

IN THE WAITANGI TRIBUNAL

**Wai 3300
Wai 3316
Wai**

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF Tomokia ngā tatau o Matangireia - the
Constitutional Kaupapa Inquiry (Wai
3300)

BY Jane Mihingarangi Ruka, on behalf of
the Grandmother Council of the
Waitaha Nation, including the three
hapu of Ngāti Kurawaka, Ngāti
Rakaiwaka, and Ngāti Pakauwaka

AND Continued...

**MEMORANDUM OF COUNSEL FILING WRITTEN SUBMISSIONS ON
PROPOSED INQUIRY DESIGN**

Dated: 14 March 2024

RECEIVED

Waitangi Tribunal

15 Mar 24

Ministry of Justice
WELLINGTON

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BY Danny Te Rakai Watson and
Tūwharerangi Ruka, on behalf of the
Grandfather Council of the Waitaha
Nation, including the three hapū of
Ngāti Kurawaka, Ngāti Rakaiwaka,
and Ngāti Pakauwaka (“the
Claimants”)

MAY IT PLEASE THE TRIBUNAL:

- 1.** This Memorandum of Counsel (“MoC”):
 - a.** is filed for and on behalf of:
 - i.** Jane Mihingarangi Ruka, on behalf of the Waitaha Grandmother Council, which includes the three hapu of Ngāti Kurawaka, Ngāti Rakaiwaka, and Ngāti Pakauwaka; and,
 - ii.** Danny Te Rakai Watson and Tūwharerangi Ruka, on behalf of themselves, the Grandfather Council of the Waitaha Nation, including the three hapū of Ngāti Kurawaka, Ngāti Rakaiwaka and Ngāti Pakauwaka (“collectively the Claimants”);
 - b.** provides written submissions on behalf of the Claimants, in response to the Memorandum-Directions of Chief Judge Fox prior to the second inquiry planning wānanga, dated 1 March 2024 (“the 1 March MDs”).¹
- 2.** The Claimants have been directed to file written submissions on the proposed Inquiry design following the second Inquiry planning wānanga by no later than 5pm on Thursday 14 March 2024.²
- 3.** The Claimants submit that they do not agree that the wānanga as proposed (“the Wānanga”) should proceed at this time. In relation to their interests in Te Raki, they hold this view for the following reasons:
 - a.** it is important that an agreed view is reached of exactly what te Tiriti/the Treaty of Waitangi means, and exactly what governance authority Māori provided to the British Crown, prior to the parties engaging in the Wānanga as proposed;
 - b.** the Claimants were involved in Te Paparahi o Te Raki Inquiry (“the Wai 1040 Inquiry”), in which they strongly advocated for the constitutional foundation which is reflected and recognised in He Whakaputanga o te Rangatiratanga o Nu Tireni/He Whakaputanga me te Tiriti o Waitangi;

¹ Wai 3300, #2.5.11.

² At para 12(b).

- c. in its Report on Stage 2 of the Wai 1040 Inquiry, the Tribunal recommended, inter alia, the following:

In our view, a crucial first step will be for the Crown to recognise the agreement in te Tiriti as described in our stage 1 report, and our conclusion that the Crown did not acquire sovereignty through an informed cession by the Rangatira who signed te Tiriti at Waitangi, Waimate, and Māngungu. Only then can the parties move forward with a shared understanding, and begin to take steps towards giving practical effect to the agreement that they entered into in 1840;³

- d. the Crown is yet to indicate it accepts the conclusion in the Tribunal’s Stage One Report (“the Wai 1040 Stage One Report”), namely, that the Crown did not acquire sovereignty through an informed cession by Te Raki Rangatira (“the Non-Cession Conclusion”);
- e. until the Crown acknowledges and accepts the Non-Cession Conclusion, the Claimants see little point in proceeding to wānanga with the Crown;
- f. the Claimants see some value in wānanga amongst themselves, without the Crown’s involvement, until such time as the Crown has acknowledged and accepted the Non-Cession Conclusion; and
- g. Counsel seeks a Direction from the Tribunal that Counsel for the Crown promptly seeks instructions from the relevant Ministers, and reports back to the Tribunal as to whether the Crown accepts the Non-Cession Conclusion.

- 4. In relation to their interests in other parts of Aotearoa, the Claimants do not wish to proceed with the Wānanga as proposed, for the following reasons:

- a. in July 2017, Counsel filed, in the National Freshwater and Geothermal Resources Inquiry, an MoC on behalf of certain claimants, advocating that the Non-Cession Conclusion should apply to all Māori in Aotearoa who want it to apply to them, a copy of which is attached as **Annex A**⁴;

³ *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Paparahi o Te Raki Inquiry* (Wai 1040, 2022), at pg 1468.

⁴ Wai 2358, #3.2.99.

- b.** the then Chief Judge, W W Isaac, in a Decision attached as **Annex B**, concluded that the Non-Cession Conclusion *may be relevant* to contemporary Inquiries:

...our decision is that the findings of the Te Raki Stage 1 Report may be relevant to contemporary Inquiries. For the water inquiry however, we do not have the evidence and submissions necessary to consider the question of how and when the Crown obtained the sovereignty it exercises today, a matter which is currently before the Te Raki Tribunal in its stage 2 inquiry. Further, this Tribunal should not pre-empt the Te Raki Tribunal's stage 2 report by making findings on matters more particularly before the Te Raki Tribunal, including the consequences (if any) of its stage 1 report for the principles of the Treaty.

In coming to these conclusions, it was not necessary for us to consider the parties' submissions on whether the findings of the Te Raki Stage 1 Report apply to Māori in other districts;⁵

- c.** the issue of whether the Non-Cession Conclusion applies to other Māori in Aotearoa is still therefore a moot point;
- d.** if, after an Inquiry, the Tribunal decides that the Non-Cession Conclusion does not apply to other Māori and other rohe, then the Claimants request, that prior to any Wānanga commencing, an Inquiry should be held to ascertain what the meaning and effect of the Treaty is for non-Te Raki Māori and their rohe; and
- e.** Counsel therefore seeks a Direction from the Tribunal setting out timetabling calling for submissions from the parties, followed by a Judicial Conference, to discuss how the following issue ought to be determined:
 - i.** does the Non-Cession Conclusion apply to non-Te Raki Māori and outside of Te Raki rohe?

- 5.** The Claimants seek leave to reserve their ability to make further submissions on the Inquiry design, once they have received a response from the Crown, as sought at sub-paragraph 3.g. above.

⁵ Wai 2358, #2.6.29, at [59] and [60].

6. While the Claimants applaud the fact that the Tribunal is willing to explore new ways of undertaking its inquiry processes, they submit that the whare concept which has been promulgated does not accord with their tikanga. This whare was built without their input. It creates an unsafe environment for them. It is simply not acceptable that the entity responsible for widespread Māori human rights atrocities is invited to sit in a whare to “co-create” solutions with the descendants of those who were killed trying to protect their tino rangatiratanga, despite the perpetrator refusing to ever acknowledge those atrocities.

7. It is apposite that a focal point of the Wai 1040 Stage Two Report centred on the Claimants’ tūpuna, Hone Heke, cutting down the flagpole four times in protest at the British Crown’s usurpation of Te Raki Māori tino rangatiratanga. This protest then led to the “Northern Wars” in which many of the Claimants’ tūpuna were slaughtered. Now 179 years later, Hone Heke’s firm belief that their tino rangatiratanga had not been “ceded” to the British Crown has been shown in the Wai 1040 Inquiry to have been legitimately held.

8. The Claimants find the proposal that they proceed to engage with the Crown representatives on future looking constitutional remedies, in circumstances whereby the Crown continues to ignore the Non-Cession Conclusion, repugnant to their tikanga, and to basic notions of justice, fairness and the rule of law.

Dated 14 March 2024



Janet Mason
Counsel Acting

IN THE WAITANGI TRIBUNAL

Wai 2358

Wai 2601

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the National Freshwater and
Geothermal Resources Inquiry

**MEMORANDUM OF COUNSEL IN RELATION TO THE
APPLICATION OF TE PAPARAHI O TE RAKI INQUIRY
STAGE 1 REPORT CONCLUSIONS**

Dated: 14th July 2017

RECEIVED Waitangi Tribunal
14 Jul 2017
Ministry of Justice WELLINGTON

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Counsel Acting: Janet Mason

MAY IT PLEASE THE TRIBUNAL:

1. This Memorandum of Counsel (“MoC”) is filed:

a. on behalf of:

- i.** Cletus Maanu Paul, Chairperson of the Mataatua District Maori Council (“DMC”), on behalf of himself and the Mataatua DMC;
- ii.** Titewhai Harawira, Chairperson of the Tamaki Makaurau DMC, on behalf of herself and the Tamaki Makaurau DMC;
- iii.** Des Ratima, Chairperson of the Takitimu DMC, on behalf of himself and the Takitimu DMC;
- iv.** William Jackson, Chairperson of the Tamaki ki te Tonga DMC, on behalf of himself and the Tamaki ki te Tonga DMC;
- v.** Rihari Dargaville, Chairperson of the Te Tai Tokerau DMC, on behalf of himself and the Te Tai Tokerau DMC;
- vi.** David Potter, on behalf of himself and the Tangihua Whānau and the Hapū of Ngati Rangitihī;
- vii.** Pita Paul, on behalf of himself and various Marae throughout Aotearoa;
- viii.** Haami Piripi, on behalf of himself and the iwi of Te Rarawa (Wai 1699, Wai 1701);
- ix.** Cletus Maanu Paul and Mr Charles Muriwai White, as members of Ngai Moewhare, a marae located in the rohe of Ngāti Manawa, and a claimant in Te Ika Whenua Inquiry (Wai 212);
- x.** Michelle Marino and Mr. Errol Churton, on behalf of themselves, and the descendants of Taringa Kuri (Wai 377);
- xi.** Ruiha Collier, on behalf of herself, and various whanau and hapu members (Wai 1524, Wai 1541, Wai 1673, Wai 1681),

(together, and along with their constituents, called “the Claimants”); and

- b.** responds to the Memorandum-Directions of His Honour dated 30th June, indicating that the application of the Te Paparahi o Te Raki Stage 1 Report (“the Stage 1 Report”) finding to this National Freshwater and Geothermal Resources Inquiry (“this Inquiry”) would benefit from early clarification.¹

- 2.** His Honour invited parties to file submissions on the following issue (“the Cession Issue”):

Should this Tribunal consider the consequences (if any) of the Te Raki Stage 1 report for the principles of the Treaty and their interpretation, in advance of the Te Raki Stage 2 Tribunal completing its inquiry and report?²

- 3.** This MoC responds to the Cession Issue in three parts, namely:

- a.** What are the conclusions in the Stage 1 Report, and, what are the consequences, if any, for the principles of te Tiriti o Waitangi/the Treaty of Waitangi (“te Tiriti/the Treaty”)?
- b.** Should the rationale and conclusions in the Stage 1 Report, in relation to the meaning and effect of te Tiriti/the Treaty (“the Non-Cession Conclusions”) apply to Te Raki Claimants in this Inquiry? and
- c.** Should the Non-Cession Conclusions also apply to Non-Te Raki Claimants who wish them to do so?

