"EXCLUSIVE AUTHORITY": INVESTIGATING THE INTERPRETIVE MANDATE OF THE WAITANGI TRIBUNAL AND THE CONSTITUTIONAL EFFECTS OF ENTRENCHING IT

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This article contemplates a possible role for the Waitangi Tribunal in movement towards constitutional transformation. To arrive at that destination, this article first analyses the Tribunal's interpretive authority according to the Treaty of Waitangi Act 1975 and looks to the Tribunal's constitutional status. The meaning and effect of its interpretive mandate in s 5(2) is suggested to be confined within its recommendatory and investigative operations. As a key function, this indicates—alongside case law and commentary—that the Tribunal sits in its own, distinct constitutional position between and around the judiciary, executive and legislature.

Building on the present position, this article makes a case to entrench the Tribunal's interpretive authority, thereby giving more formality and legitimacy to its unique constitutional status. In examining what that protected status looks like, this article imagines the Tribunal in a preliminary role as a body of the "relational sphere" suggested by the Matike Mai report. Using Māori scholarship, this suggestion is critically analysed.

I INTRODUCTION

Aotearoa New Zealand is in a state of constant legal and constitutional evolution. The institutions that make up the state are varied and wide-reaching in their scope. But one of our most important institutions sits in a curious constitutional position.

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The Waitangi Tribunal | Te Rōpū Whakamana i te Tiriti o Waitangi is a creature of statute. Efforts by courts and commentators to define its constitutional position have been thoughtful and considered, but the only conclusion reached has been the fact that it is constitutional.[1] But could it offer more in the pursuit of constitutional transformation?

This article will use a statutory focus point to refine the scope of a broad and abstract area of law. First, that focus point will be framed in an exercise of statutory interpretation, examining the meaning of s 5(2) of the Treaty of Waitangi Act 1975. The focus point—the section and its meaning—will then be used to examine the constitutional place of the Waitangi Tribunal, concluding that it sits in a unique constitutional space. Finally, the statutory focus point and the constitutional positioning will be brought together. This article will argue that protecting s 5(2) through entrenchment could begin to formalise the unique constitutional place of the Waitangi Tribunal. This could represent the initial stages of a relational body like that imagined in Matike Mai and the beginnings of constitutional transformation.

In Part Tuatahi (the first),[2] this article will undertake an assessment of the s 5(2) power conferred on the Waitangi Tribunal, analysing what "exclusive authority" means in relation to the purposes of the Act. In Part Tuarua (the second), a holistic assessment of the Tribunal's institutional status will outline the various ways in which it fits into Aotearoa's constitutional framework, looking to its form, function and authoritative considerations of its status. These Parts in combination explain the current position of the Tribunal and its interpretive power.

Part Tuatoru summarises the mechanism of manner and form entrenchment and its use in Aotearoa New Zealand. Drawing on Part Tuarua, I analyse how entrenchment might affect the Tribunal's institutional position. An examination of this hypothetical action argues that such a move could make a small step towards the development of a relational sphere in Aotearoa's governance and constitution. This suggestion is considered with reference to theories of constitutionalism, drawing on Māori scholarship and kaupapa Māori legal theory. This Part argues that entrenchment could formally underscore the Tribunal's constitutional position and power and be a legislative offramp towards constitutional transformation.

1 See for example *Skerret-White v Minister for Children* [2024] NZCA 160, [2024] 2 NZLR 493; PG McHugh "The constitutional role of the Waitangi Tribunal" (1985) 7 NZLJ 224; and Marc Daalder "Ministers accused of Cabinet Manual breach with threats to Waitangi Tribunal" (19 April 2024) Newsroom <www.newsroom.co.nz>.

2 These three parts are titled in te reo Māori to reflect the inherently Māori kaupapa underlying this article. Simultaneously, this is a nod to the three written articles of te Tiriti o Waitangi | the Treaty of Waitangi which forms the fundamental basis for this work. As a Pākehā, and tangata Tiriti, I am conscious that my engagement with the following subject matter is predicated on the existence of a colonial system from which my ancestors benefitted. Kia kaha te reo Māori.

II TUATAHI: THE WAITANGI TRIBUNAL'S INTERPRETIVE MANDATE

The words of the Treaty of Waitangi Act give the Waitangi Tribunal "exclusive authority" to determine the "meaning and effect" of te Tiriti | the Treaty "for the purposes of [the] Act".[3] That empowering provision is core to the Tribunal's function and, in part, situates it constitutionally. To make later constitutional discussions more tangible, this Part will explain what that interpretive authority means by examining what the purposes of the Act are.[4]

The Treaty of Waitangi Act establishes the Waitangi Tribunal.[5] It was introduced by a Labour Government following an election policy to legally acknowledge the principles of te Tiriti o Waitangi | the Treaty of Waitangi.[6] This followed increasing Māori advocacy in the 1960s and 70s, calling for Crown responses to cultural and land losses and continual dismissal of Tiriti | Treaty obligations.[7] The 1975 legislation gave the Tribunal jurisdiction over claims only from 1975 onwards, but in 1985 amendment legislation allowed it to investigate historical claims.[8] This extension led to significant investigations and reporting on large swathes of Aotearoa New Zealand's history, which continue today.

The texts of the Treaty of Waitangi and te Tiriti o Waitangi appear in sch 1 of the Act. Section 5 sets out the functions of the Tribunal and subs (2) is the focal point of this article.

A Statutory Framework and s 5(2)

The relevant provisions of the Act are set out to inform later analysis. Hansard and case law help to define the Act's purpose and frame the Tribunal's power.

The Act's long title records:

> An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.

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3 Treaty of Waitangi Act 1975, s 5(2).

4 "Interpretive authority" is used to mean the authority conferred on the Tribunal in s 5(2): to "determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them".

5 Section 4(1).

6 Matthew SR Palmer "Indigenous Rights: New Zealand" in David S Law (ed) *Constitutionalism in Context* (Cambridge University Press, Cambridge, 2022) 303 at 322.

7 At 321.

8 At 324. See Treaty of Waitangi Amendment Act 1985, s 3(1).

The text of the preamble states:

> Whereas on 6 February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the M[ā]ori people of New Zealand:
>
> And whereas the text of the Treaty in the English language differs from the text of the Treaty in the M[ā]ori language:
>
> And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles.

