OFFICIAL

KEI MUA I TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI

WAI 1040

WAI 1464

MO TE TAKE O	Te Ture Te Tiriti o Waitangi 1975
ME	
TE TAKE O	Te Paparahi o Te Raki (Wai 1040)
ME	
TE TAKE O	Nga kereme o Te Riwhi Whao Reti, ratou ko Hau Tautari Hereora, ko Romana Tarau mo Te Kapotai me Ngati Pare hapu (Wai 1464)

Closing Submissions

Dated this 21st Day of January 2011

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Waitangi Tribunal
21 JAN 2011
Ministry of Justice
WELLINGTON

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MAY IT PLEASE THE TRIBUNAL:

1.0 Mihi

1.1 Tena koutou e nga rangatira o te Roopu Whakamana i Te Tiriti o Waitangi. E mihi nui ana ki a koutou katoa e toa nei ki te hautu i te mana me te ihi o ratou i ta nei i nga tohu o o ratou tinana ki te Tiriti o Waitangi, i kitea ai he tangata Ngai Taua. Tena ra koutou.

1.2 It is important that Te Kapotai tell their story as their tupuna were part of He Whakaminenga (The United Confederation of Northern Tribes) and their hapu were involved in many key events including the selection of Te Kara, the signing of He Whakaputanga o Te Rangatiratanga o Niu Tireni and Te Tiriti o Waitangi, the fourth attack on the flagstaff, the Northern Wars, the peace-making hui and numerous hui, petitions and protests. Their hapu korero is korero tuku iho, history that has been passed down from generation to generation. Te Kapotai therefore again wish to record their appreciation to the Tribunal for providing them with this import opportunity to be heard on these issues.

2.0 Whakarapopotanga

2.1 There are seven key issues before this Tribunal. Essentially this Tribunal must determine what was the understanding, meaning and effect of He Whakaputanga o Te Rangatiratanga o Niu Tireni and Te Tiriti o Waitangi and to determine what was the intended nature of the relationship and mutual commitments between the Crown and Maori under these two documents.

2.2 Te Kapotai have said that in determining how their tupuna understood He Whakaputanga and Te Tiriti o Waitangi, context is everything. Their context extends beyond 1840.[1]

2.3 On the 4th of May 1845 Colonel Hulme ordered the attack on a number of pa including the pa of Te Kapotai. He stated:

[1] Te Kapotai Hapu Korero, Wai 1040, D 5, 3.

> *...its is my sad duty to state my conviction that till the principal pahs on the kawakawa are destroyed, and till the majority of their rebellious inhabitants are killed, there will be no peace at the Bay of Islands, no security for other settlements.*
>
> *The pahs to which I refer are (besides Pomare's) those of Kawiti, of Hori Kingi, of* ***Waikadi****, of Marupo.*[2]

2.4 Just 5 years after the signing of Te Tiriti o Waitangi, this was in fact how the Crown understood Te Tiriti o Waitangi, how it saw the nature of the relationship with the Maori and its mutual commitments to them.

2.5 It is counsel's submission that in spite of how the Crown chooses to paint the picture and dress it up in 2010, at 1840 it used the Treaty to presume sovereignty and the right to dispossess Te Kapotai of their whenua and rangatiratanga. As Te Kapotai's history shows they were caught by the Crown's colonising objectives. They were deceived.

2.6 Te Kapotai was one of the first areas to be settled. From the late 1700s – 1830s Te Kapotai rangatira were dealing extensively in trade, working with the missionaries and travelling overseas. Te Kapotai tupuna were astute leaders, they knew the game of trade and how to adapt to the times. They had mutually beneficial relationships with Pakeha where they were able to come to the shores to reside and trade. Te Kapotai benefited from a thriving economy.[3]

2.7 The early 1800s was a changing period as their economies flourished and as more Pakeha moved into the area. All trading, living and political arrangements were conducted in accordance with existing and entrenched tikanga. The rangatira had absolute control over their lands and affairs within their area. They were in the position of power and their rangatiratanga was necessarily secure.[4]

2.8 Te Kapotai tupuna were part of He Whakaminenga, and were present at the selection of Te Kara in 1834. They understood that in order to trade internationally they needed to have a flag to identify their nation and ship.

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[2] Fitzroy to Hulme, 4 May 1845, w/o 1/433, pp 269-70.
[3] Te Kapotai Hapu Korero, Wai 1040, D5, 7 – 22.
[4] Te Kapotai Hapu Korero, Wai 1040, D5, 7 – 22.

2.9 In 1835 their rangatira signed He Whakaputanga. By He Whakaputanga their rangatira were declared the independent and sovereign authority in New Zealand. Their rangatiratanga was affirmed under this document. They sought a continued relationship with the King, rangatira to rangatira, and sought his assistance with the understanding that at all times their rangatiratanga would prevail.[5]

2.10 5 years later in 1840,the political and economic position of Te Kapotai had not changed. Their rangatira turned out at Waitangi to discuss Hobson's proposal for Te Tiriti o Waitangi. Hobson's instructions were to obtain the free and intelligent consent of the rangatira to hand over their sovereignty to the Crown. Hobson could not speak Maori so he instructed missionary Henry Williams to convey the proposal of Te Tiriti o Waitangi to the rangatira present. Williams assured the rangatira that Te Tiriti o Waitangi was intended to continue the honourable and respectful relationship with Her Majesty. The Governor/Kawana was to come to the lands and control its British subjects. When the rangatira raised concerns regarding the extent of the Governor's authority, they were assured that their rangatiratanga would remain.[6]

2.11 The rangatira had reasonable expectations that their rangatiratanga would remain. However, this was never the intention of the Crown. Based on the assumption that by signing Te Tiriti o Waitangi the rangatira consented to cede their sovereignty to the Crown, the Crown then took purposive, successive and repetitive steps to suppress and dismiss the rangatiratanga of those rangatira and hapu.

2.12 In the Crown's mind, there was only one sovereign. In the minds of the rangatira their rangatiratanga prevailed. Clearly they did not have the same understanding of Te Tiriti o Waitangi.

2.13 Te Kapotai have provided evidence which has shown that what authority and power the Crown has today was only gained through deception at the signing of Te Tiriti o Waitangi and the warfare and the brutal realities of the colonising process which followed. The Treaty of

[5] Te Kapotai Hapu Korero, Wai 1040, D 5, 24-35.
[6] See paragraphs 7 – 7.79 below.

Waitangi laid the foundation for the conflict and depression that followed.[7]

2.14 For Te Kapotai the motive of the Crown during these times is irrelevant. Whether the Crown thought it was protecting them or civilising them is immaterial. They are heartened that there is evidence before this Tribunal that recognises that "the motive for the dispossession of an indigenous people is irrelevant if the end result is still dispossession".[8]

2.15 Their evidence supports the view expressed by Moana Jackson that "abhorrence" for colonisation, but the continuation to colonise is a contradiction in terms.[9] We submit this is the contradiction which underpins the Crown's case in this Inquiry.

2.16 From Te Kapotai's perspective, they have never consented to give their rangatiratanga to the Crown. Not by The Treaty of Waitangi, or by Te Tiriti o Waitangi.

2.17 We ask, after reading the evidence of Te Kapotai and learning of the tragedies that befell them just years after signing Te Tiriti o Waitangi, in particular the British attack on Te Kapotai pa, would they have agreed to sign? It is clear from their evidence that they did not sign up for war at 1840 and this was certainly not how they understood Te Tiriti o Waitangi and saw their relationship with their Te Tiriti o Waitangi partner, the Crown.

2.18 In order to address the important issue of how the rangatira understood He Whakaputanga and Te Tiriti o Waitangi Te Kapotai presented evidence during Hearing Week 4 which focused on:

(a) providing the Tribunal with a context of how things were in Te Kapotai prior to the signing of He Whakaputanga and Te Tiriti o Waitangi; and

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[7] See paragraphs 8 – 11.12 below.
[8] Transcript of Moana Jackson, Wai 1040, 4.1.4, 175.
[9] Ibid.

(b) providing the Tribunal with the experiences of their tupuna and their hapu after the signing of He Whakaputanga and Te Tiriti o Waitangi.

2.19 What their evidence has shown is that although the signing of He Whakaputanga and Te Tiriti o Waitangi were important events in their history, what is more important in understanding what their tupuna were agreeing to, was the context in which they signed and their experiences before and after 1840.

2.20 For Te Kapotai this paints the true picture of their understanding and experience, one which begun with great hope, yet ending in a history of deception, struggle, and despair.

2.21 These submissions recount the Te Kapotai experience. The key points Te Kapotai would like to remain in the minds of the Tribunal members are that:

(a) from their perspective only the Maori text of He Whakaputanga and Te Tiriti o Waitangi are relevant when determining the understanding of their tupuna of these documents. He Whakaputanga and Te Tiriti o Waitangi i roto i te reo Maori were the versions that were discussed, signed and understood by their tupuna;

(b) the evidence clearly supports that there was no cession of mana or rangatiratanga by the rangatira who signed He Whakaputanga and Te Tiriti o Waitangi;

(c) Te Tiriti o Waitangi did not replace He Whakaputanga. Te Tiriti o Waitangi is a continuation of He Whakaputanga. The two documents and surrounding events must be interpreted as a whole; and

(d) to suggest that the rangatira, would or could surrender their mana and rangatiratanga is irreconcilable with the Maori philosophies, beliefs and tikanga by which they lived;

(e) any other interpretation that would have their tupuna ceding their rangatiratanga is a denial of historical reality, a manipulation of the past to make it fit what exists today.

2.22 The Tribunal has been reminded throughout the Inquiry that in order to determine what the rangatira understood of He Whakaputanga and Te Tiriti o Waitangi, it must put to one side the extensive commentary and remember that the historiography of the Treaty of Waitangi is confused, and it has been prone to persistent anachronism and is inherently bias.[10]

2.23 When considering He Whakaputanga and Te Tiriti o Waitangi the Tribunal must bear in mind the two contexts:

(a) the first is that both He Whakaputanga and Te Tiriti o Waitangi were discussed, understood, and signed by rangatira operating within a context that is iwi and hapu specific in terms of law, politics and history. They are texts in the context of iwi and hapu reality.[11]

(b) the second is that both He Whakaputanga and the Treaty were discussed and understood by the British Crown operating within a context that was specifically shaped and determined by the ideologies and presumptions of dispossession. They are the texts in the context of colonisation.[12]

2.24 As Salmond has said, the questions regarding the Treaty of Waitangi, is not so much about British intentions (on which much of the technical evidence rests), but about Maori understandings of Te Tiriti o Waitangi, and whether in the process of debating and signing that agreement, the free and intelligent consent of the rangatira to a cession of sovereignty was gained.[13]

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[10] Brief of Evidence of Professor Dame Anne Salmond, Wai 1040, A 22, 1.
[11] Brief of Evidence of Moana Jackson, Wai 1040, D2 ,3, para 9.
[12] Ibid.
[13] Professor Dame Anne Salmond, Response to Commentaries on my Evidence, and Written Questions, Wai 1040, A 22 (D), 28.

2.25 As a result of this Inquiry there is now a significant body of expert tangata whenua evidence before the Tribunal on the Maori perspective and context regarding these documents.

2.26 These submissions seek to support all hapu of Te Paparahi o Te Raki who have come before the Tribunal to say that at no point in signing He Whakaputanga and Te Tiriti o Waitangi did the rangatira understand or have the intention of ceding rangatiratanga (sovereignty) to the Crown.