¹ Memorandum-Directions Dated 30 June 2017 (Wai 2358 #2.6.21) at [3].

² Ibid at [2].

4. The matters set out at paragraph 3 above will be addressed in turn in the remainder of this MoC.

A: Stage 1 Report Conclusions and Consequences for the Principles

5. This section looks at the conclusions of the Stage 1 Report and the consequences, if any, for the principles of te Tiriti/the Treaty (“the Principles”).

A1: Conclusions of the Stage 1 Report

6. The Tribunal concluded in the Stage 1 Report that:

Our essential conclusion, therefore, is that the *rangatira did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories*. Rather, they agreed to share power and authority with the Governor. They and Hobson were to be equal, although of course they had different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis. But the rangatira did not surrender to the British the sole right to make and enforce law over Māori [emphasis added].³

7. As such, te Tiriti/the Treaty was not a treaty of cession.
8. The Tribunal went on to state that the meaning and effect of te Tiriti/the Treaty ought primarily to be derived from the text of te Tiriti, and the explanations and assurances given to Te Raki Māori, at the time:

In our view, the meaning and effect came from the Māori text, on the one hand, and the verbal explanations and assurances given by Hobson and missionaries, on the other... What [Hobson] appeared to be asking for was agreement to what had been the Colonial Office’s plan as recently as

³ Waitangi Tribunal *He Whakaputanga me te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 527.

December 1838: **the exercise of authority over British subjects only**. As such, he omitted to mention the very powers Britain then claimed it had obtained: the authority to make and enforce law for all people and over all places in New Zealand. Our essential conclusion, therefore, is that the rangatira did not cede their sovereignty in February 1840 [emphasis added].⁴

9. This was a landmark decision and heralded a turning point in the way that scholars had previously viewed te Tiriti/the Treaty. Much of the previous discussion and analysis had centred around the idea that there was a tension between:
 - a. the Crown’s sovereignty, which was supposedly ceded by Maori to the British Crown under Article 1 of the English version, and the Kāwanatanga, or lesser form of governance, which was supposedly ceded under the Māori version; and/or
 - b. the Kāwanatanga ceded by Maori to the British Crown, under Article 1 of the Māori text and the Tino Rangatiratanga preserved under Article 2 of the Māori text and
 - c. the main task of the Courts, scholars and Crown officials was to attempt to reconcile these tensions.

10. However, it was accepted by most, as a given fact, that the Crown had acquired the authority that it had acquired, whatever the nature of that authority, over **all of Aotearoa New Zealand**, not just over its own subjects and their legitimately acquired land. The fact that the Te Raki Tribunal has now concluded that this is not the case, has significantly changed the way that the issue of the Partnership between the Crown and Māori is framed.

11. Counsel has recently completed Generic Closing Submissions (“GCSs”) on these points, and characterises the Tribunal’s findings as essentially identifying

⁴ Waitangi Tribunal *He Whakaputanga me te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 526.

3 distinct spheres of authority co-existing under te Tiriti/the Treaty as at 1840, namely:

- a. the British Crown governing its subjects over land legitimately acquired by it or them (“British Authority”);
- b. Māori tino rangatiratanga over Māori peoples, lands and other taonga (“Māori Authority”); and
- c. a partnership, to be discussed and agreed where Māori and English populations intermingled (“Shared Authority”).

12. As no cession of sovereignty had been effected, Te Raki Māori Tiriti/Treaty rights, interests and authority were intended to sit over the authority to be exercised by the Crown. Te Tiriti/the Treaty also envisioned a third sphere, where Māori and Pākehā would share power equally.

13. These submissions have referred to the Stage 1 Report as a landmark decision. It is submitted that the importance of the Non-Cession Conclusions ought not be underestimated. The great difference between the Stage 1 Report’s conclusions and previous conclusions on the meaning of te Tiriti/the Treaty, is that the Te Raki Tribunal interprets the Kāwanatanga in Article 1, which is given to the British Crown, to mean Kāwanatanga only over British settlers and any lands legitimately acquired by them, and **not** Kāwanatanga over Māori and their taonga and territories, albeit subject to Māori retaining their Tino Rangatiratanga.

14. In this regard, Counsel has attached, as Annex A, the Linguistic Evidence of Professor Patu Hohepa which was relied upon in the Wai 1040 Stage 1 Inquiry.⁵ Professor Hohepa is, arguably, the most eminent Māori language professor in Aotearoa New Zealand today.

⁵ Wai 1040, # D4.

15. It goes without saying that the Non-Cession Conclusions were received by Te Raki Claimants with much relief and joy, for it confirmed to them that which they had always known.

A2: Consequences for the Principles

16. Were there consequences from the Non-Cession Conclusions which had an effect on the Principles?
17. Counsel submits that there are implications that arise for the Principles from the Non-Cession Conclusions.
18. In the Stage 1 Report, the Tribunal also stated:

In drawing this conclusion, we say nothing about how and when the Crown acquired the sovereignty that it exercises today. Our point is simply that the Crown did not acquire that sovereignty through an informed cession by the rangatira who signed te Tiriti at Waitangi, Waimate, and Mangungu.

What does this mean for treaty principles? *Given we conclude that Māori did not cede their sovereignty through te Tiriti, what implications arise for the principles of the treaty identified over the years by both this Tribunal and the courts?* That is a matter on which counsel will no doubt make submissions in stage 2 of our inquiry, where we will make findings and, if appropriate, recommendations about claims concerning alleged breaches of the treaty's principles. *It suffices to reiterate here that, in February 1840, an agreement was made between Māori and the Crown, and we have set out its meaning and effect. It is from that agreement that the treaty principles must inevitably flow* [emphasis added].⁶

19. Counsel has filed, as an attachment to the Opening Submissions for Hearing Week 2 of this Inquiry, a copy of the GCSs for Issue 1 – Kāwanatanga, Tino

⁶ Waitangi Tribunal *He Whakaputanga me te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 527.

Rangatiratanga and Autonomy (“the Issue 1 GCSs”).⁷ Paragraphs 221 to 352 of those Issue 1 GCSs, which Counsel led the drafting of, set out detailed submissions on the implications of the Tribunal’s Stage 1 Report for the Principles.

20. Essentially, the major difference/inconsistency between the Principles as espoused previously, and the Non-Cession Conclusions, is the extent of the Kāwanatanga ceded, or more appropriately, not ceded, to the British Crown at 1840. Previously, the Principles had relied upon an assumption that the Crown had been granted the authority to govern all of Aotearoa New Zealand, and its inhabitants, subject to the Article 2 Tino Rangatiratanga rights of Māori. However, the Stage 1 Report concluded that this was not the case, at least in relation to Te Raki Māori.

21. The Principles have been formulated variously by the Courts, the Executive, and the Tribunal. There are no rigid Principles, set in stone. There is some flexibility in the manner in which these different bodies have approached the Principles. That said, there do, however, appear to be a number which are common to the numerous iterations of the Principles. Primary among these is the assumption that, under te Tiriti/the Treaty, Māori had ceded sovereignty to the British Crown. This assumption subsequently became fully embedded in Aotearoa New Zealand’s case law as one of the Principles after it was articulated in the *Lands Case*.⁸ It was then relied on and expanded upon in subsequent cases.

22. In the *Broadcasting* case, Hardie Boys J quotes President Cooke’s statement from the *Lands Case* that the signing of te Tiriti/the Treaty meant that:

...in brief the basic terms of the bargain were that the queen was to govern and the Māoris were to be her subjects; in return their chieftainships and

⁷ *Annex B to Opening Submissions for Hearing Week 2* (Wai 2358, #3.3.27(b)).

⁸ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

possessions were to be protected, but sales of land to the Crown could be negotiated.⁹

23. Most importantly, the Principles rested on an interpretation of te Tiriti/the Treaty that sovereignty had been ceded by Māori to the British Crown, under Article One.
24. The Principles were therefore predicated upon the assumption that te Tiriti/the Treaty gave the Crown the right to govern over all inhabitants of New Zealand and over all of New Zealand's territory. In other words, the Principles rely upon and assume a cession of sovereignty from Māori to the British Crown.
25. The Stage 1 Report concluded that the Partnership founded between Māori and the Crown at 1840 was not a mere bargain in which the queen would take over the sovereignty of all of New Zealand's territory and all of its inhabitants, including Māori. As is abundantly clear, the Non-Cession Conclusion is inconsistent with the Principles, as enunciated by the courts in the *Lands Case* and in subsequent cases, and by the Tribunal in its various Reports, as well as by the Executive.
26. The cases cited above, and in the Issue 1 GCSs, were decided before the decision in the Stage 1 Report. That Report has changed the parameters of the discussion on the meaning of te Tiriti/the Treaty. Consequently, Counsel submits that the Principles ought to be reinterpreted in light of the Non-Cession Conclusions, to ensure they are consistent with those conclusions.
27. Counsel submits that now that we understand that te Tiriti/the Treaty was not a treaty of cession, it follows that legal precedents which relied upon that false premise must, in the interests of justice, and in accordance with the rule of law, be revisited.

⁹ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 661-663.

- 28.** In his *Lands Case* judgment, Justice Somers chose not to discuss the differences between the Treaty and te Tiriti, and stated that:

I do not think it necessary to discuss the differences between the two texts and the possible different understandings of the Crown and the Māori in 1840 as to the meaning of the Treaty. They are issues best determined by the Waitangi Tribunal to whom they have been committed by Parliament.¹⁰

- 29.** Similarly, Cooke P also stated:

Section 9 of the 1986 Act requires the Court to interpret the phrase "the principles of the Treaty of Waitangi" when necessary. In doing so we should give much weight to the opinions of the Waitangi Tribunal expressed in reports under the Treaty of Waitangi Act 1975.¹¹

- 30.** In order to undertake its role, the Tribunal must turn its mind to the actual meaning of te Tiriti/the Treaty, if it is to make findings on whether or not the Principles have been breached. The Tribunal has stated that the Principles "must inevitably flow" from the text of te Tiriti/the Treaty.¹²

- 31.** The Stage 1 Report conclusions differed in a significant way from previous interpretations of te Tiriti/the Treaty. Previously, the courts had made findings on the basis that te Tiriti/the Treaty had provided the Crown with the authority to govern unilaterally over all of New Zealand and over all the inhabitants of New Zealand, so long as the Crown actively protected the lands and other taonga of Māori. This sometimes involved consultation, at other times, engagement, and at other times, informed consent.

- 32.** Most obviously, the current Principles overstate the authority conferred to the Crown under te Tiriti/the Treaty.

¹⁰ *New Zealand Maori New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 661-662. *Council v Attorney General* [1987] 1 NZLR 641 at 691.

¹¹ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 661-662.

