OFFICIAL

IN THE WAITANGI TRIBUNAL **Wai 1040**

Wai 682, Wai 49

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND IN THE MATTER OF Te Paparahi o Te Raki Inquiry

CLOSING SUBMISSIONS FOR TE RUNANGA O NGATI HINE

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Te Waiata Pupuri Whenua o Ngati Hine 1874 (Maihi Kawiti)

Maringiringi ai te toto i raro ra ei	*That blood has been spilt*
Ko te hekenga tonu na Maui	*upon this legacy of Maui*
Ana pokapokanga	*its lacerations*
He tini te kowhao homai noa ra	*dividing it into many forms.*
He kati mo te Whenua e	*To establish territories*
E mau aira ko runga noa ra	*that defines its surface*
Te taro ake na ei	*as it lies*
Ki taiporutu ra ki te tai whakakii	*from generation to generation.*
Na wiri nga tau ei	*As the years pass*
Pokipoki te tara ei	*and the people proliferate*
Te taka noa ake, he koraki te hau ei	*a wind (the pakeha) sweeps in from the*
Hei whiu i ahau	*north*
Noho ana hoki au ki te kei o te waka	*to expel me.*
Nou e Rohu hei tu piki noa	*I take my place at the stern of the canoe*
Mau nei e taiki e	*Rohu come to the fore*
Ma te whakapua noa	*let you engage him*
Ka riro ra nga tangata o tenei Whenua	*lest by simple proclamation*
Ka memene ki tawhiti e	*the people of this land are overtaken*
Te mutu ra ia, te Rotu, te tangata ra e	*and we are left to look forlornly to the past.*
Nana i ako mai, ko Anaha i titiro ei	*When will this man desist,*
Huri rawa i raro ra	*For he has taught us, that as Annais had*
Kei te ekenga mai, keke ana te papa e	*looked askance*
To pae rangatira e	*with his eyes downcast*
	when the deed is done, it would have
	shaken the very foundations
	of your assembly of Chiefs.

MAY IT PLEASE THE TRIBUNAL:

PART A

Overview

1. The modern New Zealand state is built upon a false premise.

2. The idea that rangatira who signed Te Tiriti agreed to cede sovereignty to the British Crown is historically wrong, yet it remains the foundation upon which the nation rests.

3. So long as this is so New Zealand is weakened by a moral, political and legal deficit.

Introduction

4. Sir James Henare:

> "The tale of our elders, they did not know the English language, they only knew one language, their own language. And when they couldn't reach that understanding, then war was the only result and those battles continue in the verbal manner these days. For the laws that they keep creating to suppress us and to elevate them above us, down to us today, we are still battling. This elder of yours says I will continue to do this battle until my eyes are closed. My battle with them for Te Tiriti o Waitangi will never end. There is nothing wrong with what was embodied in Te Tiriti o Waitangi, those are the Maori thoughts. There are only three Articles and we continue to say that you must honour each and every one of them."[1]

5. Edmund Burke (1783):

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[1] Sir James Henare, Extract from speech to Labour Members of Parliament, 9 September 1988

> "All political power which is set over men, and ... all privilege claimed ... in exclusion of them, being wholly artificial, and ... a derogation from the natural equality of mankind at large, ought to be some way or other exercised to their benefit. If this is true with regard to every species of political dominion, and every description of commercial privilege ... then such rights or privileges, or whatever else you choose to call them, are all in the strictest sense a *trust*; and it is of the very essence of every trust to be rendered *accountable*; and even totally to *cease*; when it substantially varies from the purpose for which alone it could have a lawful existence."[2]

6. Sir Robert Jennings:

> "To constitute cession it must be intended that sovereignty will pass. Acquisition of governmental powers, even exclusive, without an intention to cede territorial sovereignty, will not suffice."[3]

What happened? – Some images

Kawiti

"E tika rawe e koro
Mai ahaina taku iti
E hei te kurupine
Te awa o te tupua
Paki noa koutou
I tua pa era
Tehea te kai e
Kia horahia
Kia whakaihi atu
Taku reo
Te puri tangata
E taka mai nei"

---

[2] Edmund Burke, Address to Parliament, December 1783 on the East India Bill cited in McHugh, *Aboriginal Societies and the Common Law* at page 130

[3] Sir Robert Jennings (ed Oppenheim's International Law: Volume 1 (9th edition); London and New York, Longman, 1996), at page 680 (cited in Palmer, The Treaty of Waitangi in New Zealand's Law and Constitution at page 164

And so it was my son
It matters not we were
but a few

We could barricade
A river of foreigners
Until you were safely
beyond the horizon
Which offering then
Should be laid out
To be spellbound
By my voice
To hold back men
That might descend
Upon us"[4]

Maihi Kawiti

"Ko te kawenata tenei i hanga ki Waitangi hei ture mo Niu Tireni, katahi ka pekea mai e te kaahu paoa iho e te kaahu, werewere haere ana i nga waewae, heoi tenei."

"This was the covenant made at Waitangi as a law for New Zealand (he is talking about Te Tiriti which he sets out as Chapter XIII of his letter). Suddenly a hawk interposed itself, snatched up the Treaty and flew away with it clutched dangling in its claws. That is this."[5]

"The government of New Zealand have milked the cow that was sent by Queen Victoria as a covenant to the tribes of New Zealand."[6]

---

[4] Kawiti song to Ngati Hine cited in brief of evidence of Johnson Erima Henare dated 4 October 2010, Wai 1040 #D14

[5] Maihi P Kawiti letter to Taonui, 24 March 1876, (Translation of Erima Henare filed with memorandum of counsel 21 December 2010)

[6] Maihi Kawiti, Appendix 4 to brief of evidence of Johnson Erima Henare, 4 October 2010, Wai 1040, #D14

Colonisation of New Zealand: Daily Southern Cross 18 July 1846

> "The sovereignty of the island was obtained by a species of political fraud. The Treaty of Waitangi was founded upon wise and equitable principles, we admit: but the manner in which they were unfolded and explained to the Natives, (as far as the Treaty itself is concerned), was most defective. An engagement so solemn, and pregnant with such important consequences, should have been as clear and specific in its phraseology, and as particular in its definitions, as the Native language could have made it. It should have explained, minutely to those about to become amenable to its restrictions, the nature and extent of the powers it constituted, the concessions it granted and the privileges it conferred: whereas, the miserable document upon which the right of the Crown to exercise its prerogative is founded, is neither perspicuous in language, nor explicit in detail.
>
> Consequently the Chiefs on the one hand had but little conception of the character of the power they had acknowledged, and the extent of the obedience that would be required from them; and on the other hand, the Government had no just idea of the nature of those claims which it had guaranteed to respect. In fine, the Natives ceded the sovereignty of the Islands without well knowing what they were doing; and the Government glided into power by a sort of hocus pocus process of unpremeditated deceit. What could reasonably be expected to result from such a commencement but rebellion and strife."[7]

Summary of argument

The Māori paradigm

7. The rangatira who put their sacred mark to He Whakaputanga and Te Tiriti lived and died under the laws of their people. Their respective hapu and iwi had over centuries developed tikanga/law to govern relationships within and between the people[8].

---

[7] New Zealander, Volume 2, Issue 59, 18 July 1846, pp 2-10

[8] Refer to evidence of the Week 1 Pou Korero and the expert evidence of Mr Moana Jackson for a detailed account of these political arrangements and their origins

8. Mana (and the later expression rangatiratanga) is the term that best captures this political and constitutional power.

9. Ngati Hine rangatira did not, indeed could not surrender to the British Crown their mana, their rangatiratanga.

10. The objective of the Chiefs was to strengthen and enhance their mana, their rangatiratanga. By entering into He Whakaputanga and Te Tiriti they believed they had done so.

> "... What our people hope for in He Whakaputanga was that the Māori world view would remain dominant in this country. Article II of Te Tiriti o Waitangi reaffirms that."[9]

11. The rangatira to rangatira relationship with the English sovereign established by Hongi was maintained and taken a stage further in He Whakaputanga and Te Tiriti.

12. The Chiefs sought and believed they had obtained an honourable and mutually beneficial relationship through which they would share in the benefits of increased trade and access to European technology. They and their people would also enjoy the protective support of the British Crown in matters of international relationships and concerning the management of British subjects settled in New Zealand and still to arrive.

The Crown paradigm

13. The British saw its Empire as one founded upon law.

14. The British understanding of sovereignty as at 1840 was founded upon the idea that there could only be one sovereign in a domestic

[9] Erima Henare responding to questions from the Tribunal, Week 1 transcript, Wai 1040 #4.1.1 at p 309

legal system. The Crown's sovereignty within its territory was supreme, and shared with no-one.

15. In accordance with British understanding of international law, Māori Chiefs were sovereign and had a capacity to enter into valid international treaties. This was explicitly recognised in He Whakaputanga.

16. Britain decided to add New Zealand to its Empire.

17. Māori consent was regarded as an essential legal prerequisite.

18. Accordingly the English text of the Treaty was drafted as a treaty of cession. Hobson was instructed to obtain the "free and intelligent consent of the Natives, expressed according to their established usages" to a cession of sovereignty. He failed to do so.

The result

19. Britain asserted its sovereignty over New Zealand and usurped Māori mana/rangatiratanga by a "species of political fraud".

20. There was absolutely no meeting of minds on the fundamental notion of subject hood and the giving up of the supreme decision making power to the English sovereign.

21. Te Tiriti in fact did the opposite. It guaranteed to Māori the retention of their mana, their rangatiratanga, their ability to decide for themselves.

22. Despite all this Ngati Hine and Ngapuhi have still sought to maintain and uphold the rangatira to rangatira relationship established by Hongi and taken further in He Whakaputanga and Te Tiriti.

23. Their challenge to the Crown remains the same; honour He Whakaputanga, honour Te Tiriti.

The challenge

24. On the day these hearings commenced Erima Henare warned the Tribunal of the difficult task it faced. Mr Henare said:

> "There's an inherent institutional bias against our claim. The bias comes with the myths that explain and justify the New Zealand state and the idea of undivided parliamentary sovereignty. The history invoked is not the Māori history. The Treaty invoked is the English version, not the Māori version.
>
> ...
>
> In Māori terms our case is straightforward. Under Te Tiriti our Rangatiratanga, our sovereignty was guaranteed to us, not taken away. Ngapuhi do not and have never seen Te Tiriti as cession of sovereignty. At the same time by Te Tiriti our tupuna bound themselves to the Queen and agreed to the Queen's Governor remaining here to look after her subjects. In pakeha legal terms this seems to present something of a paradox. Sovereignty is seen as all or nothing. For Ngapuhi Te Tiriti was a solemn commitment, a kawenata to a relationship with the Queen. The Crown and the Māori side by side with God above; the Chiefs' authority was guaranteed. The conversation with the sovereign that began with Hongi Hika in 1820 lives on today."[10]

25. These hearings are long overdue. This should have been the first of the Tribunal's historical inquiries. The modest hope is that the resulting report will help correct the myths and misunderstandings about He Whakaputanga and Te Tiriti.

26. The English text of the Treaty was drafted as a treaty of cession. In reliance on that text Britain wrongly assumed it had obtained Māori consent to a cession of sovereignty. Britain acted as if it had

[10] Transcript Wai 1040 #4.1.1, pages 35, 36. Brief of evidence Johnson Erima Henare Wai 1040 #A30(c) paragraphs 30, 31, 41, 42, 43

legitimately obtained sovereignty by cession and the modern New Zealand State arose out of that assumption. In so doing Britain effectively usurped Māori mana or sovereignty which had been recognised in He Whakaputanga and guaranteed in Article II of Te Tiriti.

27. Dr Palmer was right to observe:

> "The topic about which the Tribunal is least clear is the cession of sovereignty as it has apparently altered its stated views from time to time."[11]

28. Dr Palmer references that observation to the report of the CNI Stage 1 Tribunal where that Tribunal stated:

> "that arguments by both the claimants and the Crown that the Tribunal has changed its position on sovereignty (albeit in different directions) are probably fair in relation to the reports they cite."[12]

29. Appended to this submission as Appendix 1 is a selection of extracts from previous Tribunal reports that highlight the different approaches the Tribunal has previously taken to the question of a cession of sovereignty pursuant to the Treaty/Te Tiriti. These extracts are appended as a reference point. To be clear, the Tribunal is not thereby being invited to simply adopt or follow any or all of this jurisprudence. Some parts align with the claimants' evidence, others do not.

30. The Tribunal's task is to hear and understand the evidence presented in this Inquiry and to review and revise as appropriate those earlier findings.

---

[11] Dr Matthew Palmer, The Treaty of Waitangi in NZ Law and Constitution, Victoria University Press 2008 at p 120

[12] Refer Palmer supra Chapter 3 at p 120 and p 407

31. As a former Deputy Chairperson of the Tribunal has observed, the Tribunal:

> "... uniquely, and sometimes awkwardly, straddles the judicial and political worlds."[13]

This can be an uneasy place to be, in a small and intimate democracy. A number of the Tribunal's earlier reports reflect the politics of the time and a palpable reluctance to confront the sovereignty question.

32. There is no room for compromise or evasion in this Inquiry. The Stage 1 issues clearly require the Tribunal to make findings in respect of Ngapuhi understandings of the meaning and effect of He Whakaputanga and Te Tiriti.

33. After the first battle at Okaihau, Hone Heke suggested to Kawiti that they sue for peace. Kawiti's response was:

> "I mea au i tu ai koe ki te riri kia taea te ika nui o te kopua, kahore i te patihitihi nei ano kua karanga koe kaati."

> "I expected when you took up arms that you would go out to catch fish in the deep parts of the ocean. Now, while only in the shallows still, you cry out for peace."

34. The Tribunal, having finally had the courage to launch this waka must not now take fright at the depth or size of the ocean.

35. The Crown must now wade out beyond the shallow waters of de facto power and what Erima Henare has called "squinty legalism".

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[13] Judge Wainwright, paper to Waitangi Trubunal Conference, 17, 18 November 2005, NZLS, CLE, p 5

Was sovereignty ceded?

36. The Ngati Hine (and Ngapuhi) evidence has been unambiguous and consistent: sovereignty was not ceded to the Crown under Te Tiriti (or any other instrument).

> "... What our people hope for in He Whakaputanga was that the Māori world view would remain dominant in this country. Article II of Te Tiriti o Waitangi reaffirms that."[14]

37. In its Orakei Report the Tribunal acknowledged that kawanatanga is less than the sovereignty ceded in the English text but went on to find:

> "The cession of sovereignty however is implicit from surrounding circumstances."

For Ngati Hine the surrounding circumstances point in the opposite direction. It is respectfully submitted that this finding is plain wrong. It is clearly untenable in light of the Ngati Hine evidence.[15]

38. The Ngati Hine viewpoint was summarised by Erima Henare as follows:

> "15. Ruapekapeka had everything to do with what Kawiti thought about the power arrangements in this country agreed pursuant to He Whakaputanga and Te Tiriti.
>
> ...
>
> 20. If the Tribunal really wants to understand the Ngati Hine, and indeed the Ngapuhi understanding of He Whakaputanga and Te Tiriti then the Tribunal must understand why they thought and acted as they did in the years after 1840. You will never understand rangatiratanga otherwise. If the Tribunal does not understand

[14] Erima Henare responding to questions from the Tribunal, Week 1 transcript, Wai 1040 #4.1.1 at p 309

[15] Waitangi Tribunal, Orakei Report, Chapter 11.11.4(a)

> rangatiratanga, then it will never understand the Maori perspective on He Whakaputanga and Te Tiriti. Rangatiratanga is also why I said in my opening remarks in Week 1 that Waka Nene and Patuone were not fighting Kawiti and Heke in order to uphold the British idea of an undivided sovereignty."[16]

39. Ngapuhi rangatira from the time of Hongi Hika and Waikato actively sought to establish and maintain a rangatira to rangatira relationship with the English sovereign. It is a bond their descendants have strived to uphold, even at great personal cost. The relationship and the commitments entered into under He Whakaputanga and Te Tiriti are viewed as enduring covenants incorporating sacred and temporal aspects.

