

OFFICIAL**ORAL EVIDENCE FOR THE WAITANGI TRIBUNAL: WAI 1040****Distinguished Professor Dame Anne Salmond**

The evidence that I am presenting today was commissioned by the Tribunal, which asked me to revisit an earlier analysis of Māori understandings of the Treaty of Waitangi, prepared for the Tribunal during the Muriwhenua Land Claim in 1992. In that report, I addressed questions about the historical context in which the transactions and debates surrounding the Treaty of Waitangi took place; how various Māori participants may have understood the Treaty; and its likely impact upon their rights to land and other resources.

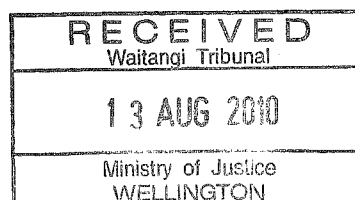
In preparing my evidence for this hearing, it was indicated that I should not undertake further research. Of the questions now before the Tribunal, therefore, I have addressed No. 5, *'How did Māori understand Te Tiriti / The Treaty? And, therefore, what was the nature of the relationship and the mutual commitments they were assenting to in signing Te Tiriti / the Treaty?'*

My background and experience relevant to this exercise have been outlined in the written report.

The Research

In my report, I have endeavoured to present a good deal of primary material about the various versions of the Treaty of Waitangi, and the debates at Waitangi, Mangunu and Kaitaia, so that the Tribunal can make up their own minds about a number of key issues.

Unfortunately, however, no contemporary eyewitness accounts in Māori of those transactions appear to survive. I have therefore attempted to cast light upon contemporary Māori understandings of the agreements that were reached at Waitangi and elsewhere, by



- A close examination of the text of Te Tiriti, including an historical-semantic analysis of some key terms, and the fidelity of their correspondence with sections of the Treaty in English. In this exercise, I have worked closely with Merimeri Penfold, a native speaker from Te Hapua and scholar of Māori; and also drawn upon five contemporary ‘back-translations’ of Te Tiriti into English;
- An inquiry into the Māori text of the Bible and other documents in ‘missionary Māori’ from the period, placing these terms in a wider linguistic context. For my earlier report, I worked closely with the late Cleve Barlow on this issue, a native speaker from Hokianga and expert on the historical linguistics of Māori, and drew upon his concordance of *Te Paipera Tapu* and other early texts in Māori;
- An examination of earlier and slightly later manuscripts written by Māori in Māori on related topics;
- An analysis of the debates at Waitangi, Hokianga and Kaitaia. Although these accounts record the various speeches in summary and in English, they are the best surviving contemporary evidence of the views and concerns expressed by the *rangatira*, and the assurances that they were given by the Crown and its allies at the time.
- Reflection upon the historical and rapidly changing context in Northland at the time of the Treaty, including relationships among some of the key *rangatira*, and between these individuals and various European leaders.

Key Arguments and Conclusions:

In this oral submission, I will take it for granted that the Tribunal and counsel have read my report, and in order to save time, will focus upon a few key arguments and conclusions, as follows:

1. Te Tiriti and The Treaty are two very different documents, with divergent histories and implications

Although the phrasing of the Tribunal's question No. 5 suggests that Te Tiriti / The Treaty are alternative versions of a single historical entity, 'The Treaty of Waitangi,' in fact 'Te Tiriti' and 'The Treaty' are two very different documents, with divergent histories and implications. In my view, it is a fundamental error to blur the discussion of these two texts, as is so often done. Over the years, this persistent error has led to a confused and confusing historiography of the Treaty of Waitangi.

'The Treaty' in English, first drafted by James Freeman, the secretary of Captain Hobson, the Lieutenant-Governor elect (who had no knowledge of *te reo Māori*), was revised by James Busby, the British Resident in New Zealand, and then edited by Hobson and his officials into a final version. Although the final draft in English was read out by Captain Hobson at the beginning of the proceedings at Waitangi, it contributed little to the discussions with the *rangatira*, since most (perhaps all) of them did not understand it. For this reason it is, strictly speaking, irrelevant to the question of what was agreed with the *rangatira* at Waitangi and elsewhere in 1840.