It is s 5(2) that confers upon the Tribunal a broader power of what is effectively interpretation of te Tiriti | the Treaty (emphasis added):

> In exercising any of its functions under this section the Tribunal shall have regard to the 2 texts of the Treaty set out in Schedule 1 and, *for the purposes of this Act, shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them*.

The combined function of the three provisions reproduced above forms the scope of the Tribunal's interpretive power. Primarily, this focus rests on the interactions between the "exclusive authority" in s 5(2) and the recorded purposes contained in the long title and preamble. The impact of the purposive provisions on the purported exclusive authority will reveal to what extent the Tribunal has authority over Tiriti | Treaty interpretation.

B "Purposes of the Act" and Exclusive Authority

The actual power contained in s 5(2) and the practical shape of that power requires interpreting the purposes of the Act.

1 Statutory language

The statutory language is somewhat ambiguous as to what the "purposes of the Act" are. These purposes are drawn from the long title and the preamble of the Act.

According to *Parliamentary Practice in New Zealand*, the preamble is not law but "is one indication of the meaning of an Act".[9] The Law Commission observed that the function of long titles

9 David McGee (ed) *Parliamentary Practice in New Zealand* (5th ed, Clerk of the House of Representatives, Wellington, 2023) at [34.8.1].

when used previously "appear[ed] to be to explain the general purpose of the Act".[10] Both are part of the legislation and are relevant to its interpretation.[11]

There are some slight differences between the long title and the preamble of the Act. The long title identifies a much broader purpose, relating to providing for the observance and confirmation of the principles of te Tiriti | the Treaty. The preamble refers more to the establishment of the Tribunal and its purposes of making recommendations.

Together, this suggests that the purposes include providing for the observance and confirmation of Treaty | Tiriti principles. Another purpose is to establish a Tribunal, which will make recommendations on claims relating to the application of the principles of te Tiriti | the Treaty. To effect that recommendatory purpose, it will determine meaning, effect and inconsistencies using Treaty | Tiriti principles.

These multiple purposes do not necessarily conflict; they sit alongside each other in different capacities. In the absence of any directive otherwise, it should therefore be assumed that each of the purposes in the long title and the preamble contribute to the overall "purposes of the Act". If the purpose of the Act was primarily or only to provide for the observance and confirmation of Treaty | Tiriti principles by using the Tribunal, there may be a practical difference in the interpretive authority of the Tribunal. This could more strongly require deference by other bodies to the Tribunal.

But s 5(2) refers to "purposes". As it stands, it is more likely that the effect of the "purposes of the Act" is that the Tribunal exercises a mandate to interpret te Tiriti | the Treaty when investigating and making recommendations on claims before it. Other bodies can defer to its interpretation from those contexts but are not required to do so. Hansard and case law support this view.

2 *Hansard*

The Treaty of Waitangi Bill was introduced to the 37th New Zealand Parliament on 8 November 1974 by Hon Matiu Rata, Minister for Māori Affairs under the Third Labour Government. On introduction, Rata declared that:[12]

> [The Bill's] purpose is to provide for the observation and confirmation of the principles of the Treaty of Waitangi and to determine claims about certain matters which are inconsistent with those principles.

At the Bill's third reading, Rata reiterated that the "principal purpose" of the Bill is:[13]

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10 Law Commission *Legislation Manual: Structure and Style* (NZLC R35, 1996) at [30].

11 Legislation Act 2019, s 10.

12 (8 November 1974) 395 NZPD 5725.

13 (10 September 1975) 401 NZPD 4342.

> … to give statutory acknowledgement to the principles of the treaty … and to establish a tribunal to examine any Act, regulation, Order in Council, policy, or practice adopted by the Crown that is claimed to be inconsistent with the principles of the treaty.

Alongside these explicit outlines of the legislation's purpose, Rata discussed the intention behind the Bill in continuing support for the "spirit of the treaty".[14] He said it arose from an undertaking of the government to "examine the practical means of legally acknowledging the principles set out in the treaty".[15]

Notably, an opposition speech to the Bill at the second reading drew on submissions on the Bill by the Law Society. That speech recorded the Society's concern at the Tribunal's exclusive authority specifically, noting that "the political and ultimate practical consequences of the exercise by the tribunal of this function cannot be foreseen", suggesting a higher tribunal should exist to re-examine issues of "important constitutional principle".[16]

These excerpts suggest that the primary, overarching purpose of the Act is to give effect to the "principles" of the Treaty. The purpose of the Act is also to establish the Tribunal to exercise its inquisitorial and recommendatory function. Rather than the establishment of the Tribunal forming part of the function of the Act, it is clearly part of the purpose.

3 Case law

The recent case of *Skerret-White v Minister for Children* includes a contemporary examination of the constitutional role of the Waitangi Tribunal and will be referred to later to elucidate its institutional position.[17] The Court of Appeal stated that:[18]

> … the legislature created the Tribunal for the express purpose of providing for the observance and confirmation of the principles of the Treaty. And it gave the Tribunal the power to make recommendations on claims relating to the practical application of the Treaty and to determine issues of inconsistency with the Treaty's principles.

14 (8 November 1974) 395 NZPD 5725.

15 (8 November 1974) 395 NZPD 5725–5726.

16 (10 September 1975) 401 NZPD 4344–4345.

17 *Skerret-White*, above n 1.

18 At [37].

Multiple cases restate the fact of the Tribunal's exclusive authority for the purposes of the Act, recounting the purposes of the Act per the long title and preamble or restating the text of s 5(2).[19]

The 1987 case of *Huakina Development Trust* makes the most helpful mention of the interpretive authority.[20] In evaluating the meaning of a part of te Tiriti | the Treaty, Chilwell J noted:[21]

> The Waitangi Tribunal, empowered by s 5(2) of the Treaty of Waitangi Act 1975, to have exclusive authority, in exercising any of its functions under the section, to determine the meaning and effect of the Treaty, has translated the crucial passage …

His Honour went on to record multiple translations of Tiriti text into English by the Tribunal. His Honour later noted the Tribunal's interpretation of the combined effects of the Preamble and arts 2 and 3.[22]

This passage suggests a degree of deference by the judge to the Tribunal's translation and interpretation. It also indicates—if only implicitly—deference on the basis of the s 5(2) exclusive authority.