> "**Judge Coxhead**– He pātai taku, Erima, i kōrero mai koe mo te 'relationship' ehara i te 'partnership' and so upon the signing of the Treaty, what was the nature ki ngā rangatira rā what was the nature of that relationship and the commitments that they made?
>
> **Erima Henare** – I go back to my statement yesterday and Hone Heke alluded to that in his discussion with Governor Hobson, as I also relayed yesterday, that the relationship began with Hongi. It was a relationship of co-equals. The history of Hongi visiting England and meeting with the King of England, one could surmise, even at this stage in life that not many English people would have met the King and here is an absolute foreigner who gets to have an audience with the King who he treats as his brother.
>
> In the letter by Edward Parry, Hongi's son, Eruera Pare Hongi, he writes to the King when Hongi dies and says, 'kua mate tō hoa'. And I guess that's the nature of the relationship that we hoped would endure through the Treaty. The issue around the relationship versus a partnership: In the Māori worldview there is really no issue between the two words. They did agree that the governor should stay here to look after the Pākeha people who are living here, and that is the nature and possibly the extent of the partnership that they envisaged. But the relationship, which is the question that my tuakana Kīngi raised today and is live in the hearts and minds of everyone

[16] Erima Henare's amended brief of evidence dated 5 November 2010, Wai 1040, #D14(b)

> here today is; that if that relationship that we began with King George in 1918 is to endure, then it is to the Queen of England who we should be speaking to now."[17]

40. It would appear that (not before time) the Crown has finally stopped asserting that Māori knowingly ceded sovereignty under Te Tiriti. Counsel for the Crown did not argue to this effect in opening submissions and none of the Crown's witnesses asserted as much. The Crown case appears to be that the English and Māori versions of the Treaty can be reconciled at least to some extent on the basis that the term "sovereignty" is a working approximation of the rule of law or civil government.

41. On the question of whether there was a meeting of minds or whether Hobson, in fact, obtained the free and intelligent consent of the rangatira, the best the Crown's witnesses could come up with was "that they [the Crown] succeeded in getting consent to something"[18] or a meeting of minds to a "considerable extent".[19] Dr McHugh thought there was "some overlap".[20]

He Whakaputanga and Te Tiriti : mana and tapu

42. At the commencement of these hearings Erima Henare said:

> "From our Maori perspective there is only Te Tiriti o Waitangi. That is what was signed here. It is to that Tiriti that our ancestors, our tupuna affixed their tohu tapu from the ngū of their noses, making it tapu. The other texts, I beg to offer is just the English version. It is not the same as Te Tiriti o Waitangi and has no mana. It is an English language version that meant nothing to our tūpuna, nothing. They signed only what they understood, Te Tiriti i roto i te reo Māori. We ask members of the Tribunal, that you bear this in mind and give it the weight that it should be accorded.

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[17] Erima Henare responding to questions from the Tribunal Week 1, transcript Wai 1040 #4.1.1 at p 315
[18] Dr Loveridge, Transcript Week 4, Wai 1040 #4.1.4 at p 451
[19] Professor Ward #A19 para 216 #A19(a) para 31
[20] Transcript Week 4, Wai 1040 #4.1.4 at p 557

When they put their sacred marks on Te Tiriti, drawn as they were from the ngū of the nose, our tūpuna sealed a pact of honour with the Queen. They agreed only to the Queen's Governor remaining here, to look after his own. They valued the relationship, the relationships, the privileges extended by the Queen.

But they never agreed or understood that the Queen's Governor or the Queen's Government could do what it did, without limits, contrary to Te Tiriti itself. My tūpuna never agreed to that and neither do we.[21]

43. Hirini Henare said this in Week 1:

"Ka heke mai tenei mana tapu ki runga i nga ngu o nga moko o nga ihu o matou tupuna i moko ai taua tapu ki nga kawenata tapu o te whakaputanga o nga rangatira o aotearoa, me te tiriti maori o waitangi, (tera kahore i raweke hia e koe) taau pene i hutia mai e koe e te karauna, ki te haina i nga kawenata tapu nei, ko te huruhuru i hutia mai e koe, i te tero o te rakiraki, koia taau haunga o taua huruhuru arai tutae o taua manu, kei te piro ngea tonu te iwi o ngapuhi nui tonu, haunga ano te whiu tonu a to pene i nga ture pokokohua rawa atu, ki runga ia matou

Ka puta ano te korero a taku tupuna a kawiti, i te tukunga mai o te putiputi roiho e kawana hopihana, hei here i te whanaungatanga kia ia te kawana, ko te whakahoki a taku tupuna a kawiti, he punita, hei uukui i to mangai, me nga para, e taka mai ana.

The mana of our ancestors from came from our gods, mana of our lands as we are the land through the lines of genealogy which I have put up and that mana was the tattoo that they wore and was their moko or signature which was to seal their authority on the documents of te whakaputanga o te rangatiratanga o aotearoa me te tiriti maori o Waitangi.

My ancestor Kawiti also countered the difference is of the mana of the Māori moko (signature) on the documents which begat from the gods, to that used

[21] Brief of evidence of Johnson Erima Henare Wai 1040 #A30(c), paras 18, 33 and 34

> by Pakeha to sign, a feather used as a pen to sign the documents .... from a ducks (birds arse)."[22]

The objective

44. The claimants have long been fearful that the Tribunal will not have the courage to truly and honestly report on these claims, which call into question the founding assumptions of the state to which it must report. Ironically, just as the tide of scholarship finally catches up with many of the claimant perspectives, a new and different form of political expedient arises that threatens to once again submerge the claimant voice. This is the presumption that all Crown/Māori issues can be resolved through expedited Treaty settlements.

45. Under this paradigm all claimant grievances are assessed in a broad brush way to see whether they constitute breaches of the principles of the Treaty. This framework is premised on the assumption that the Crown assumed the right to govern on the back of a cession of sovereignty from Māori. The right to govern is complete and absolute. Dr Paul McHugh puts it this way:

> "So far as Māori rights associated with the Treaty of Waitangi are concerned, these may be related to Diceyan principles in an unavoidably brutal way: the Crown has legal sovereignty over New Zealand, this ultimate authority being vested in the Crown and Parliament. No body can legally set aside any legislation other than Parliament itself, so the Courts cannot give the Treaty priority over any statutory provision. These days the Courts are willing (and this is only a recent willingness) to interpret legislation wherever possible in the light of the Treaty. However, in the face of outright conflict between statute and Treaty, there can be no dispute that the former must prevail. Moreover, the Crown's legal sovereignty over its territory is indivisible and shared with no-one. There can be no legally recognised sovereign authority

[22] Brief of evidence of Hirini Henare (Wai 1040, Withheld, 2.4.47) (Brief 1)

> in New Zealand but the Crown supreme in its paramount parliamentary aspect."[23]

46. To question these assumptions is seen to put at risk the enduring resolution of historical Treaty grievances. To attack or question the legitimacy of the legal framework within which settlements are placed is seen to be a threat to the integrity and durability of the settlement framework itself (let alone the wider institutional framework).

47. Real as they are, these political and constitutional issues must not intrude into the Tribunal's honest assessment of the historical evidence in relation to Māori understandings of He Whakaputanga and Te Tiriti.

48. Māori history since 1840 has been one of resistance, adjustment and compromise in the face of the growing de facto power of the settler state. For some hapu and iwi these compromises have entailed a relinquishment of a fight over sovereignty and co-operation within the new legal framework. Debates that began in the nineteenth century over these matters continue within and between whānau, hapu and iwi.

49. The Ngati Hine tupuna who signed He Whakaputanga and Te Tiriti did not cede their mana or sovereignty to the Crown. That has always been the Ngati Hine understanding. It remains so to this day.

50. Ngati Hine understand all too well the power of the State. Ngati Hine understand all too well that governments can and do ignore Tribunal reports. Ngati Hine have nonetheless participated in this Stage 1 Inquiry with a degree of cautious optimism.

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[23] Dr Paul McHugh, Article in Renwick collection, Victoria University Press 1991 "The lawyers concept of sovereignty, the Treaty of Waitangi and a legal history of New Zealand", page 174 (Note included in papers provided to Dr McHugh in cross examination, M Doogan, Wai 1040 #A21(b)

> "We nevertheless remain optimistic. This optimism exists because of the small window being afforded by this process to redeem history with the truth. It is ironic, that given our history, that we look to you Tribunal, a 'creature' of Government statute that a creation of the Crown could be an instrument for justice by delving into the past and reporting the truth. But you can and have been in the past an instrument for justice.
>
> You, the Tribunal are the only quasi judicial body in New Zealand that has the specific task of considering both the Māori and the English versions of Te Tiriti. The Tribunal is regarded by other nations as New Zealand's Truth and Reconciliation Commission, and it is in that vein and that spirit, that we invite you to hear the truth."[24]

51. Ngati Hine do not expect the Tribunal to grapple with or try to resolve all the legal, constitutional or political consequences that may flow from a Tribunal report that faithfully records and understands their korero about He Whakaputanga and Te Tiriti. Their modest expectation is that the Tribunal does understand their history and faithfully records it.

52. Ultimately, if the Tribunal disagrees and the Crown does not listen the issues will not go away. They will become the burden for the next generation.

> "We have come too far not to go further, we have done too much not to do more."[25]

Lost in translation?

53. The Tribunal has a very important (and unique) statutory responsibility. In exercising its functions to inquire into claims and make recommendations the Tribunal is directed to have regard to the two texts of the Treaty and has exclusive authority to determine the

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[24] Brief of evidence of Johnson Erima Henare Wai 1040 #A30(c), paras 13 and 14
[25] Ta Hemi Henare

meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them.[26]

54. It is difficult to conceive of any other Inquiry where this responsibility is so central.

55. As to the approach to be adopted under the Tribunal's statute it is submitted that the following extract from the Tribunal's Tauranga Moana Report is apposite:

> "Although the Act does not prefer one text over the other, we agree with the Orakei Tribunal's view, namely that considerable weight should be given to the Māori text because that was the version that was assented to by the Māori signatories. We also note the widely accepted principle of contra proferentem, whereby any ambiguity in a contract is to be interpreted in favour of the non-drafting party."[27]

56. Dr Matthew Palmer was right to point out that the following principles of international law for the interpretation of treaties favour the Māori understanding of the terms of the Treaty in 1840.

- If one language version has to be chosen over the other, the arguments for choosing the Māori version are strong, deriving from the fact that the overwhelming majority of rangatira signed the Māori text of the Treaty and that that was the version printed officially in Britain, followed by the English translation so marked.

- At international law, 'the meaning which best reconciles the texts, having regard to the object and purposes of the treaty, is to be adopted'.

- The principle *in dubio mitius* provides that that meaning of an ambiguous term should be preferred which is less onerous to the party assuming an obligation or which interferes less with the territorial and personal supremacy of a party.

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[26] Section 5(2) Treaty of Waitangi Act 1975
[27] Waitangi Tribunal Tauranga Moana Report, 1886-2006, p 18

- The principle of interpretation *contra proferentum* provides that that meaning should be preferred which is least to the advantage of the party which prepared and proposed the provision or for whose benefit it was inserted in the treaty."[28]

PART B

The issues and the evidence

He Whakaputanga

The Tribunal's issues

57. These are the issues the Tribunal has identified.

> "1. How did Māori understand He Whakaputanga / The Declaration? And, therefore, what was the nature of the relationship and the mutual commitments they were assenting to in signing He Whakaputanga / The Declaration?
>
> 2. How did the Crown understand He Whakaputanga / The Declaration? And, therefore, what was the nature of the relationship and the mutual commitments it was assenting to in signing He Whakaputanga / The Declaration?
>
> 3. What then was the effect of He Whakaputanga / The Declaration at 1835?"

The evidence

58. The relationship with the British Crown does not start with He Whakaputanga. This is fundamental.

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[28] Dr Matthew Palmer, The Treaty of Waitangi in New Zealand's Law and Constitution, Victoria University Press, 2008, p 163

59. For several decades prior to He Whakaputanga Ngapuhi rangatira engaged with the opportunities and challenges presented by contact and trade with Europeans.

60. He Whakaputanga came about because it aligned with the political objectives of the rangatira. The Ngapuhi rangatira who signed He Whakaputanga wanted to maintain the relationship established with the King by Hongi and Waikato and take it a stage further. They were actively seeking a strategic alliance with the British Crown in order to secure practical assistance in the management of trade and international relations.

61. Kawiti was a signatory to He Whakaputanga. He was a late convert to Te Tiriti.

62. Kawiti was amongst the Ngapuhi rangatira who had been actively exploring new forms of alliance amongst the hapu in order to meet some of these challenges.

63. As Dr Patu Hohepa has noted in 1835:

> "(a) Māori population was around 125,000;
>
> (b) Māori had not been invaded or inundated by foreigners;
>
> (c) Foreigners in Aotearoa numbered under 2,000;
>
> (d) Māori were not ruled indirectly;
>
> (e) Māori hapu and papahapu (allied hapu) were still tikanga driven and were still powerful;
>
> (f) Hapu and whānau were armed with sufficient muskets and cannons to combine and repel."[29]

[29] Linguistic evidence of Dr Patu Hohepa, Wai 1040 #D4 at para 89, p 35

64. Following the approval of the flag in 1834 Busby had to some degree gained the confidence of the Chiefs. Although he was the local representative of a world power, Busby had no military backing. Such influence as he was able to acquire derived solely from the fact that he was a representative sent by the King. Actual outcomes on the ground depended entirely on Busby's ability to persuade and the extent to which the objectives he advanced coincided with those of the Chiefs.

65. From Busby's contemporary writings it is known that he talked to the Chiefs about the protectorate arrangement between Great Britain and the Ionian Islands.

66. Dr Manuka Henare cites the following extract from a letter Busby wrote to the Colonial Secretary of New South Wales in June 1837. Referring to the core principle of He Whakaputanga he wrote:

> "It is founded upon the principle of the protecting state, administering in chief the affairs of another state in trust for the inhabitants, as sanctioned by the treaty of Paris, in the instance of Great Britain and the Ionian Islands, and as applied, I believe, in various instances, on the borders of our Indian possessions (NLS Copy of Despatch from Governor Sir R Bourke to Lord Glenelg, 9th September 1837, relative to the Affairs of New Zealand; with four enclosures)."[30]

67. Dr Henare goes on to say:

> "Busby explained the principles to the rangatira when they were choosing te kara, the flag of independence and in the making the He W[h]akaputanga o te Rangatiratanga, the Declaration of Independence and illustrated the principles with the example of the Ionian Islands who through the Treaty of Paris 1815 (see Appendix VII) entered into a protectorate relationship with Great Britain and one in which Ionian sovereignty remained with Ionia. Busby has said that he discussed de Vattel's principles of international law directly to the rangatira, I found no record of it, but they appeared to have an

[30] See evidence of Dr Manuka Henare, Wai 1040 #A16 and #B3 at paras 325-327

> understanding of the principles and practicalities of a protectorate administration. This is demonstrated in He Wakaputanga and Te Tiriti o Waitangi. From a Māori view, the principles of international law underpinned their willingness to enter into a treaty of protection and not cession. The later expressions of the metaphor of kaipuke or the ship asserted by Panakareao at the Kaitaia signings of the Treaty and recorded in Pompallier's report to the Pope in the Vatican on Ngapuhi understanding of the treaty. The metaphor of the kaipuke and the gaining of a captain to help sail the ship expresses the principles of protection and honest leadership. The rangatira understood the difference between the owner of a ship and the captain who was a hired hand."[31]

68. The principles of the Ionian Islands' arrangement are consistent with the terms of He Whakaputanga. The territorial sovereignty and independence of New Zealand is explicitly acknowledged. The Chiefs affirm a relationship of friendship and protection including to those of the King's subjects who have settled in New Zealand. In return the King agrees to continue to protect "the infant State" from all attempts upon its independence by other nations.

