OFFICIAL

IN THE WAITANGI TRIBUNAL

WAI 1040

WAI 1259

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF of Pairama Tahere for Te Uri o Te Aho Hapu

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CLOSING SUBMISSIONS - WAI 1259 CLAIMANTS

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MAY IT PLEASE THE TRIBUNAL:

INTRODUCTION:

1. These Submissions are made by Counsel for the Claimant on behalf of Te Uri o Te Aho hapu. The hapu's claim (WAI 1259-#1.1) was filed with the Waitangi Tribunal on 29 March 2005. A late Brief of Evidence was also filed with the Tribunal (#D11) on behalf of the Claimant, Mr Pairama Tahere and the hapu on 1st October 2010.

2. Counsel addresses a fairly limited number of issues in the closing submissions for the Tribunal to consider.

3. These include:
   (a) How did Maori 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?:
   (b) How did the Crown 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?:
   (c) How did Maori 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?
   (d) How did the Crown 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?
   (e) The issue of free and intelligent consent.
   (f) The involvement of the missionaries

4. This submission is written from the perspective of past and present descendants of the tupuna Te Awha of Te Uri o Te Aho hapu. Where oral history has been relied on it is from Pororua Whare Kiwa's (alias Pororua Whare Kauri) line of descendants. Pororua was the second born son of Taiapa Kiwa and grandson of Te Awha.

5. Given that 171 years have also passed Counsel accepts there can never be complete certainty over the finer detail of what is remembered. Accordingly, the hapu submission takes into account both oral history and the historical records that have survived and those that the hapu members have had an opportunity to read.

How did Maori understand He Whakaputanga/The Declaration?

6. When He Whakaputanga was signed Pororua was the hapu rangatira. He was not a signatory to He Whakaputanga. Despite that his descendants today are asserting they can nevertheless make a valuable contribution to words explaining that rangatira from that era understood He Whakaputanga. The descendants have claimed Pororua understood what He Whakaputanga was about and the reason for this he was in regular contact with the Maori political heavyweights of the time and knew their views. These people were his first or second cousins, and uncles and were in fact part of the group of rangatira driving the process.

7. In respect to the reason behind Pororua not signing Mr Tahere said:
"...His refusal [to sign] *was deliberate and our hapu korero i tuku iho is that he refused to do so because he was adamant, he would not allow the mana of another to be exercised over his own, whomever they were..."* [1]
The significance of this korero is it provides clear evidence that in 1835 the power base, the mana, rested at hapu level and not as it seems to be a later perception with the wider politic of Ngapuhi iwi. Counsel also highlights the significance of key individuals and understanding what those individuals thinking was allows us to develop a picture to explain what happened.

8. Counsel notes much significance has been placed on Ngapuhi as a tribe however, this can be somewhat misleading and "fudged" what was the actual reality in 1835/1840.

9. Ngapuhi as a tribe is recent and the mana did not come into prominent use until the inter-hapu wars began escalating in the

[1] BOE of Mr Pairama Tahere #D11 at page 4-5, paragraph 11, L1-L5.

early 1800's. One of the earliest accounts of the use of "Ngapuhi tribe" is an account of them attacking Ngati Whatua in 1807. However, by the early 1820's references to Ngapuhi as a tribe was in common use, which was largely the doing of Hongi Hika and Ngapuhi raids into Thames and Rotorua. Those raids occurred in the early 1820's shortly after his return from Britain in 1821. While Hongi Hika was leader of the various Ngapuhi war parties (or tribe) that carried out the musket raids, the excursions themselves were of relatively short duration. The one into Tamaki - Thames[2] lasted less than a week and it is said Hongi and his party had to leave the battlefield and the bodies of their fallen enemies which they'd been feasting on as was the custom because they were becoming too putrid and the smell too over powering to bear. When the group returned home from that raid, they didn't stay together. The individuals from different hapu dispersed and returned to their respective hapu. That was normal practice. What Counsel is alluding to is that "Ngapuhi tribe" was a loose alliance of Northern hapu that joined together in times like war.

Authors of He Whakaputanga/ The Declaration

10. There is significant body of historic evidence which says the Declaration of Independence was a creature of British Resident James Busby's authorship. That wasn't disputed by claimant witnesses during this hearing and is accepted by the hapu.

11. He Whakaputanga, however, is a different matter. Professor Alan Ward in his evidence states Henry Williams translating The Declaration into Maori. [3]

12. During the hearings evidence was given by Dr. Hohepa which suggested there may have been another individual involved in its drafting.

13. Nuku Aldridge in his evidence said that Te Whakameninga (the Maori congress) although new in name, was certainly not a new concept or unknown to Maori. According to his hapu's oral history he said: "Although *Te Whakameninga was a new term,*

[2] An Encyclopaedia of New Zealand 1966, Hongi Hika,(C1780-1828) Paragraph 6, line 18-24
[3] Professor Alan Ward, Page 288 –week 4 transcript, line 3.

it operated in a traditional framework of huihuinga. Minenga itself is not a new term and refers to a meeting where decisions are made in the operation of the huihuinga. Te Whakameninga itself actually means a group of people coming together to meet in an assembly more formal than huihuinga, where command decisions are made to affect the lives of people.