2.27 The Crown has never respected the agreement it entered with the rangatira under He Whakaputanga and Te Tiriti o Waitangi. A theme of these submissions is that the wrongs that the Crown did on Te Kapotai were because (whether intentionally or not) it wrongly assumed sovereignty under the Treaty of Waitangi. Through a typically British colonising process the Crown did everything it wanted, to impose its sovereignty and suppress the rangatira to a position of inferiority.

2.28 Te Kapotai have fought in every successive generation to uphold their understanding that their rangatiratanga was affirmed in He Whakaputanga and Te Tiriti o Waitangi.

2.29 To address the issues of the meaning and effect of He Whakaputanga and Te Tiriti o Waitangi, and how Te Kapotai tupuna understood these sacred documents these submissions focus on key issues that have been raised in the evidence in this Inquiry. In dealing with these issues these submissions focus on three time periods:

A KO TE KAPOTAI TE HAPU (pre 1800 – 1835)

B HE WHAKAPUTANGA ME TE TIRITI O WAITANGI (1835 - 1840)

C NGA PAKANGA, HOUHOU TE RONGO (1840 – 2010)

A KO TE KAPOTAI TE HAPU

3.0 **Ko Te Kapotai te hapu**

Ko Mahuhukiterangi te waka

Ko Whiti te tupuna

Ko Kapowai te maunga

Titiro iho ana ki tona pa tu moana ko Motukura

Ko Waikare te awa

Ko Te Turuki te marae

Ko Te Kapotai te hapu

3.1 Te Kapotai trace their origins from the Mahuhukiterangi waka, from their ancestor Tahuhunuiorangi down to Tuhukea and from the three siblings Pare, Whiti and Horahia.

3.2 Originally Te Kapotai were known as Ngati Tu. From the time of their tupuna Whiti their hapu became known as Te Kapotai.

3.3 The rohe of Te Kapotai is situated in the Bay of Islands. Te Kapotai have provided for the Tribunal their whakapapa and evidence of their mana i te whenua, mana i te moana and rangatiratanga in te rohe o Te Kapotai. It is through whakapapa, ahi ka and ringa kaha that their mana i te whenua, and mana i te moana has passed from generation to generation.

Ka tu tonu ra
Nga pouherehere
Kapowai, Tirikohua, Pukemahangarua,
Te Ranga, Ngaiotonga,
Nga maunga korero[14]

[14] Ibid, 12.

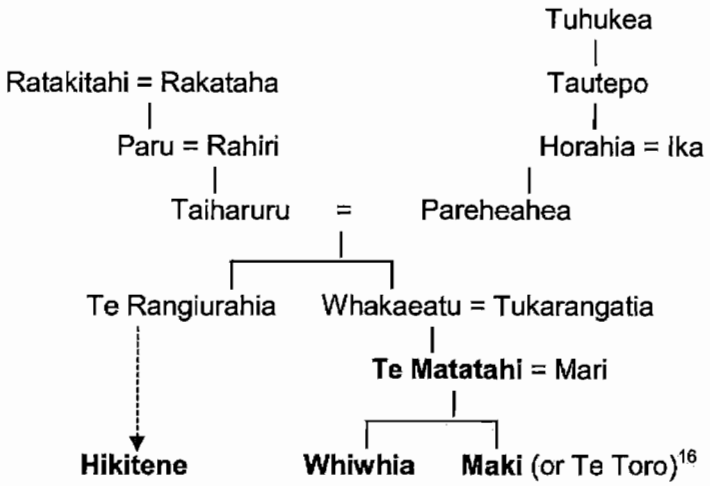
4.0 Nga Kaihaina o He Whakaputanga me Te Tiriti o Waitangi

4.1 Hirini Henare, in Week 1 of the Initial Hearings, gave the whakapapa of the rangatira who signed He Whakaputanga and Te Tiriti o Waitangi, including the Te Kapotai rangatira, Whiwhia, Te Matatahi, Te Toro, Hikitene and Tawatawa.

4.2 On 28 October 1835, Te Kapotai tupuna, Whiwhia signed He Whakaputanga.[15]

4.3 On 6 February 1840, Te Kapotai tupuna, Hikitene, Te Matatahi and Te Toro signed Te Tiriti o Waitangi. Tawatawa was also another signatory who was Te Kapotai and Ngati Wai, a descendant of Te Rangiurahia and lived at Whangaruru and Waikare.

4.4 Below is the whakapapa of the Te Kapotai rangatira who signed He Whakaputanga me Te Tiriti o Waitangi:



[15] Ibid, 24.
[16] Te Kapotai Hapu Korero, Wai 1040, D 5, 8.

5.0 Rangatiratanga/mana

"He tohu nui ano Te Tiriti o Waitangi no te mana rangatira me te atawhai ki te tangata"[17]

5.1 It is our submission that every issue raised in this inquiry, for example, "consent of the rangatira to a cession of sovereignty", a "meeting of the minds", translations and interpretation of the two texts, inevitably comes back to rangatiratanga.

5.2 Erima Henare has said that, "if the Tribunal does not understand what rangatiratanga is, then it will never understand the Maori perspective on He Whakaputanga and Te Tiriti o Waitangi".[18]

5.3 He goes on to say that "absolutely critical to a proper understanding of the relationship Maori agreed to in entering into Te Tiriti o Waitangi is an appreciation of their understanding of the guarantee of "rangatiratanga" in Article 2".[19]

5.4 Te Kapotai has presented evidence on the nature and exercise of rangatiratanga prior to Pakeha contact through to the signing of He Whakaputanga, the singing of Te Tiriti o Waitangi and the years following.[20]

5.5 Upon the arrival of Pakeha in the late 1700s, the whole of Waikare area was under the rangatiratanga of Te Kapotai tupuna.[21] It had been so for many generations.

5.6 At 1840, the mana i te whenua and mana i te moana of Te Kapotai was secure. It was secured through and evidenced in their whakapapa, mana rangatira, ahi ka, ringa kaha, pepeha, whakatauki, waiata, pa, kainga, mahinga, wahi tapu, place names, kaitiakitanga and so on.

5.7 Erima Henare and other kaikorero have discussed the rangatira and the nature of their rangatiratanga in some depth and those discussions

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[17] Te Kapotai Hapu Korero, Wai 1040, D5, para 7.11, Remo Wetere (1902)
[18] Transcript of Erima Henare, Wai 1040, 4.14. 113, 16.
[19] Ibid, 9.
[20] Te Kapotai Hapu Korero, Wai 1040, D5
[21] Ibid,15.

should be read in their entirety. However, the following key points are relevant to the issues:

(a) Rangatira and mana go together. You cannot have one without the other. Mana properly understood is a description of the power and influence possessed by a rangatira, his mana is his rangatiratanga, his influence or power over others;

(b) Rangatiratanga therefore was the highest form of authority or power, equivalent in a Pakeha sense to sovereignty;

(c) Rangatira roles in the north were determined by meritocracy;

(d) Rangatira were duty bound to protect the mana and rangatiratanga of the hapu, its lands and the lives that were led there;

(e) A rangatira was never entitled to give or subordinate their mana or rangatiratanga to anyone; and

(f) Rangatiratanga and therefore mana, in reality are absolutely inalienable. [22]

5.8 When rangatiratanga and land was contested by other rangatira these contests were often settled through warfare. "The 'force of arms' was characteristic of the Maori cultural character of the time and Ngapuhi were best at it".[23]

5.9 It is clear in that in the history of Te Kapotai, this was the case. It has been said "Ko te tikanga o tenei kupu o te mana rangatira he kore e tae mai no tetahi iwi ki te takahi i ana tikanga".[24]

5.10 Te Kapotai oral history accounts for the ringa kaha, or forceful defence of their lands against tribes including among others Ngare Raumati, Ngai Tamatea, Ngati Miru, Ngati Paoa, Ngati Hine and Ngati Hau.

[22] Transcript of Erima Henare, Wai 1040, 4.1.4, 121.
[23] Brief of Evidence of Erima Henare, Wai 1040,A 30 (c) 7, para 24.
[24] Te Kapotai Hapu Korero, Wai 1040, D 5, para 3.4.

5.11 Te Kapotai withstood challenge from other Maori who threatened their rangatiratanga and it was no different for any British challenges to their rangatiratanga before and after the signing of Te Tiriti o Waitangi.

5.12 Te Kapotai and the Crown had different interpretations of He Whakaputanga and Te Tiriti o Waitangi. That is why we are here today. But importantly it is this knowledge and understanding of rangatiratanga, they took with them to the signings of these documents in 1835 and 1840.

5.13 Te Kapotai expected that their rangatiratanga would remain. When they realised the divergence in understanding, Te Kapotai were duty bound to protect it. Te Kapotai fought and lost lives to uphold the mana of He Whakaputanga me Te Tiriti o Waitangi and their rangatiratanga which was affirmed under both documents.

B HE WHAKAPUTANGA ME TE TIRITI O WAITANGI 1835 – 1840

6.0 He Whakaputanga

6.1 We arrive at 28 October 1835, the signing of He Whakaputanga. Te Kapotai tupuna Whiwhia signed on this day.

6.2 The Tribunal asks how did Maori understand He Whakaputanga? And therefore what was the nature of the relationship and mutual commitments they were assenting to in signing He Whakaputanga/The Declaration?

6.3 For Te Kapotai, and all rangatira of He Whakaminenga, He Whakaputanga was about declaring their sovereignty and autonomy. He Whakaputanga recognised and affirmed their existing mana and rangatiranga. He Whakaputanga was an expression to all others that no one had the ability to make laws outside of themselves. It sought a continued relationship and assistance of the Crown without limitation on their rangatiratanga.

The Context

6.4 Te Kapotai have provided the following evidence relating to the context in which their tupuna signed He Whakaputanga:

(a) Prior to the signing of He Whakaputanga and Te Tiriti o Waitangi Te Kapotai had a strong identity and their rangatiratanga and mana i te whenua and mana i te moana was secure;

(b) Their tikanga and how they dealt with their lands and affairs were entrenched into their everyday lives, they had their own law and they did not want another authority;

(c) Te Kapotai's early contact with the Pakeha was extensive, written records dating as early as the Du Frense expedition in 1770s. There was no doubt that their tupuna wanted to benefit from the presence of settlers and there is no doubt that settlers benefited from the manaaki of Te Kapotai, and that they both wanted these arrangements to continue. However, the key

point from Te Kapotai's traditional history is that these arrangements would always be on their terms.

(d) Prior to the signing of He Whakaputanga and Te Tiriti o Waitangi their rangatira were in control of any arrangements they made with the settlers and importantly, there is absolutely no evidence from their oral and traditional history to suggest that their tupuna wanted to alter their rangatiratanga and control within Te Kapotai.

6.5 This context that has been given by Te Kapotai is supported by Moana Jackson's evidence where he states:

> *The simple reality, sourced in culture as well as law, is that power did not change even during the 1820s and 1830s...it is simply contrary to iwi and hapu realities to presume that the initiatives undertaken at the time were in any way a retreat from, or a diminishing of the authority implicit in history and whakapapa...*
>
> *As a result an initiative such as He Whakaputanga would be acceded to only if it was deemed to be consistent with the political and legal traditions that had been nurtured for so long. As Pou korero have illustrated that was certainly the case in Te Paparahi o Te Raki. Logic and common sense, let alone simple realities made such a conclusion.*[25]

6.6 Some expert witnesses struggle with the evidence of Week 1 Pou Korero that the rangatira were meeting in the decades prior to He Whakaputanga because there is no documentary evidence for this. This is because they would like to believe that Maori had no form of government or forum for decision making to regulate themselves, therefore they were inferior and in need to a greater authority. However, joining allegiance and coming together for a common purpose was not a new concept. Since ancient times their hapu had been forming alliances with other hapu for war, planting, harvesting,

[25] Brief of Evidence of Moana Jackson, Wai 1040, D2 ,3, 15, para 47.

food gathering and other kaupapa. He Whakaputanga was just another example of this.