¹²

- 33.** What the Claimants are requesting is that the Principles be interpreted, as they ought to, in light of the Stage 1 Report conclusions. In particular, the Principle that the Crown acquired rights of governance over all Māori and over all of New Zealand must now be called into question. This cannot be a Principle given that it is not actually what the bargain under te Tiriti/the Treaty was.
- 34.** Counsel wishes to make clear that the Claimants' argument is not that the Crown does not, under the laws of New Zealand, hold and exercise sovereignty. Rather, the argument is that the Crown does not derive the sovereignty that it purports to exercise from te Tiriti/the Treaty. The Crown's current exercise of Kāwanatanga over the Māori people and their lands and taonga cannot be said to be a Principle, because it is clearly inconsistent with the text and meaning of te Tiriti/the Treaty that was set out in the Stage 1 Report.
- 35.** Counsel again makes the point that the Tribunal's role is not to determine whether or not, under the general laws of New Zealand, the government can exercise sovereignty and what may or may not be the constraints on that exercise of sovereignty – the Tribunal's role is confined to that given to it by Parliament, as set out in the ToW Act, that is, to make decisions about Crown conduct, as weighed against the yardstick of the Principles, which, in turn, must come from the meaning of the text of te Tiriti/the Treaty itself, which as set out above, is the exclusive domain of the Tribunal, at least in their decisions under the ToW Act.
- 36.** This point needs to be made crystal clear in the context of this Inquiry. For often, the Crown conduct complained about may well be seen by the general civil courts as conduct that is legitimately exercised within the Crown's authority, namely, it may very well be seen under the common law of New Zealand to be lawful, but that very same conduct could still however, be found by the Tribunal to be inconsistent with the Principles.

- 37.** The Claimants submit therefore, that the previous Principles which relied upon the assumption that the Crown has Kāwanatanga over all of Aotearoa New Zealand and all of its inhabitants, ought to be revised to say that the sovereignty that the Crown currently exercises is in breach of te Tiriti/the Treaty, and is held and exercised partially on behalf of Māori, by the Crown, in trust, in a protectorate capacity, until such time as the Partnership arrangement envisaged under te Tiriti/the Treaty has been negotiated and given effect to.

B Application of No Cession to Te Raki Claimants

- 38.** This section looks at whether the Non-Cession Conclusions should apply to Te Raki Claimants in this Inquiry.
- 39.** Counsel is instructed that the following Claimants rely upon the Non-Cession Conclusions in the Stage 1 Report, and are part of Te Raki:
- a.** Titewhai Harawira, Chairperson of the Tamaki Makaurau DMC, on behalf of herself and the Tamaki Makaurau DMC;
 - b.** Rihari Dargaville, Chairperson of the Te Tai Tokerau DMC, on behalf of himself and the Te Tai Tokerau DMC;
 - c.** Haami Piripi, on behalf of himself and the iwi of Te Rarawa (Wai 1699, Wai 1701); and
 - d.** Ruiha Collier, on behalf of herself, and various whanau and hapu members (Wai 1524, Wai 1541, Wai 1673, Wai 1681), (together, and along with their constituents, called the “Te Raki Claimants”).
- 40.** The role of the Tribunal set out, primarily, in sections 5 and 6 of the ToW Act, involves inquiring into claims that the Crown’s conduct, in relation to any ordinance or Act, or regulations, order, proclamation, notice, or other statutory

instrument, or its policies or practices, or acts or omissions, was or is inconsistent with the Principles.

41. The Tribunal is therefore responsible for determining what the Principles are and, as they emanate from the text of te Tiriti/the Treaty, the Tribunal must decide upon the meaning of te Tiriti/the Treaty that it relies upon. Under section 5(2) of the ToW Act:

In exercising any of its functions under this section the Tribunal shall have regard to the 2 texts of the Treaty set out in Schedule 1 and, for the purposes of this Act, shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them.

42. The preamble of the ToW Act emphasises this role:

Whereas on 6 February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the Māori people of New Zealand:

And whereas the text of the Treaty in the English language differs from the text of the Treaty in the Māori language:

And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles.¹³

43. In order to undertake its role, the Tribunal must turn its mind to the actual meaning of te Tiriti/the Treaty, if it is to make findings on whether or not the Principles have been breached. The Tribunal has stated that the Principles “**must inevitably flow**” from the text of te Tiriti/the Treaty.¹⁴

¹³ Treaty of Waitangi Act 1975, preamble.

¹⁴ Waitangi Tribunal *He Whakaputanga me te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 527.

44. Counsel submits that these matters are integral to this Inquiry, as the Tribunal cannot properly undertake its task of assessing whether Crown conduct is in breach of the Principles unless it has an accurate view of the meaning and effect of te Tiriti/the Treaty and therefore what the Principles should be.
45. The approach taken in the *Report on the Trans-Pacific Partnership Agreement* (“the TPPA Report”) and the *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (“the Reoffending Rates Report”) was that such matters were not within the scope of those inquiries. Instead they relied upon an interpretation of te Tiriti/ the Treaty that Maori had given the Crown the authority to govern over all of Aotearoa New Zealand and its entire population.
46. The Reoffending Rates Report concluded that:

...the interested parties submitted that the report on stage 1 of the Te Paparahi o te Raki inquiry found that ‘the understanding upon which past Treaty/Tiriti principles were based, that is, that Māori ceded sovereignty to the Crown, was wrong’. According to the interested parties, this finding means ‘the Crown cannot claim a legitimate kawanatanga right to represent Māori on matters of incarceration on the back of a cession of sovereignty, given that it has now been found that a cession of sovereignty by Māori did not occur’. This issue is outside the scope of our inquiry.¹⁵

47. Similarly, the Tribunal determined in the TPPA Report that:

It is not our role to consider the consequences of the Te Raki Tribunal’s conclusions in the stage 1 report for Treaty principles – that is a matter for that Tribunal in stage 2. Nothing we say in this inquiry is intended to intrude into, or influence, the ongoing Te Raki inquiry. We also consider that an urgent inquiry is not the appropriate forum to address broad constitutional questions, particularly those concerning the Crown–Māori relationship in respect of international instruments. We do not have the time, evidence, or range of interested parties to properly conduct such an inquiry.¹⁶

¹⁵ Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 79-80.

¹⁶ Waitangi Tribunal *Report on the Trans-Pacific Partnership Agreement* (Wai 2522, 2016) at 7-8.

48. Counsel submits, with the greatest of respect, that the conclusions in relation to the application of the Non-Cession Conclusions, in both the Reoffending Rates Report and the TPPA Report, are incorrect.
49. In the Reoffending Rates Report, the Tribunal concluded that the argument presented by the Claimants, which essentially related to the application of the Non-Cession Conclusions to that Inquiry, were “outside the scope” of that Inquiry.¹⁷ However, the Non-Cession Conclusions have major impacts on the Principles, and given that the Tribunal is bound by its parent statute, the ToW Act, to assess Crown conduct in light of the Principles, and given that the Principles must emanate from the text of te Tiriti/the Treaty, then it is difficult to see how the Non-Cession Conclusions could possibly be “outside the scope” of any Inquiry, particularly in relation to Te Raki Claimants.
50. To the contrary, it is actually highly relevant, and one of the most important issues which all Tribunal Inquiries, subsequent to the Stage 1 Report, must grapple with. Counsel respectfully submits that it is ultra vires the ToW Act, a breach of natural justice, and, a fettering of the Tribunal’s discretion, to say that Te Raki Claimants should not be able to rely on the Non-Cession Conclusions before the Tribunal in **any** Inquiry that they are involved in, and that those Conclusions are out of bounds, at least, until the Te Paparahi o Te Raki Stage 2 (“Te Paparahi”) Report has been released, an event that is likely to occur years from now.
51. Likewise, Counsel respectfully submits that, in the TPPA Report, the Tribunal’s rejection of the Non-Cession Conclusions was incorrect. That Tribunal Panel stated that they did not have the time, evidence or range of interested parties to properly address broad constitutional questions.¹⁸ Counsel submits that the Non-

¹⁷ Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 79-80.

¹⁸ Waitangi Tribunal *Report on the Trans-Pacific Partnership Agreement* (Wai 2522, 2016) at 7-8.

Cession Conclusions *must be* relevant to, at least, all Te Raki Claimants who wish to rely upon it as a matter of course.

52. The Claimants reject the idea that the consequences of the Non-Cession Conclusions for the Principles are a matter only for Stage 2 of the Te Raki Inquiry. Each Tribunal must deliberate on the Principles and their application to the evidence and facts before them. Counsel respectfully submits that the Tribunal undertaking its statutory functions is not an interference with the Tribunal's findings in Stage 2 of Te Paparahi Inquiry. The Te Raki Claimants have not made extensive submissions on their water rights because they expected those matters to be heard and decided upon in this Inquiry. In doing so they intended that there be no duplication between the matters which the Tribunal is inquiring into in Stage 2 of the Te Raki Inquiry, and any matters in this Inquiry. It would be incongruous to have an interpretation of te Tiriti which said that Te Raki Claimants ceded a right of kawanatanga over their people and territories to the British Crown applying in one Inquiry in which they are participating; whilst another completely antithetical interpretation of te Tiriti consistent with the Non-Cession Conclusion applies in another Inquiry.
53. Moreover, Counsel makes the point that the application of the Non-Cession Conclusions to the Principles is one requiring legal submissions, and no further evidence is required.
54. Counsel submits that the Stage 1 Report's conclusions go to the heart of the Tribunal's statutory responsibilities under the ToW Act and, therefore, *must be relevant to all Tribunal Inquiries*, and of particular relevance to Te Raki Māori. Counsel states, respectfully, that to do otherwise would be to disregard the Stage 1 Report and its important conclusions, and to wrongly proceed on the false premise that, under te Tiriti/ the Treaty, the Crown was granted the authority to govern over all of Aotearoa New Zealand and over Māori and non-Māori alike.

C Application of No Cession to Non-Te Raki Claimants

55. This section looks at the application of the Non-Cession Conclusions to Non-Te Raki Māori Claimants.

56. The Non-Te Raki Claimants are:

- a.** Cletus Maanu Paul, Chairperson of Mataatua DMC, on behalf of himself and the Mataatua DMC;
- b.** Des Ratima, Chairperson of the Takitimu DMC, on behalf of himself and the Takitimu DMC; and
- c.** William Jackson, Chairperson of the Tamaki ki te Tonga DMC, on behalf of himself and the Tamaki ki te Tonga DMC;
- d.** Pita Paul, on behalf of himself and various Marae throughout Aotearoa;
- e.** Cletus Maanu Paul and Mr Charles Muriwai White, as members of Ngai Moewhare, a marae located in the rohe of Ngāti Manawa, and a claimant in Te Ika Whenua Inquiry; and
- f.** Michelle Marino and Mr. Errol Churton, on behalf of themselves, and the descendants of Taringa Kuri (together, and along with their constituents, called the “the Non-Te Raki Claimants”).