Te Whakameninga and Travel

From the early 1800's Maori took hold of the changes that were occurring, and did something about it. From that particular time, Maori sent out people to look and get information. Then information came back from all around the world. As I talked about my foundation korero, our people had always been travellers and gathers of information. Sending out people to gather information about the nations with whom they now had contact was a logical response in terms of their tikanga.

I suggest Te Whakameninga started in1808 with Te Pahi and others, who were later joined by his nephew Ruatara. Te Pahi travelled around all over the place. In the north everyone knows about Te Pahi. When Huru and Tuki came back in 1792, they must have had a long discussion about Governor King with their uncle Te Pahi. In the following years the number of whalers, sealers and traders increased and caused trouble for Maori. Te Pahi then went to visit Governor King in 1805, and I think he went to collect evidence, which he did. The interesting part about Te Pahi was that he said to king, "you need to deal with your sea captains coming to my country'. In Te Pahi's mind, something needed to happen and he sought king's intervention. When Te Pahi came back, he found a whole heap of things that weren't good as far as the future of Maoridom was concerned. He started making moves, and had conferences with hapu around the place which were the initial steps of working towards what we now know as Te Wakaminenga. [4]

14. Dr Henare's evidence for the claimants was Maori had been toying with the idea of regular Government under the protection of the British from as far back at 1820. He said: "*The seeds of a new political system of Governance were sown earlier in 1820 when Samual Marsden travelled to the Hauraki/ Thames area with Te Morenga, a close Ngapuhi friend and*

[4] Affidavit of Nuki Aldridge, #B10,pp 46-47, paragraphs 183 -185,: See also page 48,paragraph 189.

confidante over many such trips. Te Morenga, like the Hauraki leaders, was concerned about the need for the cessation of Maori fighting Maori and the disruptions to the economic and social life and he considered that some form of government with new capabilities might now be appropriate.

According to Marsden, some Hauraki people endorsed the idea of "regular Government" and the protection of the British Government. There were two reasons. The first was that some forms of Governance might protect them from the aggression of the larger and stronger tribes and second they wanted to turn their attention to new endeavours and as Te Morenga wrote "reap the fruits of their industry" (Marsden in Elder 1932:46,335).

Te Morenga and others like Hongi Hika and Waikato were also privy to lengthy discussions with missionaries and traders who expounded of Government, either in Nu Tireni or Australia"[5]

15. Counsel submits to the Tribunal that the evidence of Dr Hohepa, Mr Aldridge and Dr Henare is clearly indicative of a massive input on the part of Maori on the end result that is - He Whakaputanga and as Nuki Aldridge hinted the authorship of He Whakaputanga should rightly be attributed to Maori He said:
"The He Whakaputanga was based on Te Whakameninga. History has been turned around to say that Maori only came together in 1835. But they had already been having meetings all over the place in regard to Te Whakameninga and these meetings continued after 1835. You can find that even in the history writing of English historians. You can't tell me that one minute they are battling, then the next minute a group of rangatira wrote a letter collectively, and then signed He Whakaputanga. I believe that He Whakaputanga did not happen overnight but came to fruition over a period of time through Te Whakameninga".[6]

16. Evidence presented in the course of the stage 1 hearings is that The Declaration and He Whakaputanga are not the same and

[5] BOE of Dr Manuka Henare, page 26, paragraph 131-133
[6] Affidavit of Nuki Aldridge, #B10,page 65, paragraph 251.

when He Whakaputanga is back translated to English it says something quite different from the Declaration.

17. The Hapu tautoko the back translation of He Whakaputanga into English of Nuki Aldridge[7]. They also confirm he took time to attend on the hapu and discuss with kaumatua and kuia his interpretation and receive feedback. Counsel understands he did this with other hapu as well as part of the process of translating the Document. He said of the original He Whakaputanga documents discovery: *"I found He Whakaputanga in a lawyer's office in Wellington! We made copies and distributed it all over the world".*[8]

What was the nature of the relationship and the mutual commitments Maori were assenting to in signing He Whakaputanga/The Declaration?

18. For the Hapu, He Whakaputanga was regarded as a sacred covenant. It is regarded in the same way today. Nuki Aldridge gave evidence that Busby continued to collect signatures until 1839 and by that time there were 52, however, Nuki Aldridge also said in his presentation that it was still being signed after 1860. Clearly that would indicate, there was at least a group of Maori who believed He Whakaputanga remained intact after the treaty or putting it another way Maori sovereignty remained intact despite the treaty.

How did the Crown understand He Whakaputanga/The Declaration?

19. As far as present descendants are concerned Maori sovereignty over New Zealand was recognised by the British Crown in 1835. Their belief is well supported by the historic record.

20. Dr Paul McHugh for the Crown in explaining the British Crowns understanding by noting that the Declaration received whole hearted approval from the Governor of New South Wales and the Colonial office. He said:

[7] Affidavit of Nuki Aldridge, #B10Pages 68- 74.
[8] Affidavit of Nuki Aldridge, #B10Page 76, paragraph 277, L3 –L4.