6.7 To further contextualise He Whakaputanga and the intent of the rangatira in signing the document, the Tribunal has heard the evidence of Dr Manuka Henare where he describes this early contact period as a 20 year "conversation" toward nationhood. Dr Manuka Henare identifies 6 decisive events in the continuing conversation which began with the rangatira travels overseas including that of Hongi Hika and Waikato to Britain to meet with King George IV and continued with the 1831 Letter to King William IV, followed by the welcoming of Busby, the selection of Te Kara, and the signing of He Whakaputanga and Te Tiriti o Waitangi.[26] On this Dr Manuka Henare concludes:

> *I have found no evidence to support the view that sovereignty was ceded by Ngapuhi rangatira to any third party....Rather the evidence suggests that there was 20 years of Maori, particularly Ngapuhi efforts to move toward nationhood that culminated in the signing of Te Tiriti o Waitangi.*[27]

6.8 Te Kapotai have provided evidence that their tupuna were part of He Whakaminenga and were involved in many of the events identified by Dr Manuka Henare.[28]

6.9 It is not necessary to discuss these events in depth as they have been well traversed in a large portion of the evidence for these Initial Hearings.

6.10 However, to address each event in short from a Te Kapotai perspective we know:

(a) In the early 1800 - 1820s Te Kapotai rangatira Whiwhia and Te Toro were travelling overseas, including to Paramatta where they spent time with the Reverend Marsden's family;

[26] Brief of Evidence of Dr Manuka Arnold Henare, Wai 1040, B3, 9.
[27] Ibid, 6.
[28] Te Kapotai Hapu Korero, Wai 1040, D5,

(b) Te Kapotai rangatira were part of He Whakaminenga and had strong alliances with northern rangatira, particularly rangatira of neighbouring hapu in the southern Bay of Islands;

(c) Te Kapotai rangatira Riwhi Hari received one of the 12 axe heads that Marsden gave to Ruatara on his arrival in 1814 to distribute to rangatira in the Bay of Islands. The axe head was made into a kakauroa named Ringakaha and remains with the hapu today and was present before the Tribunal at hearings weeks one, three and for the Te Kapotai presentation at Whitiora Marae in week four. Hari was killed during the British attack on Te Kapotai Pa in 1845; and

(d) In 1834 Te Kapotai rangatira were present at the selection of Te Kara. From their travels and extensive trade, they knew that in order to trade internationally they were required to have a flag to identify their nation and ship. Te Kara was a symbol to the world of the mana and rangatiratanga of the rangatira trading here.[29]

The text

6.11 To understand the intention of the rangatira who signed He Whakaputanga the Maori text rather than the English translation best captures the mind of the signatories.[30]

6.12 Article 2 reads:

> *"Ko te Kingitanga ko te mana i te whenua o te wakaminenga o Nu Tireni, ka meatia nei kei nga Tino Rangatira anake to matou huihuinga; a ka mea hoki, e kore e tukua e matou te whakarite ture ki tetahi hunga atu, me tetahi kawanatanga hoki kia meatia i te wenua o te wakaminenga o Nu Tireni, ko nga tangata anake e meatia nei e matou o o matou ture me meatia nei e matou i to matou huihuinga"*[31]

6.13 Busby's 1835 explanation reads:

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[29] Te Kapotai Hapu Korero, Wai 1040, D 5, 23.
[30] Brief of Evidence of Dr Manuka Henare, Wai 1040, B3, 56.
[31] Ibid, 57.

All sovereign power and authority within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary rangatira and heads of tribes in their collective capacity, who also declared they will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled.[32]

6.14 Dr Manuka Henare's semantic translation reads:

The sovereignty/kingship (Kingitanga) and the mana from the land of the Confederation of New Zealand are here declared to belong solely to the true leaders (tino rangatira) of our gathering, and we also declare that we will not allow (tukua) any other group to frame laws (whakarite ture), nor any Governorship (kawantanga) to be established in the lands of the confederation, unless (by persons) appointed by us to carry out (whakarite) the laws (ture) we have enacted in our assembly (huihuinga).[33]

6.15 Article 2 and its respective translations have been repeated here because by this article ("Ko te Kingitanga, ko te mana i te whenua o te Whakangaminenga o Nu Tireni") the confederation of rangatira are declared sovereign.

6.16 The rangatira and Missionary Williams used the terms "Kingitanga" and "mana" to denote sovereignty. The rangatira understood these terms "kingitanga" and "mana" and based on their knowledge of the Bible and understanding of the British forms of government from trading and travels overseas during the early 1800s.

6.17 It is noteworthy that later in Article 2 "kawanatanga" is used to denote governorship, a lesser power or function than that of the sovereign. Yet five years later in Te Tiriti o Waitangi, "kawanatanga" is used for

[32] Ibid.
[33] Ibid.

sovereignty, not "kingitanga" or "mana" which would have been the logical terms to use.

Conclusion

6.18 The 1831 Letter, Te Kara, and He Whakaputanga must be seen for what they are. They were, as the evidence shows, purposive and intentional steps on the part of the rangatira. They were about trade and specific ways of adapting to the changing times. Furthermore, all three acts were a promotion and affirmation of the rangatira's rangatiratanga, not a cession.[34]

6.19 At 1835 Te Kapotai tupuna had been dealing with British missionaries, officials, traders and settlers for well over two decades. They understood trade and economics and they understood British models of government. For them He Whakaputanga had both economic and political dimensions. It declared their existing independence; they were the sovereign, with the mana and rangatiratanga over the lands. It also sought continued trade relationships and assistance from the King without limitation on their rangatiratanga. They were the sovereign, with the mana and rangatiratanga over the lands.[35]

6.20 Te Kapotai tupuna took with them this understanding of He Whakaputanga to the debates and signing of Te Tiriti o Waitangi.

7.0 Te Tiriti o Waitangi/The Treaty of Waitangi

"The Crown has lied and manipulated the meaning of Te Tiriti o Waitangi to the extent that it has eroded away its very meaning today"[36]

7.1 On 6 February 1840, at Waitangi, Te Kapotai rangatira Hikitene, Te Matatahi and Te Toro signed Te Tiriti o Waitangi. Tawatawa was another signatory who was Te Kapotai and Ngati Wai, a descendant of Te Rangiurahia and lived at Whangaruru and Waikare.

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[34] Brief of Evidence of Dr Manuka Henare, Wai 1040, B3, 9, para 48.
[35] Te Kapotai Hapu Korero, Wai 1040, D 5
[36] Transcript of Erima Henare, Week 1, Wai 1040, 31.

7.2 The Tribunal asks how did the rangatira understand Te Tiriti o Waitangi/The Treaty of Waitangi? And therefore what was the nature of the relationship and mutual commitments they were assenting to in signing Te Tiriti o Waitangi? What then was the effect of Te Tiriti o Waitangi/The Treaty of Waitangi at 1840?

7.3 The short answer is that the rangatira did not understand the Treaty of Waitangi (then English version). They did not debate, read, or consider the Treaty of Waitangi at any time prior to or during the signing on 6 February 1840. They did not sign the Treaty of Waitangi. Therefore, at 6 February 1840, in their minds the Treaty of Waitangi had no effect; they did not assent to any mutual commitments or agree to any kind of relationship with the Crown under the Treaty of Waitangi. They did not cede sovereignty.

7.4 At the outset of any discussion of how the rangatira understood Te Tiriti o Waitangi/The Treaty of Waitangi it is necessary to keep in mind the following statement of Salmond:

> *The text of the Treaty in English has been persistently privileged over Te Tiriti o Waitangi, the text that was in fact signed by the rangatira, and scholarly discourse about the Treaty of Waitangi has been set within European frames of reference, and often dominated by those who do not speak Maori (and cannot therefore even read Te Tiriti o Waitangi in its own language), and who are relatively unfamiliar with the Maori world...For this reason, the gulf between Te Tiriti o Waitangi and the Treaty is often denied, or not understood, or minimized. In my view, as I have argued in detail above, the two documents describe very different political arrangements. For this reason, I do not know how they can be reconciled.*[37]

7.5 It is our submission that the two texts cannot be reconciled.

7.6 We also submit that Salmond's observations are particularly evident in the Crown case before this Tribunal. Under cross examination all Crown witnesses agreed that they were not experts in matters

[37] Anne Salmond, Response to Commentaries on My Evidence, and Written Questions, Wai 1040, A 22 (D) 15 November 2010, 23.

regarding Maori tikanga, culture and philosophy, or in the interpretation and translation of these documents. They largely agreed that in reaching their conclusions they had relied on English language secondary sources and they had not consulted Maori sources.[38] Dr McHugh noted he was not in a position to be able to give an account of Maori evidence.[39] Any Maori perspective is notably missing.

7.7 Therefore, the Tribunal should take caution in the weight that it affords the Crown evidence given that is has not been informed by Maori understandings and Maori experts.

7.8 It is easy to indulge in a comparative assessment of the two texts, and there is the tendency to revert to the English version, the Treaty of Waitangi. There is also the tendency to place more validity on the English translation (based on Western views) of terms such as "mana", "kawanatanga", and "rangatiratanga", which sit at the heart of the issues regarding the translation and interpretation of Te Tiriti o Waitangi and the Treaty of Waitangi.

7.9 In the evidence of some experts before the Tribunal they have gone straight to dictionaries for the "plain meaning" of these complex words rather than consulting Ngapuhi linguists who have significant korero tuku iho on them.[40] Under cross examination Crown witnesses agreed that for the Maori perspective on issues of translation and interpretation of He Whakaputanga and Te Tiriti o Waitangi they would regard Maori expert evidence as relevant.[41]

The central bargain

7.10 As mentioned, by Article 1 of Te Tiriti o Waitangi the rangatira agreed for the Queen to have some form of "kawanatanga" (the nature of this is covered in more depth below). According to the English translation of Te Tiriti o Waitangi 'kawanatanga" equates to sovereignty.

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[38] Transcript of Professor Alan Ward, Wai 1040, 4.1.4, 306. Loveridge, Wai 1040, 4.1.4, 433. Transcript of Dr Mc Hugh, Wai 1040, 4.1.4, 587. Transcript of Dr Parkinson, Wai 1040, 4.1.4, 620.
[39] Transcript of Dr McHugh, Wai 1040,
[40] Transcript of Samuel Carpenter, Wai 1040, 4.1.3, 244.
[41] Transcript of Professor Alan Ward, Wai 1040, 4.1.4, 306.

7.11 Under Article 2 of Te Tiriti o Waitangi Maori were guaranteed their "tino rangatiratanga". A concept embodying mana, sovereignty and the unqualified exercise of their chieftainship.

7.12 There is no doubt in the Maori mind that "tino rangatiratanga" under Te Tiriti o Waitangi is a greater power than "kawanatanga". The rangatira had knowledge of the terms based on their use in He Whakaputanga and the Bible.

7.13 As a result of the Initial Hearings there is now a significant body of evidence before the Tribunal by Maori experts, linguists and descendants of the tupuna who signed Te Tiriti o Waitangi. Week 1 Pou Korero have argued that these words are in fact complex philosophies and concepts which must be perceived from a Maori world view, based on the tikanga and culture of the day. Interpreting Te Tiriti o Waitangi with te ao Maori as a starting point will no doubt give rise to a more balanced approach to oral traditional knowledge and histories.