57. In reaching the Non-Cession Conclusions, the Tribunal in the Stage 1 Report considered three key aspects surrounding the signing of te Tiriti/the Treaty:

- a.** the written text of te Tiriti/the Treaty;
- b.** the oral aspects of the agreement; and

- c. the contextual circumstances of the Crown/Māori relationship at the time.¹⁹

58. In determining that there was no cession of sovereignty, the Stage 1 Report relies mainly upon the Māori version of te Tiriti. Te Raki rangatira who signed te Tiriti/the Treaty signed the Māori version. The Stage 1 Report gives considerable weight to this factor. The Tribunal stated:

We do, however, agree with the approach adopted by the Tribunal in previous reports, which have given special weight to the Māori text in establishing the Treaty’s meaning and effect. They have done so because the Māori text was the one that was signed and understood by the rangatira – and indeed signed by Hobson himself.²⁰

59. The Tribunal interpreted te Tiriti as follows:

Article 1, then, had Māori conveying to the Queen ‘te kawanatanga katoa o ratou whenua’, which has been generally rendered as the complete government or governorship of their lands...

In article 2, Māori were guaranteed ‘te tino rangatiratanga’ over all their taonga. This was a significant departure from the English text, which made no mention of authority. Moreover, here Māori were guaranteed not just their rangatiratanga – used in he Whakaputanga for ‘independence’ and in the Bible for ‘kingdom’ – but the fullest extent of it through the use of the adjective ‘tino’...

Henry Williams’s translation of pre-emption – as the ‘hokonga’ of land to the Queen at agreed prices – certainly shifted the meaning from what Hobson intended to acquire : the sole right of purchase by the Crown...

In article 3, Williams used ‘tikanga katoa’ to convey ‘all the rights and privileges’ of British subjects. As we saw in section 7.5.4, there is no consensus among recent backtranslators of te Tiriti whether Māori would have interpreted this as imposing obligations as well as granting benefits and entitlements. Ultimately, though, there was nothing explicit about the need for obedience to British laws as the corollary of the cession of

¹⁹ Waitangi Tribunal *He Whakaputanga me te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 526.

²⁰ Waitangi Tribunal *He Whakaputanga me te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 522.

kāwanatanga in article 1, even though the translation of article 3 provided a further opportunity to explain to Māori the workings of British sovereignty.²¹

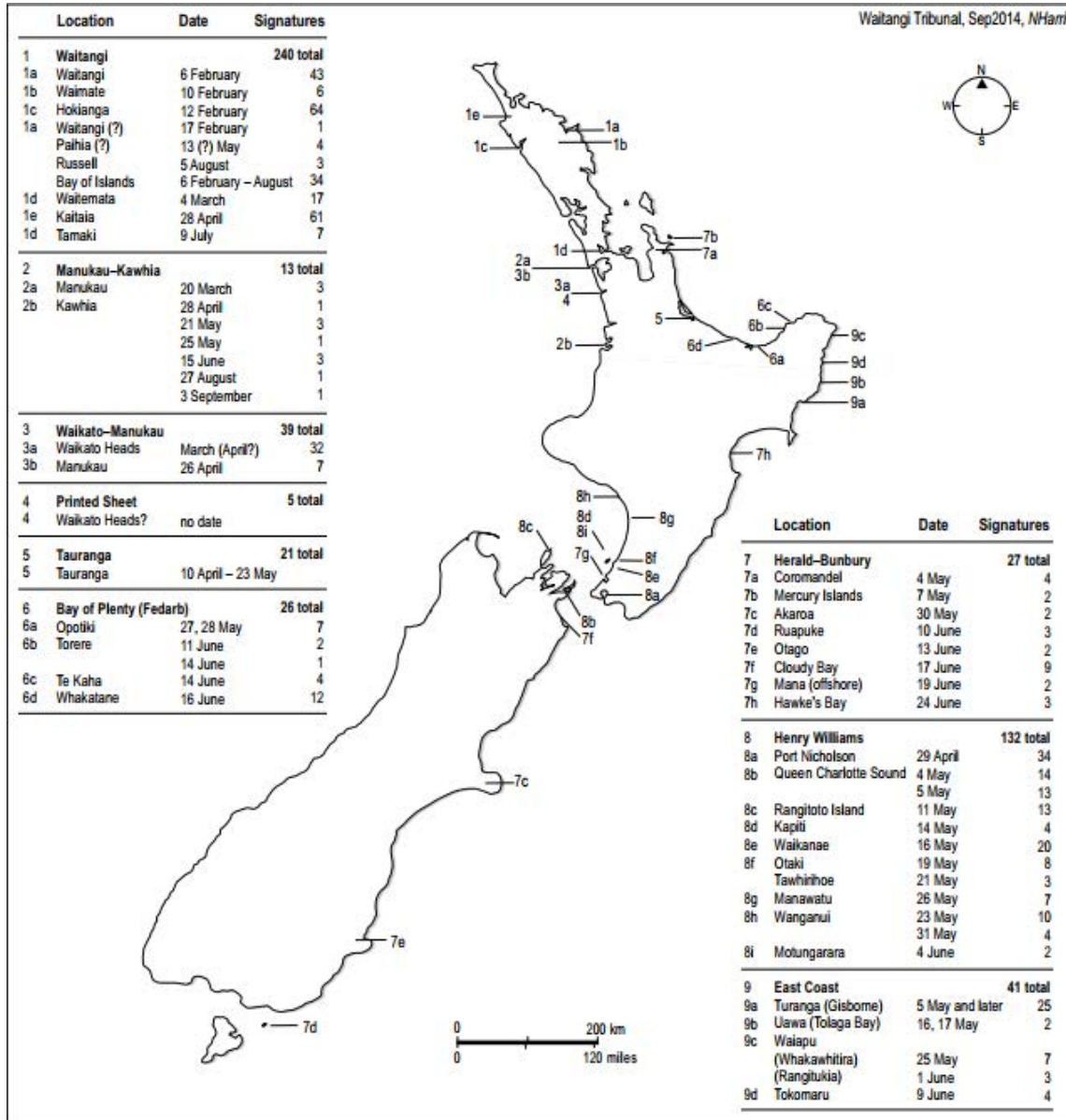
60. The second element which contributed to the Non-Cession Conclusions comprised the oral agreements which were based on the particular circumstances of Te Raki Māori at Waitangi. In concluding that there was no cession of sovereignty, the Tribunal cites the specific oral assurances given to Te Raki Māori, that is, “the verbal explanations and assurances given by Hobson and the missionaries”.²² They further specify that “*Bay of Islands* and *Hokianga* rangatira did not cede their sovereignty when they signed te Tiriti o Waitangi.”²³ Consequently, part of the rationale behind the Non-Cession Conclusions is specific to the circumstances of Te Raki Māori, due to the nature of the oral agreements made which enlarged upon the written text of te Tiriti.
61. In this regard, the Non-Cession Conclusions enjoyed the benefit of extensive research into the nature of the verbal explanations and assurances given to Te Raki rangatira on and before 6 February 1840.
62. With regard to this second element, the specific circumstances surrounding the signing of te Tiriti/the Treaty by Non-Te Raki Māori will differ to some extent. About 40 chiefs signed the Treaty of Waitangi at Waitangi on 6 February 1840. Following that signing, about 500 other Māori had signed te Tiriti by the end of 1840. A total of 544 Māori, including 13 women, put their names or moko to the document; all but 39 signed the Māori text. Of those rangatira, approximately 240, or 44%, had signed in Te Raki. Between February and September 1840,

²¹ Waitangi Tribunal *He Whakaputanga me te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 512.

²² Waitangi Tribunal *He Whakaputanga me te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 526.

²³ Waitangi Tribunal *He Whakaputanga me te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 527 [emphasis added].

missionaries, traders and officials explained its terms at 51 signing meetings from the Far North of the North Island to Ruapuke Island in Foveaux Strait.²⁴



Treaty Signatories and Signing Places²⁵

²⁴ Ministry of Culture and Heritage “Treaty Signatories and Signing Locations” (1 July 2016) *NZ History* <nzhistory.govt.nz/politics/treaty-making-the-treaty/treaty-of-waitangi-signing-locations>

²⁵ Waitangi Tribunal *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Paparahi o Te Raki Inquiry* (Wai 1040, 2011) at 388.

- 63.** It is reasonable to assume that, having successfully induced 40 Te Raki rangatira to sign at Waitangi on the 6th of February, and a further 200 Te Raki Māori at a later date, Non-Te Raki Māori would have received the same assurances from the Crown's agents. However, in the absence of further submissions and/or evidence, Counsel acknowledges that this is, at this stage, mere speculation. The nature of the oral agreement made between Non-Te Raki Māori and the Crown will require further submissions and/or evidence.
- 64.** The third element comprises the contextual circumstances of the Crown-Māori relationship as at 1840. Counsel submits that, broadly, these circumstances were the same for most, if not all, Māori, at least in the North Island. The elements of Tikanga Māori and Ture at 1840 had sufficient similarities to render the understandings of the text of te Tiriti similar for all Māori.
- 65.** Counsel concludes that the Non-Cession Conclusions should inform the Principles for all Non-Te Raki Claimants that wish it to do so for the following reason:
- a.** The text of te Tiriti was the same – there was only one te Tiriti. The interpretation which the Stage 1 Report settled on arose out of the most extensive Inquiry the Tribunal has ever had on the meaning and effect of the text of te Tiriti. As this has been the most comprehensive examination of what the text of te Tiriti means, and given the Tribunal's exclusive authority to determine the meaning and effect of te Tiriti/the Treaty, it ought to prevail as the standard and definitive interpretation of te Tiriti.
 - b.** Forty-four percent (44%) of all those who signed te Tiriti/the Treaty were Te Raki Māori, and this is the most significant grouping, both in numbers, and because they were the first Maori to sign it. The Tribunal finding which applies to them ought to also apply to all Māori, Te Raki and Non-Te Raki alike.

- c. The surrounding contextual circumstances would have been the same for all Māori.
- d. Of the three elements set out at paragraph 57, only one is place-specific, namely, the verbal agreements entered into at the time of the signing of te Tiriti/the Treaty. Two out of three of these elements, arguably, apply to all Maori.

- 66.** Counsel reiterates that the Tribunal is bound by its legislation to look at whether Crown conduct is contrary to the Principles. It must turn its mind to what these Principles should be, and therefore to what the agreement was between the Crown and Māori. In this Inquiry, the Tribunal can apply the Principles located in the Non-Cession Conclusions, or it can apply the orthodox meaning of te Tiriti/the Treaty which accepts that the Crown was given Kāwanatanga to govern over both non-Māori and Māori and their taonga, subject to Māori retaining their Tino Rangatiratanga.
- 67.** The Claimants submit that the Tribunal ought not, automatically, choose the latter option as the default one applying to non-Te Raki Māori, over and above the Non-Cession Conclusion, as has been done in the TPPA Report and the Reoffending Rates Report.
- 68.** Counsel submits that it is for each claimant, or group of claimants to make specific submissions on whether or not they wish the Non-Cession Conclusions to apply to them. However, Counsel respectfully submits that it would not be open to the Tribunal to automatically determine that the Non-Cession Conclusions on the meaning and effect of te Tiriti/the Treaty are out of bounds, or outside of the scope, for non-Te Raki Māori that may wish to use it.
- 69.** Counsel also makes the point that this Inquiry is a National Kaupapa Inquiry, and the Tribunal is obliged, under its statutory functions, to reach a conclusion

as to what Principles will apply to its consideration of the Crown's conduct and policies which are at issue.