69. Since the time of Hongi and Waikato Ngapuhi rangatira chose to establish and maintain a relationship with the English sovereign. By the 1830's they were conscious of potential threats from other nations. He Whakaputanga, and the flag were logical and strategic steps. The nature of the relationship and mutual commitments the rangatira were agreeing to in signing He Whakaputanga are straightforward. They have been comprehensively described in claimant evidence and in the evidence of a number of historians, Dr Manuka Henare in particular.[32]

70. Key features that emerge from the evidence are:

70.1. The affirmation of the fact that law making authority and governance (sovereignty) in the territories of the united tribes resided only with the Assembly of Chiefs.

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[31] Brief of evidence Dr Manuka Henare, Wai 1040 #B3 at para 327, p 77

[32] See also the important evidence of Mr Nuki Aldridge Wai 1040 #B10

70.2. A commitment by the Assembly of Chiefs to meet regularly and pass laws directed to dispensing justice, preserving peace and good order and regulating trade.

70.3. A commitment by the King to protect New Zealand from challenges to its independence from other nations.

70.4. The recognition that the King possessed power and knowledge in the field of international relations. Confirmation of the King's agreement to continue to protect and assist the Chiefs as they worked to meet the new challenges international trade and relationships presented.

70.5. Recognition of the need to extend the Assembly of Chiefs to include the Southern tribes.

70.6. A commitment by the Chiefs to protect and treat fairly those of the King's subjects already settled in New Zealand and those who may continue to arrive.

71. All these features of He Whakaputanga reflect political issues and objectives common to both Māori and the British. It would be entirely wrong to see He Whakaputanga as just a British initiative arising out of imperial practice and the exigencies of the time. Those aspects are there and are well covered in the Crown evidence.

72. The Crown evidence focuses on British imperial objectives and practice. In this context He Whakaputanga is downplayed or dismissed as a short lived and naive attempt by Busby to formalise the legal basis for a Crown jurisdiction administered through the agency of the local sovereigns (the hereditary Chiefs).[33]

[33] See in particular the evidence of Dr Loveridge and Dr McHugh

73. Seen through the paradigm of British imperial history Māori participation in He Whakaputanga tends to be dismissed as a short lived and unrealistic attempt to confederate politically independent and often divided hapu.

74. The problem with this approach is the complete absence of the perspective of the other party to the document.

The Māori perspective

75. The Māori perspective is just as rich and complex as the British. It has been little studied and is poorly understood outside Ngapuhi. These hearings offer some hope of correcting that imbalance.

76. For Ngati Hine, the effect of He Whakaputanga as at 1835 has never been in doubt. It was the affirmation by the King's representative of the mana or sovereign power of the Chiefs and the mutual commitment to a relationship under which the Chiefs would protect the King's subjects coming to New Zealand and the King would in turn protect and assist the Chiefs in fending off any challenges to their mana or authority.

77. The starting point was the enduring relationship with the King established by Hongi Hika. Erima Henare summarised it in this way:

> "He aha te tikanga o ēnei kōrero mo Hongi Hika? Ko te mea nui ko tana tūtakitanga ki te Kīngi o Ingarangi. He orite ki te orite, he mana ki mana, he rangatira ki te rangatira, he āriki ki te āriki.
>
> What is the underlying meaning of these stories about Hongi. Of great purport is his meeting with the King of England. Like with like, power with power, chief to chief, supreme authority to supreme authority."

and also

"He matua ano te matua, engari te ihi, te wehi, te mana ā he rerekē tēra – he rerekē tēra. E ai ki ngā kōrero, kaore ia (a Hongi Hika) i tuohu i aha ki te Kīngi o Ingarangi. Ko tana hiahia, he nui ngā kōrero o te Karauna tae noa mai ki etahi iwi o ēnei rā ko te kupu *partnership* nei. Ehara tēra It is not that (partnership). Ko te whāinga a Hongi Hika he *relationship* kē, he whakahoatanga.

That which Hongi sought was a relationship, a friend.

He whakahoatanga orite. Koia na te haere o Hongi Hika ki Ingarangi. Ka tīmata tēra noho i waenga i a Ngāpuhi me te Kīngi o Ingarangi.

That was why Hongi went to England. That was the beginning of the relationship between the King of England and Ngapuhi Ka mate Hori te tuawhā ka tū mai ko Wiremu. I te wā i mate ai a Hongi tukuna atu e Eruera Pare Hongi tana tamaiti. I tuhi Ngāpuhi i te reta ki te Kīngi ki te whakaatu atu kua mate tana hoa a Hongi.

Ngapuhi wrote to King George advising him of Hongi's passing

Kaore tēra i te kōrerotia e ngā kaituhi hītori o ēnei rā, me nga mea o mua. He aha te tīkanga a tēra? He whakahoatanga e haere tonu ana.

What is the meaning of that? A friendship that endures beyond the individuals."[34]

78. Well before Busby arrived in New Zealand Ngapuhi rangatira including Kawiti had been meeting and discussing strategies and alliances to meet the challenges that came with European contact and trade.

"Na, e tuhia nuitia ana Te Pūhipi, nāna i whaiwhakaaro, nāna i waihanga, nāna i waitohu Te Whakaputanga. No mua noa atu te haerenga atu o Kawiti ki Te Pīnia ki te kōrero atu ano ki ngā iwi o reira, ki Hokianga ki te kōrero kia Nene rāua ko Patuone, kia ngātahi a Ngāpuhi –waihangatia tetahi momo whakahaere i a tātou.

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[34] Brief of evidence Johnson Erima Henare, Wai 1040 #A30(c), paras 132 and 134; translation by Erima Henare

> Many good things are written about Busby (and his role in the Declaration of Independence) in that it was his idea, and that he wrote the text of the Declaration. Long before (the declaration) Kawiti went to Pinia on the shores of the Whaingaroa harbor to talk to the Chiefs of that place also to Nene and Patuone in Hokianga seeking to unify Ngapuhi – and to put in place some sort of governance.[35]

79. Further discussions took place immediately after the death of Hongi Hika:

> "…. I mua noa atu i te matenga o Hongi Hika i haere atu a Kawiti ki reira. Ka noho rāua ka kōrero mo tetahi whakakotahitanga o ngā iwi o Te Taitokerau.
>
> They sat and discussed a unity of Ngapuhi."[36]

80. For Ngati Hine, He Whakaputanga embodies the thinking and aspirations of their tupuna. It is not seen as something arriving unilaterally from Busby. It embodies Māori aspirations, thoughts that "blossomed form the brains of Māori".

> "... e kōrero ana ki ngā mihinare; *I te tuatahi i tae mai koutou ngā mihinare, whai muri mai i a koutou ko Te Pūhipi, whai muri mai he tāhae.* Na ngā tūpuna te whakaaro. Mēna na Te Pūhipi rāua ko Te Nāna Clendon te whakatinanatanga mo ngā whakaaro o te ia ko te kaupapa kei muri i Te Whakaputanga, anei ko ngā uri e noho atu nei. Ehara na tauiwi. He mea hōu tēna kia Ngāpuhi. Koia e ū tonu nei te nuinga o Ngāpuhi ki Te Whakaputanga. He whakaaro i puta mai i ngā roro o ngā kaumātua i tēra wā.
>
> If it is indeed Busby and Clendon who are credited with the Declaration then it needs to be noted that the thought and essence behind it belongs to the ancestors of the descendants who sit here today. Not the pakeha. That is new to Ngapuhi (that the Declaration was a pakeha construct). That is why most

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[35] Brief of evidence Johnson Erima Henare, Wai 1040 #A30(c), para 143; translation by Erima Henare

[36] Brief of evidence Johnson Erima Henare, Wai 1040 #A30(c), para 138; translation by Erima Henare

> of Ngapuhi cling to He Whakaputanga. A thought that blossomed from the brains of Maori."[37]

81. Kawiti signed both He Whakaputanga and Te Tiriti. Kawiti's sons, Taura and Te Kuhanga (Maihi) also signed Te Tiriti.

82. Maihi Kawiti wrote extensively about He Whakaputanga and Te Tiriti. On 21 March 1888 Maihi spoke at a meeting of Te Whakaminenga o Nga Rangatira held at Te Tii on the occasion of the opening of the new house named Te Tiriti o Waitangi. Maihi had this to say:

> "And so I present to you the document of 1835 sent to William the Fourth, King of England that led to the Te Tiriti o Waitangi. May I briefly explain. This is the first declaration by the Māori people of New Zealand. This which was signed by Rangatira being an agreement to vest in King William our guardianship of the Māori people through the infancy of their association with his benevolence and his presentation of the "Flag", to the Rangatira of New Zealand. From the establishment of that flag there were many infractions right up until the year 1840 and Te Tiriti o Waitangi came into being. And so I ask, how did we come to possess the authority of this Tiriti o Waitangi, or was it given to us. I say it was derived from this assembly and the agreement written here and signed by them in the year 1835. That is why I have raised it, to bring clarity.
>
> First (1) there was the Flag.
>
> Second (2) te Tiriti o Waitangi. These articles were entrusted to protect the Māori people.
>
> As to the request by Rangatira from the South to Paora that legislature be taken there, Paora advised that March was approaching and that we should meet in Waitangi to create new laws for us, lest my own authority would be void. But not so this assembly of Rangatira who upon the authority they

[37] Brief of evidence Johnson Erima Henare, Wai 1040 #A30(c), para 145; translation by Erima Henare

> signed as Rangatira and witnessed by their signatures that led to this Tiriti."[38]

83. He Whakaputanga was an affirmation by the rangatira of their authority. The flag and Te Tiriti were articles entrusted to protect the Māori people. The authority came from the assembly of rangatira who sent the 1835 declaration to the King.

84. Also of interest in this address are Maihi's concluding remarks where he refers to the second Article in He Whakaputanga which Maihi describes as stating that

> "the sovereignty over the mana whenua of the assembly of Rangatira of New Zealand shall be said to rest only with the Rangatira of this assembly."[39]

85. Maihi says this should be taken out and this relates back to his remarks at the commencement of his address where he says

> "Paora's invitation to Rangatira from the South was to come to Te Tiriti o Waitangi to make new laws this year, isn't because the authority rests here, but that we should come and affirm those very words of this Tiriti o Waitangi. For it is Te Tiriti o Waitangi that Paora wants the Rangatira of this country to invoke at this Parliament."

86. Maihi is diplomatically acknowledging that the authority of Te Tiriti o Waitangi came from the Assembly of Chiefs who signed He Whakaputanga, but it is not the only or sole authority. Other tribes have their own mana, and they may join this Assembly of Chiefs.

87. While Maihi was making this speech in 1888 it is important to appreciate that:

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[38] Documents filed as a supplement to evidence of Erima Henare. Refer memorandum of counsel dated 21 December 2010 Wai 1040 #3.1.464 and #D14(d)

[39] Refer translation of hui minutes attached to counsel memorandum, supra #D14(d)

87.1. Ngapuhi rangatira were continuing to meet to discuss strategic political issues just as their fathers had done.

87.2. In the face of intrusion by the settler Government rangatira such as Maihi regarded He Whakaputanga and Te Tiriti as the basis upon which they could lawfully resist the intrusion of the settler state and maintain their own authority and mana.

88. The Ngapuhi rangatira who signed He Whakaputanga and Te Tiriti lived and died under a tikanga or code of honour that meant their word was their bond. Important rangatira to rangatira relationships such as that established by Hongi with the King and then carried forward through He Whakaputanga and Te Tiriti were not entered into lightly. Once the commitment was made the rangatira and the succeeding generations were bound to uphold these pacts of honour. That is why there is such an enduring and consistent recognition in the korero and writings of Ngati Hine and Ngapuhi rangatira of He Whakaputanga and Te Tiriti as kawenata or covenants. The covenant being understood to incorporate both spiritual and temporal aspects.[40]

89. In opening submissions the Crown says:

> "Dr Loveridge is unaware of any historical evidence that rangatira established a new form of government following the declaration of independence."[41]

90. Herein lies a large gap in the respective understandings of the Crown and the claimants about the meaning and effect of He Whakaputanga. It appears Busby and the Colonial officials expected the Chiefs to mimic British modes of governance and assemble in an orderly way at an appointed time each year in a kind of local Parliament. From the

[40] See for example evidence of Erima Henare. It appears that none of the Crown witnesses take issue with this proposition:
[41] Opening submissions of the Crown, 13 October 2010, para 41.2, Wai 1040

perspective of the rangatira they did not need to establish "a new form of government following the declaration". They already had their own governance arrangements and they regarded He Whakaputanga as an explicit acknowledgement of that fact. The King was acknowledging the integrity of their mana, their rangatiratanga.

91. After the declaration the rangatira and their hapu continued to harvest, trade and fight. They welcomed or expelled foreigners and made peace under their own mana. Busby, the missionaries and other Pakeha had only such influence in any of these matters as the Chiefs allowed or considered appropriate.

92. On matters involving all of Ngapuhi the Chiefs continued to meet. This was the case before 1835, after 1835, after 1840 and right down to the present day.

93. After 1835 and in the time of Kawiti the Assembly of Chiefs (He Whakameninga) met at various places in the North. The burden of hospitality was shared. If the Colonial records show that Busby did not attend any such meetings after 1835 this shows nothing other than the fact that the rangatira did not wish to consult him on the matters under discussion.[42]

94. At the same time if Busby or any other British official wished to introduce a policy or practice that affected the interests of the hapu the Chiefs expected to be consulted. Not in the modern sense of that term, but to be consulted in order to consider whether they would agree with any such new idea. Examples of course include the hui at Waitangi in February 1840 to consider Te Tiriti. Subsequent decisions to shift the Capital to Auckland and levy duties met with a predictable response. After Hone Heke chopped the flag pole down for the third time all of Ngapuhi nearly rose against the Crown

[42] Refer evidence of Erima Henare

because the Governor landed troops in the Bay of Islands. An all out war was only averted when the Governor met with and took advice from Ngapuhi rangatira and missionaries.[43]

95. After 1840 and as the numbers of settlers increased rapidly and British law and ultimately settler government became more intrusive Ngati Hine rangatira along with other Ngapuhi rangatira adopted modes of assembly such as runanga. Maihi Kawiti was prominent in a number of these initiatives including for a short while participation in a runanga established by Governor Grey in the early 1860's.

96. A striking early example of this was recorded in the columns of the Daily Southern Cross on 26 February 1848. This is of particular interest because it clearly shows the rangatira deciding to exclude pakeha from their deliberations::

> "The Nancy, late from the Bay of Islands brings us the startling intelligence that the Native tribes of the North have entered into a league with each other, and had drawn up in their own style a bill of rights, - and that delegates from various districts, have been convened for the purpose of giving consistency and form to this novel procedure. We have not yet been able to get a copy of this curious document, but our correspondent at the Bay, promises to use his best exertions to obtain one, though he apprises us that the Chiefs are extremely reserved and cautious on the subject, and that they even decline mentioning the motives which influence them to adopt the present course. Indeed so cautious are they in this respect, that they would not admit a single individual into the house where the Confederation (if we may use the term) was formed, except those who signed the Bill of Rights. When we received this intelligence, we concluded that the Natives must have been 'put up' to this course, but upon the most careful inquiry we find such is not the case – it is a spontaneous movement. As might have been expected, Heke is the mainspring of this movement, and we know that he has been, during the last

[43] Refer Ralph Johnson "The Northern War 1844-1846 Wai 1040 #A5 at Chapter 2, and Dr Grant Phillipson, "Bay of Islands Māori and the Crown 1793-1853, August 2005 at Chapter 7

> few months receiving deputations from various parts of the country, even as far as from Poverty Bay."[44]

97. In his evidence to the Waitangi Tribunal hearing the Te Reo Māori claim Sir James Henare provided some background to the runanga of which he was a member:

> "I want to say something about the Runanga o nga Rangatira o te Tiriti o Waitangi.
>
> Also the Chiefs of Nga Puhi and the Treaty of Waitangi. I survive only because of my extreme youth when I was appointed to it in 1930. Indeed I was only a teenager when I was appointed by those Chiefs, all of them were octogenarians or in their hundredth year. They were the sons and the grandsons of those Chiefs who signed the Treaty of Waitangi on 6 February 1840. Now I am the sole survivor.
>
> The Runanga came into being before the turn of the century after the demise of the Parliament of Waitangi, Caairea [sic – "carried"?] by my own great grandfather, Maihi Kawiti. We met twice a year at Waitangi to consider matters and legislation which in our opinion contravened the principles of the Treaty. I remember great were the concerns and debates on the rapidly dwindling area of land left to the Māori people and for the first time in my life I heard my elder Chiefs mention the word non-legal recognition of their taonga, the Māori language by the founders."[45]

98. The fact that the Crown may have been excluded from or ignorant of Ngapuhi political arrangements and discussions in the 1830's and 1840's (and subsequently) does not mean (as the Crown implies) that there was no such political organisational structure. The Crown has difficulty understanding history through Māori eyes. Ngati Hine hope that the Tribunal will be better placed to hear and understand this history and thereby help bridge the misunderstandings and

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[44] Daily Southern Cross, Volume 3, Issue 140, 26 February 1848, p 2 "The Present Crisis of the Colony"

[45] Sir James Henare, evidence to Te Reo Māori claim, page 3 Doc 71A

misrepresentations currently entrenched in the so called "mainstream".