C The Extent of the Tribunal's Interpretive Authority

Considering the statements made in Hansard and the indications from case law, on balance it is most appropriate to conclude that the purposes of the Act limit the Tribunal to an interpretive authority within its inquisitorial and recommendatory context. This is consistent with the conclusions drawn based on the statutory language. Therefore, the Tribunal has exclusive authority to determine the meaning and effect of te Tiriti | the Treaty for the purposes of making recommendations on claims and determining inconsistencies as to the practical application of the Treaty and its principles. Examining the practical effect of that authority allows functional comparisons in a constitutional analysis.

The 1987 *New Zealand Māori Council* case contemplated the s 5(2) exclusive authority. The oft-cited judgment of Cooke J and that of Richardson J only describe it.[23] But Somers J's judgment articulated the interaction between the Tribunal's exclusive authority and the courts' jurisdiction:[24]

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19 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [SOE case] at 640; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 204; *Ngāti Apa Ki Te Waipounamu Trust v R* [2000] 2 NZLR 659 (CA) at [22]; *Attorney-General v Mair* [2009] NZCA 625 at [68]; and *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] NZLR 423 at [45], n 36.

20 *Huakina*, above n 19, at 204.

21 At 204.

22 At 205.

23 At 652 and 671.

24 SOE case, above n 19, at 689.

> … this court has the function and duty to decide whether any act taken or proposed to be taken under the State-Owned Enterprises Act is inconsistent with the principles of the Treaty and hence to decide, so far as is necessary for the case in hand, what those principles are. Such a finding by this Court will of course be binding and to the extent that it is material in any case should be followed by the Waitangi Tribunal as a declaration of the highest judicial tribunal in New Zealand.

This statement seems implicitly to have been followed through Treaty jurisprudence in New Zealand courts. Te Puni Kōkiri published *He Tirohanga ō Kawa ki Te Tiriti o Waitangi | The Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal*, which clearly demonstrated the articulation of Treaty principles through both the Tribunal and the courts.[25] It seems to have been taken as read that while the Tribunal was handed exclusive authority to determine the meaning and effect of the Treaty for the purposes of the Act, this did not exclude the courts' ability to do the same for other purposes.

Naturally, the judiciary's role as interpreters of the law gives them an inherent mandate to decide on Treaty principles where they are "necessary for the case in hand".[26] Some comment could be made on a distinction between "meaning and effect" and "principles". Perhaps it is solely for the Tribunal to comment on matters of linguistic interpretation between the texts of the Treaty, whereas courts by direction of so-called "Treaty clauses" look to principles. This could be supported by the deference to the Tribunal's translation by Chilwell J in *Huakina*.

Fundamentally, this exercise has explained that the Waitangi Tribunal is probably given exclusive authority to determine the meaning and effect of the Treaty:

(a) in order to provide for the observance and confirmation of Treaty principles; but
(b) only in the context of its inquisitorial and recommendatory functions.

As contemplated above, other bodies may defer to its interpretations in recognition of its expertise and role, but s 5(2) does not require this. Overall, this exercise sheds light on the core interpretive function of the Tribunal. Parts Tuarua and Tuatoru investigate the broader scope surrounding this function, looking to the institutional context and constitutional future.

III TUARUA: THE CONSTITUTIONAL POSITION OF THE WAITANGI TRIBUNAL

The constitutional position of the Waitangi Tribunal has proved difficult to define. By looking to its function, form and authoritative comments on its status, this Part will explain the Tribunal's unique constitutional position. The exclusive authority contained in s 5(2) and its scope is connected to that

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25 Te Puni Kōkiri *He Tirohanga ō Kawa ki te Tiriti o Waitangi | A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001).

26 SOE case, above n 19, at 689.

position. From examination of the current position, Part Tuatoru suggests possibilities for protection and constitutional expansion.

A Function

In form, function and even name, the Tribunal is obviously similar to other bodies that fall within the judicial branch. Its hearing processes, involving the presentation of submissions and evidence before Tribunal members, is reminiscent of a courtroom or other tribunal setting.[27] The Act itself directs that the Evidence Act 2006 shall apply to the Tribunal "as if the Tribunal were a court".[28] Of course, its inquisitorial function is far less adversarial than a typical court setting, and its flexibility in community-based locations and evidence presentation clearly marks it as distinct from a typical courtroom.[29] In these respects, similarities with administrative tribunals can be seen, with specialist tribunal members and more inquisitorial powers.[30] But most tribunals and court processes have appeal pathways and binding powers, whereas the Waitangi Tribunal does not. The recommendatory function of the Tribunal can be likened to that of other commissions of inquiry, which similarly have non-binding functions.

B Form

Hidden in cl 8, sch 2 of the Treaty of Waitangi Act is the statutory signal deeming the Waitangi Tribunal to be a Commission of Inquiry under the Commissions of Inquiry Act 1908. This crucial clause is fundamentally what precludes technical definition of the Tribunal as part of the judiciary, despite its practical function strongly indicating such a status.

Under the Inquiries Act 2013, the different types of inquiry are Royal commissions, public inquiries and government inquiries.[31] The former two can be established by the Governor-General through the authority of the Letters Patent and by Order in Council.[32] A government inquiry can be established by ministers.[33] Notably, other bodies are conferred with Commission of Inquiry status

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27 Waitangi Tribunal "Going to Hearings" (29 February 2024) <www.waitangitribunal.govt.nz>.

28 Treaty of Waitangi Act, sch 2 cl 6(3).

29 See Waitangi Tribunal, above n 27.

30 Matthew SR Palmer and Dean Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at 170–171.

31 Inquiries Act 2013, s 6. The effect of s 38 means that the Commissions of Inquiry Act 1908 applies to the Waitangi Tribunal in place of the Inquiries Act.