"The recognition of Maori sovereignty and the declaration was accepted straight –forwardly: it was a logical, if somewhat dramatic, corollary and extension from what had gone before.[9]

21. Further evidence to support what hapu believed was the British Crown's understanding comes from considering the actions of the British Parliament in refusing to enact the South Seas Bill in 1836. It highlights very clearly, the British Government recognised New Zealand's sovereignty status-Parliament's refusal to legislate was on the basis that they lacked capacity to legislate outside their dominion and to attempt to do so would be interfering in another sovereign dominion.

22. Finally, the last evidence that will be mentioned that supports the hapu belief as to the understanding of the British Crown is Lord Normanby's instructions to Captain Hobson. By 1839 the British Parliament accepted it was going to try to acquire sovereignty over New Zealand, and Lord Normanby's express instructions were explicit that obtaining the free and intelligent consent of Maori was a prerequisite to erecting an imperium. He instructed:

"...we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgment in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with her Majesty's immediate predecessor, disclaims, for herself and for her subjects, every pretension to seize on the islands of New Zealand, or to govern them as part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established use, shall be first obtained.[10]

23. Counsel suggests in regards to Lord Normanby's instructions the record shows a shift in the Colonial Office and Parliaments

[9] BOE of Dr Paul McHugh, #A21, page 40, paragraph 71, line 6-8.
[10] Normanby to Hobson, 15 August 1839, CO 209/4: 157.

thinking on Maori sovereignty between1835 to 1839. That shift stopped short of denying Maori sovereignty but pulled back on acknowledging absolute sovereignty which the earlier historic records show. In respect of this issue Professor McHugh said: *"It is difficult to talk of He Whakaputanga having a constitutional effect in as much as that effect from 1835 until 1840 could only occur in the Imperial sphere, we are talking about a constitution effect in British law, where the Crown's constitutional authority ran (chiefly in Great Britain and, perhaps New South Wales). Certainly it was regarded a manifestation of Maori judicial capacity an the tribes' continued independence in that period, however, it was, at least in British eyes, quickly discredited as a constitutional confederation of the northern tribes. The Crown's reluctance to constitute an imperium in New Zealand, its perception of a self- imposed constitutional inability to do so without this consent stemmed from the more general recognition of Maori status rather than specifically from He Whakaputanga although that was in the mix that composed that recognition".*[11]

24. Crown Counsel Mr Andrew Irwin acknowledged Dr Loveridge's comments on the reluctance of the Colonial Office to take a stance on the question of sovereignty. He said quoting Dr. Loveridge:

    "...by the acute reluctance by the Colonial Office to take a firm stance in the face of more pressing priority's and intense public disagreement on the question of colonisation. However, an on-going and key concern of British officials was the protection of Maori society through the imposition of control over British subjects and the prevention of uncontrolled settlement..."[12]

25. In the hearings the overall impression that has been put forward in the Crowns evidence is that by about 1836 the British view was that He Whakaputanga was done and dusted, and certainly by December 1837, the Colonial Office had accepted it would be necessary to introduce civil government and the rule of law into New Zealand and that they would actively try to promote early colonisation in order to protect Maori as best they could. Counsel surmises that their need to

[11] BOE of Professor P Mc Hugh, #A21, pages 17, paragraph 52, L1-L12.
[12] Submissions of Andrew Irwin, hearing week 4 transcript page 279, line 21 to 26.

go to that extreme was based on their perception that Te Whakameninga was not functional. On this issue Professor Mc Hugh's commented:

"He Whakaputanga, as an attempt to build a confederate Maori state in Northland through which the British might exert vicariously constitutional authority was regarded by British officials as spent by the time Te Tiriti was signed. That official view was formed within months of its conclusion and was demonstrated by the attention that then turned more distinctly towards the British sovereignty (initially in parts). Indeed the solicitation from the chiefs of a Treaty ceding sovereignty to the Crown was emblematic of the British authorities' perception of the short lived character of He Whakaputanga. In their eyes it was quickly exposed as an unworkable constitutional device to erect an effective Maori state with judicial institutions to which British subjects so much as Maori might be amenable".[13].

26. Historic records were pawed over in depth during the hearings and Counsel highlights that these records show that between 1836 and 1837 the British Resident, the missionaries and resident Pakeha were asking or otherwise advocating for the British Crown to intervene without delay. They were reporting a disintegrating state of affairs which rangatira were struggling without success to control. One of those reports apparently suggests that if nothing was done, their belief was eventually the rangatira would get to the point where they would have had enough and fix the problem by slaughtering all the Europeans.

27. Busby's communications to Governor Bourke of New South Wales or the Colonial Office had changed from advocating the establishment of a civil government under Maori rangatira to insisting the Crown intervene before the tribal wars had the effect that not a single native would remain standing.[14]

[13] Professor P Mc Hugh, Page 527L10-L21.
[14] Dispatch #84 of 18 January 1836 from Busby to Bourke: BDB pages 233-249.

Therefore, what was the nature of the relationship and the mutual commitments the Crown were assenting to in signing He Whakaputanga/The Declaration?