Nevertheless, as soon as the meeting at Waitangi was over, the Treaty in English was certified by Henry Williams as a 'translation' of Te Tiriti, the Maori text that had been debated and signed by many of the *rangatira*; and was circulated as the 'official' version of the 1840 agreements, both in New Zealand and Britain. In fact, the reverse was the case. 'The Treaty,' Hobson's final draft in English, was the text that had been translated into Maori by Henry Williams and his son Edward; while Te Tiriti was read out, debated and signed by many (but not all) of the *rangatira* during the meetings at Waitangi, Mangungu and Kaitaia.

Despite its draft status, the Treaty in English subsequently became the focus of scholarly discussions (almost invariably in English) of the Treaty deliberations, and their political and legal implications. This history, however, tells us more about imperial assumptions; subsequent relationships between Māori, the Crown and the settlers in New Zealand; and the intersections between historiography and power than it does about the promises that were in fact exchanged between the *rangatira* and the Crown in 1840.

Nevertheless, the Treaty in English does cast significant light upon the intentions of the British Government, Captain Hobson, and Henry Williams, among others, in those transactions. The fidelity of the translation equivalents between various sections of the Treaty in English and Te Tiriti is material to questions about good faith in the negotiations at Waitangi and elsewhere.

2. Since Te Tiriti is the authoritative record of the agreements between Maori and the Crown in 1840, it is in this text that the nature of the relationship and the mutual commitments to which they were assenting are most powerfully defined.

In seeking to answer the Tribunal's question about how Maori understood Te Tiriti, the nature of the relationship with the Crown, and the mutual commitments to which they were assenting in signing that document, it is the text of Te Tiriti itself that provides the most powerful evidence. In order to assess that evidence, Merimeri Penfold and I produced an historical-semantic translation of Te Tiriti into English, with an in-depth discussion of many of the key terms that bear upon the Tribunal's question, drawing upon historical as well as linguistic evidence.

a. The relationship with Maori is defined as one with the rangatira of various hapū.

The use of the terms *hapū* and *rangatira* throughout Te Tiriti indicates that by 1840 in Tai Tokerau, *hapū* (today often translated as 'sub-tribe,' but at this time as 'tribe') were the dominant form of descent group, rather than *iwi*, for example. In addition, while there is powerful evidence that during the early nineteenth century, there had been *ariki* (paramount chiefs, ritual leaders) in Northland, by 1840, *rangatira* were recognised as the most senior leaders of descent groups in that part of the country.

This Northern context helped to shape the terminology of Te Tiriti, in which *hapū* were described as entering into agreements with the Crown through their *rangatira*, with the term *tinu rangatiratanga* being used to describe their powers and capacities. *Ariki* are not mentioned, and it is interesting that none of the *ariki* in other parts of the

country (for instance, Potatau te Wherowhero and Te Heuheu) are known to have signed Te Tiriti.

b. According to the preamble to Te Tiriti, the Queen sent the Kāwana as a 'kai-whakarite' to the Maori people (plural).

The preamble to Te Tiriti explains that the Queen had decided to send a *rangatira*, the *Kāwana* or Governor, '*hei kai wakarite ki nga Tangata maori o Nu Tirani.*' These phrases, which we have translated 'as a mediator to the māori people [pl.] of New Zealand,' introduce the concept of *kai whakarite* – one who makes things alike, or equal – a term used in early Māori translations of the Bible as a translation equivalent for 'judge' (e.g. Kai Whakarite – Judges).¹ The role of *kai whakarite* as a mediator in inter-*hapū* disputes had become familiar in the North as a role that the missionaries might usefully play, while the term *kai wakarite* was used by William Williams in an 1832 translation of an official letter to describe the role of the newly-arrived British Resident, William Busby, as a facilitator and mediator in Māori-European exchanges.² The syntax of the phrase '*ki nga Tangata maori o Nu Tirani*' suggests that the Governor was to play this *kai-wakarite* role, not so much with *hapū* as collectivities, as with their members as individuals.

