

BOOK REVIEWS

A Simple Nullity? The Wi Parata Case in New Zealand Law and History

David V Williams

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I INTRODUCTION

David V Williams' *A Simple Nullity? The Wi Parata case in New Zealand law and history* breaks new ground in its revisionist history of the titular plaintiff's case. *Wi Parata v Bishop of Wellington* is infamous for its curt dismissal of the Treaty of Waitangi which, although *obiter dictum*, continues to be cited in order to be denounced. Williams suggests, however, that the "law doth protest too much".¹ Present attacks on the judgment in *Wi Parata* are based upon contemporary understandings of the Treaty applied inappropriately to the 19th century. Consequently, Williams re-examines this notorious case, shedding new light on the case's facts, context and authorship, as well as re-figuring its place within the broader legal history of the Treaty.

While this work is thoughtful and well-considered, those readers who question the profitability of studying a single case — particularly a case frequently held to be wrongly decided — may be frustrated. Williams acknowledges such readers, but does not address their concerns until the penultimate chapter. That discussion might have been better placed at the opening of the book, so as to inflect subsequent chapters with a clear purpose for sceptical readers.

Furthermore, the level of detail in this work may not appeal to some. Williams constructs a colourful narrative of the events leading to the dispute that formed the basis of *Wi Parata*, immersing the reader in early New Zealand history and moving skilfully between a chronological account of facts and more thematic discussion. However, the expository depth of this work may impede those wishing to absorb quickly the key arguments.

¹ David V Williams *A Simple Nullity? The Wi Parata case in New Zealand law and history* (Auckland University Press, Auckland, 2011) at 4.

II THE GIFT OF THE WHITIREIA BLOCK

Williams opens his work by creating a rich historical backdrop, introducing the four key protagonists involved in the facts of the case and the arrival of Christianity to Ngāti Toa and Ngati Raukawa. Williams paints comprehensive pictures of all four protagonists, including their education, heritage and, in the case of Hadfield, health. These details are enjoyable to read and, in many instances, it is the minute detail that leads to a significant point. However, this introduction is an example of the aforementioned level of intricacy that may prove discouraging to some readers.

In the following four chapters, Williams chronicles the events leading up to the land dispute and revises a number of popular (mis)conceptions surrounding the case. First, Williams challenges the casting of Ngāti Toa in the role of duped victims who gifted the Whitireia block in response to Selwyn's request for land to build a composite educational institution. On the contrary, it was Māori rangatira who sought out missionaries to establish Trinity College, which was to be modelled on the pre-existing St John's College at Purewa. The project was both initiated and driven by Māori, and modern ideas to the contrary downplay Māori agency and mistakenly assume that Pakeha were in a position of decision-making authority.

Williams then rectifies the startling lack of attention paid to the actual facts of *Wi Parata*. Most authors pay little or no attention to these facts, and the small minority that do rely on those reported in the *New Zealand Jurist*. That report repeated the plaintiff's declaration as filed in the Supreme Court, which included the allegation that the Crown grant of the land at Whitireia was issued "without the knowledge or consent of the tribe".² However, Williams makes the crucial point that the case was argued exclusively on questions of law and the facts declared by the plaintiff are contradicted by historical records. For instance, the plaintiff alleged that Whitireia was the principal Ngāti Toa settlement and that the offer of land took place in 1848. However, historical records indicate that the gift occurred in 1847, and there is no evidence to indicate that any settlement existed at Whitireia at the time of the gift. In fact, if Whitireia were the site of Ngāti Toa's principal pā it would have been unsuitable for Trinity College, which was to be physically separate from both Pākehā and Māori communities. Thus, the allegation of Parata's lawyer, George Barton, that Whitireia was Ngāti Toa's principal settlement, was "an exaggerated puff".³ Williams also challenges the plaintiff's assertions that the proposed College was initiated by missionaries and that the Crown grant was issued without Ngāti Toa's consent. Selwyn's personal correspondence demonstrates that he was "led into this undertaking,

² Ibid, at 45.

³ Ibid, at 48.

without any seeking of [his] own”,⁴ whilst Ngāti Toa formally informed Governor Grey of the gift in two letters dated 16 August 1848. That the facts of this much-maligned case have been so neglected is bizarre, and highlights the importance of close historical studies such as this book provides.