PART C

Te Tiriti

The issues

99. The Tribunal have identified the following issues:

99.1. How did Māori understand Te Tiriti / The Treaty? And, therefore, what was the nature of the relationship and the mutual commitments they were assenting to in signing Te Tiriti / The Treaty.

99.2. How did the Crown understand Te Tiriti / The Treaty? And, therefore what was the nature of the relationship and the mutual commitments it was assenting to in signing Te Tiriti / The Treaty?

99.3. What then was the effect of Te Tiriti / The Treaty at 1840?

The evidence

100. The first and obvious point, but it bears repeating is that Ngati Hine have never understood Te Tiriti as a cession of mana or sovereignty to the Crown.

101. A good summary of the Ngati Hine understanding of Te Tiriti and the nature of the relationship comes from Erima Henare's description of the Rongomau Seal, designed by Maihi Kawiti, himself a signatory to Te Tiriti.

"... it's a seal known as 'Te Rongomau', and this is interesting: Shortly after the re-erection of the flagstaff Maihi applied to the Governor for a seal which he himself designed. The seal was to be called 'Te Rongomau'. The Governor sent a message of approval in 1858 to this via McLean – approving the application and advising that the seal would be sent as soon as it's ready.

I want the Tribunal to look at the metaphor here. The seal signifies Queen Victoria's clenched hand – it's that part of the seal that goes like that. It is made of elephant ivory. And that's really – the metaphor is this; this is Victoria's hand, the seal sitting on the table doesn't jump onto the wax by itself, but with Victoria's hand and my hand then the seal can be applied. So me and her the same – her hand, my hand and we can apply the seal, that is the metaphor, that is what Maihi believed he was signing when he signed Te Tiriti o Waitangi, side by side with God above."[46]

The relationship

102. It is the ongoing relationship with the British Sovereign that is the key.

"Ka tae tātou ki Te Tiriti o Waitangi. He aha nga whakaaro a Ngāpuhi mo te Tiriti o Waitangi? Ko ngā whakaaro o Ngāpuhi mo Te Tiriti o Waitangi e hoki ana ki te tūtakitanga o Hongi ki te kingi. He tūtakinga hoa, he tūtakinga orite, e haere tonu ana, e haere tonu ana. Kaore i tua atu, kaore i tua mai. Ko tetahi ano o ngā tino hiahia o ngā rangatira o Ngāpuhi i tēra wā ko ngā rawa o ngā iwi o tāwahi. Kaua ko Ingarangi anake.

What are the thoughts of Ngapuhi for Te Tiriti o Waitangi? The thoughts of Ngapuhi about Te Tiriti o Waitangi have their genesis in the meeting between Hongi and King George. A meeting of mutual friends, of equal status and so their conversations live on. Nothing more, nothing less. Another of the issues were that Ngapuhi wished to acquire the new technology from overseas. Not just that of England.

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[46] Evidence Erima Henare Week 4 transcript, page 124 Wai 1040 #4.1.4, Brief of evidence 30(c)

Ka whāriki au i ēnei kōrero mo muri i aku kōrero mo te Tiriti ka kite koutou he aha i whārikingia e ahau ēnei kōrero. He hiahia ki ngā rawa o whenua kē."[47]

103. As Erima Henare has stressed, Article 2 of Te Tiriti is critical.

"Ko te Tiriti o Waitangi i hainatia ki konei. Ko te wāhanga nui o Te Tiriti i hainatia ko te wāhanga tuarua. Kia noho tonu te mana, te rangatiratanga ki ngā iwi taketake o tēnei whenua.

The most important part of Te Tiriti that was signed was Article the Second. That which stated that the supreme authority should rest only with the people of this land.

Ka eke ki te kōrero a Hone, a te pāpā a Patu i nanahi rā a Rima – i whakaae rātou. Koia na ngā korero i puta i te tou rangatira, i tere puta ai rātou ki te haina. I te mea i whakaae rātou me noho mai te kāwana – me noho mai hei tiaki i ngā Pākeha i konei, ka tahi. Ka rua, kia haere tonu te whakahoatanga orite, tīmata mai i a Hongi.

That is what facilitated the ease of discussion at Te Tou Rangatira that led to the signing. They had decided to allow the Governor to remain, firstly to look after the pakeha here. And secondly as tangible evidence of the relationship begun by Hongi - tīmata mai i a Hongi. Horekau rātou i whakaae ki te tuku i te mana.

They did not ever agree to the cession of sovereignty. Kite koe i te mōhio o ngā mihinare.[48]

104. Erima Henare also referred to a panui issued by Maihi Kawiti on 20 September 1887 in which Maihi declared:

"It was noted and observed by those assembled, that the Māori people of New Zealand still held authority, power, (mana), as set out by the Chiefs of New Zealand on 28 October 1835. This was their word at the time to their King/Queen of England, that he/she remain as a parent for us while we are

[47] Brief of evidence of Erima Henare, Document A30(c), para 168
[48] Brief of evidence of Erima Henare, Document A30(c), para 173

still in our nascent state lest our sovereignty be annulled by the Government of New Zealand, and, this was agreed to by the Chiefs this 28th day of October 1835."[49]

105. In his evidence Mr Henare explained the significance of this as follows:

> "24. Maihi is absolutely clear as to the relationship between He Whakaputanga and Te Tiriti. The Māori people still held mana as set out by the chiefs on 28 October 1835. That authority or power was also expressed as rangatiratanga and this independence the King/Queen of England agreed to protect. This protection was viewed as extending to the "kawanatanga" introduced by Te Tiriti. This is why Maihi places such emphasis ("one's word is one's bond") on the Queen's guarantee of "the absolute sovereignty", "te tino rangatiratanga" over hapu lands, dwelling places and worldly possessions.
>
> 25. This linking of He Whakaputanga and Te Tiriti is entirely logical and correct if you read the documents in te reo Maori.
>
> 26. As I said in Week 1 from our Māori perspective there is only Te Tiriti o Waitangi. That was what was signed here. The other text is the English language version which is not the same as Te Tiriti and it meant nothing to our tupuna.
>
> 27. The covenant or relationship was with the English sovereign. It dated back to the time of Hongi. The King also advised Hongi that his troops must never be allowed to come to this country as that would be a bad sign. The King/Queen had recognised Maori rangatiratanga and mana in 1835 and agreed to protect it "as a parent for us while we are still in our nascent state". That same mana or rangatiratanga was again guaranteed by the Queen in Article 2 of Te Tiriti. In Maori eyes that meant protection against intrusion on that authority by anyone, including the kawanatanga established pursuant to Te Tiriti."

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[49] Appendix 2 to brief of evidence of Johnson Erima Henare, 5 November 2010 Wai 1040 Doc

106. Under cross examination by Ms Sykes about this panui and in reference to section 71 of the Constitution Act 1852 Mr Henare confirmed that the rangatira believed that their tino rangatiratanga guaranteed by Te Tiriti was not subject to the British Parliament. On this basis Maihi could legitimately seek to establish an independent authority or district where the laws and customs of his people were paramount.[50]

107. One of the most authoritative written records of the Ngapuhi understanding of the relationship established with the King by Hongi is set out in the letter Hone Heke wrote to the Queen in July 1849. The extracts below are taken from a transcription of that letter by Mr Erima Henare and a translation into English by Mr Waihoroi Shortland. These were filed with a memorandum of supplementary documents to Mr Henare's evidence on 21 December 2010.

108. It is a lengthy letter which needs to be read entire. Hone Heke is appealing to the Queen to intervene and instruct her Governors and her people to behave properly and in accordance with the words of Hongi and King George. Some of the key passages are set out below:

> "To the Queen of England,
>
> Greetings, give to me the solace of King George's words to Hongi when he did come to Europe – when King George asked him – why have you come. And he said there are two things for which I have come. Guns and thirty soldiers. And King George's words in reply to him were, No, I cannot countenance the sending of soldiers to New Zealand lest your home is taken over, let it remain for your children and your people, they (the soldiers) may not do the right thing.
>
> And so they continued to debate the issue and King George uttered these words to Hongi, and he said, but the missionaries I will send to you, as friends for you, they are good people, if they do wrong send them back."

[50] Cross examination Erima Henare, Transcript Week 4, Wai 1040 #4.1.4 at p 138

...

and in our benevolence we gave half to them (the missionaries) and kept half to ourselves - we alone would occupy this area together - not with countless others. Nevertheless in our naivety through many meetings, the troubled days arrived, just as King George had predicted to Hongi.

More difficulties were to follow, Busby arrived and with him a different purpose, then came Hobson, the first Governor with a different purpose. The flag of New Zealand that had flown, now only England's was raised. He did not call an assembly at Waitangi so that many more could be informed. The flagpole was important to the security of the country. That is why I asserted that he had gone and hidden himself. For it was I who had ensured they could land here, Busby and the first Governor.

Before the right thing could be done Fitzroy arrived, the second Governor – with yet another purpose. Unaware as I was of each Governor's purpose – we gave uninformed consent – I urged him to come and talk with me about that pole – he never came. Instead he raised two more girdled with iron and smeared with tar – That gave rise to the fighting – his mind hardened and there I was in breach to you.

Then came Governor Grey, a fighting governor. That is why I say, someone must have sent these people. In my estimation you have caused this breach between us, which has broken King George's words to Hongi.

Now, You might say that it is I who is in breach, No, That is why I say to you, It was upon your assent that the flag for my country of New Zealand was commissioned. And with the sovereignty of the land and the people whom you have sent, I would know that you indeed care for New Zealand and the words of King George. For although they have died, the words live on. And so, it is for you to cherish and honour for the greater good and respect and to ensure peace I do implore - that you give due guidance to the people that are continuing to come here.

...

Does it seem right to you that the blood of our children and our women be spilt on the land. That is wrong. This is innocent blood. That is why I say, you are above all people. You should define the meaning of the flag, or a

committee should define it. If it is not settled and the wrong cannot be set right by a committee then these problems will continue unabated – If it is settled, then the bond given by King George to Hongi will be affirmed. I will not desecrate their words."

109. Several features from this letter stand out:

- Heke is seeking answers; he wants to know why, contrary to the King's word to Hongi troops had been sent to New Zealand to fight over the flag.

- Heke is again testing the meaning of the flag: is it a land grabbing flag?

- Heke is appealing directly to the Queen because he knows that the Governors are subordinate. He is seeking an explanation for the fact that each of the Governors have acted in ways that he cannot understand and to which he did not consent.

- He issues a direct challenge to the Queen:

  "that is why I say someone must have sent these people. In my estimation you have caused this breach between us, which has broken King George's words to Hongi".

- Heke clearly links the commissioning of the flag and He Whakaputanga to a recognition of the Māori sovereignty over the land and the people. Based on the recognition of that sovereignty Heke does not consider himself in breach of the words between King George and Hongi. He wants the Queen to uphold those words and to clarify for her people the respective meaning of the Māori and the British flag as it applies in New Zealand.

110. The importance of Hongi's visit to England and the relationship he established with the King cannot be overstated. The scholarship of Dr Manuka Henare has gone a long way towards making more accessible for a wider audience the details around this visit and the relationship that sprung from it.[51]

111. It was Dr Henare who drew attention to Pompallier's characterisation of the Treaty relationship by use of a metaphor – New Zealand being a ship owned by Māori, with the Governor invited to come and help sail it:

> "Hone Heke, as I mentioned earlier was a close friend to John Baptiste Pompalllier, and in Pompallier's diaries, there is an inference that the person who gave to Pompallier the metaphor of the ship was Hone Heke. So, if that is anywhere near true and Pompallier got it right, if he heard right, then the idea that according to Ngapuhi (Hone Heke Ma), New Zealand is like a ship which they own, all they have asked the Governor to do is help sail it. Now this fits adequately in the life of Hone Heke and others we have seen the Governor here to do a certain job, the ownership of things is clear and his task is clear."[52]

Kawiti

112. Moetu Tipene Davis gave important evidence focusing on Kawiti, his sayings, and a number of his waiata in particular. In her concluding remarks she stressed to the Tribunal and the Crown that in order to truly understand how Māori understood He Whakaputanga and Te Tiriti and the nature of the relationship they signified you need to understand why Kawiti went to war so soon after those covenants had been entered into.

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[51] See in particular Dr Manuka Henare, "The Changing Images of Nineteenth Century Māori Society – From Tribes to Nations, Doctoral thesis, Victoria University 2003 Wai 1040 #A16 at pp 160-172

[52] Cross examination Dr Manuka Henare, Week 2 transcript Wai 1040 #Doc 4.1.2 at page 133

"For Ngāti Hine the reasons are clear and they come from the words of our tupuna Kawiti. Pakeha tend to see land in terms of the uses to which it can be put and the resources upon or under it. For Ngāti Hine and for Kawiti our mana, our rangatiratanga was bound up in the relationship to the land. This is not to say Kawiti was averse to a relationship with the Pakeha. Kawiti could see the benefits that came from trade and from the relationship with the English sovereign.

Kawiti understood that Ngāti Hine independence (or sovereignty) had been recognised and affirmed and his personal rangatiratanga guaranteed through He Whakaputanga and Te Tiriti. The Governor had no legitimate right to claim an interest in Ngāti Hine lands or to act unilaterally on matters that affected his people or his lands."

113. One of Kawiti's sayings discussed in the evidence of Moetu Davis was the maxim "E te whānau" first pronounced by Kawiti in 1846 not long after the battle of Ruapekapeka. It is one of Kawiti's sayings that continues to guide Ngati Hine.

"E te whanau

I te pakanga hau ki nga Atua i te po,

Hoi, kihai ahau i mate.

Na reira, takahia te riri ki raro i o koutou waewae

Kia u ki te whakapono, he poai Pakeha koutou i

Muri nei

Waiho kia kakati te namu i te wharangi o te

Pukapuka,

Hei konei ka tahuri atu ai

Kei takahia e koutou nga papa pounamu a o

Koutou tupuna e takoto nei

Titiro atu ki nga taumata o te moana.

My illustrious warriors and people,

I had my wars with the Gods during the night, but
I survived.

Therefore I call upon you to suppress war

Underfoot.
hold fast to the faith, for the day will come when

you will become like the Pakeha.

Await therefore until the sand fly nips the pages

Of the book.

Then and only then shall you arise and oppose.

Do not desecrate the sacred covenants endorsed by your forebears.

Look beyond the sea to the transfiguration of the future."[53]

114. Ms Davis highlighted the following key points:

- Kawiti's reference to his clash with the Gods provides an insight into the overlapping of the spiritual and temporal worlds which is a natural part of Māori society.

- The reference to the suppression of war underfoot refers to Kawiti's attempts to make peace with the Government. Kawiti had gone to war over concern about dispossession of Ngati Hine from their lands and he would agree to peace on no other terms. Having secured the lands he was encouraging the people to support the peace.