7.14 The gulf between the Treaty of Waitangi and Te Tiriti o Waitangi will only continue if this Tribunal and the Crown choose to ignore the evidence that has been put before them. It is Te Kapotai's view that the two texts cannot be reconciled. However, the truth is captured time and time again in their evidence and these submissions. The mana of He Whakaputanga and Te Tiriti o Waitangi can now be restored.

7.15 Te Kapotai have told the Tribunal that the context at 1840, the discussions on the eve of the signing, the assurances of the Governor, the representations of the missionaries, and the text of Te Tiriti o Waitangi itself show why their tupuna signed Te Tiriti o Waitangi. All aspects informed their decision to sign.

7.16 Again, from a Maori perspective it is a wasted exercise to look into the Treaty of Waitangi which we know is neither an adequate nor accurate translation or interpretation of Te Tiriti o Waitangi.

The context at 1840

7.17 First to address the climate in the north at 1840. The evidence does not show a major shift in the way of life In the Bay of Islands in the five

years between He Whakaputanga and Te Tiriti o Waitangi as the Crown suggests. To say that the rangatira were prompted to sign Te Tiriti o Waitangi because they had lost control of trading and land deals and that the situation in the north was desperate for external regulation is an exaggeration.[42]

7.18 In fact, under cross examination Dr McHugh agreed with Dr Hohepa's description of the situation in the north.[43] At 1840 Te Taitokerau was still essentially Maori. The Maori population was around 125,000 and the European population around 2000.[44] While Pakeha were increasingly disruptive, they did not have control over the lands, language, and the way Maori conducted their affairs.[45] In support of this Moana Jackson has said:

> *Even by 1840 the colonisers were still just a distinct, sometimes unruly little population in the midst of independent polities it is simply not a human reality, let alone a Maori one, that the presence of a tiny minority would bring about a surrender of long held and deeply cherished concepts of power*[46]

7.19 Again, at 1840, the context in Te Kapotai was that rangatira had the lands and therefore the rangatiratanga and mana over the lands. They were fully self sustainable and were not dependant on others. There was no British military presence and their rangatiratanga had not been compromised by British Officials or settlers to any real or concerning extent. They were in the position of power and did not want or need the authority of another.[47]

7.20 Pou Korero during Hearing Week 1 have shown the relationship between He Whakaputanga to Te Tiriti o Waitangi. They have said that Te Tiriti o Waitangi must be read in light of He Whakaputanga because there had been no real change in the way of life in the Bay of Islands between the years of 1835 and 1840. He Whakaputanga

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[42] Transcript of Professor Alan Ward, Wai 1040, 4.1.4, 408.
[43] Transcript of Dr McHugh, Wai 1040,4.1.4, 542.
[44] Brief of Evidence of Dr Patu Hohepa, Wai 1040, D 4, at para 89.
[45] Anne Salmond, Response to Commentaries on My Evidence, and Written Questions, Wai 1040, #, 15 November 2010, 25.
[46] Brief of Evidence of Moana Jackson, Wai 1040, D2.
[47] Te Kapotai Hapu Korero, Wai 1040 D5, 29.

declared their sovereign status, they were in control and there is no evidence that they wanted to or needed to alter this position.[48]

7.21 Dr Manuka Henare also argues that Te Tiriti o Waitangi is an extension of He Whakaputanga. He places Te Tiriti o Waitangi at the pinnacle of the "long conversation" or intentional and positive steps that the rangatira took towards nationhood and forming an honourable and respectful relationship, rangatira to rangatira, with the British Crown. This relationship started in the 1820s with the visit of Hongi and Waikato to the King.[49]

7.22 Dr Manuka Henare provides that his assessment of the surviving documentation and oral history shows an honourable relationship between the two.[50] Regarding Hongi's visit to the King Dr Manuka Henare says, "Hongi and Waikato were not paraded like natives, they were paraded as emissaries..."[51]

7.23 Erima Henare in his opening statement discusses the astuteness of the rangatira who signed Te Tiriti o Waitangi:

(a) Throughout human history, Maori leaders who could visualise a better future for their people were prepared to develop strategies and take risks to facilitate the achievement of their vision;[52]

(b) Our ancestral leaders, our tupuna took calculated risks in signing Te Tiriti o Waitangi based upon their own military capacity and capability at that time, and their assessment that they had nothing to fear from the handful of Pakeha that were here; and[53]

(c) Moreover they had reasonable expectations based upon the early contact and trading relationships that they and their

[48] Te Kapotai Hapu Korero, Wai 1040, D 5, 22.
[49] Brief of Evidence of Dr Manuka Henare, Wai 1040, B3, 9.
[50] Transcript of Dr Manuka Henare, Wai 1040, 4.1.4,
[51] Ibid.
[52] Transcript of Erima Henare, Week 1, Wai 1040, 31.
[53] Ibid.

descendants would profit from the Te Tiriti o Waitangi relationship with her Majesty Queen Victoria.[54]

7.24 This is supported by Ward who says:

> *I have enormous respect for the men who made that agreement (the Treaty), Williams and the rangatira...I think they are great men for what they achieved to put together as a framework of principles by which two people could live together...*[55]

7.25 Ward talks here about the overall spirit and potential of the Treaty. In cross examination he notes his frustration about the shame of what could have been in terms of what was agreed to in 1840.[56]

7.26 This was certainly the potential that the rangatira perceived and intended would result. However, it is doubtful on the facts and history that the British Crown ever intended or believed that they could become sovereign in this country while honouring and respecting the rangatiratanga of the rangatira. This is simply contradictory to the concept of sovereignty and the colonising process which had already begun long before Te Tiriti o Waitangi and was occurring in many other countries in the world.

7.27 There is the consistent theme in the Crown argument that at 1840 the intentions and motives of the British Crown were humanitarian and there was genuine concern to protect Maori. The Crown argues that prior to Te Tiriti o Waitangi it was reluctant to establish sovereignty in New Zealand because they recognised it was an "independent Maori nation or society". If officials were so reluctant to intervene, then why

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[54] Transcript of Erima Henare, Week 1, Wai 1040, 31. This is supported by Ralph Johnson is his Northern War Report (Wai 1040, A 5, 95) where he states "Expectations that Ngapuhi authority would be acknowledged and respected can be traced back to early meetings and agreements forged between British monarchs and Ngapuhi chiefs in the 1820s and 1830s. These expectations were carried through in the 1835 Declaration of Independence and ultimately the Maori text of the Treaty of Waitangi in 1840. These earlier political engagements had signalled to Ngapuhi, a British regard for, and recognition of Maori chiefly authority.

[55] Transcript of Alan Ward, Wai 1040, 4.1.4, 321.

[56] Ibid, 379.

was the Crown issuing proclamations two decades earlier asserting that the British already had rights over New Zealand.[57]

7.28 The Crown argues that by 1840 the situation had changed. He Whakaputanga had not achieved what the Crown thought it would and that Maori had not formed a system of government capable of withstanding the changing political and economic climate. The land dealings and the "un-official" colonisation that was occurring in the Bay (colonisation by settlers and unregulated trade) was so serious that it was necessary to intervene in order to "protect Maori".[58]

7.29 In particular, there was the view that Maori needed protecting from the impending "French invasions". "Better the British than the French" is a phrase commonly heard when discussions take place on this matter. However it has been raised during these hearings that the British have a long and conflicted history with the French, and the British were no doubt looking out for their own motives and interests when dealing with the French.[59]

7.30 Samuel Carpenter provides that the general perception of the officials at that time was that the "inferior" "savages" were in need of a protector and a great authority.[60]

7.31 On this point Moana Jackson states:

> *The very doctrine of a benevolent protection thus contains some internal inconsistencies, hypocrisies even. The first is the notion that the bad faith and dishonourable process of one people colonising another could ever be one of good faith and honour. Dispossession is dispossession whether it is carried out at the point of a gun or with a benevolent promise. The second is that it is premised on all of the racist dualities about the inferiority of Indigenous Peoples and the consequent*

[57] Footnote re 1814 proclamations.
[58] Transcript of Alan Ward, Wai 1040, 4.1.4.
[59] Transcript of Samuel Carpenter, Wai 1040, 4.1.4, 280.
[60] Ibid.

assumption that they lacked the capacity to look after themselves[61]

7.32 By the end of the 19th Century the British colonisers had colonised more indigenous people in the world than any other. In other words, they were experienced colonisers and dispossessors. Moana Jackson provides that:

> *...one of the difficulties in this country is that the Crown has since 1840 sort of created this 'top of the pops' of colonial dispossession where it put itself at the top of the hit parade because it disposed us more beneficently than anyone else.*[62]

7.33 Nevertheless the Crown claims it has legitimate sovereignty in New Zealand because the rangatira consented to cede their sovereignty to the Crown. According to the Crown, at 1840, The Treaty was a valid instrument of cession.[63] The Crown claims a kinder form of acquisition and colonisation because it tried to avoid and mitigate violence by obtaining the consent of the rangatira.

Free and Intelligent Consent

7.34 Te Kapotai have said that they have never knowingly or willingly relinquished their rangatiratanga. Therefore the notion that their tupuna consented to hand over their rangatiratanga to the Crown is problematic for Te Kapotai on a number of levels.

7.35 Hobson was instructed to obtain sovereignty with the acceptance of Maori. Acceptance was to be gained through "free and intelligent consent", through serious and respectful negotiation, expressed according to established usages of the rangatira.[64] We submit Hobson did not achieve this.

7.36 The central question that must be asked regarding consent is whether Maori understood that they were being asked to cede sovereignty. If they did not understand that the Crown wanted an authority above their

[61] Brief of Evidence of Moana Jackson, Wai 1040, D2, 25.
[62] Transcript of Moana Jackson, Wai 1040, 4.1.4, 172.
[63] Transcript Dr McHugh, Wai 1040, 4.1.4, 556.
[64] Transcript of Alan Ward, Wai 1040, 4.1.4, 335.

rangatiratanga, how could they give free and informed consent for that to occur?

7.37 The Tribunal has repeatedly heard that from a Maori point of view consent was unfufillable. The rangatira could not consent to give their mana away. The evidence is clear that there was no established custom or "usage" for a cession of mana or rangatiratanga, and therefore no established usage for a cession of sovereignty. Had Hobson asked the rangatira to hand over their rangatiratanga, they would have told him, there was no way that could happen. Te Kapotai's history and exercise of mana and rangatiratanga since the time of occupation of Waikare is proof of this.[65]

7.38 In any case, by Te Tiriti o Waitangi, the rangatira were not asked to cede sovereignty or give to the Crown a power greater than their own. Under Te Tiriti o Waitangi, Maori were asked to agree to a kawana a governor, something less than sovereignty. While the English version of the Treaty asks Maori to cede sovereignty, it has little relevance as Maori did not sign or agree to the Treaty of Waitangi. This is the fundamental point

7.39 Some expert witnesses argue that Maori had no conception of the word sovereignty. On this point Moana Jackson states "I think the issue is not whether or not we understood sovereignty but whether or not we understood mana...and I think the arguments about whether we understood sovereignty are actually clouding of the issue because they take away from the words that our people actually discussed, which were the words in Te Reo Maori in Te Tiriti o Waitangi".[66]

7.40 Maori did understand the concept of sovereignty and British forms of government. The Crown witnesses agreed that Maori knew the difference between a kawana (governor) and a kingi (sovereign). Maori knew that a kawana was not the sovereign and that the king or the sovereign is more powerful than a governor. Therefore, what Maori

[65] See Te Kapotai Hapu Korero, Wai 1040, D5.
[66] Transcript of Moana Jackson, Wai 1040, 4.1.4, 190.

were agreeing to under Te Tiriti o Waitangi was for a kawana /governor not a cession of sovereignty.[67] Another fundamental point.