70. The DMC Claimants, in particular, are creatures of a statute which applies nationally. It is arguable that the interpretation of te Tiriti/the Treaty which they rely upon must therefore be a national one, not one based on specific case-by-case circumstances. For the reasons set out at paragraph 65 above, they submit that the Non-Cession Conclusions ought to apply to them.
71. Counsel has received very clear and candid instructions to make known to the Tribunal that the Claimants were, and are, wholeheartedly disappointed by the manner in which the TPPA and the Reoffending Rates Tribunal Panels have declined to engage with the Non-Cession Conclusions, even in the face of glaring and obvious legal problems in their approach. They trust that this Tribunal will not also, for convenience sake, turn a blind eye to the Non-Cession Conclusions.
72. The Claimants are of the view that the consequences of the Non-Cession Conclusions for the Principles must be considered by this Tribunal in completing its proceedings and its report in this Freshwater Inquiry.
73. As Mrs Harawira stated in her introduction of Mr Maanu Paul during day 3 of Hearing Week 2:

After almost two centuries of various actions protesting the Crown's imposition of Kāwanatanga over us, we were relieved to have the Tribunal's decision in the Te Paparahi o Te Raki Stage 1 Report. That decision was that our rangatira did not cede our tino rangatiratanga over our people, our taonga nor our territories when they signed Te Tiriti. The authority that the British Crown was given was to control their own populations on their own legitimately acquired land. This is what the Tribunal has already concluded about us.

As a Ngapuhi kuia, I want to make very clear that we expect that this conclusion will apply, at the very least, to us as Ngapuhi when this honourable Tribunal looks at any of the grievances we bring before you. We

would also, as the kaitiaki of Te Treaty o Waitangi, like to say that this interpretation should apply to all others of our whanaunga in Aotearoa who wish it to do so.²⁶

Dated 14th July 2017



Janet Mason

Counsel Acting

²⁶ Introduction of Maanu Paul by Titewhai Harawira at Hearing Week 25, on 28 June 2017.

IN THE WAITANGI TRIBUNAL

Wai 2358

CONCERNING

the Treaty of Waitangi Act 1975

AND

the National Fresh Water and
Geothermal Resources Inquiry

DECISION ON APPLICATION OF TE RAKI STAGE 1 FINDINGS

19 September 2017

Introduction

1. The issue for consideration in this decision is:

Should this Tribunal consider the consequences (if any) of the Te Raki Stage 1 report for the principles of the Treaty and their interpretation, in advance of the Te Raki Stage 2 Tribunal completing its inquiry and report?

Background

2. During the course of preparation for hearing stage 2 of this inquiry, additional parties were accorded interested party status. These included a number of District Māori Councils (DMCs) with a different “case theory” than the New Zealand Māori Council. Those DMCs are represented by Ms Janet Mason of Phoenix Law, who has at times filed various submissions about the differences between the cases. The differences include, in Ms Mason’s submission, a refutation of any “public ownership” of water, and a reliance on the findings of the Te Raki stage 1 report¹ that the kāwanatanga ceded in the Treaty was merely a right to govern settlers on land legitimately acquired from Māori (Wai 2358, #3.1.298).
3. In February 2017, the Tribunal agreed to the filing of a new claim, Wai 2601, for those named Wai 2358 claimants who “do not support the case theory advanced by the other named claimants” (Wai 2358, #2.6.9). The new claim was registered in May 2017 and consolidated into the Wai 2358 inquiry in June 2017 (Wai 2358, #2.6.19). The Wai 2601 claim was filed by Maanu Cletus Paul and Charles Muriwai White (formerly named claimants in Wai 2358) and the Te Tai Tokerau DMC (this DMC was also formerly included in Wai 2358) (Wai 2358, #1.1.3). As part of the “distinct case theory”, the Wai 2601 claimants alleged as a breach of the principles of the Treaty:

the Crown’s failure to recognise and give effect to the tino rangatiratanga of the Maori rangatira over their peoples, and lands and other taonga, which was never ceded under Article 1 of te Tiriti/the Treaty. Article 1 of the Te Tiriti/the Treaty gave the British Crown the authority to govern over their own subjects and over land legitimately acquired by them, but not to unilaterally enforce their regulatory and legal regimes over Maori and/or their taonga. Reliance is placed upon the findings in the Tribunal Report which came out of Stage 1 of Te Paparahi o Te Raki Inquiry (Wai 2358, #1,1,3, p 8).

4. In hearing week 2, Ms Mason filed opening submissions on behalf of the Wai 2601 claim and of interested parties (Wai 2358, #3.3.27). Ms Mason appended generic closing submissions from the Te Raki stage 2 inquiry, which dealt with kāwanatanga, sovereignty, and the consequences of the Te Raki stage 1 report for Treaty principles (Wai 2358, #3.3.27(b)). Those generic closing submissions were dated 27 March 2017, as the Te Raki Tribunal was then (and is now) in the process of completing its stage 2 hearings.
5. During the course of hearing week 2, the findings of the Te Raki stage 1 report were also referred to as applicable to this inquiry in the briefs of evidence of a number of witnesses: Cletus Maanu Paul (Wai 2358, #E1(b)); Ruiha Te Matekino Collier (Wai 2358, #E4); Haami Piripi (Wai 2358, #E5); Rihari Dargaville (Wai 2358, #E9(a)); Arthur Mahanga (Wai 2358, #E12); and Moana Jackson (Wai 2358, #E5).
6. The application of the findings of the Te Raki stage 1 report to this inquiry was also the subject of Mrs Titiwhai Harawira’s introduction of Mr Paul’s evidence. Mrs Harawira stated:

After almost two centuries of various actions, protesting the Crown’s imposition of Kāwanatanga over us, we were relieved to have the Tribunal’s decision in the Paparahi o Te

¹ Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wellington: Legislation Direct, 2014)

Raki Stage 1 Report. That decision was that our rangatira did not cede our tino rangatiratanga over our people, our taonga, nor our territories when they signed Te Tiriti o Waitangi.

The authority that the British Crown was given was to control their own populations on their own legitimately acquired land. This is what the Tribunal has already concluded about us. As a Ngā Puhi kuia, I want to make very clear that we expect that this conclusion will apply at the very least to us as Ngā Puhi when this honourable Tribunal looks at any of the grievances we bring before you.

We would also, as the kaitiaki of Te Tiriti o Waitangi, like to say that this interpretation should apply to all others of our whānau in Aotearoa who wish it to do so (Wai 2358, #E1(c)).

7. Issues about the Te Raki stage 1 report's findings and the ongoing Te Raki stage 2 inquiry were discussed at a judicial conference at the end of day 3 of the second hearing week (28 June 2017). After hearing oral submissions from Ms Mason (for the Wai 2601 claimants and interested parties), Ms Sykes (for interested parties), Mr Smith (for the New Zealand Māori Council), and Dr Ward (for the Crown), the presiding officer proposed to put an issue question to counsel for written submissions, after which the Tribunal would make a decision. Counsel indicated that this course was acceptable to the parties.
8. On 30 June 2017, the Tribunal issued a memorandum-directions which noted that the statement of issues for stage 2 of this inquiry would not need to change, but the application of the Te Raki stage 1 findings was "a matter that would benefit from early clarification" (Wai 2358, #2.6.21). The issue question posed by the Tribunal is set out above in paragraph 1. Submissions were filed in response on behalf of the Wai 2601 claimants, the Wai 2358 claimants, the Crown, and a number of interested parties. Before considering these submissions, it is important to summarise the findings of the Te Raki Tribunal in its stage 1 report, quoting from chapter 10 of that report:

At various points in this chapter we have arrived at conclusions about the treaty's meaning and effect in February 1840. As we have said, the agreement can be found in what signatory rangatira (or at least the great majority of them) were prepared to assent to, based on the proposals that Hobson and his agents put to them, and on the assurances that the rangatira sought and received. Here, we summarise our conclusions.

- The rangatira who signed te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain. That is, they did not cede authority to make and enforce law over their people or their territories.
- The rangatira agreed to share power and authority with Britain. They agreed to the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Māori interests.
- The rangatira consented to the treaty on the basis that they and the Governor were to be equals, though they were to have different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis.
- The rangatira agreed to enter land transactions with the Crown, and the Crown promised to investigate pre-treaty land transactions and to return any land that had not been properly acquired from Māori.
- The rangatira appear to have agreed that the Crown would protect them from foreign threats and represent them in international affairs, where that was necessary.

Though Britain went into the treaty negotiation intending to acquire sovereignty, and therefore the power to make and enforce law over both Māori and Pākehā, it did not explain this to the rangatira. Rather, in the explanations of the texts and in the verbal assurances

given by Hobson and his agents, it sought the power to control British subjects and thereby to protect Māori. That is the essence of what the rangatira agreed to.²

The Parties' Submissions

Submissions in support

Phoenix Law

9. On 14 July 2017, Ms Janet Mason filed submissions on behalf of the Wai 2601 claimants and a number of interested parties (Wai 2358, #3.2.99). More particularly, the submissions were on behalf of:
 - a) The chairpersons of the Mataatua, Tamaki Makaurau, Takitimu, Tamaki ki Te Tonga, and Te Tai Tokerau DMCs;
 - b) David Potter for the Tangihua whānau and the hapū of Ngāti Rangitihī;
 - c) Pita Paul (on behalf of himself and “various Marae throughout Aotearoa”);
 - d) Haami Piripi on behalf of Te Rarawa (Wai 1699, Wai 1701);
 - e) Cletus Maanu Paul and Charles Muriwai White “as members of Ngāti Moewhare and as claimants in Te Ika Whenua” (Wai 212);
 - f) Michelle Marino and Errol Churton for the descendants of Taringa Kuri (Wai 377); and
 - g) Ruiha Collier on behalf of herself and “various whānau and hapū members”.
10. Ms Mason relied in part on her generic submissions filed in the Te Raki stage 2 inquiry. As noted above, these had been attached to her opening submissions in the present inquiry (Wai 2358, #3.3.27(b)). Counsel submitted that the applicable findings of the Te Raki Stage 1 report are (in brief) that on 6 February 1840 the Māori signatories at Waitangi did not cede their sovereignty (their authority to make and enforce law over their own peoples and territories). Rather, the rangatira agreed to share power with the Governor, which would be negotiated on a case-by-case basis where the two populations mingled. The Te Raki Stage 1 Tribunal found that the meaning and effect of the Treaty was derived from the Māori text and from the verbal explanations and assurances given by Governor Hobson and the missionaries. In Ms Mason’s submission, the finding that the Crown did not obtain sovereignty by way of cession through the Treaty “has significantly changed the way that the issue of the Partnership between the Crown and Māori is framed”. In her submissions to the Te Raki Stage 2 Tribunal, Ms Mason “characterises the Tribunal’s findings as essentially identifying 3 distinct spheres of authority co-existing under Te Tiriti/the Treaty”: the Crown was to govern its own subjects on lands legitimately acquired; the rangatira were to govern their own people, lands and taonga; and a partnership would be discussed and agreed where the populations became intermingled (Wai 2358, #3.2.99, pp 4-6).
11. In Ms Mason’s submission, there are “implications that arise for the [Treaty] Principles from the Non-Cession Conclusions”. She noted the Te Raki Tribunal’s statements that the Crown exercises sovereignty today, and that counsel in that inquiry would have the opportunity to make submissions about any implications for Treaty principles in Stage 2. Counsel also noted the Te Raki Tribunal’s statement that the Treaty principles “must inevitably flow” from the “meaning and effect” of the agreement made between the Crown and Māori in February 1840 (Wai 2358, #3.2.99, p 7). In her submission, it is the Tribunal’s duty in the Water inquiry to derive the principles from the meaning and effect of the Treaty as defined in the

² Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 529

Te Raki stage 1 report, especially for Te Raki claimants who appear in this inquiry (Wai 2358, #3.2.99, pp 12-14).