28. In so much as The Declaration was British resident Busby's baby the hapu of Te Uri o Te Aho acknowledge and accept that Busby made a significant effort to support Maori and the Declaration, and hence the formation and establishment of a Maori civil government. However, Busby was poorly resourced and had to go begging to Governor Bourke of New South Wales for funds to hold the first congress. Counsel refers to Dr Loveridge's evidence in 'Knot of a Thousand Difficulties' – Britain and New Zealand, 1769-1840 where Dr Loveridge said:

    "Barely was the ink dry on his [Busby] dispatch to London that he was writing to Sydney to ask for funds for the construction of a "House of Assembly" to accommodate chiefs traveling from the Bay of Islands for meetings of the Congress, and to house the sessions themselves. The Idea, said Busby, had been raised by Henry Williams before the Declaration meeting, and when proposing to the Chiefs that the Congress should meet periodically Busby had promised he would ask Bourke for financial assistance".[15]

29. Despite Busby's requests for resources and funding, that funding was not received as the New South Wales Governor did not have the funds to meet Busby's request. Therefore despite what the British Crowns good intentions may have been and their agreement to act as Maori's protector against invasion from foreign powers they did little to follow up of what had been promised and agreed.

30. Nuki Aldridge put it this way:

    "Busby continued to collect signatures to He Whakaputanga from rangatira until 1839, when the total stood at 52. The King received it, and promised his continued support. But then it was discredited by the Colonial Office".[16]

31. Dr. Loveridge's evidence confirms that by about 1836 the Colonial Office was trying to answer the question-By what

[15] Evidence of Dr Loveridge, Knot of a Thousand Difficulties, page 70, paragraph 81, line 4-9.
[16] Affidavit of Nuki Aldridge, #A10, page 76, paragraph 279.

method was colonisation to be affected? Counsel comments that this is hardly a year after He Whakaputanga was signed so the inference to be drawn is the Colonial Office and the British Parliament never really saw New Zealand as an alley despite what King George IV and King William IV might have agreed to with the Maori Chiefs of New Zealand and put their seal to.

32. Dr. Loveridge's evidence was that by December 1837 the Colonial Office had decided to introduce civil government and the rule of law in order to ensure the orderly colonisation of New Zealand. That decision was he noted based on trying to protect Maori as best they could.

33. During week Counsel Tevake Afeaki talked about the Kingdom of Tonga which entered into four treaties with Britain, France, Germany and the United States. These were protective in nature. Tonga retained its sovereignty despite those treaties and he noted New Zealand in the south pacific was then the exception. He said that: "*But, sir, control of some kind over one little state (Tonga), it did not happen. Tonga entered into a Treaty of friendship and protection with Britain, France, Germany and the United States, and so in the international legal and historical context there was an alternative to annexation, and it was protection and friendship ironically with gunships and things in the harbours. So you accept that's an exception to that South Pacific situation there, sir?*"[17]

How did Maori 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?

34. As with He Whakaputanga Pororua did not sign Te Tiriti / The Treaty either. The corollary of that is Te Uri o Te Aho did not cede sovereignty.

35. Mr Tahere said: "*Pororua did not sign either He Whakaputanga or Te Tiriti.*"[18] He then went on to explain the hapu's present stance in the following way:

[17] Week four transcript, Tevake Afeaki questions Dr Loveridge, page 459, line 1 – 8.
[18] BOE of Pairama Tahere, #D11, page 4, paragraph 11, line 1.

"As far as Te Uri o Te Aho hapu were concerned in 1835 and 1840(and that stance has been maintained down through the generations to the present) Te Uri o Te Aho was not bound without Pororua's signature, moko or mark irrespective of whether any junior or fledgling hapu rangatira may have signed. Though it doesn't seem as though any did. I therefore state categorically that Te Uri o Te Aho did not cede sovereignty to Queen Victoria or to her representatives of the British Crown."[19]

36. An issue raised in the Muriwhenua report was whether or not Pororua was invited to take part in the signing.

37. When Mr Hami Piripi from the Kaitaia/Muriwhenua area presented his evidence in week two he suggested at least 18 rangatira from the Kaitaia and Muriwhenua area were present, many of those rangatira were relatively young and under Panekareao's influence and asserted that the Kaitaia Chief was selective in who he asked.

38. The hapu oral histories have no knowledge of whether or not an invitation was extended to him. They only know he didn't sign because of his fear of the effect in his mana and that he mistrusted the missionaries and Hobson.

39. The hapu's contribution to the discussion on Te Tiriti / The Treaty in 1840 is based on nga korero i tuku iho. The ultimate source was from Pororua's regular contact with leading political figures of that era and what they shared of their opinions with Pororua.

40. As mentioned earlier it was key individuals that controlled the power base in Tai Tokerau and many were either related to Pororua or had strong alliances with him.

41. Particular mention is made of Pororua, Panekareao, Hongi Hika, Kawiti and Hone Heke. All were powerful rangatira, their influence shaped New Zealand history. They were major movers and shakers in the political arena and their combined mana extended from the Northern most reaches of Muriwhenua,

[19] BOE of Pairama Tahere, #D11, page 5, paragraph 1, line 3 – 10.

down the East coast of Northland to the Bay of Islands and inland to the West to Kawakawa, Kaikohe and Mangamuka.