c. The use of the term 'ture' in Te Tiriti:

The preamble explains that Te Tiriti would apply to '*ki te tangata maori ki te Pakeha e noho ture ana*' ('to the māori people and to the Pākeha who are living without law'); and describes the articles that follow as *ture*. In Biblical texts in Māori, *ture* (derived from 'Torah' in the Bible), a missionary-coined word used in Māori translations of the Bible as an equivalent for 'law, ordinance, statute' and the like,³ was closely associated with the role of *kai wakarite* [adjudicator]. These phrases in the preamble suggest that these *ture* or laws (ie. those articulated in the text of Te Tiriti) would primarily apply

¹ Barlow, Cleve, 1990, *He Pukapuka Whakataki Kupu o te Paipera Tapu: A Concordance of the Holy Bible* (Rotorua, Te Pihopatanga o Aotearoa), 85.

² Orange, Claudia, 1987, *The Treaty of Waitangi* (Wellington, Allen & Unwin), 13, 16 – see Appendix I. See also Biggs's discussion of *whakarite* in Biggs, Bruce, 1989, *Humpty Dumpty and the Treaty of Waitangi*, in Hugh Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland, Oxford University Press).

³ Barlow, 1990, 307.

to the currently unregulated relations between Māori and European individuals, and I suggest that the *rangatira* would have understood them in that way.

d. In Te Tiriti, agreements are exchanged between Queen Victoria and the rangatira, and the term tuku is used throughout, placing Te Tiriti in the context of chiefly gift exchange and alliance:

From the preamble onwards, Te Tiriti is phrased throughout as involving the Queen both directly and personally in its various provisions. The term *tuku*, used in chiefly gift exchanges to refer to the release of *taonga* including heirlooms, men and women in marriage, and land, is also used throughout Te Tiriti. Indeed, Te Tiriti is expressed as a series of *tuku* [gift exchange] transactions between Queen Victoria and the *rangatira*:

- A *tuku* by the Queen of a *Kāwana* [Governor] as a *kai-wakarite* [mediator, adjudicator, negotiator] to Māori people (in the Preamble);
- A *tuku* by the *rangatira* of parts of New Zealand to the Queen, now and in the future (also in the Preamble);
- A *tuku* by the *rangatira* to the Queen of all the *kāwanatanga* of their lands (Ture 1);
- An agreement by the Queen to the *tinu rangatiratanga* of the *rangatira*, the tribes and all the people of New Zealand over their lands, their dwelling-places and all of their valuables [*taonga*] (Ture 2);
- A *tuku* by the *rangatira* to the Queen of the trading [*hokonga*] of those areas of land whose owners are agreeable (also in Ture 2);
- A *tuku* by the Queen to Māori people individually of her protection, and *tikanga* [customary rights] exactly the same as those of her subjects in England (Ture 3).

In my view, this framing of Te Tiriti as a chiefly gift exchange would have led most of the *rangatira* to understand these *tuku* as forging a personal, aristocratic alliance

between themselves and the Queen and their descendants, with mutual, lasting obligations.

e. The use of the terms kāwanatanga and tino rangatiratanga in Te Tiriti:

The words *kāwanatanga* in the Preamble and Ture 1 of Te Tiriti; *rangatiratanga* in Ture 2, and *kīngitanga* in the Declaration of Independence are all constructed alike. A stative referring to a status or role – *kāwana* (Governor); *rangatira* (chief, aristocrat); or *kīngi* (King) takes a nominalising suffix (*-tanga*) to become an abstract noun describing the qualities of such a position in society, with its associated powers, obligations and privileges. *Rangatiratanga* is thus generally translated as ‘chieftainship;’ *kīngitanga* (perhaps the closest transliterated equivalent for ‘sovereignty’) can be translated as ‘kingship;’ and in strict parallel, *kāwanatanga* in 1840 is best translated as ‘governorship’ (the equivalent given by William Martin, the first Chief Justice of New Zealand, and other contemporary European translators), or the state of having a governor with his privileges, obligations and powers.