32 Inquiries Act, s 6(1)(a) and (2).

33 Section 6(3).

such as the Social Security Appeals Authority,[34] which is defined as a "judicial authority".[35] It is evident that these bodies typically operate under the executive and are created as such. According to its strict legal status, then, the Tribunal can be considered lacking formal constitutional status, with a close but undefined relationship with the executive.[36]

But to liken the Waitangi Tribunal in form to other commissions of inquiry is reductionist and fails to appreciate the nuance of its existence. The Law Commission, in its paper on inquiries which preceded the 2013 Act, explicitly excluded the Waitangi Tribunal and other bodies that derive power from the 1908 Act as out of scope, an allusion to this difference.[37] Unlike typical commissions of inquiry, the Tribunal is a creature of statute, with its ongoing existence attributable to Parliament's legislative mandate. Its legal form, let alone its constitutional position, is unique.

C Commentary

Sources have identified the Tribunal as being part of, or adjacent to, the judiciary. In early 2024, two Ministers' statements about the Waitangi Tribunal were criticised by commentators and lawyers as contravening the Cabinet Manual's direction to take care in commenting on matters before the courts.[38] In that instance, each criticism noted the Waitangi Tribunal was not strictly a court, but was sufficiently analogous to warrant the protection afforded by the Cabinet Manual.[39]

In 2000, a publication by the Waitangi Tribunal stated that "the Tribunal is part of New Zealand's judicial system", a seemingly authoritative statement of its own institutional position.[40] It identified the key differences between the Tribunal and the courts, but its self-description as part of the judiciary and independent from the Crown is telling.[41]

The Court of Appeal's decision in *Skerret-White v Minister for Children* is perhaps the most recent judicial consideration of the Tribunal's institutional position. Its facts required a deep examination of principles of comity in relation to a minister and the powers of the Waitangi Tribunal. There, the Court

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34 Social Security Act 2018, sch 8 cl 12.

35 Section 401(2).

36 Law Commission *The Role of Public Inquiries* (NZLC IP1, 2007) at [16]–[18].

37 At 5.

38 Daalder, above n 1.

39 Daalder, above n 1.

40 Geoffrey Melvin *The Claims Process of the Waitangi Tribunal: Information for Claimants* (Waitangi Tribunal, Wellington, 2001) at 3 and 7.

41 At 4–7.

of Appeal noted that "the Tribunal is not easily located within the judicial branch".[42] It further noted the inclusion of the Tribunal under a heading of the "Executive" in one piece of academic work.[43]

The judgment engaged in some discussion of the Tribunal's institutional status but made no clear conclusion on where it sits beyond its constitutional importance. In considering comity, the Court concluded that if such principles were to apply, it "must involve obligations of both 'actors': the Tribunal and the Crown".[44] This careful ruling deliberately avoided concluding on the Tribunal's role and instead showed an inclination towards classifying it as an institution unto its own. The Court's approach in *Skerret-White* is not unique: the Supreme Court in 2022 acknowledged the Tribunal's jurisdiction as "unique in New Zealand's legal and constitutional framework".[45] Where the question of the Waitangi Tribunal's institutional status has arisen, if only peripherally, courts have observed its unique nature and core importance to the constitutional framework, while hesitant—if not refusing—to categorise it conclusively.[46]

D Judicial Tribunal, Executive Arm, or Legislative Body?

The Waitangi Tribunal functions like a judicial body. Its form is similar to that of an executive body. Its mandate is derived from Parliament. It sits in a unique constitutional position, occupying a crucial role as an instrument of te Tiriti | the Treaty, but operating in and around the three core institutions of a Westminster-style constitution.

The very effect of its "exclusive authority" lends weight to the contention that it resembles a judicial body. The role of interpreting the Treaty and determining its meaning and effect is analogous to the constitutional role of the judiciary—arguably the *most* analogous of the three branches. The judiciary interprets the law as laid out by legislation and thereby makes common law; the Tribunal interprets the Treaty and thereby rules on its principles and application.[47] This core function of the judiciary, reflected in the function of the Tribunal, makes a strong case for its placement in that realm. But its limited power to make binding decisions detracts somewhat from this position.

It could be argued that this role to determine the meaning and effect of te Tiriti | the Treaty is not unlike the investigative and inquisitorial roles often conferred on inquiries. It could be seen to fulfil the fact-finding, independent checking and participatory government roles of an inquiry, identified by

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42 *Skerret-White*, above n 1, at [109].

43 At [109].

44 At [115].

45 *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 at [16].

46 See for example *Minister for Children v Waitangi Tribunal* [2024] NZHC 931 at [58].

47 Palmer and Knight, above n 30, at 135.

the Law Commission as key purposes in such bodies.[48] But this argument is weaker than the strong parallels between legislative and Tiriti | Treaty interpretation. The fact of that authority conferred on the Tribunal convincingly orients the body as a quasi-judicial one, its powers reflective of an executive relationship but fundamentally judiciary-adjacent. Despite the refined scope of its interpretive authority, the Tribunal's mandate to determine the meaning and effect of te Tiriti | the Treaty is clearly parallel to that of the courts and judiciary.

Of the three branches, the Tribunal is most commonly described in the same breath as the judiciary, but simultaneously there is widespread agreement that it is not strictly a court. It is undoubtedly a creature of statute, its terms and powers laid out by legislation enacted by Parliament. But that same legislation deems it a commission of inquiry, imposing on the Tribunal a relationship of some description with the executive.

The general hesitance among commentators and courts to slot the Tribunal neatly into one of three branches of government is understandable and appropriate. The Supreme Court's observation of the Tribunal's unique position emphasises this. Perhaps the continued tendency of courts to conceive of the Tribunal as an institution of its own kind is really an indication of movement towards a constitutional model that embraces spheres of kāwanatanga and rangatiratanga.[49] In Part Tuatoru, this constitutional shift will be considered as part of an evaluation of the institutional effects of entrenching the Tribunal's "exclusive authority".

IV TUATORU: ENTRENCHMENT AND THE CONSTITUTIONAL DEVELOPMENT OF THE WAITANGI TRIBUNAL

This Part will briefly explain the mechanism of entrenchment and its use in Aotearoa New Zealand before examining the case for entrenching s 5(2) and the associated constitutional implications, drawing on Parts Tuatahi and Tuarua. Finally, some observations will be made to connect the case for entrenchment with possible future avenues of constitutional transformation. Through elaboration of the current position, this article now looks to the future.

A Entrenchment

The term "entrenchment" will be used in this article to refer to the mechanism through which Parliament binds itself as to the manner or form in which legislation must be amended. First, an examination of methods of entrenchment and the rationale behind them will be briefly undertaken, before the effect of entrenchment in Aotearoa New Zealand is explained. This section only intends to provide the context necessary for the remainder of the article.