- Kawiti was aware that Te Tiriti contained mutual obligations and he implored his people to uphold the covenants. However the phrase

> "Waiho kia kakati te namu i te wharangi o te pukapuka, hei konei ka taburi atu ai"

[53] Brief of evidence of Moetu Tipene Davis, 4 October 2010, para 32

> "Await therefore until the sandfly nips the pages of the book. Then and only then shall you 'arise and oppose' ",

was a reminder to his people that they had a responsibility to arise and oppose any failure by the Crown to honour its covenants.

115. In securing the peace Kawiti had secured the lands and would agree to peace on no other terms. Ms Davis set out the following two letters from Kawiti to the Governor which make the point clearly:

> **"You shall not have my land, September 1845**
>
> O friend the Governor, - Saluting you. This is my word to you. Will you not hearken to my word? It was you who said I was the first to commence killing the Europeans and that I should therefore be the first to propose peace. I accordingly gave my consent to a letter to Mr Williams. It was he who said you were urging me to make peace. On this account I wrote a letter to you, but as you have said we are to fight – yes we will fight. If you say, 'Let peace be made', it is agreeable; but as regards this, you shall not have my land. No, never, never! I have been fighting for my land. If you had said that my land should be retained by myself I should have been pleased.
>
> Sir you, are very desirous to get my land, I shall be equally desirous to retain it for myself.
>
> This is the end of my speech. It ceases here.
>
> From me, KAWITI
>
> **Do not be hasty about the Land written in November 1845**
>
> Sir the Governor, - Salutations to you ... If this war were solely yours, and the natives had not taken part in it with you our peace would have been made; but as for native fighting perhaps it cannot be made straight because Waaka is constantly naming his dead. No; it is for those who were killed long ago – on account of Hao, of Tuahui, Tihi and Poaka. These were killed long ago. Sir Governor ... Do not be hasty about the land. Land is heavy

(enduring) but man is light (perishable) ... Sir, if you say that we fight, it is well.

If you say 'Cease' it is well; but do not say that you will not yield some portion of your thoughts.

From me, KAWITI"[54]

116. As Ms Davis observed Kawiti clearly understood that Ngati Hine independence (or sovereignty) had been recognised and affirmed. Kawiti's personal rangatiratanga was guaranteed through He Whakaputanga and Te Tiriti. The Governor therefore had no legitimate right to claim an interest in Ngati Hine lands or to act unilaterally on matters that affected his people or his lands. It is necessary to understand this in order to understand why Kawiti, a signatory to both He Whakaputanga and Te Tiriti ultimately went to war over these matters.[55]

Maihi Kawiti

117. This theme of mana and rangatiratanga being bound to the land is echoed in the writings of Maihi Kawiti, particularly in the whenua papatuputupu document included with the evidence of Erima Henare. The following extracts are taken from the translation provided by Mr Henare:

"**UPOKO I**

OF THE PLACES AND AREAS, FEBRUARY 19, 1887

Motatau is the stump bound to the post, Hineamaru, a joining of people, of land. This is it. Bound tightly, ever tighter, ever the tightest. This is our very essence. We the descendants of Hineamaru, living in the shadow of these two mountains, Motatau and Hikurangi whose proverb is: They shall

[54] Brief of evidence of Moetu Tipene Davis, 4 October 2010, pp 24-26
[55] Brief of evidence Moetu Tipene Davis, Wai 1040 #D13, paras 44-46

stand and endure through both night and day. As with the great laws of England!

UPOKO II

Waiomio, February 19, 1887

For the environs of Waiomio and surrounding areas, this is the book of the Ngati Hine Committee based at Waiomio that shall lay down the new laws for the reservation of Waiomio and on into other lands bound together by the people on this the 9th day of February 1887. These are the rules:

Page 7

1. That we will never sell our lands to the pakeha.

2. That we shall never permit the Maori Land Court to hold jurisdiction. That we the Maori will be covered by our own laws set out in the three key principles above, known as Upoko 1, Upoko 2 and Upoko 3. All Maori law and rules shall be joined to these principles. There is to be one way of management, only one. It is not to be different. As outlined above, Hineamaru is the pou to whom we are all tied, to hold as one the laws and lands of Hineamaru and in addition the unity of Hinemaru's descendants.

Page 26

Of the laws for the people, should there be any Maori who may be travelling the world with no land, they are welcome to come here and work the land and grow food for themselves. If one of these landless people is on the land let them not talk about the land per se but of the fruits of their labours. This is in keeping with the words handed down by our ancestors that the land maketh the man and the man maketh the land. Another saying from the ancestors is to look after and care for others and you will receive the love of others in bounty. If you do not care for others you will not enjoy the praise of others. That is an old saying from the ancestors handed down to all generations. Down to and including this generation the words of our ancestors are like those of written of David (the Bible) that say that when

> good works are partnered with the truth, and when right and peace are one then truth shall be upon the land, and that virtue shall look down on earth. These are the final words that the truth is upon the land, that wrong is the domain of man, these are guidelines for the land and man."[56]

Te Tiriti

118. For Ngati Hine there is only Te Tiriti. That was the document signed by their tupuna. As Erima Henare truthfully and bluntly put it: the other version was the English language version and that meant nothing to them.[57]

The meaning and effect of Te Tiriti

119. The meaning of Te Tiriti is captured in the following summary written by Maihi Kawiti in 1887.

> "Tua 2 o nga pukapuka, ko te Tiriti o Waitangi, 1840, te a o Pepurere. Ka herea ko te kupu, i mea te kupu a te Kuini rarangi. Ktuatahi ko Wikitoria, te Kuini o Ingarangi, i tanna mahara atawhai ki nga rangatira, ki nga hapu, ki nga tangata katoa o Niu Tireni, te tino rangatiratanga o ratou whenua, me o ratou kainga, me o ratou taonga katoa."
>
> "The second of the papers, was Te Tiriti or Waitangi, 6 February 1840. One's word is one's bond, the Queen's line says. Firstly: Victoria Queen of England in fulfillment of her kind and generous thoughts towards the Chiefs, the hapu and all Māori living in New Zealand guarantees to them the absolute sovereignty over their lands, their dwelling places and all their worldly possessions and resources."[58]

120. The Ngati Hine evidence has been clear, and aligns with evidence given by a number of technical witnesses and kai korero for other hapu. The closest word in Māori for the concept of sovereignty is

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[56] Erima Henare, translation He Whenua Papatupu, filed 21 December 2010
[57] Erima Henare, opening remarks Week 1
[58] Panui Te Korimako 20 September 1887 Maihi Kawiti, Appendix 2 to the Amended Brief of Evidence of Johnson Erima Henare 5 November 2010, Wai 1040 Doc #30(c)

"mana". "Your freedom ends where my nose begins and that's what mana is."[59] Rangatiratanga is the emanation of mana, its practical manifestation.[60]

121. Rangatiratanga and "tino" rangatiratanga denote absolute authority or power, power over life and death itself.[61]

> "O nga ture mo te whenua ki te pokanoa te tangata ki to Hoko i tetahi wahi o te whenua wahi rakau, ranei ka whakamatea ia e te iwi nui tonu."
>
> "Of the laws for this land; should anyone alienate any part of this land or forests they will be killed by the people."[62]

122. As the writings of Maihi Kawiti clearly demonstrate, Ngati Hine had always considered their mana or authority as having been acknowledged by the King in 1835, and then confirmed and guaranteed under Te Tiriti.

123. What then did Ngati Hine agree to by their assent to the Governor and the "kawanatanga"?

> "The term 'kawanatanga' was understood by my tupuna as referring to a lesser delegated set of powers such as Governors over Provinces in the biblical texts. My tupuna knew the difference between 'He Kingi' and 'He Kawana'.
>
> And, Sir, that is why I brought the Bible here, printed in 1833, because in the book of John, when it talks about the trial of Christ by Caiaphas and others, and is handing over to Pontius Pilate, the Governor of Duty at the time, it is quite clear in there who held the authority because in John he also talks about Caesar, and Caesar being the greater of the two, the Emperor. My tupuna knew the difference between a King and a Kawanatanga.

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[59] Cross examination Erima Henare, Week 4 Transcript, Wai 1040 #4.1.4 at p 131

[60] Refer evidence of Erima Henare, Dr Patu Hohepa, Distinguished Professor Dame Anne Salmond and Moana Jackson

[61] For amplification and examples refer evidence of Erima Henare

[62] He Whenua Papatupu Maihi P Kawiti, 1874 at p 26. (Translation Erima Henare filed with memorandum of counsel 21 December 2010)

> A particular bit of 'squinty legalism' that I object to in the Crown evidence is the claim made by Carpenter and others that 'sovereignty' and 'government' were identical terms and therefore Williams' use of Kawanatanga to translate sovereignty was correct. Williams' use of 'Kawanatanga' to translate sovereignty was disingenuous at best ...
>
> Pursuant to Te Tiriti my tupuna agreed to the introduction of the Kawanatanga in which they stood side by side with the Queen, God above."[63]

The Treaty

124. The English text of the Treaty is clearly drafted as a treaty of cession pursuant to Article I the Chiefs "cede" to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of sovereignty.

125. Māori consent to British annexation was regarded as an indispensable legal prerequisite. Annexation must, wrote the Lords of the Treasury in 1839:

> "be strictly contingent upon the indispensable preliminary of the territorial cession having been obtained by amicable negotiation and with the free concurrence of the native chiefs."[64]

126. Dr Paul McHugh makes the same point, the Crown saw Māori consent as an indispensable prerequisite to the erection of any sovereign authority.[65]

127. Normanby's final instructions to Hobson dated 14 August 1839 included detailed guidance as to the importance of patient and sincere explanation to Māori of the British proposal to seek agreement to a cession of sovereignty from Māori. It is salutary to consider these

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[63] Transcript of evidence Erima Henare Week 4, pages 119-120, Wai 1040, Doc 1.4.1
[64] NZ papers 1820-1890, A1280, Mitchell Library, Sydney, cited in Belich "Making Peoples", Penguin 1996 at page 196
[65] Brief of evidence of Dr Paul McHugh, 16 April 2010, Wai 1040 #A21 at paras 8 and 9

instructions in light of what Hobson actually did upon landing in New Zealand. Far from overcoming Māori ignorance or distrust by the gradual exercise of mildness, justice and perfect sincerity Hobson proceeded with a degree of ruthless pragmatism to draft, translate and seek agreement to a treaty within days of arrival.

> "The Queen, in common with Her Majesty's immediate predecessor, disclaims, for herself and for her subjects, every pretention to seize on the islands of New Zealand, or to govern them as a part of the Dominion of Great Britain, unless the free and intelligent consent of the Natives, expressed according to their established usages, shall be first obtained.
>
> ...
>
> Her Majesty's Government have resolved to authorise you to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands which they may be willing to place under Her Majesty's Dominion. I am not unaware of the difficulty by which such a Treaty may be encountered. The motives by which it is recommended are, of course open to suspicion. The Natives may, probably, regard with distrust a proposal which may carry on the face of it the appearance of humiliation on their side, and of a formidable encroachment on ours; and their ignorance even of the technical terms in which that proposal must be conveyed, may enhance their aversion to an arrangement of which they may be unable to comprehend the exact meaning, or the probable results. These, however, are impediments to be gradually overcome by the exercise on your part, of mildness, justice, and perfect sincerity in your intercourse with them. You will, I trust, find powerful auxiliaries amongst the missionaries, who have won and deserved their confidence, and amongst the older British residents who have studied their character, and acquired their language.
>
> ...
>
> In selecting you for the discharge of this duty, I have been guided by a firm reliance on your uprightness and plain dealing. You will, therefore, frankly and unreservedly explain to the Natives, or their Chiefs, the reasons which should urge them to acquiesce in the proposals you will make to them.

> Especially you will point out to them the dangers to which they may be exposed by the residents amongst them of the settlers amenable to no laws or tribunals of their own; and the impossibility of Her Majesty's extending to them any effectual protection unless the Queen be acknowledged as the sovereign of their country, or at least of those districts within, or adjacent to which, Her Majesty's subjects may acquire lands or habitations."[66]

The translation of the treaty

128. Hobson was instructed to obtain the "free and intelligent consent" of Māori . Hobson could not speak Māori. He was totally reliant on the missionaries and some resident Pakeha to translate and convey the meaning of the Treaty to Māori. The missionary, Henry Williams, was the person primarily responsible for translation of the English text into Māori.

129. The Ngati Hine position on the adequacy of Henry Williams' translation is clear:

> "I have to say that I take a more critical view of Williams than my father was inclined to do so. Dad would tend to give Williams the benefit of the doubt, saying that the inadequacies in the translation had more to do with Williams' lack of understanding of the Māori language. I don't doubt that Williams genuinely believed that it was in the best interests of Maori to become British subjects. I believe Williams knew what he was doing, and he was essentially acting in a political way to try and secure Maori consent. Williams translated He Whakaputanga and he signed as a witness, in that document all sovereignty and authority is translated as 'Ko te Kingitanga ko te mana'. We now know that the very object of Te Tiriti from the English point of view was to have the chiefs of he Whakaminenga relinquish to the Crown that sovereignty which the Crown recognised five years before, in 1835. That is what Article 1 of the English version says. It is certainly not what article one of Te Tiriti says, and Article 1 of the English version plainly contradicts

[66] Marquis of Normanby to Captain Hobson, 14 August 1839, Copy annexed to Crown memorandum dated 18 August 2010

> Article 2 of Te Tiriti, and Williams, as the translator, had to have known about this."[67]

130. Mr Henare also spoke of the oral tradition within Ngati Hine that Williams had admitted to Kawiti in the early 1850's that he had not used the word "mana" in Te Tiriti as he knew that none of the Chiefs would have signed.[68]

131. Mr Henare confirmed his substantial agreement with the evidence of Distinguished Professor Dame Anne Salmond on the inadequacies of Henry Williams' translation.

132. The Ngati Hine understanding also aligns with numerous other hapu kaikorero whose tupuna had signed Te Tiriti. It is further supported by the linguistic evidence of Dr Patu Hohepa and the expert evidence of Moana Jackson.

The two texts: modern scholarship

133. Quite apart from evidence presented to this Inquiry it is fair to say that in recent decades the tide of scholarship is finally catching up with the claimant perspective. In her 1987 book Claudia Orange observed:

> "The Treaty was presented in a manner calculated to secure Māori agreement. The transfer of power to the Crown was thus played down. Māori suspicions were lulled by official recognition of Māori independence, and by the confirmation of a degree of that independence under British sovereignty, and by the extension of Crown protection and other rights. Māori were told that the Crown needed their agreement in order to establish effective law and order – primarily for controlling Europeans, or Pakeha as they were called. Finally, the benefits to be gained from the Treaty were stressed, rather than the restrictions that would inevitably follow."

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[67] Evidence of Erima Henare Week 4, Transcript, page 120

[68] Brief of evidence John Erima Henare 4 October 2010 and amended brief 5 November 2010, Wai 1040 #D14 at paras 31.4 and 39.4 respectively

and

> "When Hobson reported these proceedings to the Colonial Office, he asserted that efforts had been made to explain to the chiefs 'in the fullest manner' the effect that might result from the treaty. It is difficult to see how he could honestly claim this. As presented, the treaty seemed to be confirming the chiefs' authority and directing its effects mainly at Pakeha, aiming specifically at better control of British subjects. Such control might be to the advantage of the Māori people, even though it would mean accepting an increased British authority and sharing the ruling power of the land. Apart from this, however, other predictable changes that would affect Māori life do not appear to have been touched on. Most importantly, there is an absence of any explanation that Māori agreement to kawanatanga ('sovereignty' in the English text) would mean British annexation, a substantial transfer of power that would bring international recognition of New Zealand as a British colony. On the contrary, from the emphasis on protection, Māori might have expected that they were being offered an arrangement akin to a protectorate."

and

> "The explanations given at treaty signings support the conclusion that, though Māori expected the treaty to initiate a new relationship, it would be one in which Māori and Pakeha would share authority. The intervention of Britain would still be limited. At Kaitaia at least, chiefs were assured that Māori customs and law would not be interfered with, and Māori were encouraged to believe that their rangatiratanga would be enhanced. While they might have reasoned, as Heke did, that they could not be certain of the effect of the treaty, they might reasonably have believed that they were ceding only limited rights to Britain – perhaps a relinquishment of responsibility for external affairs – and that Māori control over tribal matters would remain."[69]

134. Jamie Belich wrote in 1996:

> "It is possible that 'rangatiratanga' was an honest attempt to translate 'ownership'. But it is more probable that it was a deliberate or semi-

[69] Claudia Orange: The Treaty of Waitangi, Allan & Unwin, 1987 at pp 33, 46 and 89

> deliberate act of deceit by those who translated the Treaty into Māori, notably Busby, Henry Williams and his son Edward. We should understand their motives. They knew Māori would not give away their Chieftainship, yet they honestly believed that the Treaty was now the only way that Māori could be saved from physical or spiritual extinction at the hands of the agents of vice."[70]

135. Earlier scholars, particularly Ruth Ross had also identified the problems in reconciling the Māori and English texts of the Treaty.

