the claimants raised esoteric and metaphysical arguments in support of their claim. For example,

> where any property or part of the universe has value as a cultural asset, because of its ability to assist or sustain an activity which represents the preservation and sustenance (or undisturbed possession) of tikanga Māori [Māori customary practices], the Crown has an obligation under the Treaty of Waitangi to recognise and guarantee Māori rangatiratanga [self-determination] over its allocation and use for that purpose.[52]

Such arguments have the potential to cut across intellectual property rights. There are numerous plants, animals, chemical or mineral compounds, locations, images or sounds that are 'part of the universe' and which have been part of Māori culture (in cooking, art, building or hunting techniques, songs, customary medicines, just to name a few). If priority access to these things is necessary to preserve Māori culture, this would raise issues over existing copyright, patent, and design laws. It was preserving these privileges which was a central argument behind Māori objections to entry into the

50 Waitangi Tribunal, *Allocation of Radio Frequencies,* (Wai 26, Wai150, 1990)

51 Ibid, 45.

52 Ibid, 9.

TPPA, as that agreement had specific requirements requiring signatory nations to adopt international intellectual property protections, which would undermine Māori claims.

The scope and limits of Māori rights to protect their culture were explored in Wai 262 (the Māori Culture and Identity case referred to above), where the Tribunal heard the following claims:

- Whether the work in question is a taonga work [Māori treasured possession] or a taonga-derived work, Māori are entitled to prevent offensive and derogatory public uses of it.
- if the work in question is a taonga work, then the kaitiakitanga [guardianship and protection] relationship that comes with it justifies more extensive rights in Treaty terms. These would include the right to be consulted and, where appropriate, to give consent to the commercial use of such works.
- Māori are also entitled to prevent offensive and derogatory public uses of mātauranga Māori [Māori knowledge].[53]

Examples of these treasured possessions and Māori knowledge include the Haka ceremonial war dance, Māori tattoo art, and depictions of Māori people, tools and other artwork. What constitutes 'offensive' use is so subjective the Tribunal did not even seek to define it, simply stating it would be best left to be decided in individual cases. Depictions on dinner plates, tea towels, coffee mugs, or product packaging were asserted by the claimants, and it seems clear any commercial use would be considered 'offensive'.

It is not just artwork and images that were claimed needed to be restricted to protect Māori culture, but Māori connections to New Zealand's fauna and flora also. One claimant went so far as to assert that Māori 'relationship with taonga species is so all-encompassing it amounts to ownership of the genetic resources of that species'.[54] The Tribunal acquiesced recommending changes to New Zealand's bioprospecting, intellectual property, and genetic modification laws, in effect giving Māori an entitlement to or veto over various scientific discoveries or processes.

These findings sit neatly within the modern social justice paradigm of preventing 'cultural appropriation'. This paradigm is inherently unfair. Use by people of another culture's clothing, music, art, language or scientific techniques is 'appropriation', though there is no comparable limitations on the use of Western art, music, fashion, language, or scientific or business methods. Western-derived concepts of intellectual property laws allow for exclusive commercial exploitation of certain works or processes, but for a set period of time only (a patent generally lasts for 20 years in Australia, or 25 for pharmaceutical patents, copyright lasts for the life of the creator plus 70 years) but Indigenous rights to protect their culture is unlimited. The concept of cultural appropriation is also regressive and divisive. Most advances in art, music, science, or engineering arise from the sharing of ideas, new inspirations from contact

53 Ibid, 48.

54 Ibid, 74.

with new ideas, or the fusions of ideas that together improve on the original ideas. This encourages the exchange of ideas between people and advances all humanity as a result.

The protection of Indigenous rights on the basis it is 'offensive' also sits neatly into the framework in which much social justice activism operates. 'Hate speech', 'microaggressions', 'bigotry', and 'intolerance' are the rhetorical weapons used by activists to protect the "feelings" of members of the oppressed intersectional coalition (although such rhetorical tools are not available for everyone). The promotion of new rights that protect Indigenous Australian culture from 'offence' will likely be adopted by the activists who are likely to constitute the Voice to Parliament.