7.41 Another issue regarding consent is that it appears that the only opinion that mattered regarding whether or not sovereignty had been obtained from the rangatira was Hobson's.[68] The Colonial office took Hobson's report on its face value. They did not consult the texts of the Treaty/Te Tiriti before issuing the formal proclamation declaring British sovereignty over New Zealand.[69]

7.42 Furthermore, Hobson, in coming to the view that the rangatira had consented to a cession of sovereignty was totally reliant on the word of the missionaries.[70] While the missionaries were friendly with the Maori, they had interests of their own. They were some of the largest land holders in the Bay of Islands. In respect of translating and discussing the proposal for Te Tiriti o Waitangi with the rangatira, they were effectively agents of the Crown.

7.43 Key Crown witnesses have conceded that consent was imperfect. When questioned on the issue of consent, Dr Loveridge states "in my view, the effort was made in a limited sort of a way to get that consent".[71]He continues, "they succeeded in getting consent to something...I think there is an acceptance certainly of an imposition of British law at some level, under the Governor".[72]

7.44 The extent of the authority the Crown was supposed to get under the Te Tiriti o Waitangi remains in issue in this Inquiry. The Tribunal has heard polar views regarding the meaning of kawanatanga.

7.45 At the extreme end there is Dr Parkinson for the Crown and Samuel Carpenter claiming that at 1840 kawanatanga was the only appropriate term for sovereignty. In response to that assertion Salmond has said "kawanatanga is not an accurate or even plausible translation of

[67] Transcript Dr Paul McHugh, Wai 1040, 4.1.4, 537.
[68] Ibid.
[69] Ibid.
[70] Ibid 546.
[71] Transcript of Dr Donald Loveridge, Wai 1040, 4.14., 435.
[72] Ibid, 541.

sovereignty".[73] Salmond argues that the terms "kingitanga" and "mana" as used in He Whakaputanga would have been logical translations for sovereignty. Pou korero have argued the same.[74]

7.46 We ask the Tribunal to accept the Pou Korero and Salmond's interpretation of the use of the above terms.

7.47 Then there is Professor Ward who provides that under Te Tiriti o Waitangi, the rangatira and the Crown both understood that there was going to be a governor and that that governor would exercise "some" authority in conjunction with the rangatira.[75] However this concept of shared sovereignty would not work in either the western or Maori paradigm where both the British and Maori believed they were both Kings of the same land.

7.48 While there is some uncertainty about kawanatanga what is clear from Te Kapotai's perspective is that when the exercise of kawanatanga was in question, their rangatiratanga would prevail. In their mind, kawanatanga was always qualified by their rangatiratanga as no one could have mana greater than theirs.

7.49 For a number of reasons Te Kapotai believe that Hobson could never have passed the consent test. It is their belief that the Crown wrongly assumed sovereignty under the Treaty. If consent was not obtained, from the chiefs and the Crown's assertion of sovereignty was wrong, then was what occurred nothing less than a usurpation of Maori sovereignty?[76]

7.50 Finally on the issue of consent, when Dr Paul McHugh was asked by the Tribunal "if Hobson had not got the degree of consent that he considered sufficient to "discharge his office"...what would you say to that proposition that there was no contemplation that Hobson would fail in his mission", he responded "yeah, failure was not an option".[77]

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[73] Professor Dame Anne Salmond, Response to Commentaries on my Evidence, and Written Questions, Wai 1040, A 22 (D), 3.
[74] See in particular the Week 1 Opening statement of Erima Henare (Wai 1040, A 30 (c).
[75] Transcript of Professor Ward, Wai 1040, 4.1.4.
[76] Ibid, 553.
[77] Transcript of Dr McHugh, Wai 1040, 4.1.4 606.

7.51 If there is something that is undeniably evident in Te Kapotai's experience it is that failure to obtain sovereignty was not an option for the Crown. The next section which looks further at the texts of Te Tiriti o Waitangi and the debates on the eve of the signing which highlight the deceptions on the part of the Crown in its effort to obtain sovereignty.

The texts

7.52 Erima Henare has said, "He iti te kupu, he nui te korero". In this context he means "one word can mean many things". This is to caution an over analytical approach to interpreting the terms contained in Te Tiriti o Waitangi and to avoid a manipulation of the texts to support that Maori ceded sovereignty to the British by Te Tiriti o Waitangi/The Treaty of Waitangi as is so often done.

7.53 Te Kapotai history supports the korero of Erima Henare where he argues that the Te Tiriti o Waitangi text is the most authoritative account of what the rangatira actually agreed to at 1840:

> *Ngapuhi consider Te Tiriti o Waitangi to be the evidential proof of who holds acknowledgement for rangatiratanga and sovereignty. The fact that Te Tiriti o Waitangi was signed is the best evidence that no demand on the 6 February 1840 was made to cede sovereignty...in other words the retention of Maori sovereignty guaranteed the existence of Te Tiriti o Waitangi*[78]

7.54 For Te Kapotai and all others in Te Paparahi o Te Raki, Te Tiriti o Waitangi is the only version that is relevant in determining what their tupuna understood they were agreeing to.

7.55 It would be a lengthy process to revisit the linguistic evidence of Dr Patu Hohepa, that provides an analysis of the articles of Te Tiriti o Waitangi from a Ngapuhi perspective. Te Kapotai endorses Dr Hohepa's definitions of key terms used in Te Tiriti o Waitangi, including:

[78] Transcript of Erima Henare, Wai 1040, 4.1.1, 121.

(a) Rangatiratanga – Dr Hohepa notes that this term was used in both He Whakaputanga and Te Tiriti o Waitangi. Rangatiratanga covers kingdom (Lord's prayer), trusteeship, power as or of rangatira – sovereignty, mana and mana motuhake;

(b) Kawanatanga – or Governorship. In the context of Te Tiriti o Waitangi governorship means that the Governor will only govern pakeha people; and

(c) Tino rangatiratanga – Tino rangatiratanga in this context translates as absolute unfettered chieftainship.[79]

7.56 Questions have been raised regarding the use of particular Maori words in Te Tiriti o Waitangi. It has already been discussed that at 1840 the rangatira knew well what the role of kawana or governor was, a role lesser than a King or Queen (a sovereign), and that kawanatanga was not even a plausible translation of sovereignty.[80]

7.57 It then raises the question as to why the word "mana" being synonymous with rangatiratanga and which denotes the highest form of power, which was used in He Whakaputanga, was not used in Te Tiriti o Waitangi. Had it have been used in Te Tiriti o Waitangi the rangatira would have known that the Crown was seeking sovereignty or a greater authority than their own under the arrangement.

7.58 On this point Erima Henare and Salmond alike argue that had the word mana been used, the rangatira would have never signed:

> *No one with any knowledge of Maori life in 1840, however, would have asked the rangatira to surrender their mana, which came from their ancestors, and was not theirs to cede. Its loss would have meant death and disaster to themselves and their people. It would also have been contradictory and a folly to ask them to give up their rangatiratanga, their status and standing as leaders among their people; and in any case this had already been used in the text of Te Tiriti o Waitangi, where it*

[79] Brief of Evidence of Dr Patu Hohepa, Wai 1040, D4, 53, 54..
[80] Professor Dame Anne Salmond, Response to Commentaries on my Evidence, and Written Questions, Wai 1040, A 22 (D), 3.

was guaranteed to the rangatira and the Maori people in Article 2."[81]

7.59 The British Crown therefore knew that they had to use a term such as kawana which represented a lesser power or authority in order to get the rangatira to consent.

The discussions

7.60 On 5 February 1840 the rangatira met with Hobson, the missionaries and other officials at Waitangi to discuss Te Tiriti o Waitangi. Since then, the proceedings of this hui and the surviving accounts of the speeches given by the many rangatira present have been pulled apart in efforts to resolve the outstanding issues between the two texts.

7.61 Salmond has cautioned the Tribunal with the weight that it gives to the interpretations of the speeches, noting that the surviving accounts of the speeches are invariably in English, yet they were delivered by the rangatira in Te Reo Maori. She notes:

> *Difficulties with translatability arise from fundamental differences between Maori and English world theories and systematic systems. Given these differences, some of the key concepts in the original speeches in Maori may have been impossible to render adequately in English, even if the translator could grasp them.*[82]

7.62 Salmond and others have highlighted some key points which must be taken into account when considering various sources of the discussions (this generally applies to other written accounts about He Whakaputanga and Te Tiriti o Waitangi);

(a) The speeches were given in Te Reo, by rangatira whose dominant form of communication was oral, not written;

(b) That the version that was read out aloud and explained to the rangatira was the one in te reo, Te Tiriti o Waitangi. While the English version of the Treaty of Waitangi was read once, the

[81] Brief of Evidence of Anne Salmond A 22, 29.
[82] Ibid, 25.

large majority would not have understood it as their first language was Maori;

(c) That Hobson could not speak Maori and therefore the speeches of the rangatira were translated to him by the Missionaries, in missionary Maori;

(d) When the rangatira raised concerns regarding the loss of lands, and questioned the power the Governor would have, they were assured by the missionaries that their rangatiratanga would remain intact;

(e) A lot of the discussion was around whether the Governor should stay or go. Their understanding of a Governor or kawana was largely interpreted with reference to their experience of Governors in their travels overseas.[83]

7.63 Te Kapotai have provided evidence that at the Treaty discussions on 6 February 1840 their rangatira spoke out in support of Wai, a rangatira from Ngai Tawake, who had earlier challenged the Governor and expressed concerns about how trading practices had been reduced to lying, stealing and cheating.[84]

7.64 We know that dodgy land dealings were a particular issue for Te Kapotai as there had been an increasing number of Old Land Claims which had not been investigated. The rangatira were assured by the missionaries at the Treaty discussions that Old Land Claims would be investigated.

7.65 The Reverend Charles Baker and his son who lived at Waikare in 1840 were also present on the day of the discussions and the signing of Te Tiriti o Waitangi. He took his Anglican teachings to the Waikare. Te Kapotai rangatira had good relationships with Baker and other missionaries. Te Kapotai have said that their tupuna would have trusted the promises and assurances of the missionaries present.[85]

[83] Ibid.
[84] Te Kapotai Hapu Korero, Wai 1040, D 5, 29.
[85] Ibid 29.

7.66 During Hearing Week 1 Erima Henare spoke in relation to the Anglican Mission and those missionaries present at the discussion at Waitangi:

> *Our tupuna took calculated risks in signing Te Tiriti o Waitangi. They believed in the words that were conveyed to them, and trusted the people that explained its meaning. And in that respect I ask, "Why isn't the Anglican Church here today?". They believed what they were told and they signed on the basis of that understanding*[86]

7.67 In regards to the missionaries at the time, throughout these hearings evidence has been provided on how they had their own interests to protect. The missionaries were essentially advocating for a cession and were inclined to secure Maori consent to the point of deceiving the Maori mind. [87]

7.68 After all the missionaries knew that Hobson was not the sovereign. Hobson knew he was not the sovereign. The missionaries proposed and the Maori discussed with them the role of a kawana (governor). They were not asked to agree to a sovereign. The missionaries did not explain that the governor would have greater mana or be more powerful than the rangatira.