136. In 1991 Dr Paul McHugh wrote:

> "Did the chiefs really intend to cede all their legal sovereignty? Although rarely expressed in such a technical, Diceyan manner, the modern view would indicate otherwise. The Waitangi Tribunal and commentators such as Ross, Kawharu, and Orange have reviewed the historical and anthropological evidence carefully. The indications are that the chiefs thought they were retaining their own authority over their people according to their customary law (te tino rangatiratanga).[71]

137. In 1993 Professor Jock Brookfield wrote:

> "But whatever the chiefs individually intended, it is impossible to believe that any of them consented to the claims of absolute and unlimited power, even over the Treaty itself, which, under the doctrine of parliamentary sovereignty, were made by Queen Victoria's Parliament and are made today by the New Zealand Parliament as its successor."[72]

The two texts: contemporary sources from the nineteenth century

138. It is not only contemporary scholars who can confirm and corroborate the claimant perspective, there is no shortage of knowledgeable

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[70] Jamie Belich: Making Peoples, Penguin 1996 at page 194

[71] Paul McHugh, The Māori Magna Carta, New Zealand Law and the Treaty of Waitangi, Auckland Oxford University Press 1991, 46, cited in Palmer, The Treaty of Waitangi in New Zealand's Law and Constitution at p 72

[72] Jock Brookfield, valedictory lecture at the University of Auckland, Professor Jock Brookfield, 1993 cited in Palmer, The Treaty of Waitangi in New Zealand's Law and Constitution at p 72

European observers in the 1840's who also recognised the difficulties reconciling the Māori and English texts. Belich observes that:

> "Hobson's interpreters shifted emphasis between English and Māori written versions in a direction that improved the chances of Māori consent. This suggests that they were capable of shifting it further in the same direction in the oral version. French Catholic missionaries summarised the discussions at Waitangi:
>
> All the Chiefs will preserve their power and their possessions. They had not the slightest intention of ceding their territory or their sovereignty; they 'do not want the Governor' to extend his authority over the natives, but only over the Europeans."[73]

139. New Zealand's first Attorney-General, William Swainson, gave opinions in 1842 and 1843 to the effect that Māori consent to British sovereignty only applied to those tribes whose Chiefs had freely and with full understanding signed the Treaty. It did not apply to those who had not signed. With regard to Te Rauparaha and Te Rangihaeata, Chiefs who had signed the Treaty, Swainson was of the view that neither could have been said to have given

> "their intelligent consent to it, as it is now well known that, in common with many others, they had not the remotest intention of giving up their rights and powers of dealing, according to their own laws and customs, with the members of their own tribes or of consenting to be dealt with in all cases according to our laws."

Swainson went on to say:

> "I consider that the title of Great Britain to the sovereignty of New Zealand rests partly upon discovery, partly upon cession, partly upon assertion, and partly upon occupation; that from these sources conjointly, as against all other nations, and as to British subjects, I think that Great Britain has a title to the sovereignty over the whole of New Zealand, and that she possesses the

[73] From Turner "Politics of Neutrality" 88,100 cited in Belich: Making Peoples, Allan & Unwin, 1996 at page 195, 196

> right of pre-emption of territory from the natives, and has the power to regulate trade and commerce with other nations; but as to those tribes who have never ceded the sovereignty and who refuse to acknowledge the Queen's authority, I think that Great Britain has not the right, nor would it be consistent with good faith to impose upon them her penal code."[74]

140. William Swainson also wrote in 1859 that:

> "The only clear idea which they had formed of the consequences of ceding to us the sovereignty over the country was, that they should be the immediate gainers. If the consequences of that act had been fully understood by them – if they had been aware that in ceding the sovereignty they gave to us the power to abrogate their own usages and customs, to destroy the power of their own Chiefs, and to impose our own laws upon them – it may well be doubted whether a single Chief of influence would have become a party to the Treaty of Waitangi."[75]

141. In his History of the Signing of the Treaty of Waitangi Colenso records the following exchange:

> "**Mr Colenso:** 'May I ask your Excellency whether it is your opinion that these Natives understand the articles of the treaty which they are now called upon to sign?
>
> **The Governor:** 'If the Native chiefs do not know the contents of this treaty it is no fault of mine. I wish them fully to understand it. I have done all that I could do to make them understand the same, and I really don't know how I shall be enabled to get them to do so. They have heard the treaty read by Mr Williams.'
>
> **Mr Colenso:** 'True, your Excellency; but the Natives are quite children in their ideas. It is no easy matter, I well know, to get them to understand – fully to comprehend a document of this kind; still, I think they ought to know somewhat of it to constitute its legality. I speak under correction, your Excellency. I have spoken to some chiefs concerning it, who had no idea whatever as to the purport of the treaty.'

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[74] William Swainson cited in brief of evidence of Dr Paul McHugh 16 April 2010 at p 75

[75] Cited in Dr Matthew Palmer Treaty of Waitangi in New Zealand's Constitution, Victoria University Press, 2008 at pages 69, 70

> **Mr Busby here said:** 'The best answer that could be given to that observation would be found in the speech made yesterday by the very chief about to sign, Hoani Heke, who said, 'The Native mind could not comprehend these things: they must trust to the advice of their missionaries.' '
>
> **Mr Colenso:** 'Yes; and that is the very thing to which I was gong to allude. The missionaries should do so; but at the same time the missionaries should explain the thing in all its bearings to the Natives, so that it should be their own very act and deed. Then, in case of a reaction taking place, the Natives could not turn round on the missionary and say, 'You advised me to sign that paper, but never told me what were the contents thereof.' '
>
> **The Governor:** 'I am in hopes that no such reaction will take place. I think that the people under your care will be peaceable enough: I'm sure you will endeavour to make them so. And as to those that are without, why we must endeavour to do the best we can with them.' "[76]

142. Dr Phillipson was right to emphasis the importance of the following account from the diary of Felton Mathew, the first surveyor general of New Zealand who was present during the signing of the Treaty. Dr Phillipson rightly concludes that the following extract is important because Mathew was relying on the English language versions of what was being said to and by Māori. What he understood from that exchange in English was that the Queen's sovereignty was equated with protection and "full power over their own people – remaining perfectly independent".

> "He [Hobson] then caused to be read to them a treaty which had been prepared, by which the native chiefs agreed to cede the sovereignty of their country to the Queen of England, throwing themselves on her protection but retaining full power over their own people – remaining perfectly independent, and only resigning to the Queen such portion of their country as they might think proper on receiving a fair and equitable consideration for the same. This treaty having been read and explained to them, they were

[76] W Colenso: The Authentic and Genuine History of the Signing of the Treaty of Waitangi, Government Printer 1890, pp 32-33

> asked to state their opinions on the matter, and to make known if any of the conditions were not clearly understood or required any explanations."
>
> "During the whole ceremony with the chiefs, nothing was more remarkable than the very apt and pertinent questions which they asked on the subject of the treaty, and the stipulations they made for the preservation of their liberty and perfect independence."[77]

143. The problems associated with the translation and the unseemly haste with which Hobson sought to promulgate the Treaty were noted by European observers at the time.

144. The following extract from the Daily Southern Cross in 1843 lengthy but worth setting out in full because it demonstrates very clearly what European observers at the time thought occurred in February 1840. It will be clearly seen that the author, (much closer to the action than the Crown witnesses), has a far more sceptical view about the extent to which the two texts of the Treaty can be reconciled. The author is particularly scathing of the conduct of Captain Hobson and his advisers who he says "were determined to obtain sovereignty at any cost". Hobson certainly acted as if failure was not an option (as Paul McHugh put it). By the simple expedient of comparing the two texts of the Treaty the author concludes (quite accurately)

> "our readers will at once perceive that the Natives have made no surrender of any of their rights and privileges to Captain Hobson or the agents of the British Government. ... The Natives have agreed to give up nothing to the agent of the British Government that has any tangible shape or meaning. The word kawanatanga they certainly gave up, but what meaning did the Natives of New Zealand attach to this word, which never existed until Captain Hobson came here?"

145. This is the extract from the 1843 article:

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[77] Dr Grant Phillipson, Bay of Islands Māori and the Crown 1793-1853, August 2005, pp 282-283

"Daily Southern Cross 26 August 1843:

His Excellency Mr Shortland, the Treaty of Waitangi, and the Wairoa [Wairau] Massacre

'It however, rebounds to the honour of England and of the Marquis of Normandy in particular, that a more enlightened, and a more humane principle was intended to be carried out in the case of New Zealand, and it is much to be regretted that the execution of the Marquis of Normandy's humane views should have been entrusted to mean so utterly incompetent for the task, as Captain Hobson and his Colonial Secretary Mr Shortland. The new system or that of treating the aborigines as rational and human beings, who have certain inherent rights and privileges which it was illegal, unjust, and unchristian to usurp, was fully and unequivocally recognised in all the instructions given by the noble Marquis to his servants in this country. Every pretension to New Zealand by virtue of any of the old and barbarous rights of might, power, conquest, and discovery, were abandoned and disclaimed. Captain Hobson was required to assume no higher character in New Zealand than that of British Consul. He was not by any means to pretend to exercise the functions of sovereignty over this country, unless the Natives expressed an intelligent desire to place themselves under the protection of the Crown of England, in which case, he was allowed to enter into a fair, honest and honourable Treaty with them for the cession of their sovereignty to the Crown of England, the object being clearly understood to be for the benefit of the Natives. Every right claim or title on the part of the Crown of England, rest upon this Treaty (of Waitangi as it is called). The Crown of England has preferred no other title, and it holds no other, but that which is founded upon the Treaty of Waitangi.

Unfortunately for New Zealand, Captain Hobson and his advisers had more of the spirit of a pizarro and a cortes, than of the humane and enlightened Normanby. They were determined to obtain sovereignty at any cost to England, or to humanity; the humane name of consul was never mentioned in New Zealand. The high sounding title of Governor was announced on the first day of landing, as that which the agent of the humane Normanby would delight to be honoured with; and instead of waiting to ascertain the wishes of the poor Natives regarding the object of his mission, Captain Hobson immediately set about framing a Treaty, which Treaty he caused to be submitted to the Natives of the Bay of Islands two or three days after his

arrival. By dint of argument, promises, and gifts, some of the Bay Natives were induced to sign this Treaty, which neither they, nor their fathers could understand. ... The majority of the Native Chiefs of New Zealand, however either refused, or never had an opportunity of signing this famous Treaty. The home government however, were duly informed that the whole country was ceded to Her Majesty; and the Colonial Office was duped by Captain Hobson. More than two thirds of the Chiefs of New Zealand had never signed this famous Treaty; many of those who did sign it received blankets, or other gifts for so doing, not one of them understood the nature or meaning of it, and the Treaty itself is a complete tissue of nonsense. The Natives surrender nothing whatever, and the Crown of England obtains no more legal or real title by it to the sovereignty of New Zealand than it had before Captain Hobson or Mr Willoughby Shortland, his secretary were born.

..."

[Note, the article then refers to the text of the Treaty together with a translation printed with the article.]

"...Our readers will at once perceive that the Natives have made no surrender of any of their rights and privileges to Captain Hobson or the agents of the British Government. The Treaty of Waitangi is in truth a hoax imposed upon the British Government by Captain Hobson and his advisers, and New Zealand, as far as that Treaty is concerned, is no more a part of the British Empire than it was when Captain Cook first landed upon its shores. The Natives have agreed to give up nothing to the agent of the British Government that has any tangible shape or meaning. The word *kawanatanga* they certainly gave up, but what meaning did the Natives of New Zealand attach to this word, which never existed until Captain Hobson came here? And what meaning has this attempt at a word, in any language whatever?

The sound was never heard by the Natives of New Zealand before, and if they can be supposed to surrender anything upon the faith of a word which is not, (and if it be) which has no meaning, we leave lawyers to say?

We fear that a sovereignty founded upon such a pretext, will be, as it has been found to be, based upon a worse than sandy foundation – upon a foundation which must be cemented with blood to keep it together. If ever there was a fraud practised upon the British public, and upon the

> Government of England, it has been down by Captain Hobson and his advisers. The deception is not only criminal, but of a most aggravated character. That it not only has the Government of England being led astray by this foolish Treaty, but hundreds of individuals have, upon the faith of its existence, been induced to come to New Zealand under the idea that it had been regularly, and legally ceded to Great Britain.
>
> If this view of the case be true, as we doubt not it is, then must it follow that every act of sovereignty which has been exercised by the servants of the British Government, has been illegal and unwarrantable, even upon lands purchased by the servants of the British Government, unless such purchase stipulated the cession of sovereignty over such lands which we suspect was never the case."[78]

The Carpenter and Ward evidence

146. The only evidence before the Tribunal contesting the claimant perspective was the evidence of Samuel Carpenter and Professor Ward. They argued that the two texts of the Treaty were reconcilable.

147. It is submitted that this evidence is so far against the weight of evidence that it is untenable. Other Crown witnesses (Loveridge and McHugh) were more diffident. They saw some room for a meeting of minds or overlap but did not appear to go as far as Messrs Carpenter and Ward, who appeared to be motivated partly by a misplaced desire to protect the reputation of Henry Williams. It is also possible that Professor Ward has inadvertently allowed his personal views to intrude upon his role as an expert witness. Professor Ward was at least in part presenting evidence out of a concern that the claimant arguments might represent a threat to the stability of the rule of law and civil government. Personal observations such as this are directed to present and future political issues, they are not properly topics upon

[78] Daily Southern Cross, Volume 1, Issue 19, 26 August 1843 at pp 2-7

which Professor Ward is entitled to opine as an expert witness briefed as an historian.[79]

The Parkinson evidence

148. The Crown also led evidence from Dr Phil Parkinson. Dr Parkinson has undoubted expertise in "forensic bibliography", that is in tracing, identifying and recording historical documents. Analysis and interpretation of the contents of such documents is another matter. Dr Parkinson does not have relevant expertise in the fields of anthropology, linguistics, law or history that qualify him to express opinions on the range of topics and issues that he did. Accordingly, it is submitted that the Tribunal ought to disregard or give Dr Parkinson's evidence little weight.

Tribunal Issue 7: What was the effect of Te Tiriti/The Treaty at 1840?

149. Britain proceeded on the basis (consistent with prevailing international law) that Māori had legal capacity at international law to make a valid agreement at international law. Dr Matthew Palmer cites the following passage from the international lawyer, Ian Brownlie:

> "There can be no doubt, however, that the Treaty of Waitangi presupposed the legal and political capacity of the chiefs of New Zealand to make an agreement which was valid on the international plane. Moreover, there is evidence that, in the decade prior to the conclusion of the Treaty, the British Government conducted itself on the basis that relations with the Māori tribes were governed by the rules of international law. In any event, the British regarded Waitangi as a real treaty and it appears in authoritative collections such as the *British and Foreign State Papers* and *Hertslet's Commercial Treaties*. Moreover, the fact that *subsequent* developments in international law doctrine denied treaty-making capacity to what were described as 'Native Chiefs and Peoples' is irrelevant. Facts have to be appreciated

[79] Cross examination Professor Ward, transcript Week 4, pp 329-330

according to the principles of international law prevailing at the material time."[80]

150. As Professor Palmer and other commentators have noted the effect of implementation of a treaty of cession is that the party ceding sovereignty cease to have standing in international law. Any conditions to the cession are unable to be enforced under international law as the ceding party is no longer recognised as a sovereign nation. The application of this doctrine meant that hapu and still have no standing in international law to enforce the Treaty of Waitangi as a treaty of cession.