12. It also follows, in Ms Mason's submission, that "the major difference/inconsistency in the Principles as espoused previously, and the Non-Cession Conclusions" lies in the definition of the kawanatanga ceded to the Crown in article 1. Previous definitions of the Treaty principles had relied on the "assumption" that the Crown had been given authority to govern all parts and peoples of New Zealand; an assumption which, counsel argued, is no longer sustainable in the light of the Te Raki stage 1 findings. As a result, the principles as currently interpreted "overstate the authority" conferred on the Crown by article 1 of the Treaty (Wai 2358, #3.2.99, pp 8-10).
13. In Ms Mason's submission, it is not the Tribunal's role in this inquiry to determine whether the Crown has sovereignty under "the general laws of New Zealand". The Tribunal's role is to determine the principles of the Treaty, and whether those principles have been breached (Wai 2358, #3.2.99, p 11). Further, counsel submitted that the "previous" Treaty principles must be revised to "say that the sovereignty that the Crown currently exercises is in breach of te Tiriti/the Treaty, and is held and exercised partially on behalf of Māori, by the Crown, in trust, in a protectorate capacity, until such time as the Partnership arrangement envisaged under te Tiriti/the Treaty has been negotiated and given effect to" (Wai 3.2.99, p 12).
14. Counsel acknowledged, however, that there is a question as to whether the findings of the Te Raki stage 1 report apply to non-Te Raki claimants. On behalf of the chairs of the Mataatua DMC, the Takitimu DMC, the Tamaki ki Te Tonga DMC, and other clients, Ms Mason conceded that the assurances given to groups as part of "oral agreements" at Treaty-signings outside of Te Raki would need to be the subject of "further submissions and/or evidence" (Wai 2358, #3.2.99, p 21). Nonetheless, in Ms Mason's submission, the Māori text (Te Tiriti) was signed by all except 39 signatories, and the circumstances of hapū and iwi outside Te Raki were broadly the same, and so the Te Raki stage 1 findings should "prevail as the standard and definitive interpretation of te Tiriti" for everyone (Wai 2358, #3.2.99, pp 17-22).
15. In addition, Ms Mason submitted that recent Tribunal reports which have declined to apply the Te Raki findings (specifically the *Report on the Trans-Pacific Partnership Agreement* and *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates*) were "incorrect" (Wai 2358, #3.2.99, pp 14-16). In her submission, all Tribunal panels must grapple with the "Non-Cession Conclusions". It is "ultra vires the TOW Act", a breach of natural justice, and a "fettering of the Tribunal's discretion", to say that Te Raki claimants cannot rely on the findings of the stage 1 report or must wait for a stage 2 report that is "likely to occur years from now" (Wai 2358, #3.2.99, p 15).
16. Fundamentally, counsel's submission is that all Tribunal panels must carry out the statutory duty under the Treaty of Waitangi Act to apply Treaty principles which flow from the meaning and effect of the Treaty, and that the authoritative definition of the Treaty's meaning and effect is to be found in the Te Raki stage 1 report (Wai 2358, #3.2.99, pp 14-24). For Te Raki claimants, counsel argued that the stage 1 report's findings clearly apply to them for the purposes of other Tribunal inquiries. Further, in Ms Mason's submission, the Tribunal must consciously choose whether to apply the Te Raki findings to non-Te Raki claimants, or to rely on the "orthodox meaning" of the Treaty as the "default one applying to non-Te Raki Māori" (Wai 2358, #3.2.99, p 22).

The New Zealand Māori Council

17. Richard Fowler QC and Matthew Smith, counsel for the New Zealand Māori Council and the Wai 2358 claimants, submitted that the claimants "support the parties to stage 2 of this inquiry having the choice, if they wish, to advance legal arguments in their closing submissions on the consequences (if any) of the Paparahi o Te Raki Stage 1 report for the

principles of the Treaty and their interpretation, in advance of the Te Raki Stage 2 Tribunal completing its inquiry and report” (Wai 2358, #3.2.100, p 1).

18. Counsel cautioned, however, against stage 2 of the present inquiry “becoming a vehicle for parties to generally address and resolve the issue of whether Māori ceded sovereignty to the Crown after 1840”. Counsel submitted that the upcoming Kaupapa Inquiry for constitutional matters would be a more appropriate vehicle for such an inquiry, which needs to be much broader than the focus of the present inquiry on freshwater and geothermal resources. Further, such an inquiry would need to have additional parties and be subject to a less urgent timetable (Wai 2358, #3.2.100, pp 1-2).
19. In the Wai 2358 claimants’ view, the issue of whether Māori ceded sovereignty after 1840 is more “theoretical than practical” in the specific context of the freshwater issues in this inquiry, and the “real issue is how to restore mana in the context of the Treaty” (Wai 2358, #3.2.100, p 2).

Mark McGhie

20. On behalf of Whanganui groups – Ngāti Ruakopiri and Waimarino non-sellers (Wai 1072 and Wai 1738) – Mr McGhie submitted that the Tribunal should “consider the consequences (if any) of the Te Raki Stage 1 report for the principles of the Treaty”. In making this submission, Mr McGhie relied on the findings of the Whanganui Land Tribunal³ that Whanganui Māori did not sign the Treaty with an understanding of its terms or the Crown’s intentions. In addition, Mr McGhie suggested that the Water inquiry should be distinguished from the contemporary Trans-Pacific Partnership inquiry and the Reoffending Rates inquiry, because rangatiratanga over waterways would have been a “major consideration” for rangatira signing the Treaty in 1840 (Wai 2358, #3.2.103).

Tu Pono Legal Limited

21. Jason Pou and Maureen Malcolm filed submissions on behalf of:
 - a) Professor Patu Hohepa and Rudy Taylor for whānau and hapū of Hokianga (Wai 549 and Wai 1526);
 - b) Te Hapai Ashby and Gail Rika for Ngā Uri o Mangakahia (Wai 1467); and
 - c) Te Ariki Morehu for Ngāti Makino (Wai 2358, #3.2.102).
22. Counsel submitted that not all claimants in the Te Raki inquiry support the generic submissions filed by Ms Mason in that inquiry (filed in this inquiry as Wai 2358, #3.3.27(b)). Nonetheless, counsel agreed that “any development of Treaty principle and consideration of its practical application as it might relate to the ownership, exploitation, and/or use of water and/or geothermal resources, must necessarily emerge from an understanding of what was actually being agreed to when Te Tiriti was ratified”. Otherwise, there is a risk that the principles will be disconnected from the “document that they are being developed to observe”. In Mr Pou’s and Ms Malcolm’s submission, the Te Raki stage 1 report “probably provides the soundest practical point for a determination of how the principles of good faith and active protection of the exercise of tino rangatiratanga should be developed and applied practically within the determination of potential frameworks for the ownership and management of resources to ensure that Te Tiriti is observed and honoured”. But, in counsels’ submission, this matter is best left to detailed closing submissions, for which adequate time should be provided (Wai 2358, #3.2.102, pp 1-2).

Annette Sykes & Co

³ Waitangi Tribunal, *He Whiritauonoka: The Whanganui Land Report* (Wellington: Legislation Direct, 2015)

23. Annette Sykes and Jordan Bartlett made submissions on behalf of:

- a) Arapeta Hamilton for the descendants of Pōmare II, Ngāti Manu, Te Uri Karaka, Te Uri o Raewera, and Ngāpuhi ki Taumarere (Wai 354);
- b) Peter Steedman, Herbert Steedman, and Jordan Winiata-Haines for the descendants of Winiata Te Whaaro and hapū of Ngāti Paki (Wai 662);
- c) Muiora Barry and June McTanish on behalf of the descendants of the original owners of Part Kaingapipi No 9 (Wai 691); and
- d) a claim by Atiria Rora Ormsby Takiari and others on behalf of the hapū at Mokau ki Runga (Wai 788) (Wai 2358, #3.2.107).

24. Ms Sykes and Mr Bartlett submitted that the Tribunal has always interpreted the Treaty as the “particular circumstances of any case require”. They noted that the Tribunal’s reports in the Motunui, Kaituna River, and Manukau Harbour inquiries “stressed the autonomous authority embodied in rangatiratanga and said explicitly that the functions of kāwanatanga conferred by Te Tiriti were limited and less than a cession of sovereignty” (Wai 2358, #.2.107, p 5). Counsel compared these findings to those of the Orakei Tribunal, which reported after the *Lands* case. Later Tribunal reports referred explicitly to a cession of sovereignty. In counsels’ submission, it is open to each Tribunal panel to make findings on the submissions and evidence before it.

25. In particular, counsel submitted:

Our answer to the question posited then is that notwithstanding that Wai 1040 has yet to determine what may be appropriate findings with respect to the constitutional relationships between Māori and Pākehā cemented by the Treaty of Waitangi as the jurisprudence illustrates, each Tribunal is competent to make its own findings as it sees fit on questions of sovereignty and constitutional relationships that were developed by Te Tiriti o Waitangi.

The question then arises is there sufficient evidence before this Tribunal to enable the development of new principles to be argued for and then findings determined at that point. The interested parties whom we represent have certainly made it clear in their evidence that they did not cede sovereignty to the Crown nor agree for the subsumation of tikanga Māori and Māori law to that of the common law or that espoused solely by Parliament without reference to Māori, specifically without their full free and informed consent (Wai 2358, #3.2.107, p 6).

26. In Ms Sykes’ and Mr Bartlett’s submission, therefore, this Tribunal “must turn its mind to what these [Treaty] Principles should be, having regard to the circumstances of the case as it presents itself”. Further, in counsels’ submission, the jurisprudence as to Treaty principles has varied quite significantly in past reports because the Treaty has been applied to the different circumstances in various inquiries, so it would be too early at this stage for counsel to suggest what the approach should be in the Water case. In their view, the matter should be dealt with in closing submissions (Wai 2358, #3.2.107, p 7).