Chapter four focuses more closely upon the terms of the Crown grant issued over Whitireia. Williams argues that Governor Grey consulted neither Ngāti Toa nor Selwyn regarding the terms of the grant, which followed a standard format designed to promote racial amalgamation. However, whilst this standard format led to many justified grievances by Māori in other land gifts, there were no major inconsistencies between the Crown grant and the intentions of the donors of Whitireia. But the terms of that grant were never met. Shortly after the Crown grant was issued, arrangements were made for fencing and building work to be put out to tender. In 1852, disaster struck St John’s College when all of the College’s students were suspended for homosexual behaviour. The College was closed the following year and never re-opened in the form of its conception. Citing Warren Limbrick, Williams suggests that this was due to financial difficulties, poor staffing and “settler opposition to equality of race”.⁵ The failure of St John’s stymied fundraising for Trinity College, as those who had donated to the failed St John’s College could not be solicited again.

With the apparent failure of both St John’s College and the school for which Whitireia was gifted, Ngāti Toa began lobbying for its return. This, as well as lobbying targeting other failed gifts for educational purposes, led to the formation of a Commission of Inquiry. This Commission concluded that such gifts had largely failed. The Commission also recommended that the assets be confiscated and vested in government-appointed trustees. Williams thus helpfully contextualises Māori efforts to re-claim land within a “long tug-of-war” between church and state.⁶ The church claimed that it endeavoured to do its best, and may have been able to fulfil the purposes for which the land was gifted at a later date, whilst the state sought to confiscate the land for secular education. *Wi Parata* was simply one of many instances in which the church was placed in a defensive position relating to educational trusts. Despite this conflict, neither the church nor the state wanted to see Māori customary title reappear after a Crown grant had been issued.

III *WI PARATA V BISHOP OF WELLINGTON*

Having thus challenged popular conceptions of the facts and circumstances of *Wi Parata*, Williams brings the reader to the case itself. Williams re-examines the common assumption that Prendergast CJ, who delivered

4 Ibid. at 56.

5 Ibid. at 99.

6 Ibid. at 115.

the judgment, was its author. Instead, he suggests that it was in fact penned by Richmond J. Historical records support this view, indicating that Richmond J alone took notes during the trial, and conducted most of the questioning. Further, the law report was subject to corrections made by Richmond J and the ultimate judgment is in line with Richmond J's known desire to extinguish Māori customary title. However, the purpose of this discussion is not entirely clear. Whilst posterity may have vilified Prendergast CJ unfairly, it is unclear how substituting the name of one author for another significantly furthers this work's broader project of subverting legal orthodoxies.

This chapter also considers the possible influence of Parata's lawyer, George Barton, on the proceedings. Barton had a history of confrontations with the courts, and his clients were thought to have been unfairly treated as a consequence. However, *Wi Parata* was never cited as an example of alleged judicial bias, and in Williams' view the Court's refusal to look behind a Crown grant was so uncontroversial that the outcome of the case was inevitable.

Williams then considers the arguments and decision of the case, pointing out the Court's concern to make it known that Crown grants could not be impugned and that charitable trusts could not be altered without a court-ordered *cy-près* variation. Key features of the judgment traversed include the language used, the importance of Crown pre-emption, the influence of *jure gentium* and American law, the comment that the Crown was the supreme protector of the natives, the Native Rights Act 1865, and to whom the land might revert if the charity could not be altered by the *cy-près* doctrine.

IV REVISIONIST HISTORY AND THE TREATY OF WAITANGI

Perhaps Williams' most significant contribution to legal history arises in chapter nine, in which the author shifts from the legal history of Whitireia to an analysis of the issues and precedents relevant to the *Wi Parata* decision. Before doing this, however, Williams seeks to answer those who might question why a law professor would focus upon one case in such detail — particularly one that is infamous for being considered both repugnant and wrong. What follows is an interesting discussion of both Williams' methodology and the broader significance of the case. Williams declares himself influenced by the work of Brian Simpson, who has looked at the contributions of legal scientists and legal iconoclasts. The legal scientist sets up as an ideal the notion of perfect cohesion and argues that the ideal but be attainable; the iconoclast fails to account for the cohesion that is there. Simpson considers both ends of the spectrum to be wrong: simply because ideals are not attainable does not mean ideals ought

to be abandoned. Rather, Simpson prefers the “contextual study of legal cases” as a form of “legal archaeology”.⁷ Furthermore, Williams argues that focusing on the rich contextual detail of a case may subvert orthodox understanding of the law. As *Wi Parata* has been attributed inflated significance, it is an appropriate subject of intensive legal archaeology. As mentioned earlier, this illuminating point on methodology may have made a better introduction to Williams’ work.