7.69 Erima Henare states the deception of the missionaries occurred long before the day of the debates, and argues that the colonising process begins with the missionaries:

> *Engari koina te timantanga o te noho a te Karauna i konei. He ahuatanga tera no ratou, huri noa i te ao. Ka tonoa nga mihinare i te tuatahi, no muri mai ka whai atu te kawanatanga o Ingarangi.*[88]

7.70 On the day of signing, Hobson was totally reliant on the word of the missionaries that Maori had agreed to cede their sovereignty to the Crown. In Hobson's mind by the rangatira signing he had obtained sovereignty. That day he sent a dispatch to Governor Gipps at the Colonial Office, reporting on the meetings and enclosing the "official"

[86] Brief of Evidence of Erima Henare, Wai 1040, 4.1.4, A30 (c), 4, para 9.
[87] Transcript of Erima Henare, Wai 1040, 4.1.4, 139.
[88] Brief of Evidence of Erima Henare, Wai 1040 A 30(c), para 111.

English translation of Te Tiriti o Waitangi. Hobson states "46 rangatira have signed, and many of those signed the declaration of independence, this must be deemed full and clear recognition of the sovereign rights of Her Majesty over the northern parts of this island.[89]

7.71 Here a further deception occurs. As mentioned Maori had not considered or debated the English translation, yet this was the version that was sent to the colonial office. The colonial office took Hobson's word for it and determined that he had obtained consent sufficient to discharge his office.[90]

7.72 As submitted, Te Kapotai have never accepted Hobson's view, or the view of successive governments, that their chiefs consented or agreed under Te Tiriti to hand over their rangatiratanga to the Crown.

Meeting of the minds

7.73 When discussing the intended nature of the relationship under Te Tiriti o Waitangi Professor Ward for the Crown states that at the signing of Te Tiriti o Waitangi there was a "meeting of the minds" to a considerable extent. He notes that the rangatira expectations and understandings of the Treaty focussed on protecting their property, and securing them peace and good order. The rangatira understood that pre-1840 land transactions would be investigated, that the Governor would control aggressive Pakeha, that the Crown would work with them, rather that unilaterally impose their authority in the shaping of judicial and administrative institutions and finally that their mana, authority and rangatiratanga over their own people and community would remain.[91]

7.74 Ward goes on to discuss the common agreement and understandings between the rangatira and the Crown:

(a) There was substantial agreement that the Crown would keep out foreigners and control land transactions;

[89] Crown Chronology, Wai 1040,3.1.142, 12.
[90] Transcript of Dr Paul McHugh, Wai 1040, 4.1.4, 584.
[91] Summary/response of Professor Alan Ward, Wai 1040, A19 (a), para 26.2.

(b) Rangatira would have felt reassured that they would not have been deemed inferior to Pakeha or enslaved;

(c) There was a common understanding that the customary authority of rangatira among their own people would be recognised, at least for the immediate future and that the governor and his officials would work with them rather than unilaterally import their authority; and

(d) More importantly, there was a common understanding between the Crown and Maori that kawanatanga would be exercised in good faith, for the common good. This is the moral dimension of the Treaty, or the 'spirit' of the Treaty.

7.75 Te Kapotai acknowledges that this **in part**, would have been the nature of the relationship intended by the rangatira.

7.76 However, as Pou Korero, Te Kapotai and others have argued there are considerable differences in how the rangatira who signed and the Crown understood these document. They have also argued that because of the difference in understanding the intended relationship under these documents never resulted. Therefore it is impossible as Ward argues that there was a considerable "meeting of the minds".

7.77 At some point, in fact almost immediately after the signing of Te Tiriti o Waitangi, the minds did not meet at all. Following Te Tiriti o Waitangi, the Crown did not control land transactions, as promised. Te Kapotai became landless. Te Kapotai were deemed inferior, they were disposed from their customs and culture. The Government did not work with them, it unilaterally imposed its authority and there was no room for the rangatira in the new governance arrangements.[92] The Crown did not exercise its kawanatanga in good faith and for the good of Te Kapotai.

[92] See in particular the evidence of Anne Salmond, Wai 1040, A 22, 89.

7.78 A "meeting of the minds" requires the same understanding of the terms of the agreement by both parties at the time the agreement was entered into.[93]

7.79 At 1840, there could never have been a meeting of the minds when the Crown believed that they were gaining sovereignty as they knew it under the Treaty of Waitangi, and the rangatira understood they were retaining their sovereignty as they knew it under Te Tiriti o Waitangi. Te Tiriti o Waitangi and the Treaty of Waitangi are different agreements and as these submissions show clearly Maori and the Crown had polar views in terms of what the arrangement under the documents meant.

7.80 Moana Jackson discusses that "magic" that occurs when Maori rangatiratanga or sovereignty disappears under the Treaty. It comes back to the issue at the heart of this Inquiry. Under Article 2 of Te Tiriti o Waitangi, "tino rangatiratanga"(which is synonymous with mana and ultimate power) is guaranteed to the rangatira. But the English version the Treaty, (English translation of the Maori version) is utterly different and grants the Crown sovereignty. It has been put that by force of law (Article 2 of the Treaty) the ground was laid for the Crown's sovereignty to subsume and take away the rangatira rangatiratanga or authority.[94]

7.81 In spite of this the Treaty was regarded by the colonial office as a valid instrument of cession. The Crown's assumption of sovereignty under the English version is the point at which the Crown believed it had the legal, moral and every other authority it needed to take control of New Zealand. However, for the removal of all doubt the Crown issued the May proclamations declaring sovereignty over New Zealand. It is noteworthy that the proclamation was issued while the Treaty was still been taken around the country by Bunbury for consent by the rangatira.

Conclusion

7.82 What these Initial Hearings have highlighted is that:

[93] Transcript of Alan Ward, Wai 1040, 4.1.4, 324.
[94] Transcript of Moana Jackson, Wai 1040, 4.1.4, 182.

(a) The political and economic position in the north had not substantially changed between the time of He Whakaputanga and Te Tiriti o Waitangi in 1840. Maori lived in accordance with their tikanga and cultural preferences;

(b) The rangatira had been travelling, trading and dealing with the Kings and the Crown officials since the early 1800s. They were treated as rangatira and had longstanding mutually beneficial relationships with the British;

(c) They were astute leaders with a sound understanding of British systems of Government. They knew the difference between a King(sovereign) and a Governor; and

(d) It is a myth that the rangatira wanted or needed any authority above theirs. They were in the position of power

7.83 In regards to Te Tiriti o Waitangi, what these hearings have highlighted is that:

(a) Under Te Tiriti o Waitangi Maori were guaranteed their tinorangatiratanga. Embodying the concept of mana, rangatiratanga was the highest form of authority equivalent to sovereignty;

(b) Under Te Tiriti o Waitangi the rangatira were not asked to consent to a sovereign, they were asked to consent to a kawana a lesser function and power than sovereignty;

(c) Under Te Tiriti o Waitangi, the Crown was able to exercise kawantanga over its British subjects. This was always subject to and qualified by the rangatira's rangatiratanga; and

(d) Had the Crown used the terms "kingitanga", "mana" or "rangatiratanga" in Te Tiriti o Waitangi to ask for a cession of sovereignty, the rangatira would not have signed.

7.84 Finally these hearings have also highlighted some of the deceit on the part of the Crown to obtain "consent" of the rangatira under the Treaty. It appears the only opinion on whether or not consent had obtained

that mattered was Hobson's. The Treaty was part of a colonising process that was, in the end, inherently violent. The notion of obtaining the rangatira consent to a cession of sovereignty wholly benefited the Crown, it provided "ease of entry" for the Crown and laid the foundation for the violence, inbuilt in colonisation that inevitably followed.

7.85 For Te Kapotai rangatira, signing Te Tiriti o Waitangi was about continuing the relationship they had maintained over decades with the Pakeha and the British Crown. It was also about strengthening their alliance with the Queen so that her subjects coming to reside in the Bay and Waikare could be managed.

7.86 Te Kapotai rangatira were becoming annoyed with the lawlessness of the settlers, there were outbreaks of violence, gardens were being raided and the dodgy land dealings that were taking place. Te Tiriti o Waitangi was intended to be a response to this. Te Tiriti o Waitangi allowed the Queen to govern her subjects, while Te Kapotai rangatira retained their rangatiratanga. Any authority or power of the Crown was always subject and qualified by the rangatira's rangatiratanga.[95] The rangatira could have dealt with these issues through conflict and war as they did in later years, but at 1840, they sought an honourable relationship and a peaceful resolution.

[95] Te Kapotai Hapu Korero, D5, 30, para 7.7.

C NGA PAKANGA, HOUHOU TE RONGO

8.0 Post Te Tiriti o Waitangi

> *"If the flag were only for the white... we would not take up arms; we would not attack it; we would say nothing; but this flag takes away the authority of our chiefs and all our lands"*[96]
>
> *Maihi Kawiti*

8.1 During the period between Te Tiriti o Waitangi and the lead up to the Northern War were some of the most significant and memorable events in the history of Te Kapotai. This was the period where the Crown took consecutive actions to impose its newly assumed sovereignty. It follows that it was also the period where the rangatira resisted the Crown's authority and fought to defend their understanding of He Whakaputanga and Te Tiriti o Waitangi.

8.2 Te Kapotai's participation in the fourth attack on the flagstaff, the British attack on Te Kapotai pa and the subsequent Northern War is directly related to how Te Kapotai tupuna understood He Whakaputanga and Te Tiriti o Waitangi. As Pou Korero, Salmond and Moana Jackson have argued this is the only reason Ngapuhi we went to war.

8.3 Therefore, it is a disappointment for Te Kapotai that the Crown and the Tribunal are reluctant to see the relevance of the wars and events post 1840 to these Initial Hearings. Te Kapotai believe that the actions of their tupuna in these years provide some of the most persuasive evidence on the understandings of their tupuna of He Whakaputanga and Te Tiriti o Waitangi, and the intentions of the Crown at 1840.

8.4 The fact is that the Crown chronology of key events relating to He Whakaputanga and Te Tiriti o Waitangi shows a complete ignorance for the history of Te Kapotai and disregard for the 1845 British attack on Te Kapotai pa.

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[96] Johnson, R The Northern War 1844- 1846, Wai 1040 A 5, 182.

8.5 It is convenient that the scope of the Crown evidence ends at 1840. By doing this, the Crown avoids the real history which shows the Crown's successive and repetitive actions it took to impose the British rule.

8.6 Te Kapotai has provided evidence on the period following the signing of Te Tiriti and in the lead up to the Northern Wars. Te Kapotai is not asking the Tribunal for a detailed analysis of the Northern Wars period at this stage. They agree that that undertaking is better left until Stage Two of the Inquiry when they will provide more detailed evidence.

8.7 However, Counsel submits the decision of the rangatira to fight against the Crown in 1844, casts light and clarity on what their understanding was of He Whakaputanga and Te Tiriti.

8.8 After signing Te Tiriti o Waitangi, Te Kapotai rangatira continued to exercise rangatiratanga as they always had. The Crown however, was quick to assert the sovereignty it assumed it gained under the Treaty of Waitangi.

8.9 Within months of signing tensions began to arise between the rangatira and the Crown as it became clear that they held conflicting understandings of the meaning and effect of Te Tiriti o Waitangi.[97] Salmond accounts for the almost immediate shift in power from the rangatira to the Crown:

> *The British replaced Te Tiriti o Waitangi with the draft Treaty in English as the 'official' account of what had been agreed between the rangatira and the Crown. By that simple act, the balance of powers between rangatira and the kawana in Articles 1 and 2 became, in theory at least, absolute control by the Crown. Further in governance arrangements that were instituted soon afterwards, Maori were given no place, contrary to Article 3. From that time on a history of conflict and bloodshed was almost inevitable*[98]

8.10 Te Kapotai began to realise this definite imposition of British law and institutions at the expense of their traditional tikanga and culture. For

[97] Te Kapotai Hapu Korero, Wai 1040, D 5 (a), 8.
[98] Brief of Evidence of Anne Salmond, Wai 1040 A 22, 89.