42. These handfuls of rangatira were amongst the most powerful in the North. There were others. Rewi, Patuone, Tamati Waka Nene, and Maihi Kawiti spring to mind. However, this later group's contact with the hapu was more remote.

43. Counsel reiterates the alliance that existed between Pororua and the first rangatira was the source of Pororua's understanding of Te Tiriti and of the history leading up to it Counsel at this point elects to briefly summarise what these connections were.

44. Pororua was hapu rangatira from his mid 30's in 1835 until well after 1860. He took over the leadership of the hapu from Te Hotete. Te Hotete took over the leadership of the hapu from his uncle Te Awha when he was killed on the battlefield.

45. Te Awha was Pororua's grandfather, thus, when Pororua took over leadership, it represented a reversion back to the previous chiefly line.

46. Te Hotete out lived his son Hongi Hika which is why leadership did not continue down Te Hotete's line to him. In other words tikanga dictated what happened.

47. Panekareao was a cousin of and similar in age to Pororua.

48. At the time Te Tiriti was signed these two rangatira were arch rivals. In1997 the Muriwhenua report states that:
"Essential to understanding the transaction on the eastern division, however as well as those in central Oruru, is the dispute between Panekareao and Pororua. While conflicting stories from rival hapu's continue to confuse the picture, there is at least some local support for what now follows. It appears that both rangatira were born in Oruru Valley and that both were remarkable childhood leaders. Their rivalry goes back to then. Panekareao claimed a greater right in Oruru, through Te Awha he had forced Ngapuhi from Oruru Valley and had reinstated Ngati Kahu in the ancestral territory. Panekareao

identified himself with Te Rarawa, although the principle hapu of his father was in fact Ngati Kahu. Pororua, however, associated with Ngapuhi in particular Te Uri o Te Aho, the hapu of his father Taiapakiwa".[20]

49. Thus by all accounts Pororua and Panekareao, each a rangatira in their own right had spent a significant part of their lives trying to outdo the other. What is significant with Pororua and Panekareao's dealings was that in 1839 Panekareao passed 20,000 acres in Mongonui to the missions to hold on trust for Ngati Kahu. Pororua venomously denied Panekareao's right to do that and the act undoubtedly more a powerful deterant on Pororua doing anything Panekareao and the missionaries were recommending(which was signing Te Tiriti)

50. Kawiti's association with the hapu was primarily a consequence of his association with Hongi Hika. The same can be said of Hone Heke. Kawiti accompanied Hongi Hika in the musket wars in the 1820's and also accompanied him when he visited his relatives from Te Uri o Te Aho hapu. Hone Heke was Hongi Hika's nephew which is why Hone Heke in his younger years accompanied his uncle Hongi Hika. In Hone Heke's second marriage he also married his cousin Huhana who was also the daughter of Hongi Hika. The hapu korero I taku iho is, Kawiti and Te Wherowhero visited Pororua just before Te Tiriti. Then the hapu korero is Te Wherowhero and Kawiti were advocating not signing it.

What the present descendants of Pororua understood the rangatira associating with Pororua understood of Te Tiriti

51. By the time Te Tiriti was signed Hongi Hika was himself dead, however, his influence on early Maori political thinking in the North passed to his disciples Kawiti and Hone Heke. The hapu oral korero i tuku iho is that none of these earlier mentioned rangatira ceded sovereignty when they signed Te Tiriti.

52. The hapu suggest through Counsel that their understanding of what they were agreeing to was completely different to what

[20] The Muriwhenua Report 1997 page 78-79, paragraph 3.4.1, lines 1-10.

Captain Hobson and the British Crown believed and understood they were asking them to agree to. Counsel notes that the hapu korero is the parties were from two completely different worlds and the gap between those worlds just too great to realistically believe there could be a meeting of the minds in respect of the treaty they were entering.

53. In 1997 the Tribunal in the Muriwhenua report outlined what it believed was the likely Maori perspectives were on the basis of evidence they had heard from the northern tribes of Muriwhenua. Those perspectives are relevant and included:

- *"That Maori and the Queen would stand in partnership or alliance, and Maori would continue to benefit from having more Pakeha living with them.*
- *That the Governor would unify Pakeha and Maori, would end inter- tribal confrontation and keep order amongst Pakeha. This would secure law, order and national unity.* As Panekareao put it*: "We now have a helmsman; before everyone wanted to be helmsman; one said, let me steer, another, let me steer, and we never went straight...*
- *That Maori and the Governor would be equal, not one above the other. A persistent metaphor was that the Governor should not be up and the Maori down.*
- *That Maori would repose in the Governor an absolute trust. Such a relationship already existed with the missionaries. As Panekareo put it, in urging the execution of the Treaty, "what man of sense would believe that the Governor would take our food away and give us only part of it? By this, we think, he was referring to the land. For Maori, trust, and the display of trust and love, was the essential ingredients to forming a lasting relationship. It was assumed, of course, that this trust would not be one sided. Unfortunately, however, the Maori display of trust was seen by the British as acknowledging subservience.*
- *That the Governor would respect the Maori social structure by dealing through the leadership and not with upstarts who relied on Pakeha recognition to rise above their stations...*