> "This is a legal version of disappearing in a puff of logic."[81]

151. Dr Palmer goes on to again cite Ian Brownlie as follows:

> "For practical purposes, this means that the validity of the Treaty [of Waitangi] involves a paradox. Its execution mean that the separate international identity of the Confederation of Chiefs was extinguished and the procedure of implementation of the reciprocal promises was transferred from the plane of international law to the plane of internal public law."[82]

Vattel

152. Vattel published his *Le droit de gens* in 1758. Dr McHugh observes that Vattel's exposition of the law of nations was soon accepted in England and elsewhere as definitive. Dr McHugh notes:

> "Vattel's work, 'the first to adopt this view of the international system' became the handbook of the Foreign Office and relied upon by legal

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[80] Ian Brownlie, (FM Brookfield ed) Treaties and Indigenous Peoples, the Robb Lectures 1991 (Oxford, Clarendon Press 1992) 8 cited in Dr Matthew Palmer, The Treaty of Waitangi in New Zealand's Law and Constitution, Victoria University Press 2008 at p 158-159

[81] Professor Matthew Palmer, The Treaty of Waitangi in New Zealand's Law and Constitution, (above) at p 160

[82] Palmer (ibid) at p 161

practitioners in England simply because it brought theory and practice together so effectively.

The essence of Vattel's theory of international relations lay in the conception of independent and equal state sovereignty. Nations or states, the subjects of the Law of Nations ('the science of rights which exist between Nations or States'), he defined as 'political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security'. Clearly this definition was wide enough to encompass non-Christian societies – such as the princely states of the East Indies – and most tribal societies as well as the more sophisticated states of Europe. Indeed Vattel recognised those differences when he equated the sovereignty of the dwarf state with that of the 'most powerful kingdom'. Vattel indicated that a weaker state might place itself under one stronger for purposes of protection 'without, however, divesting itself of its right to self-government and of its sovereignty'. This right to self-government he identified as 'the most important' hallmark of a state. It meant a foreign state had no right of interference or governance over it, as by some claim to a right to send missionaries without the permission of the host sovereign. The lawfulness of the assumption of any such right depended upon the consent of the grantee state, no matter how dwarf-like its stature."[83]

Te Tiriti was not a treaty of cession

153. The effect of Te Tiriti was to guarantee to Maori their rangatiratanga, their mana (or sovereignty). The English text says the opposite. The proclamations and actions after 1840 in reliance on the English text of the Treaty are a usurpation of the Māori sovereignty guaranteed under Te Tiriti.

154. As the evidence of Dr McHugh confirms Māori consent to a cession of sovereignty was a legal prerequisite to annexation. In point of fact such consent was never obtained.

155. The legal consequence is clear. Professor Matthew Palmer says:

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[83] McHugh, Aboriginal Societies and the Common Law, Oxford University Press 2004 at p 110

"Conventional international law is clear that:

> To constitute cession it must be intended that sovereignty will pass. Acquisition of governmental powers, even exclusive, without an intention to cede territorial sovereignty, will not suffice." (Citing Sir Robert Jennings Oppenheim's International Law, Volume 1 9th ed, page 680)

> "This analysis makes it difficult to accept that the Treaty of Waitangi was a treaty of cession of sovereignty at international law. On the basis of what we know today, an interpretation of the Treaty of Waitangi that accorded to most rangatira an intention to cede sovereignty is, in my opinion, untenable. The implication of this view is that the Treaty is not a treaty of cession, as assumed by international lawyers such as Crawford and Brownlie who focus on the question of capacity rather than the terms of the Treaty. Rather, it may be more analogous to a 'Treaty of Protection'." [84]

156. This analysis also accords with claimant perspective on He Whakaputanga, the relationship established with the King by Hongi and Busby's explanations to the Chiefs about the Ionian Islands model.

Evidence of Dr McHugh

157. In his evidence Dr McHugh expressed a concern that:

> "There has been a tendency to write the history of the 1830s in terms of a late nineteenth century version of Crown sovereignty, seeing in proto and looming the leviathan of the settler-state with its explosive colonisation and land depletion of Māori. None of the various interest-groups foresaw the history that would play out after British sovereignty."[85]

158. It is nonetheless clear from Dr McHugh's writings and answers to questions of cross examination that as at 1840:

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[84] Dr Matthew Palmer, The Treaty of Waitangi in New Zealand's Law and Constitution, Victoria University Press 2008 at page 164

[85] Brief of evidence of Dr McHugh, 16 April 2010, Wai 1010 #A21 at para 11.

158.1. Māori consent was regarded as an indispensable prerequisite to the erection of sovereign authority;

158.2. there could be no division or sharing of the Crown's sovereignty once declared; and

158.3. to erect a sovereign authority or assert jurisdiction outside the Queen's Dominions without consent amounted to a usurpation of the tribal sovereignty.

159. In relation to the latter point Dr McHugh, writing about a Governor in Africa exercising extra territorial jurisdiction over British subjects without any formal grant from the tribal authorities notes that:

> "James Stephen, the influential Under-Secretary of the Colonial Office, had despaired over finding any means of legalising the latter situation, thinking its retroactive legitimation by Westminster a usurpation of tribal sovereignty."[86]

160. Under cross examination as to how the concept of sovereignty was understood and applied by British officials at 1840 Dr McHugh clarified his evidence and agreed with the following propositions:

160.1. The British Empire saw itself as an Empire founded upon law.

160.2. In the pyramidic structure of Empire authority flowed downwards from the sovereign.

160.3. The power that came with Crown sovereignty was the power to ultimately decide yes or no, paramount decision making.

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[86] Dr Paul McHugh, Aboriginal Societies and the Common Law, Oxford University Press 2004 at p 207 citing memorandum Stephen to Hope 26 December 1842

160.4. Within a domestic legal system there can be only one sovereign. A Governor is not a sovereign.

160.5. The Chiefs, the missionaries and the settlers in New Zealand in 1840 knew the difference between a Governor and a sovereign.

160.6. To ask the Chiefs to agree to a Governor is a different thing than asking the Chiefs to agree to a sovereign.

160.7. Under the English text of the Treaty the Chiefs were asked to surrender sovereignty not civil government.

160.8. The constitutional effect of the Treaty was that it was regarded as a valid instrument of cession by the Crown. This conferred British subjecthood upon Māori which gave the Crown and Colonial authorities the power to adjudicate and apply British law.[87]

161. In his "Aboriginal Societies and the Common Law" text Dr McHugh described the British understanding of a treaty of cession in the following terms:

> ""British practice recognised that Aboriginal polities had the capacity to make a cession of sovereignty or jurisdiction and land title to the Crown but that once this had been done those polities held no legal status. Recognition of group status was a means towards achieving its legal disappearance or getting its land. The Crown's dealings with aboriginal peoples for matters entirely of non-justiciable prerogative.
>
> For the British this denial of aboriginal legal capacity meant not so much a denial of those rights as a means of ensuring them. It placed the duty to protect these special subjects upon the Crown, and its leading officer in the Colony, the Governor, and the protectors ... reporting to him directly. This duty was embodied in the well known terminology of those relations uttered

[87] Transcript, cross examination, Dr Paul McHugh, pp 531-558

> on prairie, and in longhouse, *marae* and *kraal*, describing Victoria as 'the Great White Mother': the Crown positioned itself between settler and tribe, and its laws, administered through its officer the Governor, would protect the rights of its aboriginal subjects."[88]

162. The friendship and protection of the British sovereign was a relationship Ngati Hine sought to maintain and enhance under Te Tiriti. But it was understood by the Ngati Hine rangatira as a rangatira to rangatira relationship, not as one of ruler and subject.

163. The two texts of the Treaty embody quite different intentions and objectives. They cannot be reconciled. Jamie Belich summarises it well in the following passage:

> "The intents of the two parties were clearly in conflict. The British wished to convert Māori in to brown Britishness and subordinancy, whereas the one thing we can be sure of about Māori motives for signing is that they did not want this."[89]

There can be only one

> "MD And it is in the very nature of a sovereignty that there can only be one, is that right:
>
> PM Within a particular domestic legal system, yes.
>
> ...
>
> MD Okay. So just to take a simple analogy, this is the problem, why there was all the fuss about the flagstaff, wasn't there? When Hone Heke chopped it down, his proposal to the governor was let the Māori flag and the English flag fly side by side. The governor was not at all amendable to that. One flag, one sovereign. That is essentially what was going on there, isn't it?

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[88] McHugh, Aboriginal Societies and the Common Law, pages 131-132
[89] Jamie Belich, Making Peoples, Allan & Unwin 2006 at page 195

PM Mm.

MD Okay. Is that yes?

PM Yes.

MD Thank you. Now, the governor is not a sovereign, is he?

PM No.

MD And the missionaries and the settlers in New Zealand in 1840 knew that, didn't they?

PM Yes.

MD The chiefs who signed Te Tiriti knew this also, didn't they, they knew the difference between a kingi and a kawana?

PM Yes."[90]

164. In his "Aboriginal Societies and the Common Law" text Dr McHugh notes that Colonial Governors did wield considerable constitutional authority and were able to operate with considerable discretion. However in the pyramidic structure of empire their authority was limited. Dr McHugh referred to the *Cameron* v *Kyte* case of 1835:

"In *Cameron* v *Kyte* (1835) the court said:

> But if the governor be an officer, merely with a limited authority from the Crown his *assumption of an act of sovereign power, out of the limits of the authority so given him*, would be purely void, and the Courts of the Colony over which he presided could not give it any legal effect. We think that the office of Governor is of the latter description, for no authority or dictum had been cited before us to show that a Governor can be considered as having delegation of the whole Royal power in any colony, as between him and the subject, when it is not expressly given by his commission.

[90] Cross examination Dr Paul McHugh, Week 4 Wai 1040 #4.1.4 at p 535

The key phrase has been italicized. It indicated that colonial courts should refuse to give effect to the usurpation by the Governor of sovereign powers outside those expressly given him by commission."[91]

165. Dr McHugh was also clear that as at 1840 the operating concept of Crown sovereignty meant the power to ultimately decide, or paramount decision making:

"MD I know, but that says it all, doesn't it, for Gray Crown sovereignty was all. While there might have been this notional possibility of allowing for a residual customary authority, the power that came with Crown sovereignty was the power to ultimately decide yes or no.

PM That is right. It is paramount decision making, yes.

MD Thank you. Just to be clear, we are talking here about 1840s conception of Crown power, not a later conception.

PM We are talking about a mid 1840s, yes.

MD Okay. Do you think it was different in 1840?

PM I think things were beginning to change as talk of self government began to emerge. Not substantially different, but by the time you start getting into the late 1850s and 1860s, yes, I would say that ideas of sovereignty are beginning to change because there is the argument then for transplantation of legislative authority to a colonial assembly.

MD But in all critical respects, in all the fundamentals, the basic idea of supreme authority, that did not change, that was there in 1840, that is correct, isn't it?

PM Yes."[92]

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[91] McHugh, Aboriginal Societies and the Common Law, (above) at p 137
[92] Cross examination Dr Paul McHugh, Week 4 Wai 1040 #4.1.4 at p 541

166. Under questioning about an article he wrote for the Renwick collection in 1991 Dr McHugh agreed that the following proposition was still true:

> "Of course, from a legal point of view this sovereignty laid the constitutional foundation for the eventual, indeed almost immediate abrogation of those rights." (Referring to customary law and property rights.)[93]

167. Annexed as Appendix 2 is an extract from Dr McHugh's "Aboriginal Societies and the Common Law" which usefully draws together a number of these threads. Dr McHugh is unambiguous that even before Austin held intellectual sway late in the 19th century, any division of the Crown's declared sovereignty was inconceivable for lawyers (throughout the nineteenth century).[94]

168. It is clear from Dr McHugh's evidence and from his related research and writings that the unitary and indivisible concept of Crown sovereignty was what Hobson was instructed to obtain by consent from Māori. Ngati Hine and Ngapuhi rangatira clearly did not consent to this pursuant to Te Tiriti (or any other instrument)

169. On this crucial and fundamental point the two texts of the Treaty cannot be reconciled.

Dated at Wellington this 21st day of January 2011

Michael J Doogan
Counsel for Te Runanga o Ngati Hine

Season-Mary Downs

[93] Renwick collection "Sovereignty and indigenous rights", Victoria University Press 1991 at p 182, cross examination Dr Paul McHugh, Wai 1040 #4.1.4 at p 534

[94] Dr Paul McHugh "Aboriginal Societies and the Common Law", Oxford University Press 2004, page 205

Appendix 1 to closing submissions for Ngati Hine dated 21 January 2011

WAITANGI TRIBUNAL

SOVEREIGNTY JURISPRUDENCE

1. Orakei Report 1987

The two versions of the Treaty

In the Maori text the chiefs ceded to the Queen 'kawanatanga'. This is less than the sovereignty ceded in the English text, and means the authority to make laws for the good order and security of the country but subject to the protection of Māori interests. The cession of sovereignty however is implicit from surrounding circumstances.[1]

2. Manukau Report 1985

In the Maori text the chiefs ceded to the Queen 'kawanatanga'. We think this is something less than the sovereignty (or absolute authority) ceded in the English text. As used in the Treaty it means the authority to make laws for the good order and security of the country but subject to an undertaking to protect particular Maori interests.

'Kawanatanga' was well chosen by the missionary translators; Sovereignty or 'Rangatiratanga' is not conditioned. Although 'Kawanatanga' is a coined word it was known to Maoris from the Bible. Pontius Pilate was the 'Kawana' of Jerusalem but his authority was not the supreme authority of Caesar or God. At 1840 "Kawanatanga" was something sought by both Maori and Pakeha. Both were aware of the lawlessness of many whalers and traders and of the fights that followed, of the devastating effects of inter-tribal musket warfare, of the projected invasion by other powers and the imminence of further settlement. The Treaty opens by talking of the need for "Peace and Good Order" and the "evil consequences which must result from the absence of necessary Laws and Institutions". We think Maori people would have understood the Treaty as a promise

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[1] Chapter 11.11.4(a)

of internal peace and security through the authority of the Queen. We think both parties to the Treaty wanted this, and got it.

In the Maori text the Queen guaranteed to the Maori people in return, 'te tino rangatiratanga' of those things they wished to retain. This is something more than the 'full exclusive and undisturbed possession' guaranteed in the English text. As used in the Treaty we think 'te tino rangatiratanga' (literally 'the highest chieftainship') meant 'full authority status and prestige with regard to their possessions and interests'. 'Rangatira' and' Rangatiratanga' are used in the Bible to denote absolute power and authority. They are used to describe the Kingdom of God, the Kingdoms of the world, and God's dominion. Interestingly Hobson's own reference to the sovereignty of the Queen in a later proclamation of 27 April 1840 was rendered as "te Rangatiratanga o te Kuini" and in 1869 when the Legislative Council ordered a careful translation of the English text, "all the rights and powers of sovereignty" was rendered as "nga tikanga me nga manakatoa o te rangatiratanga."

The last rendition couples 'mana' and 'rangatiratanga'. In Maori terms the two words are really inseparable. In Williams Dictionary the first meaning given to 'mana' is 'authority of control' but even the examples cited for its use in that context incorporate the subsequent given meanings, 'influence, prestige, power and psychic force'. As we see it, 'rangatiratanga' denotes 'authority'. 'Mana' denotes the same thing but personalises the authority and ties it to status and dignity. The difficulty is that in Maori thinking 'rangatiratanga' and 'mana' are inseparable - you cannot have one without the other - but in European thinking 'authority' is an impersonal concept and can stand apart from the personality to the lawmaker. The result is that 'mana' is often left untranslated, as in the case of the Orakei transcript.