Te Kapotai rangatira, Te Tiriti o Waitangi incorporated a number of undertakings that were not fulfilled by the Crown, paramount was that their rangatiratanga, as they understood it at 1840 was affirmed.[99]

8.11 The rangatira quickly became disillusioned by the Crown's actions, within a short period of time, they realised that the relationship they thought they would have with the Crown was not going to result.

8.12 Johnson in his report on the Northern Wars 1844 - 1846 provides his assessment of the situation for Te Kapotai:

> *Te Kapotai resided in the southern eastern Bay of Islands, principally around the Waikare river. Like Ngati Hine and Ngati Manu, their southern Bay of Islands kin, Te Kapotai had had extensive early contact with Europeans and had been involved in timber milling and trading from the 1820s. There was a large number of Old Land Claims located in the Waikare Inlet. By the 1840s, they had constructed hotels at their principal settlement at Waikare for the accommodation of European families as part of an economic enterprise. Waikare had originally been an Anglican CMS but with the arrival of the Marist mission, had converted to Catholicism....Hikitene like many other rangatira had become disillusioned about the manner in which kawanatanga had impacted negatively on the mana of him and his hapu. In particular, the impact of the loss of the trading capital and commerce in the Bay of Islands after 1840 must have been sharply felt by Te Kapotai.*[100]

8.13 While there were many Crown actions which affected Te Kapotai and concerned their rangatira, the actions which had a direct and significant impact on Te Kapotai and are relevant to the issues are:

(a) 1840 - The government removed the 1834 He Whakaminenga flag from Waitangi and the re-erection of the British flag at Kororareka;

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[99] Te Kapotai Hapu Korero, Wai 1040, D 5 (a), 8.
[100] Johnson, R, The Northern War 1844-1846, Wai 1040, A5, 264.

(b) May 1840 – The government issued the proclamations declaring British sovereignty over New Zealand;

(c) June 1841 – The government issued the Customs Ordinance which stopped rangatira in the Bay of Islands from charging anchorage fees and customs charges; and

(d) September 1840 – The government relocated of the capital from Okiato/Kororareka to Auckland. This had the effect of removing trade and shipping away from the Bay of Islands and caused the economic decline in the Bay of Islands.[101]

8.14 In the following statement Johnson acknowledges the central tension between the Crown and Maori understandings which eventually lead to the wars; "the different texts carried different meanings and spawned different and contradictory understandings...and this laid the grounds for later conflict".[102]

8.15 The conflicting understandings really became apparent when the Crown erected the British Flag at Kororareka. Shortly after the signing of Te Tiriti o Waitangi, Te Kara (the 1834 He Whakaminenga flag) at Waitangi was removed and the British flag was re-erected at the flagstaff at Kororareka.

8.16 Johnson notes Te Kara (He Whakaminenga flag) was Busby's proposal and it served as a "potent symbol" for the rangatira. Orange discusses the symbolism imbued in Te Kara: "its significance lay in the Maori understanding of the event: the belief that the mana of New Zealand...the mana of the rangatira, had been recognised by the British Crown.[103]

8.17 Therefore, the Crown by erecting the British flag in Kororareka without erecting Te Kara alongside it, served to inform the rangatira that their mana and rangatiratanga was subordinate to the newly assumed sovereignty of the Crown. This was seen as a huge slight on the mana

[101] Johnson, R, The Northern War 1844 – 1846, Wai 1040, A 5, 68.
[102] Ralph Johnson, The Northern War 1844 – 1846, Presentation Summary, September 2010, Wai 1040, #, 12.
[103] Ralph Johnson, The Northern War 1844 – 1846, Presentation Summary, September 2010, Wai 1040, #, 5.

of the rangatira and was the reason Hone Heke repeatedly attacked the British Flag.

8.18 Johnson in his report on the Northern Wars, explores the rangatira understandings of He Whakaputanga and Te Tiriti o Waitangi and the relationship between those understandings and the subsequent decision to fell the British flag staff in 1844. He concludes that when the rangatira realised that their mana and rangatiratanga recognised through He Whakaputanga and Te Tiriti o Waitangi would continue to be subjugated by the Crown (through acts such as the removal of Te Kara), it provided cause for the rangatira to challenge the Crown.[104]

8.19 As mentioned, Te Kapotai tupuna did not like the way things were going. They had longstanding expectations about how the relationship would be with the Crown. However, this relationship did not result.

8.20 While Te Kapotai were assured by the Missionaries at the Treaty discussions that Old Land Claims would be investigated and land dealings controlled, dodgy land dealings continued in Waikare. Lands were being 'sold' along the river, and areas that were available for mahinga kai were no longer.[105] Old land claims were not investigated for many years after the wars. The promises conveyed by the missionaries were never delivered.

8.21 The Tribunal has heard about the resistance Maori put up to the Crowns repetitive attempts to suppress their rangatiratanga. Initially the rangatira tried to resolve the tensions peacefully. As early as May 1840 the rangatira were requesting urgent hui with Hobson to discuss the Treaty and issues of authority.[106] The diary of John Johnstone who was staying with Hobson at the time records the hui where the rangatira expressed their deep concerns about Te Tiriti o Waitangi:

> *Several rangatira from Caicoi (Kaikohe), Tyami (Taiamai), Waitangi and the vicinity of Waimati waited on the governor to tell him "Our hearts are gloomy from what Pakehas have told us, they say "that the Missionaries first come to pave the way*

[104] Johnson, R The Northern War 1844-1846, Wai 1040, A5, 41.
[105] Te Kapotai Hapu Korero, Wai 1040, D 5, 35.
[106] Johnson, R, The Northern War 1844 – 1846 (2006), Wai 1040, A 5, p 48.

for the English, who have sent their governor here, that Soldiers will follow and then he will take away your lands and shoot you, which is easy as the Missionaries by making you Christian have unfitted you for defending yourselves".[107]

8.22 The rangatira attempts to reconcile the difference in understanding were not met with willingness on the part of the Crown and as the tensions grew so did the Maori resistance or "rebellion".

8.23 Johnson aptly summarises the period between 1840 and 1844:

> *Over the years of 1840 to 1844, Ngapuhi watched as British authority and laws began to encroach first on their territory and later on their earlier agreements. Ngapuhi leaders including Hone Heke, sought meetings with the governor, wrote letter, undertook taua muru, and complained directly to settlers and officials but there was no apparent change in the attitudes shown by British authority in New Zealand. Crown officials expressed their awareness of Ngapuhi concerns, on different occasions, and yet little action was taken to rectify concerns.*[108]

8.24 The evidence shows that each time the rangatira did resist the Crown's authority the Crown reacted disproportionately in an effort to suppress the rebellion. For example, when Hone Heke cut down the British flag the first and second time, the Crown reacted by ordering more military into the Bay. For each symbolic attack, where no people were injured the Crown used it as a justification to ramp up the military presence.[109]

8.25 It is significant that when the rangatira signed Te Tiriti o Waitangi in 1840 there was no military presence in the Bay. While muskets were available there were no soldiers, war ships and other weapons. So how were the rangatira really to know that the Crown was going to revert on the relationship envisaged by Te Tiriti o Waitangi and take control of the Bay of Islands by force? The Bay of Islands was the first settled, the first place in the country where rangatira were dispossessed through warfare.

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[107] Ibid, 49.
[108] Ibid, 96.
[109] Ibid.

8.26 As Moana Jackson puts it "violence is inbuilt into colonisation".[110] It appears the Crown was looking for any invitation to bring in military arms which it knew would inevitably result in the subordination of northern rangatira. The Crown may have assumed "legal sovereignty" under the Treaty, but it needed to suppress the authority and rebellion of the rangatira in order to have control of the country.

9.0 Te Whawhai Pakeha i Waikare, i te tau 1845.

9.1 Following the fourth attack on the flagstaff the Crown set out on a military campaign to punish all 'rebel' Maori who were part of Heke's "resistance movement". The Crown did not seek to reconcile or repair the relationship in a peaceful way and the Crown ignored most of the peace efforts advanced by Heke and Kawiti at this time. Instead the Crown issued a series of proclamations which allowed the invasion and destruction of a number of principal pa in the eastern Bay of Islands, including the pa of Te Kapotai.

9.2 On 28 April 1845 the Military initiated the first attack on neighbouring hapu at Pomare's pa at Otuihu.

9.3 Te Kapotai have provided a detailed account of the attack on their pa.

9.4 On 4 May 1845, Colonel Hulme ordered the attack. He stated:

> *...its is my sad duty to state my conviction that till the principal pahs on the kawakawa are destroyed, and till the majority of their rebellious inhabitants are killed, there will be no peace at the Bay of Islands, no security for other settlements.*
>
> *The pahs to which I refer are (besides Pomare's) those of Kawiti, of Hori Kingi, of* ***Waikadi****, of Marupo.*[111]

9.5 Te Kapotai believe that the attack on their pa was an intentional action of the Crown who to that point had still not managed to impose its authority and laws and acquire the lands of the rangatira they desired for settlement.

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111 Fitzroy to Hulme, 4 May 1845, w/o 1/433, pp 269-70, cited in Te Kapotai Hapu Korero, Wai 1040, D5.

9.6 The attack on the Te Kapotai pa by the British forces was premeditated and well planned. To carry out the attack the British Crown organised for 192 soldiers, eight marines, four guides, a 12 pounder carronade, small boats, seamen, and a pilot for each boat. An excessive force on its own, however the Crown did not stop at that.[112]

9.7 On 15 May 1845 the Crown, supported by a taua of 100 from Te Mahurehure, Ngai Tawake and Hauraki, attacked Te Kapotai pa. The main pa, Te Turuki, and its kainga, hotels, crops and food stores were destroyed and burnt. The whare whakairo was also burnt to the ground. A Te Kapotai rangatira Hari was also killed and many others wounded. [113]

9.8 The attack on the pa had devastating and lasting effects for Te Kapotai.

10.0 The Northern War

> *I heke mai nga toto o oku tupuna ki mua i te mura o te puu, mo te mana o te Whakaputanga me Te Tiriti o Waitangi te take.*
>
> *The blood of my ancestors was spilt in front of the gun and they died for the sake of Te Whakaputanga and Te Tiriti o Waitangi.*[114]

10.1 Te Kapotai rangatira fought alongside Heke, Kawiti and others in the battles of Puketutu, Te Ahuahu/Ohaeawai and the final battle at Ruapekapeka.[115]

10.2 Te Kapotai have said that the Northern War, was a war of attempted control, of subjection and for sovereignty. They were faced with the ultimate decision to fight to protect their mana and rangatiratanga as they had done so for generations.

10.3 During Hearing Week 1 Hirini Henare presented one of the muskets that fought at the battles of Puketutu, Te Ahuahu/Ohaeawai and Ruapekapeka. Te Kapotai also carried the kakauroa, Ringakaha that

[112] Ibid.
[113] Ibid.
[114] Brief of Evidence of Hirini Henare (withheld), Wai 1040, 2.5.4.7.
[115] Te Kapotai Hapu Korero, Wai 1040, D 5 (a), 9.

was present at Hearing Weeks 1, 3 and 4 of the Initial Hearings. It was taken to Ruapekapeka where it fought against the British.