Bennion Law

27. Tom Bennion and Lisa Black made submissions on behalf of two Muaūpoko claims (Wai 52 and Wai 2139). In their submission, the Te Raki stage 1 report was “by and large a stand-alone report on the ‘meaning and effect of the Treaty in February 1840’ (page vii) and therefore its relevance to this inquiry should be able to be considered in the ordinary manner, without awaiting a report on Te Raki Stage 2” (Wai 2358, #3.2.111, para 4). Counsel noted that the Te Raki stage 1 report has already been quoted by another Tribunal (the Porirua ki Manawatū Tribunal). Further, the stage 1 report’s letter of transmittal states that the report “represents continuity and not change in that it reaches conclusions which

leading scholars – both Māori and Pākehā – have been expressing ‘for a generation or more’ (Wai 2358, #3.2.111, paras 5-6). Counsel concluded that the parties should be able to make submissions about the Te Raki stage 1 report “in the ordinary way” during the course of this inquiry (Wai 2358, #3.2.111, para 7).

Submissions in opposition

Lyall and Thornton

28. Linda Thornton and Bruce Lyall made submissions on behalf of:

- a) Rapata Kaa (Wai 1272);
- b) Vivienne Taueki (Wai 1629);
- c) Charles Rudd (Wai 1631);
- d) Ani Taniwha (Wai 1666);
- e) Justyne Te Tana (Wai 2010);
- f) Julie Taniwha (Wai 2149); and
- g) Te Rarua (Kui) McClutchie-Morrell (Wai 2340).

29. Counsel opposed dealing with the implications of the Te Raki Stage 1 report for the Treaty principles, which might “supplant the important work of the Northland Tribunal, and may invoke speculation as to the findings that Tribunal may make” (Wai 2358, #3.2.101, p 1). In counsels’ submission, this Tribunal “lacks the evidence and process that consist of the Northland Stage 2 inquiry and have no basis to make a conclusion in advance of that to be made by the Northland Tribunal”. It would be an “unnecessary and unwarranted digression from the important work of this Tribunal in the Wai 2358 Inquiry” (Wai 2358, #3.2.101, p 2).

The Crown

30. Counsel for the Crown, Jason Gough and Dr Damen Ward, submitted that this Tribunal should not consider the implications (if any) of the Te Raki Stage 1 report for the Treaty principles, for the following three reasons.

31. First, the Crown submitted that issues about the cession of sovereignty (and its constitutional implications) are “outside the scope of this inquiry and could not be heard on the current timetable”. In the Crown’s view, such a significant constitutional issue is not relevant to “the Treaty-consistency of the current law in respect of fresh water or the Crown’s freshwater management reforms” (Wai 2358, #3.2.122, p 1). Crown counsel supported the submissions of the New Zealand Māori Council (summarised above), and argued that the future Kaupapa Inquiry on constitutional matters would be the more appropriate forum:

Virtually all of the evidence on the cession of sovereignty comes from Northland claimants, with limited evidence on the history of Crown-Māori relations in other areas. Even with respect to those Northland claimants, there is little to no evidence on the issue of sovereignty after the signing in 1840, nor is there evidence on the wider context of Crown-Māori relations in the North since that time. For this Tribunal to address these issues, and to make the types of findings of a national and constitutional character that the second claimants seek, it would need more evidence relating to Māori throughout New Zealand, and addressing the whole historical context of Crown-Māori relations (Wai 2358, #3.2.122, p 2).

32. Secondly, the Crown submitted that “issues about the consequences of the Te Raki Stage 1 Report for claimants participating in the Te Raki inquiry should be addressed by the Te Raki Stage 2 Tribunal” (Wai 2358, #3.2.122, p 1). The Crown noted that evidence filed in the Water inquiry about various waterways has been heard in Te Raki stage 2 (including, for example, technical evidence about Poroti Springs). The Crown also noted that “submissions have been made in that inquiry about how its Stage 1 findings may affect the principles of the Treaty”. In the Crown’s view, it would not be “appropriate for this Tribunal to intervene in consideration of these matters” (Wai 2358, #3.1.122).
33. Thirdly, the Crown argued that the findings of the Te Raki stage 1 report “do not apply to parties who are not claimants in the Te Raki inquiry” (Wai 2358, #3.2.122, p 1). In the Crown’s submission, the stage 1 findings were made “in the specific factual context of that inquiry and are not of general application to Māori across the country”. Crown counsel noted Ms Mason’s acceptance (see paragraph 14 above) that “further evidence would be required to establish the nature of any oral agreements made between non-Te Raki Māori and the Crown around the signing of the Treaty, a circumstance that was relied upon by the Tribunal in making its Stage 1 findings”. In the Crown’s submission, the particular circumstances which existed in Te Raki in 1840 cannot be “assumed” to have existed elsewhere in New Zealand. The Crown concluded: “Because the Te Raki Stage 1 findings cannot apply generally, it follows that the consequences of those findings also cannot apply generally” (Wai 2358, #3.2.122, p 3).

Mr Darrell Naden’s requests for an extension

34. On 18 July 2017, Mr Naden and Ms Stephanie Roughton, counsel for interested parties, sought an extension to file submissions by 21 July 2017 (Wai 2358, #3.2.104). This request was granted by email notification on 19 July 2017. Then, on 21 July 2017, counsel sought a further extension to 28 July 2017 (Wai 2358, #3.2.108). Leave was granted for this extension on 25 July, and counsel were instructed to file their submissions no later than midday on 28 July (Wai 2358, #2.6.23). Counsel did not file submissions on 28 July 2017. Rather, the Tribunal has received a memorandum dated 8 September 2017, requesting an extension to file submissions one month after the Crown has filed its closing submissions on constitutional matters in Te Raki stage 2, or after the completion of hearing week 3 of this inquiry. This would mean that the submissions would not be received until late September at the earliest, and possibly not until November 2017.
35. This third extension request has come well after the date on which submissions were to have been filed, and after the filing of submissions by all other parties, including the Crown. The request for an extension is denied.

Discussion

This Tribunal’s duty to consider the “meaning and effect” of the Treaty in respect of claims about freshwater and geothermal resources

36. As noted by counsel in a number of submissions, the Waitangi Tribunal has the ‘exclusive authority to determine the “meaning and effect” of the Treaty’ in respect of the claims before it. This authority arises from section 5(2) of the Treaty of Waitangi Act 1975, which states:

In exercising any of its functions under this section the Tribunal shall have regard to the 2 texts of the Treaty set out in Schedule 1 and, for the purposes of this Act, shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues in respect of them.

37. For Te Raki stage 1, the purpose of the inquiry was to determine the “meaning and effect of the Treaty as embodied in the 2 texts”, and to do so in light of the meaning and effect of He Whakaputanga (the 1835 Declaration of Independence). As explained in the letter of transmittal:

The Te Papanahi o Te Raki stage 1 inquiry panel is the first Tribunal panel to have heard comprehensive historical claims from the descendants of the rangatira who signed te Tiriti in February 1840 at Waitangi, Waimate, and Mangungu. We are therefore the first to have had the opportunity to hear and test the full range of evidence about the treaty’s meaning and effect in February 1840.⁴

38. For freshwater and geothermal resources, this Tribunal has considered the meaning and effect of the Treaty in our 2012 stage 1 report. In chapter 2 of our report, we addressed the fundamental question: “what rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi?” In answering this question, we considered previous Tribunal reports (including the *Kaituna River Report* of 1984), oral evidence from tribal leaders and representatives at our hearings, “written case example evidence compiled by a mix of tribal authorities and professional witnesses”, and a number of technical reports.⁵ We considered evidence about the “indicia of ownership” put forward by the claimants, including evidence about the exercise of tino rangatiratanga over territories and waters. Such evidence included material about the exercise of “full authority and control” over water bodies at the time the Treaty was signed in 1840.⁶ We made our findings about the meaning and effect of the Treaty in respect of freshwater and geothermal resources in section 2.8.3 of our stage 1 report.⁷

39. We elaborated upon those findings and made further findings about the nature of Māori rights in water, as guaranteed and protected by the Treaty, in chapter 3 of our stage 1 report. This included some definition and application of the Treaty principles which we considered appropriate to the stage 1 claims in relation to partial privatisation of power companies.⁸

40. No doubt there will need to be further application of the Treaty and its principles to the issue questions posed in stage 2 of this inquiry. As counsel for the Wai 2601 claimants put it, the Tribunal will need to “turn its mind” to that matter (Wai 2358, #3.2.99, p 22). Any such application of Treaty principles will need to be based on the evidence and submissions received from the parties in our inquiry, and take into account the relevant findings of other Tribunal reports (as was the case with our stage 1 findings). The question here is whether, in doing so, this Tribunal should determine what consequences (if any) arise for the Treaty principles as a result of the Te Raki Stage 1 report, in advance of any findings from the Te Raki Stage 2 Tribunal.

The intention of the Te Raki Tribunal to make further findings

41. In its stage 1 report, the Te Raki Tribunal stated that its findings were *contextual* for the further investigation of whether the Crown has breached Treaty principles in the Te Raki inquiry district. Mr Bennion submitted that the stage 1 report is “by and large a stand-alone report ... and should be able to be considered in the ordinary manner, without awaiting a report on Te Raki Stage 2” (Wai 2358, #3.2.111), but the Te Raki Tribunal noted:

⁴ Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp xxi-xxii

⁵ Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), p 51

⁶ Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, p 60

⁷ Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, pp 75-81

⁸ Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, pp 136-144

The status of this report needs to be understood. In spite of the importance of its subject matter, it does not stand alone. Rather, it is a contextual report, prepared as a preliminary step towards the completion of our inquiry into Te Paparahi o Te Raki treaty claims.⁹

42. Also, the letter of transmittal explained that the Te Raki stage 1 report “makes no conclusions about the sovereignty the Crown exercises today. Nor does it say anything about how the treaty relationship should operate in a modern context”.¹⁰
43. Towards the end of the report, the Tribunal specifically noted its intention to address any implications for the Treaty principles after receipt of further submissions from the parties to its inquiry:

In this inquiry, we have been able to give thorough consideration to all the perspectives presented to us. We have reached the conclusion that Bay of Islands and Hokianga Māori did not cede sovereignty in February 1840. In drawing this conclusion, we say nothing about how and when the Crown acquired the sovereignty that it exercises today. Our point is simply that the Crown did not acquire that sovereignty through an informed cession by the rangatira who signed te Tiriti at Waitangi, Waimate, and Mangungu.