Indeed, it is already happening. In December 2022, Parks Australia, a federal government agency, made a request to the *Herald Sun* to remove a cartoon by Mark Knight depicting Uluru/Ayers Rock.[55] Following backlash from the newspaper, Parks Australia apologised for the "error", but it is unclear whether they would have made the same decision if their initial demands for censorship were joined by the constitutionally-enshrined Voice.

Many critics of the Voice to Parliament have rightly focused on how it will divide Australians by race. This may occur not simply because the Voice will be a body chosen by, comprised of, and advocating for certain Australians because of their ancestry. The Voice may also be a forum for undermining some of the things that do unite us as Australians, on the basis that such things are subject to the claim that 'this is ours, not yours'. Many of our unifying national symbols have deep connections to Indigenous culture. Indigenous animals like the kangaroo and emu on the Australian coat of arms, the image of Uluru/Ayers Rock, the boxing kangaroo, even the southern cross on our national flag, which was first seen 50,000 years ago by Indigenous Australians. If notions that these symbols represent Indigenous Australian culture alone and must be protected from 'offensive use,' then some of the ties that bind all Australians will be weakened. The Māori Voice to Parliament has facilitated exactly that in New Zealand.

55 Tyrone Clarke, 'Government apologies and backflips after demanding Herald Sun take down cartoon depicting Uluru and Voice to Parliament', *Sky news*, (online, 5 December 2022), <https://www.skynews.com.au/business/media/government-apologises-and-backflips-after-demanding-herald-sun-take-down-cartoon-depicting-uluru-and-voice-to-parliament/news-story/5c77b9fa4ddc299aee1716b91e81a710>.

Conclusion

The decisions made by the Waitangi Tribunal have consistently pushed an activist agenda of supporting Māori separatism, preferential treatment, and interference with the usual democratic process.

1. The Tribunal has declared that Māori get a veto over certain laws as was held in the Māori Land Act case, and that there are some laws that only Māori may even suggest reforms to as occurred in the Māori Community Development Act case.
2. The scope of the Tribunal has moved from mainly being focused on land rights to being involved in almost all aspects of New Zealand government, including COVID-19 policy (the COVID-19 case), the negotiation of international treaties (the Trans-Pacific Partnership case), and the interpretation of international treaties (the Māori Community Development Act case). In effect, any matter which Māori may take issue with is a potential breach of the Treaty of Waitangi, requiring the special attention of the New Zealand government, as took place in the Māori Culture and Identity case which touched on almost all aspects of New Zealand society.
3. The Tribunal has actively promoted policies that lower community standards as occurred in the Māori Prisoner Rights case and compromised community safety with the Disproportionate Reoffending case by focusing on the race of criminal offenders rather than the appropriateness of criminal sanctions.
4. The Tribunal has ensured that Māori receive priority access to key health resources, as demonstrated by the COVID-19 case and the Māori Health Services case.
5. The Tribunal's approach to intellectual property rights in the Radio Frequencies case and the Māori Culture and Identity case undermines established western intellectual property norms and threatens the availability of iconic national cultural symbols for use by all New Zealanders.

The Prime Minister's call to emulate New Zealand is a call to follow the path of the Waitangi Tribunal, which is now an entrenched part of New Zealand's legal architecture, and has become free to promote a divisive agenda that goes well beyond addressing Māori legitimate grievances, but seeks to create a separate, privileged nation within a nation.

THE NEW ZEALAND MĀORI "VOICE" TO PARLIAMENT AND WHAT WE CAN EXPECT FOR AUSTRALIA

About the Institute of Public Affairs

The Institute of Public Affairs is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom. Since 1943, the IPA has been at the forefront of the political and policy debate, defining the contemporary political landscape. The IPA is funded by individual memberships, as well as individual and corporate donors.

The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy. Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

About the author

John Storey is a Research Fellow with the Institute of Public Affairs Legal Rights Program. John is a lawyer, author and military historian. John has been a practicing lawyer for two decades. He was a partner in a large national law firm and founded and managed his own law firm as managing director. His recent book *Big Wars – Why do they happen and when will the next one be?* looks at global historical trends in military technology and tactics and what they can tell us about how warfare will look into the future.

John joined the IPA because he is passionate about free speech, the rule of law, and protecting Australia's classical liberal heritage. John is an avid reader on the topics of history, politics and security issues and is a sought-after public speaker on tax, legal and military matters.


Institute of
Public Affairs