The bulk of chapter nine then shifts to an explanation of the broader history of decisions concerning Māori customary rights and their lawful extinguishment, arguing that the doctrine of aboriginal title is sourced in *jure gentium*, case law from the Supreme Court of the United States, dicta from the Privy Council and imperial policies. The common assertion that the doctrine has existed since the English common law was received into New Zealand in 1840 is, Williams argues, wrong. Rather, the doctrine is a recent and welcome introduction to New Zealand law. The orthodox view on the doctrine of aboriginal title sees it as a “golden thread of reasoning about native title independently actionable at common law in the courts”. Williams convincingly subverts this orthodoxy and points out that, still, the Treaty is technically a legal nullity.

Williams ends his work with a valuable crystallisation of a key lesson to be learnt from *Wi Parata*. Williams considers that the recent focus on the courts’ enforcement of the Treaty has been misplaced. Non-enforcement of the rights guaranteed under the Treaty did not begin with *Wi Parata*, and such an emphasis diverts attention away from the true source of Māori grievances: Parliament. Parliament has been petitioned on numerous occasions to effect real change in the law, and Williams highlights that the change in enforcement seen in cases such as *Attorney-General v Ngati Apa*⁸ could only occur once Parliament had given the principles of the Treaty legislative recognition. In order for Māori rights to be ensured protection in future, greater constitutional protections are required.

V CONCLUSION

Williams’ archaeological dig shows insight into a much-maligned and significant case, with crucial implications for the present. Although the structure may have been usefully re-arranged to direct the sceptical reader more closely, and the detail may not suit all readers’ tastes, Williams has produced a thoughtful, comprehensive and enjoyable book.

7 Ibid., at 200.

8 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement

Jane Kelsey (ed)

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I INTRODUCTION

Seven rounds of negotiation on one of the most important regional free-trade treaties to which New Zealand will potentially become party — the Trans-Pacific Partnership Free Trade Agreement (TPPA) — have passed by virtually unnoticed. *No Ordinary Deal*, edited by University of Auckland Professor of Law Jane Kelsey, marks the beginning of a well-overdue debate about this important agreement.¹ In 16 essays, 19 expert contributors engage with a spectrum of issues ranging from the TPPA's implications on security, food safety and public health to its consequences for labour, services and finance. Consideration of these specialist topics is complemented by an overarching focus on democracy and sovereign political independence.

The book's publication is timely with two further rounds of negotiation to be held in late 2011, where the outlines of an agreement are to be decided. At this critical time, this book plays an important role in remedying the information deficit around the TPPA, a result of the absence of government consultation and the customary secrecy of treaty negotiations. *No Ordinary Deal* will be especially relevant to academics, students, practitioners and civil society groups, who are mobilising a concerted effort to influence the Government's negotiating stance. Needless to say, this book's importance for politicians working on the text of the agreement cannot be overstated. The true significance of the text, however, lies beyond the immediate significance of the TPPA. Its comprehensive treatment of socially important issues will continue to serve as a crucial reference point for future debates on trade treaties.

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¹ Jane Kelsey "Introduction" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, Wellington, 2010) 9 at 9–11.

II THE IMPLICATIONS OF THE TPPA

In her introductory chapter, Kelsey begins by discussing the contradictions of negotiating the TPPA in the current economic environment. Attempts at trade negotiation may appear untimely in the aftermath of the Global Financial Crisis, which has given governments the impetus to decry the neoliberal model embodied by the TPPA. This is evidenced by the efforts of governments within the participating nations to place constraints on the financial institutions responsible for the crisis. At the same time, liberalised economies are already a feature of all the TPPA participants and there is a plethora of bilateral free trade agreements between them.² In these circumstances, the TPPA is unlikely to achieve any of the three possible rationales identified by Kelsey: it will bring neither economic benefits, agricultural benefits nor the establishment of a wider free trade area encompassing Asian economies.³ This chapter also foreshadows important themes developed in subsequent chapters. These include the disproportionate bargaining power of the United States, the democratic deficit of the negotiations and the restriction of government legislative power by corporate interests.⁴ In bringing to light the TPPA's contradictions, minimal advantages and dire consequences, Kelsey raises the question at the heart of the book: what is the point of the agreement?

With negotiations and draft texts shrouded in secrecy, Kelsey notes that the authors make three assumptions for the purposes of predicting the TPPA's implications. First, it is likely that provisions in existing United States free trade agreements contain the minimum content that the TPPA will embody. Secondly, the demands of major corporations will likely inform the negotiating positions of the TPPA parties. Lastly, the parties will seek to maintain a neoliberal, light-handed regulatory regime.⁵

The balance of the book evaluates the promise of "a regional agreement that will have broad-based membership and the high standards worthy of a 21st century trade agreement".⁶ Each chapter addresses the TPPA's impact on a discrete domestic sector. A more logical ordering of the chapters would have been easier to follow. One possible alternative could have been grouping the chapters into themes, as has been done for this review. In this review, the chapters have been grouped according to their assessment of the TPPA's political, environmental, security, social and economic implications.