48 Law Commission, above n 36, at [22]–[45].

49 See *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (Matike Mai Aotearoa, January 2016) [Matike Mai report] at 9.

1 *What is entrenchment?*

Nicholas Barber defines entrenchment in simple terms: "entrenchment is a constitutional tool that renders legal change more difficult".[50] This general definition can refer to political entrenchment: difficulty in amending law because of its political popularity.[51] But this article contemplates legal entrenchment; that is:[52]

> … a legal rule that makes it more difficult for a body to change the law in an area that, but for the entrenching rule, would fall within its jurisdiction, and be alterable under the default rules of legal change.

More specifically, Barber describes a type of entrenchment through voting units, by which the majority required to pass an alteration is higher.[53]

Barber contends that arguments in favour of entrenchment can be distilled into general arguments of stability and identity: that entrenchment can stabilise areas of law and identify those areas which the state considers fundamental to its identity.[54] The basic argument set out in his article is that some rules are so fundamental to the state's identity that they must be afforded an extra level of legal protection.[55] Barber views this as a popular but weak argument. An identity-based entrenchment allegedly seeks to reduce a state to a single "golden thread".[56] He argues that "rather than a golden thread, the identity and continuity of the state should be imagined as a rope, in which a great many threads are entwined".[57]

2 *Entrenchment in Aotearoa New Zealand*

Entrenchment provisions were introduced into the statute book with the Electoral Act 1956 and have been carried forward into the Electoral Act 1993.[58] Section 268 creates six reserved provisions, which can only be repealed or amended if such a change is passed with at least a 75 per cent majority of the House of Representatives (a "supermajority") or a majority at a referendum.[59] At their initial

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50 NW Barber "Why Entrench?" (2016) 14 I•CON 325 at 325.

51 At 327.

52 At 327.

53 At 332.

54 At 335.

55 At 337.

56 At 337.

57 At 338.

58 See generally Elizabeth McLeay *In Search of Consensus: New Zealand's Electoral Act 1956 and its Constitutional Legacy* (Victoria University Press, Wellington, 2018) at 118 and following.

59 Section 268 itself is not protected.

inclusion in 1956, it was unclear to what extent such a requirement would be enforceable, as understandings of legislative supremacy meant any attempt to bind its successors would undermine Parliament's sovereignty.[60] But such entrenchment is now legally acceptable, and there is an expectation that courts will enforce such "manner and form" provisions.[61]

While there has been no attempt to defy the requirements mandated by s 268, the Supreme Court has noted in obiter that "the pendulum has swung in favour of enforceability".[62] In the same case, the Attorney-General conceded that courts could invalidate legislation not passed according to the provision's requirements.[63] Parliament's Standing Orders dictate that the required procedure for altering reserved provisions must be followed.[64] Entrenchment via manner and form provisions is therefore an effective mechanism that will be upheld by Aotearoa New Zealand courts.

B Protecting "Exclusive Authority"

The case must now be made to entrench s 5(2) of the Treaty of Waitangi Act. Following that, the effect of such proposed entrenchment will be examined from an institutional perspective. Finally, this article will ponder the broader implications of entrenching the interpretive authority of the Tribunal, considering its potential in bringing through an iteration of constitutional transformation and better recognition for te Tiriti o Waitangi | the Treaty of Waitangi.

1 The case for protection

Considering the entrenchment of s 5(2) requires addressing questions of why to entrench at all, and why that section.

The fundamental point for entrenchment is what Barber deems a weak but popular argument: upholding identity. His criticism that identity entrenchment reduces a state to a single thread holds some weight. But in the context of Aotearoa New Zealand and the protection of te Tiriti | the Treaty, identity-based entrenchment is far from reductionist. Instead, entrenchment in pursuit of identity protection forms the basis for those threads—the spool on which they turn, or the fibres of the threads themselves. Te Tiriti | the Treaty is the basis of state identity: it is continually heralded as our founding document and the fabric of our law.[65] Its formal legal treatment is arguably inadequate in proportion to its significance.

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60 Palmer and Knight, above n 30, at 132; and McLeay, above n 58, at 120.

61 Palmer and Knight, above n 30, at 132; and McLeay, above n 58, at 189.

62 *Ngaronoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289 at [70].

63 At [70].

64 BV Harris "How Can Entrenchment and Democracy be Reconciled in the New Zealand Constitution?" (2023) NZ L Rev 1 at 15.

65 *Huakina*, above n 19, at 196.

Entrenchment of the Treaty of Waitangi Act is one way in which to afford te Tiriti | the Treaty the protection it deserves. It is impractical and perhaps dangerous to include the Treaty itself on the statute book, as this would subject it to amendment or repeal, concerns which have been raised by Māori.[66] The Act is instead an instrument of protection, providing for the content of te Tiriti | the Treaty without subjecting it to a majority rule.

It should be noted that the Act itself remains inadequate. The Tribunal's recommendatory and non-binding powers mean its effect is only that of soft influence. It is a respected and important institution, providing crucial reporting, historical and legal analysis, but its lack of binding power continues to undermine its ability to effect real Treaty partnership. Its unique constitutional position, as discussed in Part Tuarua, remains so despite this lack of binding authority.

It is for this reason that s 5(2) specifically should be entrenched.[67] Protecting this provision could:

(a) insulate the Tribunal's legal power to interpret te Tiriti against political influence;
(b) symbolise the constitutional significance of the Tribunal's interpretive power; and
(c) consolidate the Tribunal as a quasi-judicial, but constitutionally unique, actor.

As discussed above, the Act confers on the Tribunal the authority to interpret the Treaty so it can further the observance of its principles and execute its function in investigating claims. In doing so, the Tribunal is held to be the authoritative voice on historical and contemporary Treaty compliance. Its articulation of meaning and effect has been respected throughout government and administration and continues to shape the approach of many Crown bodies to engagement with Māori.[68] Arguably, it is the authority conferred on the Tribunal in s 5(2) that provides legal legitimacy and power to that continuing interpretive exercise.