What does this mean for treaty principles? Given we conclude that Māori did not cede their sovereignty through te Tiriti, what implications arise for the principles of the treaty identified over the years by both this Tribunal and the courts? That is a matter on which counsel will no doubt make submissions in stage 2 of our inquiry, where we will make findings and, if appropriate, recommendations about claims concerning alleged breaches of the treaty’s principles. It suffices to reiterate here that, in February 1840, an agreement was made between Māori and the Crown, and we have set out its meaning and effect. It is from that agreement that the treaty principles must inevitably flow.¹¹

44. It is not unreasonable to assume from that final comment quoted above that the Te Raki Tribunal anticipated some reconsideration of Treaty principles in its stage 2 report, for the purposes of its inquiry into Te Raki Treaty claims. Ms Mason submitted on behalf of the District Māori Councils that the content, meaning, and extent of the kāwanatanga conferred by article 1 must be re-evaluated (Wai 2358, #3.2.99; 3.3.27(b)).
45. In addition, it is not unreasonable to assume from the above passage that the Te Raki Tribunal intended to address the question of “how and when the Crown acquired the sovereignty it exercises today”. This is a matter which Ms Mason submits must be addressed in our inquiry, arguing that the Crown’s acquisition of sovereignty is a breach of the Treaty (Wai 2358, #3.2.99, p 12). She has put to this Tribunal:

The Claimants submit therefore, that the previous Principles which relied upon the assumption that the Crown has Kāwanatanga over all of Aotearoa New Zealand and all of its inhabitants, ought to be revised to say that the sovereignty that the Crown currently exercises is in breach of te Tiriti/the Treaty, and is held and exercised partially on behalf of Māori, by the Crown, in trust, in a protectorate capacity, until such time as the Partnership arrangement envisaged under te Tiriti/the Treaty has been negotiated and given effect to (Wai 3.2.99, p 12).

46. Both the Crown and the New Zealand Māori Council, however, have submitted that this Tribunal should not engage in a broad inquiry into when and how the Crown acquired sovereignty (and whether it was by cession), and that we *do not need to do so* in order to determine claims about freshwater resources.
47. The question that arises here would be: do the consequences of the Te Raki stage 1 report for the Treaty principles *depend on* an inquiry into when and how the Crown acquired the sovereignty it exercises today, and whether that was by cession?

⁹ Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 3

¹⁰ Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp xxii-xxiii

¹¹ Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 527

48. Before addressing this question, it would be helpful to consider the approach taken by other Tribunal panels which have issued reports since the release of the Te Raki stage 1 report.

The approach of other Tribunal panels hearing contemporary claims

49. Since the Te Raki stage 1 report was released in 2014, the implications of its findings have been considered by a number of Tribunal panels. Because the present inquiry is a contemporary one, we have focused on four recent reports on contemporary claims.

Whaia Te Mana Motuhake (2015)

50. In 2015, the Tribunal published its report on the New Zealand Māori Council and Māori Wardens claim: *Whaia Te Mana Motuhake / In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim*. In that report, the Tribunal stated:

In establishing the principles that apply in our inquiry we are charged with reconciling the differences between the English and Māori texts of the Treaty. ... The Waitangi Tribunal has recently issued its report on stage 1 of the Te Paparahi o Te Raki (Northland) inquiry, *He Whakaputanga me Te Tiriti / The Declaration and the Treaty*. In it, the Tribunal records that British explanations at Waitangi of the Treaty's purpose focused on asserting Government control over settlers and protecting Māori authority over their own affairs. That Tribunal concluded from the historical evidence that the rangatira did not cede their sovereignty on 6 February 1840, but it (the Tribunal) noted that it "say[s] nothing about how and when the Crown acquired the sovereignty that it exercises today".

For our purposes, our urgent Māori Community Development Act inquiry deals with Crown actions or omissions that have occurred since 1992. In common with previous Tribunals which have considered contemporary claims, we interpret the Treaty as a living document applicable to present circumstances. We agree with the Motunui–Waitara Tribunal's view that the Treaty was "not intended to merely fossilise a status quo, but to provide a direction for future growth and development" and "is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles".¹²

51. Thus, the Tribunal found that, in the circumstances of the contemporary claim before it, the Treaty was to be interpreted as a living document capable of a measure of adaptation to those circumstances.¹³

The Final Report on the MV Rena and Motiti Island claims (2015)

52. In 2015, the Tribunal published *The Final Report on the MV Rena and Motiti Island Claims*. In this report, the Tribunal commented:

We have one final development to address before we move on to make our findings. As we were finalising the text of our report in November 2014, the Tribunal released *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*. In that report, the Tribunal found that the rangatira who signed the Treaty of Waitangi in February 1840 did not cede sovereignty to the British Crown. We note, however, that the Tribunal also made "no conclusions about the sovereignty the Crown exercises today", and that the claims before us are contemporary claims, meaning that they are concerned with Crown acts or omissions that have occurred since 21 September 1992.¹⁴

¹² Waitangi Tribunal, *Whaia Te Mana Motuhake / In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wellington: Legislation Direct, 2015), pp 21, 24

¹³ Waitangi Tribunal, *Whaia Te Mana Motuhake*, p 24

¹⁴ Waitangi Tribunal, *Final Report on the MV Rena and Motiti Island Claims* (Wellington: Legislation Direct, 2015), p

53. In this report, therefore, as in *Whaia Te Mana Motuhake*, the Tribunal considered that the lack of any “conclusions about the sovereignty the Crown exercises today” limited the relevance of the Te Raki stage 1 findings for contemporary claims.

The report on the Trans-Pacific Partnership Agreement (TPPA)(2016)

54. In 2016, the Tribunal delivered a pre-publication version of the *Report on the Trans-Pacific Partnership Agreement*. In this report, the Tribunal considered the relevance of the Te Raki Stage 1 findings in more detail. The issue of those findings was put to the TPPA Tribunal by claimants from the Te Raki district, and also by Ms Mason as counsel for Ngā Kaiāwhina a Wai 262 and the Mataatua DMC. In response, the TPPA Tribunal noted that the Te Raki Tribunal’s inquiry was incomplete, and that its letter of transmittal had made “caveats” about the Crown’s exercise of sovereignty today and about the modern Treaty relationship.¹⁵ In particular, the TPPA Tribunal decided:

It is not our role to consider the consequences of the Te Raki Tribunal’s conclusions in the stage 1 report for Treaty principles – that is a matter for that Tribunal in stage 2. Nothing we say in this inquiry is intended to intrude into, or influence, the ongoing Te Raki inquiry. We also consider that an urgent inquiry is not the appropriate forum to address broad constitutional questions, particularly those concerning the Crown–Māori relationship in respect of international instruments. We do not have the time, evidence, or range of interested parties to properly conduct such an inquiry.¹⁶

Tū Mai te Rangī! (2017)

55. In April 2017, the Tribunal released its pre-publication version of *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates*. The Tribunal’s report summarised submissions from interested parties in that inquiry, to the effect that:

“the understanding upon which past Treaty/Tiriti principles were based, that is, Māori ceded sovereignty to the Crown, was wrong”. According to the interested parties, this finding means “the Crown cannot claim a legitimate kawanatanga right to represent Māori on matters of incarceration on the back of a cession of sovereignty, given that it has now been found that a cession of sovereignty by Māori did not occur”.¹⁷

56. As with some earlier reports, the Tribunal found that the issue was outside the scope of a contemporary inquiry, and that it was currently being heard in the Te Raki stage 2 inquiry. In its “general conclusions” section, the Tribunal stated:

This issue is outside the scope of our inquiry. We note for clarity, however, that the Te Raki report concluded that the Bay of Islands and Hokianga rangatira who signed te Tiriti in February 1840 did not through that act cede their sovereignty. That Tribunal said that by agreeing “to share power and authority with the Governor”, those rangatira agreed to a relationship in which they and the Governor were to be “equal while having different roles and different spheres of influence”. That report said nothing about what that agreement means in contemporary circumstances, an issue currently before that Tribunal in stage 2 of the Te Raki inquiry.¹⁸

¹⁵ Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement (pre-publication version)* (Wellington: Waitangi Tribunal, 2016), pp 6-7

¹⁶ Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, pp 7-8

¹⁷ Waitangi Tribunal, *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates (pre-publication version)* (Wellington: Waitangi Tribunal, 2017), p 79

¹⁸ Waitangi Tribunal, *Tū Mai Te Rangī!*, p 80

Decision

57. The previous discussion has raised four crucial points:

- a) that the present Tribunal has considered the meaning and effect of the Treaty as at 1840 in respect of freshwater and geothermal resources in its stage 1 report, and will need to consider the Treaty and its principles further in the context of the present law and proposed water reforms in its stage 2 report;
- b) that the implications of the Te Raki stage 1 findings (if any) for the Treaty principles may depend on an inquiry into when and how the Crown acquired the sovereignty it exercises today, and whether it did so by cession after 6 February 1840;
- c) that the issues of (i) when and how the Crown acquired its sovereignty, and (ii) the implications of the stage 1 findings for Treaty principles, are currently the subject of evidence and submissions in the Te Raki stage 2 inquiry, and will be reported on by that Tribunal in due course; and
- d) that Tribunal panels holding inquiries into contemporary claims have specifically declined to deal with such matters in advance of the Te Raki stage 2 report, noting in one instance the stage 1 report's "caveat" that it says nothing about "how the treaty relationship should operate in a modern context".¹⁹

58. The summary of submissions shows that the claimants and almost all of the interested parties agree on one point: that any parties should be able to make closing submissions if they wish on the consequences of the Te Raki stage 1 report for the Treaty principles. The only exception in that regard is the submission of Linda Thornton and Bruce Lyall. They submitted on behalf of interested parties that this Tribunal "lacks the evidence and process that consist of the Northland Stage 2 inquiry and have no basis to make a conclusion in advance of that to be made by the Northland Tribunal" (Wai 2358, #3.2.101, p 2). The New Zealand Māori Council supported the proposition in our issue question, but made an additional submission that it is not possible within the parameters of the present inquiry to investigate whether the Crown acquired sovereignty by cession after 6 February 1840. The Crown supported the New Zealand Māori Council's submission on that point. The Crown also opposed any consideration in this inquiry of the consequences of the Te Raki stage 1 report for the Treaty principles.

59. Having weighed these submissions and the various factors raised in points (a) to (d) above, our decision is that the findings of the Te Raki stage 1 report may be relevant to contemporary inquiries. For the water inquiry, however, we do not have the evidence and submissions necessary to consider the question of how and when the Crown obtained the sovereignty it exercises today, a matter which is currently before the Te Raki Tribunal in its stage 2 inquiry. Further, this Tribunal should not pre-empt the Te Raki Tribunal's stage 2 report by making findings on matters more particularly before the Te Raki Tribunal, including the consequences (if any) of its stage 1 report for the principles of the Treaty.


60. In coming to these conclusions, it was not necessary for us to consider the parties' submissions on whether the findings of the Te Raki stage 1 report apply to Māori in other districts.

61. In respect of the closing submissions for this inquiry, parties may make use of any Tribunal report they wish, but counsel should be aware of and guided by the conclusions reached in this decision.

¹⁹ Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 7; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp xxii-xxiii

The Registrar is directed to send a copy of this direction to counsel for the claimants, Crown Counsel, and all those on the distribution list for Wai 2358, the National Fresh Water and Geothermal Resources Inquiry.

DATED this 19th day of September 2017



Chief Judge W W Isaac
Presiding Officer
WAITANGI TRIBUNAL



Professor Pou Temara
Member
WAITANGI TRIBUNAL



Mr Ronald Crosby
Member
WAITANGI TRIBUNAL



Dr Grant Phillipson
Member
WAITANGI TRIBUNAL



Dr Robyn Anderson
Member
WAITANGI TRIBUNAL