2 Ibid, at 9–11.

3 Ibid, at 18–22.

4 Ibid, at 12–14 and 25–28.

5 Ibid, at 18.

6 The United States Trade Representative "U.S. Engagement with the Trans-Pacific Partnership: Action to Date" (2009) Office of the United States Trade Representative <www.ustr.gov>.

Political Implications

The first three chapters examine the general political implications of the TPPA. They introduce one of the main themes of the book: how international trade treaties constrain sovereign power to legislate domestic policy. While such constraint is a problematic consequence of any trade treaty, it will be exacerbated if the TPPA includes a radical inter-state dispute provision. The concern is that such a provision would effectively place corporate interests ahead of public welfare. For example, corporate entities could be empowered to sue governments for the enactment of what they perceive to be commercially unfavourable legislation. Governments would then be forced to defend the democratically-mandated enactment of domestic policies in foreign tribunals.⁷

In chapter one, Bryan Gould provides a critical overview of New Zealand's seemingly naive commitment to free market orthodoxy.⁸ Gould cautions that New Zealand's integration into a regional free trade area will have a negative impact on its comparatively small and marginal economy. Competition with major players in the region will lead to New Zealand's absorption into larger economies as it will be forced to align itself with their domestic policies.⁹ These consequences lead Gould to the conclusion that New Zealand needs to steer clear of the agreement if it is to retain its political independence and powers of self-government.¹⁰

Australia's response to the TPPA negotiations, outlined by Patricia Ranald in chapter two, stands in stark contrast to New Zealand's apathetic stance. Australia's negative experience with the Australia–United States Free Trade Agreement, detailed in chapter six by John Quiggin, has placed the Government under public pressure not to succumb to United States demands for radical concessions in the regulation of social policy. Interestingly, the same dynamic is now evident in the United States. Lori Wallach and Todd Tucker explain in chapter three how the Obama administration must move away from the traditional North American Free Trade Agreement-style agreements that had placed corporate rights ahead of public interests, if the TPPA is to gain domestic approval.

While these preliminary chapters provide a useful overview of the political dimension of the agreement, it is the subsequent chapters on specific domestic sectors that give a true appreciation of the TPPA's political significance.

7 Thomas Faunce and Ruth Townsend "Public Health and Medicine Policies" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, Wellington, 2010) 149 at 157–161; Bill Rosenberg "International Capital and Investment" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, Wellington, 2010) 199 at 204–208.

8 Bryan Gould "Political Implications for New Zealand" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, Wellington, 2010) 29 at 29.

9 *Ibid*, at 34–35.

10 *Ibid*, at 39.

Impact on Security and the Environment

Two chapters are devoted to the consideration of the TPPA's impact on security and the environment, respectively. Paul Buchanan warns of the TPPA's security implications in chapter five. He notes that cooperation through trade is traditionally seen as the bedrock of security, discouraging conflict by the promotion of economic interdependence.¹¹ Ironically, however economic integration also facilitates significant security risks of a different nature. Buchanan argues that in a post-TPPA climate of loose regulation and relaxed market entry, the increased mobility of goods and services between TPPA parties will be used by non-state actors to further their military, criminal and espionage objectives under the auspices of commercial entities.¹² Buchanan warns that the loosening of borders for commercial purposes must be matched by stringent border controls.

In chapter nine, Geoff Bertram considers the intriguing relationship between trade and climate change policy. Unfortunately, however, his analysis is devoted exclusively to the trade consequences of climate change. Bertram comments on the determination of TPPA parties, with more stringent carbon emission schemes (particularly those under consideration in the United States), to impose border taxes on imports from countries with less restrictive policies. This would serve to even out the competition faced by local producers.¹³ He concludes that New Zealand's access to foreign markets will be at risk unless it aligns its lax climate change policy with its trading partners.¹⁴ It would, of course, also be possible for New Zealand to align itself with a similarly lenient regime yielding trade benefits at great costs to the environment, a point that is missing from Bertram's analysis. His narrow focus on trade obscures the positive environmental impact the TPPA is able to have. United States bargaining power might serve to encourage the reduction of gas emissions, which stands in stark contrast to its negative impact on all other policy sectors considered in the book.

Social Implications

In chapter four, Jose Aylwin begins the text's survey of the social implications of the TPPA, a theme that exposes dramatically the dangers of constraining legislative power. He looks at the impact of previous free trade treaties on the indigenous populations of Latin America. Their loss

11 Paul G Buchanan "Security Implications of the TPPA" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, Wellington, 2010) 82 at 83–86.