In Article 1 of ‘The Treaty’ in English, however, it is stated that the chiefs ‘cede to her Majesty, the Queen of England, absolutely, and without reservation, all the rights and powers of sovereignty.’ The question thus arises as to whether Ture 1 of Te Tiriti (*‘Ko nga Rangatira ... ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu - te Kawanatanga katoa o o ratou wenua,’* which Merimeri Penfold and I have translated as ‘the chiefs... give completely to the Queen of England forever – all the Governorship of their lands’) is a fair and reasonable translation of Article 1; particularly when in Ture 2, the Queen had agreed to uphold their *tino rangatiratanga* or ‘unfettered chieftainship.’ This question is crucial, because as Paul McHugh points out, the British government insisted that if sovereignty was to be established in New Zealand, ‘the free and intelligent consent of the natives, expressed according to their established uses, [must] first be obtained.’⁴

As other reports outline, Te Tiriti had been foreshadowed by He Wakaputanga o te Rangatiratanga o Nu Tirene, the Declaration of Independence in 1835, which was also

⁴ Normanby to Hobson, 15 August 1839, CO 209/4:157, quoted in McHugh, Paul, 2010, Brief of Evidence, 59.

translated into Maori by Henry Williams. In the Declaration, the *rangatira* had declared their *rangatiratanga* [independence] as a *Wenua Rangatira* [independent land, land of peace], asserting their *kīngitanga* [sovereign power] and *mana* [authority]. While they reserved to themselves the right to make *ture* or laws, the *rangatira* had foreshadowed that they might delegate *kāwanatanga* [function of government] to ‘persons appointed by them.’

In the *Paipera Tapu*, *kāwanatanga* was used (and not very often) for ‘province’ or ‘principality;’ and both here and in the Declaration, referred to a subordinated and delegated form of power. *Kīngitanga* was the standard translation for ‘kingdom’ in the *Paipera Tapu*, although *rangatiratanga* was also used in this way (in the Bible, and in the Lord’s prayer).

From a close inspection of a number of contemporary texts, including the Declaration, it seems that the best of the translation equivalents in Māori in 1840 for *sovereignty* would have been

- *mana* – power, efficacy deriving from the ancestors (quite close, in fact, to the ‘divine right of Kings’ in European political theory; and perhaps the best indigenous equivalent for ‘sovereignty’); or
- *kīngitanga* – the best of the neologisms, referring as it did to the status and powers of the sovereign. It was frequently used in the Bible as a translation equivalent for ‘kingdom;’ and in the English text of the Declaration of Independence, for ‘sovereign power;’ or
- *ko te kīngitanga ko te mana* – these two terms together, as used in the Declaration of Independence, for the avoidance of doubt.

Other possibilities included:

- *arikitanga* – another neologism, but one that referred to the highest human authority in Māori polities; or

- *rangatiratanga* – another neologism; used as an equivalent for ‘kingdom’ in the New Testament and the Lord’s Prayer; and for ‘independence’ in the Declaration of Independence.

If Henry Williams had used any of these words, one might agree that his translation of ‘sovereignty’ into Māori was reasonable.

No-one with any knowledge of Māori life in 1840, however, would have asked the *rangatira* to surrender their *mana*, which came from their ancestors, and was not theirs to cede. Its loss would have meant death and disaster to themselves and their people. It would also have been contradictory, and a folly to ask them to give up their *rangatiratanga*, their status and standing as leaders among their people; and in any case this had already been used in the text of Te Tiriti, where it was guaranteed to the chiefs and Māori people in Ture 2. Nor is it likely that Henry Williams would have used the term *arikitanga* in Te Tiriti, given its association in missionary Māori with Jesus Christ.

