NZ UK FTA

TIRITI O WAITANGI ASSESSMENT OF NZ UK FTA

TE TIRITI O WAITANGI ME HE WHAKAPUTANGA:

TINO RANGATIRANGA

NGĀ TOKI WHAKARURURANGA

BRITAIN WASHES ITS HANDS OF HE WHAKAPUTANGA ME TE TIRITI O WAITANGI

Ngā Rangatira and the King and Queen of England were responsible for Te Tiriti o Waitangi, and He Whakaputanga o te Rangatiratanga o Nu Tireni it is based on.

That constitutional relationship must underpin any international treaty between NZ and the UK, and Māori must be at the negotiating table as an independent equal party to the Crown.

Britain can't delegate its Tiriti relationship with Ngā Rangatira without their prior free informed consent and wash its hands of its responsibilities. BUT that is exactly what it does in the NZ UK FTA.

The Preamble recognises the unique relationship of Māori and the UK as original Tiriti signatories, then says the New Zealand Crown has assumed all those rights and obligations.

Every reference after that to Te Tiriti, and often to Māori, is limited to "in the case of New Zealand". There is no reference to He Whakaputanga at all.

There are only 4 substantive references to Te Tiriti/The Treaty in the 33-chapter FTA:

1. The Preamble

- "notes" that Britain was an original signatory of Te Tiriti/The Treaty but no longer has any responsibilities,
- "acknowledges" Te Tiriti/The Treaty as a constitutional foundation, but only for New Zealand, and
- "recognises" the right to regulate including to meet Tiriti/Treaty obligations, but subject to the FTA's rules.

2. Chapter 26 **Māori Trade and Economic Cooperation** repeats most of the Preamble,

- but does not guarantee any specific activities or outcomes and is unenforceable.
- The "Inclusive Trade Sub-committee" that oversees the chapter will operate, for NZ only, according to Tiriti/Treaty principles and tikanga.(Art 26.7, 30.8)

3. The **early review of digital trade chapter,**

- NZ intends to engage Māori to ensure the review takes account of the Crown's need to meet its obligations in Te Tiriti/The Treaty and its "principles" (Art 15.22.2(a)
- UK makes no such commitment.

THE TIRITI O WAITANGI IN THE FTA TEXT

4. The **Treaty of Waitangi Exception (Art 32.5**) remains unchanged since 2001, even though almost everyone except the Crown says it does not provide effective protection for Tiriti rights and responsibilities.

THE TREATY OF WAITANGI EXCEPTION (ART 32.5)

What's good about the Treaty of Waitangi Exception?

- Its very existence recognises that the FTA's rules may conflict with Te Tiriti/The Treaty
- The UK is not able to challenge the Crown's interpretation of The Treaty and its obligations

What's wrong with the Treaty Exception?

- It only refers to The Treaty of Waitangi, not Te Tiriti o Waitangi.
- It requires the Crown to see there is a Treaty issue, then act on it despite the FTA's rules, and be prepared to defend it if challenged.
- The Exception only protects "more favourable treatment to Māori" not
  - a failure to do things the FTA requires (eg not applying intellectual property rules)
  - or adopting Tiriti and tikanga-based policies that breach the FTA (eg Māori data sovereignty)
- Additional conditions apply to the Exception and open the Treaty policy or law to challenge
- A dispute would be judged by a panel of foreign trade experts with no Māori rights to participate.

THE CROWN REFUSES TO FIX THE TREATY EXCEPTION

At first the Waitangi Tribunal said ...

- the Treaty Exception was not perfect,
- the Crown was wrong to claim it fully protects its ability to honour its Treaty obligations
- the Exception "was likely to provide a reasonable degree of protection" to Māori
- urged the Crown and Māori to work together to consider future changes.

But the Tribunal's 2021 report on digital issues

- found the Treaty Exception (and other exceptions) didn't provide effective protection for mātauranga Māori.

Wai 2522 Mediation Agreement said

- the Crown and Māori should identify options for change.

The Crown's own Trade for All Advisory Board said

- the Treaty Exception should be revisited.

Still, the Crown won't even discuss it.