Barber highlights that entrenchment can act as "a signal of importance, a public declaration that the state regards a rule as being of especial value or significance".[69] The value of s 5(2) is perhaps not often seen in commentary, case law or Treaty discourse. Other parts of the legislation, such as its claims function under s 6 and its powers under s 8, are more commonly cited and investigated.[70] Entrenching s 5(2) as a reserved provision would make clear that this legal power to interpret and give effect to te Tiriti | the Treaty rests with the Tribunal. Other bodies should defer to its authority. It would both effect real legal protection and emphasise the core importance of this authority to the

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66 (8 November 1974) 395 NZPD 5728.

67 It is not my intention to argue for the protection of s 5(2) to the exclusion of other provisions. However, s 5(2) and the interpretive authority of the Tribunal are the primary focus of this article, and examining the effect of protecting other provisions is outside the scope of this research.

68 See for example Te Puni Kōkiri, above n 25.

69 Barber, above n 50, at 338.

70 See generally *Wairarapa Moana*, above n 19; *Wakatū*, above n 19; and *Skerret-White*, above n 1.

public. Mechanisms upholding our democracy are entrenched because of the esteem with which we consider the democratic process. This enshrines the status of democratic government as worthy of extra protection. Using the same logic, the core importance of te Tiriti | the Treaty and its operation as a founding constitutional document can be brought to the same status of democracy through entrenchment.

The question of the courts' parallel authority must naturally come into such discussion. The courts' power to interpret Treaty principles as outlined in 1987 by Somers J is a direct consequence of legislative action to give effect, with varying strength, to Treaty principles. Where a Treaty clause appears in legislation, it is the courts' prerogative to interpret that legislation. As a result, the courts maintain a parallel role to the Waitangi Tribunal in interpreting Treaty principles within the scope of their constitutional context. This cannot be denied. But equally, it is clear that the Waitangi Tribunal maintains the legislative mandate to determine meaning and effect in its particular context; and importantly, it is this context which extends to prospective action and authoritative determinations of te Tiriti | the Treaty. The courts, empowered by Treaty clauses, tend to be directed to the "principles"—and in doing so, it would be ill-advised for them to entirely disregard Tribunal work in the broader scope conferred on it of interpreting te Tiriti | the Treaty itself.

So why is it important to protect this power if it does not typically garner attention and the general practice *is* to defer to the Tribunal's authority? The easy argument is to draw comparison to the existing reserved provisions. Their entrenchment represented the legislators' appreciation of the importance of those provisions to a degree warranting the prescription of additional requirements for their amendment or repeal. It was not necessarily motivated by a mitigative protection strategy that contemplated real risk of undesirable change.[71] Here, that same argument can be applied. The authority of the Tribunal to define the meaning and effect of te Tiriti | the Treaty, thereby protecting the institution that is instrumental in its application, is worthy of symbolic protection.

In addition, the political climate *does* present some risk to the Tribunal's power. Current coalition government party, ACT New Zealand, ran in the 2023 election on a policy of passing the Principles of the Treaty of Waitangi Bill 2024, which purported to define the principles of the Treaty statutorily.[72] In reality, the effect of the proposed Bill was to redefine the Treaty, rejecting the years of definition and interpretation from the Tribunal (and the courts).[73] Other members of the coalition government have indicated a preference to remove references to the Treaty from statute law, and

71 It was more a response to the abolition of the Legislative Council: see McLeay, above n 58, at 17.

72 Nicole McKee "Defining the Treaty principles" (press release, 10 October 2022).

73 Melanie Nelson "Treaty Principles Bill: Painting over Te Tiriti" (17 March 2024) E-Tangata <www.e-tangata.co.nz>.

continue to pursue policy that effectively unravels decades of developed Treaty jurisprudence.[74] It is clear that the legislatively defined power of the Tribunal and the presence of te Tiriti | the Treaty in our law and constitution is subject to the whims of politicians catering to a colonial rhetoric. Despite the power of the Tribunal to "determine the meaning and effect of the Treaty", governments of the day seek to undermine and challenge that mandate. Protection through entrenchment would ensure a degree of insulation against the ability of a government to push through dangerous constitutional change via a simple majority with the greatest effects on a minority population.

2 *Constitutional implications*

Having examined the rationale behind entrenching s 5(2), I will now examine what the implications of this action on the institutional position of the Waitangi Tribunal would be, drawing on the discussion in Parts Tuarua and Tuatahi.

The Tribunal functions judicially, resembles executive creations in form and is mandated by the legislature. The courts continue to emphasise the unique and important position of the Tribunal in Aotearoa New Zealand's constitutional and legal framework. The Part Tuarua analysis suggests that there is realistic scope for continuing discourse to refine and shape a formal, new constitutional position for the Tribunal to fit into. Entrenchment of s 5(2) could encourage movement in this direction.

The previous analysis notes how the s 5(2) interpretive authority conferred on the Waitangi Tribunal is a power resembling that of the courts in legislative interpretation. Entrenching s 5(2) would signal forceful emphasis of this interpretive role of the Tribunal. In doing so, it would make a strong commendation of this function and power of the Tribunal to parties considering its constitutional position. For questions of comity, entrenchment could guide approaches to the Tribunal in the direction of judicial separation. Otherwise, it would still stand alone constitutionally, allowing for the necessary "something else" that a body of its nature requires.

Aligning the Tribunal with the judiciary would give more certainty to its constitutional role. But, fundamentally, it would still be drawing from state-based ideas of governance. As will be explored in later analysis, this positioning does not preclude constitutional transformation. It would guide practice and reinforce independence from government. In these senses, the public law rules governing the position of the judiciary would apply to the Tribunal by virtue of its function. In recognition of the context it occupies being uncontemplated by Westminster-style constitutionalism, it would engage with other branches in a manner underscored and motivated by te Tiriti, as an instrument of its values and a tool for its implementation. This is perhaps what the Court of Appeal meant by asserting that

74 Thomas Manch "Whose Treaty is it anyway? National-led government takes two-stage approach to changing Treaty politics" *The Post* (online ed, Wellington, 26 November 2023).

comity principles must apply between the obligations of each individual actor: those being the Tribunal and the executive.[75]

C Beyond the Tribunal

It is here that the seemingly distinct concepts traversed above can be drawn together and conceptually outline a destination of constitutional transformation. This analysis borrows from sources with much better authority to devise various constitutional models, and looks to Māori scholarship—including kaupapa Māori legal theory—to critically review these suggestions.