- *...Although Maori echoed the Governors promise to protect them by calling on them to do so, at that time it was the Governor who most needed shelter...*
- *...That the pre-Treaty transactions would be inquired into. That was the Governors express promise, made in the course of the debates...*
- *That lands unjustly held would be returned. This was in direct response to Te Kemara, Rewa and Moka, who alleged that, seven Europeans (who were specifically named) were wrongfully claiming their land and who challenged them to return it...".*[21]

54. Counsel notes that the evidence which the Muriwhenua hearings heard was largely Te Rarawa, Ngati Kahu and those Northern tribes of Muriwhenua, however, the hapu korero I tuku iho is consistent with the Tribunals findings. The beliefs held by the hapu and Ngapuhi are the same. The concepts of a partnership, Maori and the Governor being equal (and not one above the other) and that the Governor would respect Maori social structure by dealing through the chiefs is highlighted by Counsel for the hapu as being particularly important to understand of Maori Tupuna who signed Te Tiriti.

55. In the evidence presented by Distinguished Professor Dame Anne Salmond she wrote in her conclusions:
"I do not believe, however, that in signing Te Tiriti, the rangatira ceded sovereignty to the British Crown. Although the English draft of the Treaty is unequivocal on this point, Te Tiriti-'the real Treaty', as Parkinson calls it-describes a very different arrangement. In this document, the rangatira ceded Kawanatanga to the Queen: and missionary Maori in 1840, this was a subordinate and delegated power."[22]

56. Later she reflected on Maori understanding and said:
"Overall the relationship between the rangatira and the Crown described in Te Tiriti, and reinforced by these explanations was one of Chiefly alliance, a balance of powers within largely autonomous spheres of action, with Ture and the Governor's role as Kai-whakariti probably applying to the interactions

[21] Muriwhenua Report, Pages 114to 115.
[22] BOD Distinguished Professor Dame Anne Salmond,#A22, page 87, paragraph 2, L1-L5.

between them. Given their experience of chiefly alliances, and despite the advice of Pompallier and various "Pakeha-Maori" many of the believed the assurances they were given(for it was said at the time, great chiefs never lie), and signed Te Tiriti in the hope that this alliance between themselves and the British Crown, the politics of generosity would prevail. The Governor would not intervene within territories that were controlled and owned by Maori, nor interfere with 'native laws and customs' but rather, protect the rangatira and their people against unscrupulous, lawless whites.[23]

The issue of Free and Intelligent Consent

57. Lord Normanby's instructions to Captain Hobson were to obtain the free and intelligent consent of the chiefs to the cession of sovereignty according to their customs and users.

58. Professor McHugh explained the British Crowns understanding was:
"The free and intelligent consent was a prerequisite to erecting of an imperium".

Professor McHugh noted however that free and intelligent had to be viewed from the perspective of the exercise of a prerogative power. Counsel summarises his explanation which was the act of obtaining a cession of sovereignty was an act of state, and a one consequence was that such acts were outside the jurisdiction of the courts. Under that process the British Crown had the right to determine for itself (as it did) that obtaining the free and intelligent consent of the chiefs was necessary if the Crown was to consider that it was acting lawful. It have every intention of doing this, however, having set the requirements the Crown in exercising its sovereign prerogative, had the privilege of also deciding for itself, when it had met that standard.

He said when being cross examined by Counsel Mike Doogan in week 4:
"We are in an era of –at the pyramided structure to which you referred to before, the Crown appointed Hobson to obtain the

[23] BOD Distinguished Professor Dame Anne Salmond,#A22, Page 87, paragraph 3, L1-L12.

cession of sovereignty, the Crown had recognised consent as a prerequisite, but as part of the prerogative there was also implicit in that in the nature of the office and the discharge of the office that Hobson was given to estimate when, in his view, discharge of that had occurred. So the way in which the British officials would have seen and regarded their task would have been in terms of discharge of office rather than meeting particular requirements in a legal positive sense..."[24]

59. Counsel submits that while Professor McHugh's account might be an explanation it did not mean free an intelligent consent would have necessarily resulted because the Crown was to act as arbitrator of its own actions or in other words its own judge and jury. Counsel submits the British Crown's rationale behind their understanding was flawed because there was no guarantee that the end result from such a process would be fair and just. In fact it was likely to be opposite.

60. In the evidence presented in the hearings the claim that has been made by Ngapuhi was that free an intelligent consent of Maori chiefs was not obtained and the hapu absolutely agree.