In his Declaration of the Independence of New Zealand (Te Wakaputanga o te Rangatiratanga o Nu Tireni) Busby used 'mana' to describe 'all sovereign power and authority'. Some commentators consider that 'mana' best describes 'sovereignty' and imply that a careful avoidance of 'mana' in the Treaty is obvious and was misleading, the missionaries knowing that no Maori could cede his mana. We think the missionaries'

choice of words was fair and apt. In English terms the personal standing of the Queen (her mana) is divorced from the Crown's authority. To capture that sense, and to ensure that in ceding the right to make laws the Maori retained his mana without denying that of the Queen, 'Kawanatanga' was an appropriate choice of words. It also underlines the spirit of the Treaty of Waitangi apparent in both the English and Maori texts. In both texts the intention to record an appropriate priority and respect to the Maori people is very clear. Those who attended the Orakei conference understood the Treaty to mean that. At Orakei, 'mana' was preferred to 'rangatiratanga'. It emphasises the personal insult and grievance occasioned by the non-recognition of Treaty promises.[2]

3. Muriwhenua Fishing Claim Report 1988

"From the Treaty as a whole is obvious that it does not purport to describe a continuing relationship between sovereign States. Its purpose and effect was the reverse, to provide for the relinquishment by Māori of their sovereign status and to guarantee their protection upon becoming subjects of the Crown."[3]

"In any event on reading the Māori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga, therefore, refers not to a separate sovereignty but to tribal self-management on lines similar to what we understand by local government."[4]

Tinorangatiratanga – "It does not follow that tino rangatiratanga in the Maori text is the tino rangatiratanga of pre-treaty times. It was held in olden days only for so long as the tribe could maintain it against the ambitions of others. But the Queen promised peace. The Treaty would guarantee the status of the tribes without the need for war. It was obvious that to do that the Queen's authority had to be supreme".[5]

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[2] Chapter 8.3
[3] Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) p 187
[4] Ibid., p 187
[5] Ibid para 10.1.

"In any event on reading the Māori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga, therefore, refers not to a separate sovereignty but to tribal self-management on lines similar to what we understand by local government."[6]

Sovereignty - "We accept that the essentials were not lost on the Maori at the debate at Waitangi".[7]

"Sovereignty in law is not dependant on the Treaty but on the proclamations that followed the signings"[8]

"We considered above that Maori understood the cession of sovereignty in terms of some distal relationship...Nevertheless, in our view the Maori chiefs were trying to preserve a form of autonomy that did not amount to complete sovereignty but a kind of local self-government in Maori districts as we later see in the King movement and other Maori organisations. This sort of demand for independent Maori control over Maori resources and people runs right through subsequent history"[9]

Two texts – "Upon reading both texts we conclude that they are not so much contradictory as complementary of one another. In the English text the Crown guaranteed Maori their just complementary rights and properties. Just rights include the maintenance of their own customs and institutions. Their properties they could possess for so long as they wished to retain them. In the Maori text the Crown assumed the full authority of the tribes of their important possessions. It is not a case of choosing between a British concept of ownership or a Maori form of control. Both were guaranteed for so long as Maori wished to keep them".[10]

Interpretation – "The main distinction for us is in the statutory directions given in the Treaty of Waitangi Act 1975. First, in the exercise of any functions, which includes the

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[6] Ibid., p 187
[7] Waitangi Tribunal, Muriwhenua Fishing Claim Report (1998) para 10.3.
[8] Ibid. 10.3
[9] Ibid 10.3.
[10] Ibid, para 10.3.

assessment of claims, regard must be had to the two texts of the Treaty (section 5 (2). Secondly, the Tribunal has authority to determine the meaning and effect of the Treaty, but, as embodies in the two texts (section 5 (2)). Thirdly the Act recognises there are differences between the texts and authorises the Tribunal to decide issues raised by those differences (section 5 (2)). Finally and more importantly, claims are to be assessed against 'the principles of the Treaty', not just the literal terms (section 6). We therefore reject at the outset the suggestion of some of the claimants, that the Maori text alone applies in their case for their forbears signed no other".[11]

4. Māori Electoral Option Report 1994

"The precise meaning of tino rangatiratanga in the Treaty and its relationship to the kāwanatanga which was ceded in Article I has been much debated. Some have argued that tino rangatiratanga was a guarantee of Māori sovereignty; others a right to self-determination; others again a right of self-management. The difficulty is that no one of these English constitutional terms properly captures the Māori meaning, or meanings, of tino rangatiratanga, a term which is eminently adaptable to time and circumstance. But if we look beyond the strict literal meaning of the Treaty to its broader principles, it is clear that the exercise of tino rangatiratanga, like kāwanatanga, cannot be unfettered; the one must be reconciled with the other ... In constitutional terms this could be seen as entitling Māori to a measure of autonomy, but not full independence outside the nation State they helped to create in signing the Treaty."[12]

5. Ngai Tahu Sea Fisheries Report 1992

"It is clear that cession of sovereignty to the Crown by Māori was conditional. It was qualified by the retention of tino rangatiratanga. It should be noted that rangatiratanga embraced protection not only of Māori land but of much more, including fisheries ... The Crown in obtaining the cession of sovereignty under the Treaty, therefore obtained it

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[11] Ibid, para 10.4.
[12] Waitangi Tribunal, *Māori Electoral Option Report*(1994) pp 3-4

subject to important qualifications upon its exercise. In short, the right to govern which it acquired was a qualified right."[13]

Principles- "The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. This principle is fundamental to the compact or accord embodied in the Treaty as it is directly from the provisions of articles 1 and 2 of the Treaty".[14]

6. Turangi Township Report 1995

"Māori insistence on their right to retain tino rangatiratanga over their land resulted in the inclusion of article 2 of the Treaty, and was a measure of the depth and intensity of their relationship to the land and other natural resources. It follows that if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Māori in article 2 it should be only in exceptional circumstances and as a last resort in the national interest."[15]

7. Taranaki Report 1996

"Broadly ... we consider 'aboriginal autonomy' to describe the rights of indigenes to constitutional status as first peoples, and their right to manage their own policies, resources, and affairs (within rules necessary for the operation of the State) and to enjoy cooperation and dialogue with the Government."[16]

"The international term of 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as first peoples and their rights to

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[13] Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report* (1992) p 269; see also the *Turangi Township Report* (1995) pp 284-286; the *Te Arawa Representatives Geothermal Resources Report* (1993) p 31; the *Ngai Tahu Report* (1991) pp 236-237; and the *Taranaki Report* (1996) p 20

[14] Ibid, 11.5.1.

[15] Waitangi Tribunal, *Turangi Township Report*(1995) p 285; see also the *Ngawha Geothermal Resources Report* (1993) in which the Tribunal states on p 102 "While the needs of both cultures must be provided for and compromise may be necessary in some cases to achieve this objective, the Treaty guarantee of rangatiratanga requires a high priority for Māori interests when proposed works may impact on Māori taonga".

[16] Waitangi Tribunal, *Taranaki Report* (1996) p 20

manage their own policy, resources and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Māori words are 'tino rangatiratanga', as used in the Treaty, and 'mana motuhake' as used since the 1860s."[17]

8. Waipareira Report

"The intent of the Treaty was something like a marriage of two nations, two cultures, who wanted to share a house which they had planned to build together, accommodating each others needs with respect and goodwill, for their mutual benefit."

9. CNI Report Stage 1 2008

"The Crown must respect Māori authority and give effect to its law as necessary, and neither authority must operate within the minimum parameters necessary for the due operation of the State. Each must respect the other. There will, however be occasions – such as the definition of Māori land entitlements – where the authority of Māori must prevail."

Treaty standards for the political relationship – "In return for the active protection of their authority, Maori ceded kawanatanga (governance) to the Crown. Neither, Tinorangatiratanga nor kawanatanga is absolute. Each must respect each other. Maori authority must operate inside the minimum parameters necessary for the proper functioning of the State. There will, however, be occasions, such as the definition of Maori land entitlements – when the authority of Maori must prevail".[18]

"The Treaty guaranteed all Central North Island Tribes their autonomy and right of self-government by representative institutions responsible to their communities. Even so, the tino rangatiratanga of all tribes is affected by their partnership with the kawanatanga, and is not exactly the same as it was before 1840. Both Treaty partners owe each other a good deal of faith and co-operation, dialogue, and negotiation of agreement on key issues. Where those issues are fundamental to Maori and their rights as guaranteed by the

[17] Ibid., p 5, see also pp 19 ff
[18] He Maunga Rongo: The Report on the Central North Island Claims, Stage 1, 2008, p 208.

Treaty, and on the principles of good governance, the crown must govern with consent. There may be times however when the authority of kawanatanga must prevail. The appropriate agreements and compromises between Maori and Maori spheres of authority must be decided in partnership".[19]

Sovereignty in New Zealand, in terms of absolute power, cannot be vested in only one Treaty partner, as the Crowns sovereignty is constrained by the need to respect Maori authority".[20]

10. Gisborne Report (Turanga Tangata, Turanga Whenua 2004

"Once the Crown ceased to be a principled sovereign acting in accordance with the law, the whole basis for the Treaty was undermined. An arbitrary or capricious Crown is the absolute antithesis to that which the Treaty promised. Yet no matter how dire the circumstances, Māori have Treaty responsibilities as well as Treaty rights. Even under the burden of unendurable provocation, the Treaty continued to speak for reasonableness, moderation and ethical behaviour. The powers of Government were subject to two key constraints. First, they were subject to the promises made to Māori in Articles 2 and 3. Secondly, and equally importantly they were subject to the rules of the Constitution brought with the Crown from Great Britain and introduced through Article 1 of the Treaty. Foremost among those constitutional rules was that the Crown, as the embodiment of executive government is subject to the law and has no power to act outside it. That is, the Crown both rules in accordance with the law, and is itself ruled by the law."

11. The Foreshore and Seabed Report 2004

Maori ceded sovereignty (English version) or kawanatanga (Maori version) to the Crown in article 1 of the Treaty, in exchange for the Crown's protection of Maori tino rangatiratanga.[21]

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[19] Ibid.
[20] Ibid, 403.

"The Nature of the relationship between the Treaty partners is a reciprocal one, with obligations and mutual benefits flowing from it".[22]

12. Tauranga Moana, 1886 – 2006, 2010

"Although the Act does not prefer one text over the other, we agree with the Orakei Tribunal's view, namely that considerable weight should be given to the Maori text because that was the version that was assented to by the Maori signatories. We also note the widely accepted principle of contra proferentem, whereby any ambiguity in a contract is to be interpreted in favour of the non-drafting party".[23]

"Like other Tribunals before us, we see kawanatanga as meaning the right to exercise governance and to make laws for the whole of New Zealand, and we see Tinorangatiratanga as equating with mana motuhake or aboriginal autonomy. Tinorangatiratanga and kawanatanga, and their interplay, are at the heart of the relationship between the Crown and Maori".[24]

The Orakei Tribunal's view, widely endorsed by the other panels, was that the sovereignty ceded to the Crown in article 1 of the Treaty must be qualified by the recognition of tino rangatiratanga in article 2. The Taranaki report expands on the duties and responsibilities of each party and aptly describes the relationship as 'symbiotic. Each party depends on, and must accommodate, the other. In that spirit, we echo the call of Taranaki and central North Island Tribunals for the Crown to recognise the 'conciliation requires empowerment, not suppression"'.[25]

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[21] 5.1.4.
[22] 5.1.4
[23] Tauranga Moana, 1886 - 2006, p 18..
[24] Ibid.
[25] Ibid.

13. The Uruwera Pre-publication Part 1 2009

"By British law, the Crown's sovereignty over the whole of New Zealand rested on its proclamations of may 1840".[26]

"...the Treaty's essential bargain – the cession by Maori of kawanatanga/sovereignty to the Crown in return for the retention by Maori of their tino rangatiratanga".[27]

"New Zealand law regards the Crown's sovereignty over the North Island of New Zealand as having been ceded by Maori in the Treaty of Waitangi...The result is that the law regards the Treaty's fundamental bargain concerning sovereignty and tino rangatiratanga as applying to the claimants, despite the fact that they did not sign the Treaty".[28]

"Moreover 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 the issues raised by the differences between them' (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. In our view, when the 'effect' of the Treaty for non-signatories is in issue, the actual circumstances of their dealings with the Crown are of paramount importance, not the law's gloss on those circumstances...we conclude that while the Crown undertook Treaty obligations to all Maori, the meaning and effect of the Treaty for Maori varied according to whether or not their rangatira had signed it.".[29]

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[26] Te Uruwera Prepublication, Part 1, 2009, p 132.
[27] Ibid.
[28] Ibid.
[29] Ibid 137.

"The Crown and the claimants agree that in 1840 the Crown undertook Treaty obligations to all Maori, whether or not they had signed the Treaty".[30]

"The Tribunal accepts the claimants submission that in 1840, because their rangatira did not sign the Treaty and, indeed, were not given the opportunity to do so, Tuhoe did not owe reciprocal Treaty duties to the Crown. Since the claimants tupuna knew nothing of the Treaty, it could not, in any real sense, take effect to bind them to its terms".[31]

"Therefore, the Treaty took effect for the claimants tupuna in 1840 only as a unilateral set of promises made to them by the Crown. Article 2 promised to protect their tinorangatiranga and, in Tuhoe terms, mana motuhake".[32]

[30] Ibid, 152.
[31] Ibid 152.
[32] Ibid, 152.

Appendix 2 to closing submissions for Ngati Hine dated 21 January 2011

WAITANGI TRIBUNAL

EXTRACTS FROM DR PAUL MCHUGH –
"ABORIGINAL SOCIETIES AND THE COMMON LAW"

"During the 19th century the proper treatment of aboriginal peoples had required application of the unitary and absolutist view of settler state sovereignty. By that view, aboriginal peoples were treated as absorbed – assimilated – wholly into the legal system of the settler state. This *desideratum* of the indigenous person becoming an individual citizen or subject, their tribal community and association dissolved, was put into laws already contemplating that result. They were predicated upon the ultimate overriding sovereignty of the arriviste white polity. At the Colonial Office James Stephen explicitly rejected a pluralistic model, thinking Crown sovereignty over native peoples their best protection."[1]

"In the British colonies and dominions, this, it was explained in opening the chapter, was an outcome of the deep seated belief in the common law constitution based upon the sovereignty of the Crown. At this time 'tribal rights' were for Englishmen a contradiction in terms since 'rights' vested only in the individual and in terms of property ownership and representation in a legislature under the sovereignty of the Crown. The identity of the paramount sovereign itself was juridically closed and incontrovertible. There was no constitutional authority apart from the Crown."[2]

"Whatever the original sovereignty had been, there was no doubt under the common law that it disappeared upon the Crown's acquisition of sovereignty. This was so even though the Treaty of cession may have contemplated – as often it did (as in NZ, Lagos and Fiji to recall some important examples appearing in this chapter) – residual authority in the

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[1] Dr Paul McHugh "Aboriginal Societies and the Common Law", Oxford University Press 2004, page 65, second paragraph

[2] Dr Paul McHugh "Aboriginal Societies and the Common Law", Oxford University Press 2004, pages 149-150

native chiefs. De jure the Crown sovereignty was regarded as absolute even if subsequent to its assertion *de facto* the tribal chiefs and other potentates retained significant authority. England's positivist jurist, John Austin had insisted that a sovereign was subordinate to no-one, stating that 'no government is sovereign and subject at once'. Moreover, even before Austin held intellectual sway late in the 19th century, any division of the Crown's own declared sovereignty was inconceivable for lawyers (throughout that century)."[3]

[3] Dr Paul McHugh "Aboriginal Societies and the Common Law", Oxford University Press 2004, page 205