To entrench s 5(2) would be to reinforce the institutional role of the Waitangi Tribunal as quasi-judicial but inherently a body of its own command. This suggested space would draw on well-established principles of comity and Westminster-style constitutional concepts to guide relations with branches of government but equally make room for the necessarily different context of the Treaty. Here, clear parallels can be drawn with the spheres of influence contemplated in the Matike Mai report and drawn from the Waitangi Tribunal itself.[76]

The Matike Mai report outlines six indicative models of constitutional arrangement that arose out of the Working Group's wide kōrero on constitutional transformation.[77] These models to varying degrees combine "spheres of influence". The report describes these spheres as follows:[78]

> We call those spheres of influence the "rangatiratanga sphere", where Māori make decisions for Māori and the "kawanatanga sphere" where the Crown will make decisions for its people. The sphere where they will work together as equals we call the "relational sphere" because it is where the Tiriti relationship will operate. It is the sphere where a conciliatory and consensual democracy would be most needed.

It is this relational sphere that entrenchment of the Tribunal's s 5(2) power could promote.

That exclusive authority to determine the meaning and effect of the Treaty would be enforced and protected through entrenchment. This would guide and emphasise the constitutional position of the Tribunal and its relationship to other branches of government. It would remain marked as a unique constitutional actor, insulated beyond political shifts of opinion. This unique position could represent the initial formation of a relational sphere, from which the Tiriti relationship could evolve and strengthen.

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75 *Skerret-White*, above n 1, at 115.

76 Matike Mai report, above n 49, at 9; and Waitangi Tribunal *The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at xxii.

77 Matike Mai report, above n 49, at 9.

78 At 9.

In a 2013 article, Māmari Stephens considered Māori constitutionality.[79] At the close of that article, she posed several questions following her suggestion that the outlet for Māori civic collectivism sits in a political constitutionalism. One of these was [80]

> How do we retain Māori engagement and necessary flexibility facilitated by political constitutionalism whilst accessing the certainty and protections of legal constitutionalism?

I suggest that the answer to this might lie partially in the entrenchment of s 5(2) of the Treaty of Waitangi Act. To explain this answer, a brief foray into Māori conceptions of constitutionalism and constitutional transformation is required.

Morgan Godfery discusses constitutional transformation as suggested by the Matike Mai report with reference to political constitutionalism.[81] Political constitutionalism functions "in everyday life over and above legal tools and institutions":[82] its ultimate enforcer is politics.[83] Legal constitutionalism, by comparison, can be characterised as a set of rules enforceable by courts.[84] Godfery suggests that in this political constitution, a "tool of persuasion" is required to societally acknowledge the Treaty as a constitutive device (and Māori as a constituent people).[85] This acknowledgement maintains the constitutive power of Māori to reimagine and remake the existing constitution.[86] Godfery also considers that the radical element of the Matike Mai report is not the form and principles of the system contemplated, but the imagining of equal spaces for two constitutional systems.[87]

Stephens contemplates the place of te Tiriti | the Treaty in a constitutional discourse informed by Māori civic collectivism. In viewing te Tiriti within a frame of political constitutionalism, she notes that it "generates a kind of positive uncertainty", and that "the Waitangi Tribunal has been extraordinarily important as a forum" for continuing conversation between the Crown and Māori.[88] She notes that in that context, exercising a Māori constitutionalism would be concerned with maintaining channels of communication in which the Treaty has a valid, but not exclusive, role.

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79 Māmari Stephens "Māori constitutionality (and the Treaty of Waitangi)" [2013] Māori LR.

80 Stephens, above n 79.

81 Morgan Godfery "The political constitution: from Westminster to Waitangi" (2016) 68 Political Science 192.

82 Stephens, above n 79.

83 Godfery, above n 81, at 203.

84 At 204.

85 At 207.

86 At 206.

87 At 208.

88 Stephens, above n 79.

Stephens notes that overreliance on Treaty discourse "has, arguably, narrowed the view of Māori as a constitutional people", restricting the lens of Māori constitutionality to a beginning in 1840.[89]

In the context of suggesting a decolonised child protection law, Luke Fitzmaurice-Brown conceives of kaupapa Māori legal theory.[90] He suggests this framework informs the process of changing the law, aiming to address the risks of using tikanga in a Pākehā legal system to achieve Māori aspirations.[91] While he considered the framework in the context of child protection law, it could arguably be extended to a much broader level. In short, and adapted slightly to suit the broader purposes of this article, Fitzmaurice-Brown suggests a four-step process:[92]

(1) Taihoa (pause): incorporation of tikanga Māori is not inevitably good.[93]
(2) Whakarongo (listen): acknowledge and highlight the range of opinions.
(3) Whakamana (uphold mana): focus on whether change will enable rangatiratanga (and transfer of power to Māori).
(4) Whakatika (correct; embark): identify changes that provide the best starting point for more changes in the future.

Whakatika contemplates "legislative off-ramps": "legislative changes which can provide short-term improvements for Māori, but also help to set in motion the long-term constitutional changes required to truly achieve equity".[94]

The focus of this article is the product of an exercise of whakatika: a legislative offramp towards transformation. So in an attempt to practice an application of kaupapa Māori legal theory, I will briefly engage in a consideration of the first three steps of that process. This will hopefully make for a more complete examination of entrenchment of s 5(2) in the context of constitutional transformation.

Taihoa—pause. The Tribunal is not a solely Māori institution, and it is already the product of a Western system. Perhaps the better frame is considering the continued use of a flawed body to effect constitutional transformation. Does such an act continue to mask Māori as a constituent people, through the Tribunal's inherent concern with te Tiriti? Will entrenchment be a tokenistic move that

89 Stephens, above n 79.

90 Luke Fitzmaurice-Brown "Te Rito o Te Harakeke: Decolonising Child Protection Law in Aotearoa New Zealand" (2022) 53 VUWLR 507 at 529.

91 At 529.

92 At 529–531.

93 Tikanga in this context refers to practices and conventions of te ao Māori that might be contemplated in terms of constitutional law in a Pākehā system.