61. In evidence presented by Dr. Loveridge he said that:
"The difficult questions concerning the history of the treaty of Waitangi revolve around the explanations given to Maori by the Crown in order to persuade them to sign that document. Were these explanations complete and comprehensive, and what did the Chiefs take the explanations given to them to mean? I should say to begin with that, in my opinion, Hobson sincerely believed he did everything possible to explain to Maori what the Treaty meant. His record in New Zealand seems to me quit consistent: like a good officer, he did what he was told by his superiors, and seldom took initiatives which led him beyond the bounds of his instructions. He was instructed to obtain the intelligent consent of the Chiefs, as far as this was possible ..." [25]

62. During week four of the hearings Counsel Tevake Afeaki put forward interesting comparative evidence concerning the Kingdom of Tonga; he noted that Tonga entered into four sessions

[24] Week 4 Transcript, page 544, paragraph 2, L10 to L18.
[25] BOE of Dr Loveridge, page 237, paragraph 312, L1 to L10.

of sovereignty with Britain, France, Germany and the United States. He said that: "*But, sir, control of some kind over one little state (Tonga), it did not happen. Tonga entered into a Treaty of friendship and protection with Britain, France, Germany and the United States, and so in the international legal and historical context there was an alternative to annexation, and it was protection and friendship ironically with gunships and things in the harbours. So you accept that's an exception to that South Pacific situation there, sir?*"[26]

63. In the Muriwhenua report the issue of informed consent was addressed and in particular whether there could be a meeting of the minds when dealing with people from two completely different worlds. The Tribunal report express real doubt which highlights that intelligent consent was never obtained. The report stated:

"...We imply no subterfuge in describing the enormous gap between what was said and agreed and what was left unspoken. Like Maori, the British were locked into their own world-view and spoke of things which carried a raft of implications that they could take for granted and yet only they could know. Matters had to be put simply, and British constitutional terms were as incomprehensive to Maori as Maori societal norms were a mystery to the British..."[27]

"...The result, however, is that, despite the goodwill, the parties were talking past each other. Maori expected the relationship to be defined by their rules. It was natural to think so and, far from disabusing them of that view, the Treaty and the debate reinforced it. By the same token, the British, true to what was natural to them, assumed that sovereignty had been obtained by the Treaty and therefore matters would be determined by British legal precepts. It is thus important to see the Treaty not in terms of its specific details but for what it mainly was: a statement of good intent and of basic and necessary principles..."[28]

[26] Week four transcript, Tevake Afeaki questions Dr Loveridge, page 459, line 1 – 8.
[27] Muriwhenua Report, page 116, 4.3, L15-L21.
[28] Muriwhenua Report, page 116, 4.3, L28-L35.

The missionary Influence:

64. Counsel reminds the Tribunal the missionaries influence and involvement in getting Maori to sign Te Tiriti should not be forgotten or understated.

65. Without missionary assurances Maori would never have signed. The missionaries were trusted by rangatira, though the hapu say Pororua was the exception.

66. The involvement of the missionaries highlights the question of informed consent. In Colenso's report of the Treaty debate he reports Heke as endorsing advice given by the missionaries. Heke's korero clearly identifies his perception of Maori's lack of understanding (that is informed consent) on the day of the signing he said:
"...we Natives are children-yes, mear children. Yes; it is not for us, but for you, our fathers- you missionaries- it is for you to say, to decide, what it shall be. It is for you to choose. For we are only Natives. Who and what are we? Children- yes, children solely. We do not know: do you then choose for us. You, our fathers, you missionaries. Sit, I say, Governor, sit! A father, a Governor to us."[29]

67. Henry Williams is known to have been translating for four hours at Waitangi and then on the evening of 5 February he spent many hours with the rangatira discussing Te Tiriti. Unfortunately, no record of the debates that took place that evening has survived but Professor Ward described it as monumental because by the next morning the rangatira assembled at Waitangi were ready to sign.

68. At Mangungu Henry Williams is he was recorded as saying:
"...not to be in a hurry but telling them that the missionaries fully approved of the Treaty; that it was an act of love towards them by the Queen, who wished to secure to them their possessions , rights and privileges. That the Treaty was a fortress against any foreign power taking possession of their country as the French had done in Ohaeiti (Tahiti)".[30] Counsel suggestions, that while the

[29] Colenso, *Authentic and Genuine history*, page 25-26.
[30] BOE of Distinguished Professor Dame Anne Salmond, #A22,(d).page 8, L6-L10.

missionaries would have done their best, they themselves, would have lacked sufficient understanding of intricacies, which, attached to cession of sovereignty to properly explain it to Maori. The content of Henry Williams's speech above shows clearly how the missionaries simplified their explanations to Maori. The risk with doing that is that it is not possible to guarantee both parties have the same understanding of what is being agreed.

69. In the case of Pororua he a not a Christian, preferring to stick with his own spiritual beliefs. Whatever trust he may have had in missionaries was severally damaged with the transfer by Panekareao of 20,000 acres into missionaries Tailor and Fords hands. This land was on Oruru, Mongonui and Kohumaru and was land Pororua honestly believed was under his control. Pororua had doubts over whether the land would be ever returned after it had been passed to the missionaries even though Panekareao had supposedly passed the land to the missionaries to hold on trust. As will be shown in stage 2, virtually all of this land was lost and highlights Pororua's doubts were well founded. As was said earlier the action of the missionaries taking the land in 1839 undoubtedly influenced his refusal to sign Te Tiriti.

70. In the presentation in terms of the question of whether free and intelligent consent was obtained it was Distinguished Professor Dame Anne Salmond's view that the British Crown did not obtain Maori's free and intelligent consent. She said:
"Maori understanding of Te Tiriti and whether in the process of debating and signing the agreement, the free and intelligent consent of the rangatira to the cession of sovereignty was gained. I have argued that this was not the case".[31]

How did the Crown 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?