10.4 Te Kapotai, lost lives at the battles at Ohaeawai and Ruapekapeka. Many of those fallen were taken and buried on Kapowai maunga before their names were recorded. However Te Kapotai know they lost Ripiro, Wharepapa, Te Horo and Te Aoro.[116]

> *...na i runga i ena whawhai ko haere o matou tupuna, na ka mate, ka taria nga mea i mate ki runga o Kapowai.*
>
> *...It was into these battles our tupuna entered, those that fell in battle were carried up to Kapowai(Hau Hereora 2009)*[117]

10.5 It was clear that the Crown would not withdraw its military campaign until their rangatira accepted a subordinate position and until they agreed to forfeit their lands to the Crown.

10.6 In cross examination, the post Te Tiriti period and in particular Northern War was reluctantly touched on by the Crown witnesses, who again claim the wars were beyond the scope of the issues for this Tribunal.

10.7 In cross examination the Northern Wars were described as the "disasters that befell Maori". Professor Ward states that the wars were in spite of, not because of Te Tiriti o Waitangi.

10.8 Te Kapotai strongly oppose this contention. When questioned that the disasters occurred because under the English version of the Treaty, much more power was assumed or taken than was ever given or acknowledged under Article one of the Maori version, and that the assumption of sovereignty under the English text is the foundation for everything that followed, he responded:

> *It is certainly the basis on which those governors claim to act. They almost certainly exceeded, they may not have exceeded the legal authority they considered themselves vested in, but*

[116] Te Kapotai Hapu Korero, Wai 1040, D 5, 48.
[117] Ibid.

they were wrong, they were badly informed, they were arrogant, they breached the principles of the Treaty.[118]

11.0 Peacemaking

11.1 Following the battle of Ruapekapeka, Te Kapotai put down their weapons along with Heke and Kawiti and attempted to make peace with the Crown. Peacemaking efforts of the rangatira after Ruapekapeka included:

(a) 19 January 1846 – The rangatira sent letters to the governor seeking formal peace;

(b) 21 January 1846 – the first peacemaking hui was held at Pomare's pa;

(c) 23 January 1846 – Proclamation of peace was made by the Crown, but it was not settled kanohi ki te kanohi until 4 years latter at the Kororareka in 1849; and

(d) 1857-1858 – The re-erecting of the flagstaff.[119]

11.2 The governor was intent that he would not agree to peace unless Heke, Ngati Hine, Ngati Manu and Te Kapotai agreed to forfeit their lands. The rangatira would never agree to hand over their lands to the British, to do this would mean to relinquish their rangatiratanga. Peace could only be reached on the basis that they would retain their lands.

11.3 On 23 January 1846, the Crown issued a formal proclamation. The proclamation offered a full pardon to all rebel Maori, including Te Kapotai. The proclamation did not require that Te Kapotai and others hand over their land.[120]

11.4 In reaching peace with the Crown, Te Kapotai still expected that their rangatiratanga would be respected. It never did mean that they would accept Crown sovereignty and this is well evidenced in their korero tuku iho.

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[118] Transcript of Professor Alan Ward, Wai 1040, 4.1.4, 331.
[119] Johnson, R, The Northern War 1844-1846, Wai 1040, A5, 390-406.
[120] Johnson, R, The Northern Wars, 1844-1846, Wai 1040, A 5, 394.

11.5 From the time "peace" was reached, Te Kapotai have continued in every generation to challenge the Crown to respect and uphold te mana o He Whakaputanga me Te Tiriti o Waitangi.

11.6 In every generation Te Kapotai has tried to have their rangatiratanga recognised through the Crown's structures, tools and processes of the day. However these arrangements still fall far short of the promises made to their tupuna under Te Tiriti o Waitangi.[121]

11.7 The ability of Te Kapotai to manage their own affairs is always limited by the Crown, and the political will of the day.

11.8 One only needs to contrast the rangatiratanga of their tupuna at 1840 with the level of rangatiratanga the hapu has today to see what effect the Crowns colonising processes has had on their hapu.

11.9 The actions of the rangatira and the events between He Whakaputanga, Te Tiriti o Waitangi and after the Northern War are not consistent with an interpretation that their tupuna ceded their rangatiratanga, their sovereignty to the Crown.

11.10 The evidence of Te Kapotai is supported by Johnson when he concludes his findings on the origins of the Northern War:

> *The origins of the Northern War lay in the competing understandings contained within the Maori and English texts of the Treaty of Waitangi. Ngapuhi understandings and expectations of their own position and authority were based on the Maori text of the Treaty and a long history of relationships with the British Crown prior to 1840. These relationships had provided an ongoing recognition of Maori chiefly authority or tino rangatiratanga... Ngapuhi have never received any acknowledgement that the war against them was wrong. They have received neither apology nor compensation for the wrongs committed against them. At the re-erection of the flagstaff in 1857, Maihi Te Kuhanga Kawiti, on behalf of Ngati Hine and*

[121] Te Kapotai Hapu Korero, Wai 1040, D5, 54.

Ngapuhi, made compensation gifts of the pole and land. The government on the other hand paid nothing.[122]

11.11 In order to uphold what they believed they agreed to when they signed He Whakaputanga in 1835 and Te Tiriti o Waitangi in 1840, Te Kapotai tupuna paid through the ultimate sacrifice of their lives, not at the hands of rivalling hapu or settlers, but their Te Tiriti o Waitangi partner, the Crown.

11.12 Where their tupuna envisaged a relationship of mutual benefit and respect, it ultimately turned to war, loss of life, mistrust and ultimately the dispossession of their hapu.

12.0 Jurisprudence

12.1 The Waitangi Tribunal's vision is that, *having reconciled ourselves with the past and possessing a full understanding of the Treaty*, Maori and non-Maori New Zealanders will be equipped to create a future for two peoples as one nation.[123]

12.2 In exercising its functions the Waitangi Tribunal has the exclusive authority to determine the meaning and effect of the Treaty as embodied in the Maori and English texts, and to decide issues raised by the differences between them.[124]

12.3 It is noteworthy that the Tribunal in the 1983 Motunui Waitara Report, (one of its first reports which addressed the interpretation of the Treaty of Waitangi) made the following observations regarding The Treaty/Te Tiriti o Waitangi:

> *...The Treaty of Waitangi has been referred to as "The Maori Magna Carta" (refer to thesis of T.J. Lanigan of 1939 "The Treaty of Waitangi: Its Intention and Interpretation") and as, "The great charter of Maori rights" (T.L Buick "The Treaty of Waitangi"). It has also been described as a "fraud" and a "sham" (Edward G Wakefield in writing to Gladstone in 1846)...*

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[122] Johnson, R, The Northern Wars, 1844-1846, Wai 1040, A 5, 441.
[123] Coxhead C, "Where are the negotiations in the direct negotiation of Treaty settlements" (Waikato Law Review, NZLII, 2002).
[124] Treaty of Waitangi Act 1975, s 5 (2).

...It is however a fact, and whatever our personal perception of it, it seems to also be a fact that for over a century the Maori people have placed a significance on the Treaty far in excess of that given by the general public...

...In consideration of the specific terms of the Treaty it is important to appreciate that the Maori text is not a translation of the English text and conversely, nor is the English version a translation of the Maori...

...It seems remarkable to us that the sad history of error and confusion, and inefficiency in preparation, printing and preservation of the Treaty of Waitangi last century has continued to this.[125]

12.4 As this report correctly identifies the history of error and confusion of the Treaty has continued into this century and to this day. This is particularly remarkable given that at 1983 the Tribunal made the following statements regarding Te Tiriti o Waitangi:

...The Maori text goes further. It confirms to the rangatira and the hapu "tino rangatiratanga" of their lands e.t.c. This could be taken to mean "the highest chieftainship" or indeed "the sovereignty of their lands"...

...(the Maori accepted the Treaty relying on the honesty and honour of the Queen and her representative, believing the Chieftainship of their properties was guaranteed to them unreservedly and with no hidden conditions or reservations...

...It appears to us that the Maori signatories to the Treaty would have been in no doubt that they and the missionaries were agreed on what "rangatiratanga" meant. It was well known to both parties for it's used in scripture and prayer, as in "kia tae mai tou rangatiratanga" or "they kingdom come" as appearing in the Lord's Prayer...

[125] Waitangi Tribunal, Motunui Waitara Report, 1983, Chapter 10.1.

..."Rangatiratanga" and "mana" are inextricably related words. Rangatiratanga denotes the mana not only to possess what is yours, but to control and manage it in accordance with your own preferences...[126]

12.5 In these statements the Tribunal in 1983 acknowledges that rangatiratanga could be taken to mean sovereignty and that mana and rangatiratanga are inextricably related words. These same statements have been a constant in the evidence of the Pou korero, Maori linguists, hapu kaikorero and technical experts before this Tribunal in 2011.

12.6 More recently in the 2009 Te Urewera Prepublication the Tribunal issued its findings on the Tuhoe 'Constitutional Claim". Similar to the issues in these Initial Hearings, the claim raised fundamental questions about the constitutional status of the Treaty and the relationship between the Crown and Tuhoe in 1840 given that Tuhoe did not sign the Treaty of Waitangi. In its report the Tribunal made the following comment regarding its role:

"More over the Treaty of Waitangi Act states that, in performing its tasks, the Waitangi Tribunal has 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 then (s5(2)). Nothing in that wording compels the Tribunal to adopt the law's view of the Treaty's 'effect'. Indeed, the contrary outcome is suggested by the fact that the Tribunal has exclusive authority to determine the Treaty's meaning and effect, and by the silence of section 5 (2) on what matters the Tribunal should look to when deciding issues raised by the difference between the two texts of the Treaty.

12.7 It is the expectation of Te Kapotai that this Tribunal will begin its analysis and findings with the Maori texts of He Whakaputanga and Te Tiriti o Waitangi. This is consistent with the principle of contra

[126] Ibid.

proferentem which provides that whereyby there is any ambiguity in a contract is to be interpreted in the favor of the non-drafting party.[127]

12.8 It is submitted that should any question arise of which text should prevail it should be the Te Reo Maori version.

12.9 The mana of He Whakaputanga me Te Tiriti o Waitangi must be restored. If not by this Tribunal, then who else?

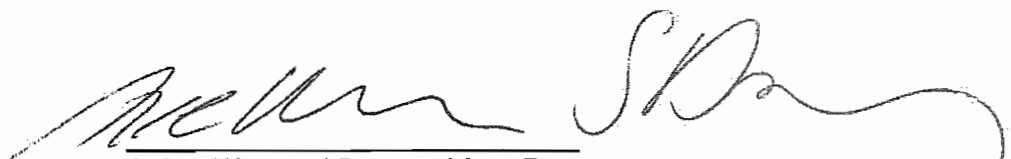
12.10 We leave the final words to Te Kapotai who have said:

> *We have suffered from the Crown's unwillingness to relent and accept our rangatiratanga. The Crown would not, and did not stop in its efforts to impose the British rule over and above our rangatiratanga. The attack on our pa is perhaps the most severe example of the Crown's campaign. Our tupuna did not sign up for that when they put their sacred moko on Te Tiriti o Waitangi. However when we look back, we now know, this is what the Crown intended for us.*[128]

12.11 Their message to their Te Tiriti o Waitangi partner, the Crown, is the same message for the last 170 years, honour Te Tiriti o Waitangi.

12.12 Te Kapotai seek a simple yet significant finding from the Tribunal, that at no stage did their tupuna cede their rangatiratanga to the Crown by signing Te Tiriti o Waitangi.

Dated this 21st Day of January 2011



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[127] Waitangi Tribunal, Tauranga Moana Report 1886 – 2006, 18.
[128] Te Kapotai Hapu Korero, Wai 1040, D 5 (a), 9.