94 Fitzmaurice-Brown, above n 90, at 530.

makes no real change? Is the Tribunal's concern with Treaty principles a fatal flaw in its capacity to act for Māori constitutional aspirations?

Whakarongo—listen. While not directed at entrenchment specifically, criticism of the Tribunal is common. Margaret Mutu acknowledges its role in dismantling myths and misremembering, but deplores Treaty principles as an attempt to bypass the Treaty.[95] She notes it is tasked with "the impossible task of reconciling" the Treaty and te Tiriti, and argues that the "principles" devised were based on the notion of a legitimate Crown claim to sovereignty and are therefore flawed.[96] Ani Mikaere acknowledges the achievements of the Tribunal but observes that it "is a creature of statute", subject to legislative intervention.[97] She similarly criticises the principles.[98] The Tribunal remains a flawed entity primarily by virtue of its very constitution.

Whakamana—uphold mana. Framed similarly to Fitzmaurice-Brown's considerations, ultimately the consensus common to many opinions is the pursuit of constitutional transformation (not reform).[99] That transformation contemplates an end goal of constitutional power shifted from the exclusive grasp of the Crown to honour a true form of rangatiratanga held by Māori. It is the pathway there that is disputed. Can incremental change, building on and evolving from existing institutions, be a genuine avenue forward? Or must "radical" leaps forward be taken to truly achieve that goal? Will entrenchment of s 5(2) and the aim of shifting power to the Tribunal actually enable rangatiratanga and transfer real power to Māori?

Entrenchment of s 5(2) could be one act to continue the transformation of the political constitution. As envisioned by Godfery, it could be one action of persuasion—encouraging an existing entity to evolve into a new site of power. The Tribunal is undoubtedly the product of a colonial system, but perhaps it already represents a manifestation of Māori constituent people and the Treaty as a constitutive device. The forum valued by Stephens forms an effective channel of communication required in her contemplation. It is not transformation itself, but a legislative offramp towards that end. Entrenchment of s 5(2) would allow for the flexibility of a political constitution, but would anchor this sufficiently in a legal constitutionalism. But these positive indicators should not be taken in a vacuum: kaupapa Māori legal theory shows there are many more questions to answer and evaluate.

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95 Margaret Mutu "'To honour the treaty, we must first settle colonisation' (Moana Jackson 2015): the long road from colonial devastation to balance, peace and harmony" (2019) 49 JRSNZ 4 at 10.

96 At 10.

97 Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, 2013) at 68.

98 At 81.

99 For the distinction between constitutional transformation and constitutional review, see Godfery, above n 81, at 201.

The authors of *The Constitution of Aotearoa New Zealand: A Contextual Analysis* include a description of the Matike Mai report and its suggested constitutional models in their chapter titled "Constitutional Futures".[100] They note that "in the current environment, it is difficult to see a popular pathway forward with these proposals absent some revolutionary moment".[101] As outlined by the previous mention of coalition government attempts to erode the legal presence of this Treaty, this is conceivably partly true. But perhaps affording the authority of the Waitangi Tribunal more protection could guide Aotearoa towards acceptance of a relational sphere first, setting a practical basis from which kāwanatanga and rangatiratanga spheres can effectively develop.

I do not wish to contend that the Tribunal is an ideal body as it stands—merely that as an existing institution, it could present an apt avenue through which relational sphere development can be identified. It lacks deliberative and decision-making power, binding authority and many of the aspects of governance contemplated by a relational sphere.[102] By no means should it be considered the proper and final manifestation of Treaty | Tiriti partnership in a relational sphere. It sits as an existing example of primary-level pursuit of a Treaty | Tiriti relationship which can be tracked through an evolving constitutional dialogue.

V CONCLUSION

In 1975, the legislature established the Waitangi Tribunal to provide for the observance and confirmation of Treaty | Tiriti principles. For that purpose, the Tribunal was conferred the exclusive authority to determine the meaning and effect of te Tiriti | the Treaty. That interpretive authority extends to the Tribunal's function of making recommendations on claims brought before it, but arguably that purpose does not limit its authority only within that context.

Throughout the decades since its inception, the Tribunal's constitutional place has been debated. It is a creature of statute, theoretically subject to the will of Parliament, but conceived in the form of an executive relation. It functions like a part of the judiciary, its interpretive authority rendering it analogous to a court in its directives on Treaty application. It cannot be easily confined to one branch. Instead, it is an entity unto its own.

As the body charged with interpreting Aotearoa New Zealand's founding constitutional document, it is undoubtedly one of this country's constitutional pou. Yet its authority remains primarily recommendatory—and some political actors tout the erosion of its position.[103] The institution's existence enjoys no more legislative surety than the legislature, executive or judiciary, but that

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100 See Palmer and Knight, above n 30, at 244–246.

101 At 245.

102 Matike Mai report, above n 49, at 9.

103 See for example Daalder, above n 1.

existence is consistently challenged politically.[104] Protection of its power through entrenchment could uplift the status of te Tiriti to align it with the rules defining our democracy.

In doing so, the unique position that the Tribunal occupies within the constitutional framework could be reinforced. This would emphasise the relationship of the Tribunal with the other branches of government as distinct, but adjacent. Such emphasis could signify the early iteration of a relational sphere as conceived in constitutional transformation kōrero by the Matike Mai report and the Tribunal itself.

This article has used the s 5(2) exclusive authority provision as the focal point of analysis. As a refined and accessible section of law, it has served as the anchoring factor to which a broad, conceptual and abstract constitutional lens is attached. It is deliberately wide in scope, traversing topics worthy of analysis in far more depth. Without a holistic lens, though, the big picture would never be painted. An investigation of constitutional law inherently engages a birds-eye view, but equally inevitably presents more questions than answers.

Imagining constitutional futures inevitably requires finding the steps between the vision and the now. As Morgan Godfery suggests, it is the imagination of goals, rather than the approaches to them, that is radical. The continued articulation of ideas and creativity will allow real processes to materialise. The intention of this article, therefore, is to propose one such idea—not necessarily in hopes of its adoption, but with aims instead to contribute to a stream of discussion flowing to the same destination. Such is the nature of ongoing dialogue.

104 The only binding power of the Tribunal comes in the form of "binding recommendations" in relation to certain land: see Treaty of Waitangi Act, ss 8A–8HJ.