This still left *kīngitanga*, the term used for ‘sovereign power’ in the Declaration of Independence.

Instead of any of these terms, however, Henry and Edward Williams used *kāwanatanga* as an equivalent for ‘sovereignty’ - a term that in Biblical texts was used to refer to the powers of governors over their provinces; and in the Declaration of Independence for ‘function of government.’ When the *rangatira* were asked in Te Tiriti to cede this kind of authority, which was European by definition and of a subordinate kind, this would have been more palatable than any of the alternatives. Nevertheless, uncertainty about the spheres in which *kāwanatanga* might operate meant that this part of Te Tiriti was still highly contentious.

From the extended analysis in my report, I concluded that in 1840, *kāwanatanga* was not an accurate or even a plausible translation equivalent for ‘sovereignty’ – whether understood as ‘supreme, irresistible, absolute, uncontrolled authority,’ as in

Blackstone,⁵ or in Paul McHugh's more minimalist definition of 'communities of amenability to British authority.'⁶ It thus fails the test of securing the 'free and intelligent consent' of the *rangatira* to the cession of sovereignty to Queen Victoria. While it is often asserted that at Waitangi, the *rangatira* ceded sovereignty to the British Crown, this tells us more about the political interests involved, the rhetorical dominance of the English draft of the Treaty, and the inadequacy of much historiography of this period, which often relies on sources in English while neglecting those in Maori, than it does about the weight of the evidence.

The text of Te Tiriti indicates that *kāwanatanga* would involve the introduction of the *ture* (laws), those enunciated in the Tiriti itself; and *tikanga* (customary rights) for Māori people exactly the same as those in England, with the Governor acting as a *kai-wakarite* (mediator, adjudicator or negotiator) between Maori and European individuals.

In the Declaration, however, the *rangatira* had already foreshadowed their willingness to entertain an arrangement in which they delegated *kāwanatanga*, or 'function of government,' to someone they themselves appointed; without disturbing their *rangatiratanga* [independence], their *mana* [authority] or their *kīngitanga* [sovereign power]. In Te Tiriti, the *Kāwana* or Governor had been appointed by the Queen, but apart from that, the text was compatible with such an arrangement. This also seems very like the situation described by Vattel (and cited by McHugh), in which a weaker state might place itself under a stronger one for purposes of protection, 'without however, divesting itself of its right to self-government and of its sovereignty.'⁷

f. The final ture of Te Tiriti:

The final *ture* of Te Tiriti, which we have translated as follows, 'In recognition of this agreement to the Governorship of the Queen – the Queen will care for all the Māori people [pl.] of New Zealand and give to them all and exactly the same *tikanga* [customary rights, conventions] as those she gives to her subjects, the people of

⁵ Blackstone, Sir William, 1825, *Commentaries on the Laws of England* I-IV (London, T. Cadell), I:48.

⁶ McHugh, 2010, 5.

⁷ Vattel, 1758, *Le Droit de Gens*, I, ch.16, cited in McHugh, 2010, 14.

England,' defines the Queen's relationship with Māori individuals as that of a *kai-tiaki* (guardian, protector). *Kai tiaki* operated in the realm of *tapu* and *mana*; and when the Northern *rangatira* first invited King William IV to become their friend and protector in 1831, they asked him to become the *kai tiaki* for these islands.⁸ Now Queen Victoria was being brought into this kind of relationship.

In this part of Te Tiriti, the Queen was offering to become a guardian for the Māori people individually; and to give [*tuku*] to them exactly the same *tikanga* [those things which are correct, proper, just right, 'straight'] as her own subjects in England, thus putting them on an equal footing with the British.

This was another large promise, which I argue that the *rangatira* would have understood as a personal guarantee that in the new regime, the Queen would ensure that they were cared for, and that matters would be handled in ways that were *tika*, giving them exactly the same customary rights (and even the same 'customs' as British subjects, since the term *tikanga* can apply to a wide range of 'right' forms of behaviour).