Research MFAT commissioned from Māori said

Te Tiriti must be central to the FTA

- but it is marginal and always less important than "trade"

Māori should have a seat at the table

- the only Māori at the negotiating table were from the Crown
- Māori will only sit on an "Inclusive Trade Sub-committee" for the unenforceable Māori Trade chapter and
- review committees on traditional knowledge that makes no guarantee to deliver any changes.

The FTA must provide protections and opportunities

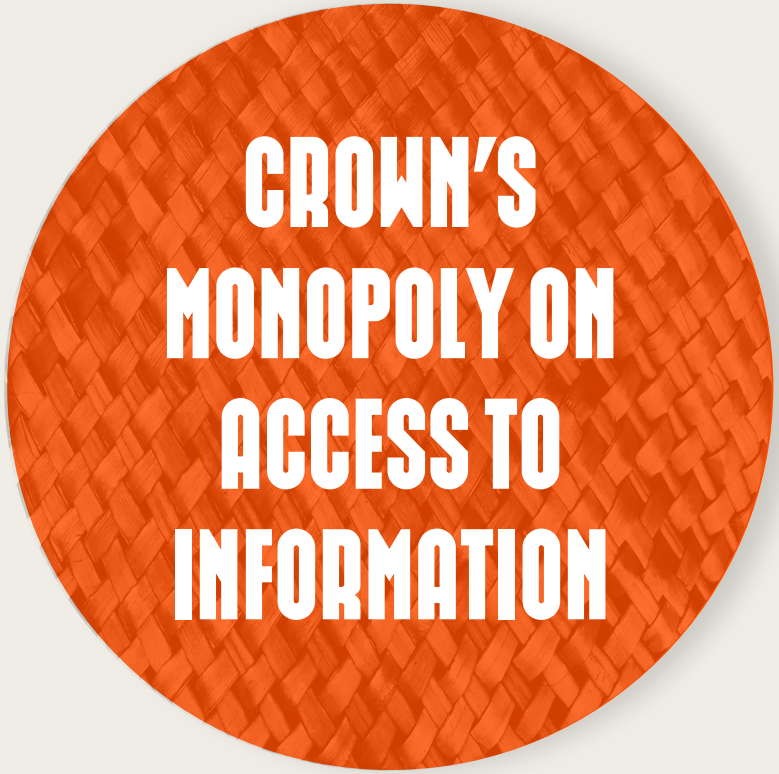
- but the Treaty Exception hasn't been fixed up,
- proposals for more effective recognition of Tiriti and He Whakaputanga have not been adopted,
- and there are no effective protections in the Agreement.

The Crown alone decided

- the negotiating mandate for the UK FTA
- what proposals were tabled for the UK to consider,
- what compromises were acceptable,
- what trade-offs should be made.

The FTA negotiations were totally controlled by Kāwanatanga through Crown officials.

- Ministers made high level decisions, advised by MFAT officials.
- There were letters to Ministers and phone calls with senior officials, but with limited outcomes.
- MFAT set up a Reference Group of leaders from FoMA, Taumata, Iwi Chairs and Ngā Toki Whakarururanga, but it only discussed the Māori Trade chapter, with very limited final effect, and despite requests did not discuss the risks from other chapters.