71. In the Muriwhenua report the Tribunal wrote:
When considering the Treaty of Waitangi and British expectations, the Treaty debate is more significant for what was not said than

[31] BOE of Distinguished Professor Dame Anne Salmond, #A22,(d). Response to commentaries on my evidence, page 29, paragraph 2, L13-L15.

what was. It was not said, for example, that for the British, sovereignty meant that the Queen's authority was absolute. Nor was it said that with sovereignty came British law, with hardly any modification, or that Maori law and authority would prevail only until they could be replaced. Similarly, while Maori assumed that they had kept the underlying right to the land on which Pakeha were living, in according with ancestral norms, the British assumed, but did not say, that the underlying(or radical) title would be held by the Crown, in accordance with English beliefs. Although no deception was intended, the assumption none the less that, in brief, the British would rule on all matters, and the fair share for Maori would be what the British deemed appropriate. We did not think the pre-eminence of British law and rule was at all stressed in the Treaty debate.[32]

72. Counsel for the hapu suggests that the absence of much of the detail that was presumed by the British Crown but not clearly spelt out cannot be necessarily regarded as conditions that were being agreed to by Maori. Dr Loveridge made it clear in his responses to Counsel that the intention to put in place a civil Government and introduce the rule of law as contained in the preamble of Te Tiriti / The Treaty carried with it a number of presumptions that the Crown took would apply. These presumptions included that the cession of sovereignty was a necessary first step before introducing a civil Government the second presumption was the introduction of English law into New Zealand with little or no modification. Although it was a presumption of the Crown based on previous colonising practices Maori never agreed to that.

73. Professor Paul McHugh in his evidence also made it clear that cession of sovereignty meat absolute sovereignty was being transferred to the Queen that was never agreed by Maori but it was non he less understood and assumed to be the case by the British Crown.

[32] Muriwhenua report, page 115, paragraph 4.3, L1 to L14.

Conclusions:

74. Te Uri o Te Aho hapu through their Counsel make the following closing remarks:
    - He Whakaputanga was an international declaration by Maori that New Zealand was an independent sovereign nation under Maori control. That was the understanding by Maori in 1840.
    - He Whakaputanga was not extinguished by the subsequent signing of Te Tiriti.
    - In considering matters on the treaty "Te Tiriti" is the only document that is relevant. The Treaty (The English version) was a document foreign to rangatira in 1840.
    - Sovereignty was not ceded by Te Uri o Te Aho.
    - There was no agreement by rangatira to cede sovereignty to Queen Victoria when they signed Te Tiriti.
    - For Maori, the signing of Te Tiriti represented a reaffirmation of a long standing political alliance between Ngapuhi and the British Monarchs.
    - In 1840 the rangatira who signed Te Tiriti understood the treaty to mean :
      They were entering into a partnership with Queen Victoria;
      The treaty allowed for the establishment of a civil government and introduction of the rule of law;
      Captain Hobson would be the new Governor (Kai-whakarite)
      The Governor was to be equal with the rangatira and govern over lawlessness amongst Pakeha.
      The Governor would also carry out when necessary a mediation role in resolving peacefully inter-hapu disputes.
      The rangatira would retain their mana and continue to exercise tino rangatiratanga as they had always done.

75. Counsel suggests that during these hearing it has been very evident that the Maori position and the Crown position are poles apart.

76. The Crown has argued and relied on the English version of The Treaty that Maori ceded sovereignty and the express terms are unequivocal.

77. Maori on the other hand continue to assert that sovereignty was never ceded in Te Tiriti and the hapu wholeheartedly agree. That Te Tiriti is the real version of the treaty, the English version has no relevance and the evidence is very few signed The Treaty, it was not the version discussed or debated by Maori.

78. Maori assert that the instructions of Normanby required the Maori Chief's free and intelligent consent as a prerequisite before erecting an imperium. The hapu say that was never achieved.

79. Maori point to Mangungu signings where they say there was strong evidence that as many as 50 who signed wanted their names or marks removed the following morning and threw their complementary blankets and tobacco back to indicate there was no deal. Hobson did not agree to that. The actions of those rangatira was prompted by having had Te Tiriti explained to them overnight and is strong evidence to indicate they did not understand what the Treaty meant on the day of signing. This points to a lack of intelligent consent.

80. The Crowns argument has been that the British Crown had a right to determine whether and when free and intelligent consent was achieved and as the cession of sovereignty is the exercise of a prerogative power the Crown can't be challenged. Counsel asserts that this process is about resolving treaty grievances and that stance is unhelpful in terms of trying to settle grievances.

Remedies

81. The hapu of Te Uri o Te Aho suffered badly as a result of breaches of the principles of the Treaty. There were broken promises made by the Governor to Maori and subsequent settler Governments which resulted in loss of property rights and other Taonga which were guaranteed to Maori under the Treaty. These matters will be addressed at stage 2.

82. Counsel urges the Tribunal to rule on the issue of cession of sovereignty and submits the case put forward by the claimants is stronger than the case presented by the Crown and accordingly Counsel suggests the Tribunal decide in favour of Maori.

17th day of February 2011

D. J. Watkins

Daniel Watkins

Counsel Acting.