The idea of *tika* in Māori has many resonances with the idea of 'justice' in English; just as the idea of *mana* resonates with the idea of 'honour.' This offer would have been appealing to the *rangatira*, given the sense of injustice that many of them felt in their dealings with some white settlers. At the same time, however, it is not clear how the rights of British subjects, framed as they were within British law and a capitalist economy, could be reconciled with *tino rangatiratanga*, framed as it was within *tikanga Māori*, in which resources including land were held collectively, and rights were shaped by principles such as *mana* and *utu* (so that war captives, for instance, who lost their *mana*, also lost much of their autonomy).

Within *tikanga Māori*, the personal commitments made by Queen Victoria in Te Tiriti would have been understood as backed by her *mana* and binding upon her descendants, which explains why over so many generations, Māori leaders would

⁸ Rangatira to William IV, 5 Oct 1831, CO 201/211.

travel to Britain and seek audience with successive monarchs, asking them to honour the words of their ancestor, and ‘put things straight’ [*tika*] for Māori people.

3. The debates at Waitangi, Mangunu and Kaitaia indicate that many of the *rangatira* were adamantly opposed to, or very uncertain about the implications of agreeing to have a Governor. The assurances they were given before or after the debates must have been crucial in obtaining the signatures of many of those who did sign Te Tiriti.

In my written report, I have cited the debates in the North at some length, to give a sense of just how contentious Te Tiriti was among the *rangatira*, and the levels of uncertainty about its implications. It is clear that during the meetings before and after the formal debates, assurances were given to the *rangatira* that their authority over their people would not be disturbed, or their *mana* challenged; and that without these assurances, many of them would not have signed Te Tiriti. In my report, I have cited one reasonably detailed account of Lieutenant Shortland’s discussion with Nopera Panakareao and other *rangatira* at Kaitaia, in which he assured them that ‘the Queen would not interfere with their native laws nor customs but would appoint gentlemen to protect them and to prevent them being cheated in the sale of their lands.’⁹ The other surviving evidence about those meetings suggests that such assurances were repeated at Waitangi and Mangunu, especially by the missionaries.

Conclusion:

In my view, most of the *rangatira* at Waitangi and elsewhere in the North understood the exchanges in Te Tiriti as forging a personal, aristocratic alliance between themselves and the Queen, and their descendants, with mutual, lasting obligations; and that the Queen would act as a guardian or *kai-tiaki* for Māori people.

As stated in the preamble to Te Tiriti, the Kāwana or Governor had been sent by the Queen as a *kai-whakarite* or mediator to the māori people, to control the lawless

⁹ Johnston, John, M.D., 1840, Journal kept by John Johnston, M.D., Colonial Surgeon, From his arrival in the Bay of Islands, March 17 1840 to April 28 1840, Auckland Public Library.

whites who had arrived among them. In signing Te Tiriti, they agreed to accept the Governor and his *kāwanatanga*.

At the same time, the *rangatira* gave to the Queen or her agent the control of the *hokonga* or barter of those lands whose owners were willing to exchange them; while the Queen promised that they would remain in control of their own lands, dwelling places and valuables; and gave them exactly the same customary rights as her people in England.

In my view, however, the agreements exchanged in Te Tiriti did not meet the test of securing the ‘free and intelligent consent’ of the *rangatira*, ‘expressed according to their established uses,’ to the cession of sovereignty to the British Crown. As William Swainson, the first Attorney-General, observed in 1842, in most cases the *rangatira* ‘had not the most remote intention of giving up their rights and powers of dealing, according to their own laws of customs, with the members of their own tribes, or of consenting to be dealt with in all cases according to our laws;’¹⁰ and this is hardly surprising. In Te Tiriti itself, and in the assurances the *rangatira* were given before and after the Treaty transactions, those rights were specifically guaranteed to them. The evidence indicates that what they ceded – *kāwanatanga* – was a lesser and much more limited power.

¹⁰ Swainson to Shortland, 27 December 1842, CO 209/16, 487.