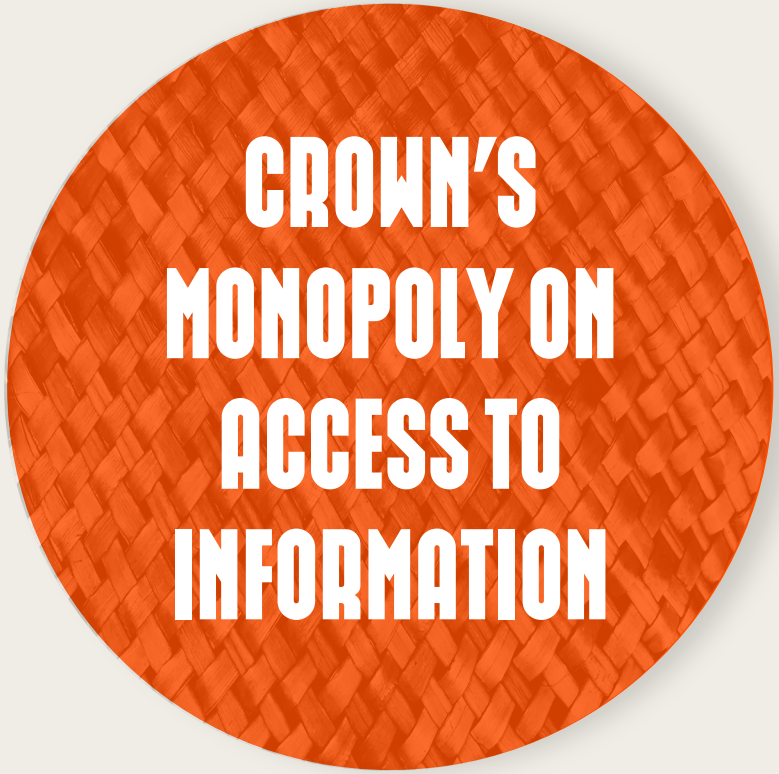


Without information Māori cannot

- effectively promote and protect their interests,
- hold Māori who are involved in dialogue with the Crown accountable.

Because **the NZ and UK Crown** have a monopoly on information, they **decided**

- what information to share,
- with whom, including which Māori,
- under what conditions of confidentiality.



The **only public information was the Crown's good news version** on

- MFAT's website
- webinars with its main officials
- the Agreement in Principle written by MFAT and the UK after most negotiations were done.

When **Ngā Toki Whakarururanga got special access** to specific information on 22 December 2021 it **was**

- too late to be effective,
- had to be kept secret so it couldn't be shared, and
- most input had no effect.

GOVERNANCE OF THE FTA RESTS WITH THE CROWN

This is a deal between the NZ and UK Crown.

- Just as there was no seat at the negotiating table for non-Crown Māori, there is no seat at the table for governing the UK FTA, except at the very margins.

The FTA will be run by a Committee of the UK and NZ Crown,

- who "may" seek advice from business, unions, civil society, the public – and Māori "in the case of NZ"
- a series of sub-committees and working groups will oversee and implement specific chapters.

Māori may sit on 2 sub-committees where they have no real power

- The unenforceable Māori Trade and Economic Cooperation chapter (26) and
- The review of traditional knowledge in the Intellectual Property chapter (17)
- Both require the agreement of both the UK and NZ to any decisions.

- **The Māori Trade and Economic Cooperation chapter (26) is weak**
  - only about cooperation between UK and NZ,
  - has no guaranteed activities, and
  - is unenforceable

    (see the Tiriti Assessment of the Māori Trade chapter)
- It is governed by an **Inclusive Trade Sub-committee** with other unenforceable chapters on gender, SMEs and development.
- **Non-Crown Māori may be invited to sit on** the **Sub-committee with officials.**

The sub-committee it is to **function, for the Māori trade chapter,** in a

- "manner consistent with Te Tiriti/The Treaty" (only in the case of NZ) and
- manner sensitive to tikanga (however that might work with in a UK/NZ entity!).

- **This sounds like real progress, but**
  - it's not clear what independent Māori presence can achieve because the sub-committee can only
    - discuss the limited cooperation activities under the chapter and
    - hear from experts on "issues relevant to the chapter".

Māori can sit on a **review of genetic resources**, traditional knowledge, and traditional customary expressions in the Intellectual Property Working Group

- **But there is no guarantee anything will change**
  - The review will consider adding provisions on those issues but
    - there is **no time limit** (just
    - "endeavour" to be "timely") and
    - any change **requires the UK to agree**, but the UK was clear in the Māori trade chapter that it doesn't agree these are intellectual property issues!

AS GOOD AS IT GETS?

The only way to revisit the text, and try to get the Tiriti relationship right, is in the review set down for 7 years after the FTA become effective (Art 30.3).

Input from various sectors, including Māori "for New Zealand", must be "taken into account".

A review of the digital chapter's implementation and operation is earlier, in 2 years (Art 15.22) but that's not a review of its rules, and there is no guarantee of any agreed outcome
(see the Tiriti Assessment on Mātauranga and digital trade).

So, the current text is likely to be as good as it gets for Te Tiriti and Māori.

NGĀ TOKI WHAKARURURANGA