12 Ibid, 89–96.

13 Geoff Bertram "Border Carbon Adjustments and Climate Change Policy" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, Wellington, 2010) 136 at 136–138.

14 Ibid., at 148.

of ancestral land without consent or consultation serves to emphasise the TPPA's potential consequences for human rights.¹⁵

Warwick Murray and Edward Challies address the agricultural dimension of the TPPA in chapter seven. Gaining access to the United States market for dairy products is identified as a primary concern for New Zealand during the negotiations.¹⁶ David Adamson warns in chapter eight that the pursuit of this goal should not obscure the importance of maintaining government control over the determination of quarantine standards, the use of chemicals in food production systems and food labelling. Relinquishing control in this area in order to gain market access for dairy products would be catastrophic.

In chapter eleven, Susy Frankel examines intellectual property (IP) protection within TPPA parties and speculates about the nature of the protections likely to be included in the TPPA. This issue is further addressed in chapter ten by Thomas Faunce and Ruth Townsend in the context of health policy in the pharmaceutical industry. New Zealand's Government-subsidised pharmaceuticals scheme, Pharmac, funds medicines based on their demonstrable health innovation over comparable marketed products. It also uses a range of pricing techniques to maintain competition in the market.¹⁷ The United States is hostile to this approach. Under the TPPA, it would seek monopoly privileges for patented medicines through tough IP laws and limitations on cost-effectiveness schemes such as those used under Pharmac. The authors warn that concessions in this area would limit public access to cheap medicines.¹⁸

The final two chapters on the social implications of the TPPA examine the restrictions on the Government's ability to support domestic industries. Jock Given in chapter twelve looks at the difficulties inherent in supporting domestic cultural industries through local content quotas. In chapter thirteen, Ted Murphy looks at the government procurement of labour. He stresses the need to avoid undue constraint of government policy in this area to promote the growth of local industries, economies and the maintenance of high labour standards.

Economic Implications

The economic implications of the TPPA are the concern of the final three chapters of the book. Collectively, they question the logic of entrenching a

15 José Aylwin "The TPPA and Indigenous Peoples: Lessons from Latin America" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, Wellington, 2010) 70 at 75–79.

16 Warrick Murray and Edward Challies "The TPPA, Agribusiness and Rural Livelihoods" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, Wellington, 2010) 109 at 120–122.

17 Faunce and Townsend, above n 7, at 155–156.

18 *Ibid.*, at 151–152.

failed liberal, pro-market model through the TPPA.¹⁹ It is worth noting that familiarity with economic terminology would be of great benefit to those wishing to gain a full appreciation of the implications explained in these sections.

In chapter fourteen, Bill Rosenberg examines the difficulties the TPPA is likely to create in the regulation of foreign direct investment. A liberal regime under the TPPA would require significant amendments to the already minimalist Overseas Investment Act 2005, threatening New Zealand's ability to control its assets. A similar trend is noted by Kelsey in chapter fifteen with regard to the liberalisation of service markets. The TPPA's demands for the deregulation of service markets could lead to the Government's cession of control over core services, including public schools and hospitals, to foreign corporate entities. In chapter sixteen, Nan Seuffert and Kelsey examine the demands of the financial services industry. Liberalisation under the TPPA allowing for unrestricted flows of capital and new toxic financial products would lay the foundation for another global financial crisis.²⁰

III CONCLUSION

A text strongly focused on the pitfalls of a free-trade treaty might be thought to be of interest only for those sympathetic to left-wing ideology. But as is made clear in the preface to *No Ordinary Deal*, this text is "about much more than free-trade".²¹ Ultimately it is concerned with the social implications of constraining a government's power to legislate in significant areas of domestic policy. The aim is not to denigrate free trade or international treaties but to engage critically with the agreement and what it means for New Zealand. *No Ordinary Deal's* balanced approach is evident in the way it draws on the negative experiences of countries already party to free trade treaties while simultaneously offering advice about the types of provisions that should be included in the final agreement. With a strong case laid down, the authors have successfully shifted the burden onto the TPPA's proponents who will face a hard task proving the benefits of being party to the agreement.²²

19 Jane Kelsey "Trade in Services" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, Wellington, 2010) 214 at 229.

20 Nan Seuffert and Jane Kelsey "The TPPA and Financial Sector Deregulation" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, Wellington, 2010) 231 at 245.

21 Jane Kelsey "Preface" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, Wellington, 2010) at 7.

22 Jane Kelsey "Epilogue" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, Wellington, 2010) at 246.



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