

**IN THE WAITANGI TRIBUNAL  
KEI MUA I TE TARAIPUUNARA**

**WAI 3300**

**WAI 421**

**WAI 593**

**WAI 869**

**WAI 1383**

**WAI 1890**

**UNDER**

**The Treaty of Waitangi Act  
1975**

**CONCERNING**

**Te Pakirehua o te Tomokia  
Ngā Tatau o Matangireia –  
the Constitutional Kaupapa  
Inquiry**

**AND**

**Claims brought by Te  
Waimate Taiamai ki  
Kaikohe Claims Alliance**

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**MEMORANDUM OF COUNSEL FOR TE WAIMATE TAIAMAI KI KAIKOHE  
CLAIMS ALLIANCE**

Dated: 20 February 2026

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CHAMBERS**

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Waitangi Tribunal

**20 Feb 26**

Ministry of Justice  
WELLINGTON

## KIA WHAKAAE MAI TE TARAIPUNARA

1. This memorandum is filed for Wai 421, 593, 869, 1383 and 1890: the combined claims of Te Waimate Taiamai ki Kaikohe Alliance.
2. By email dated 13 February 2026, the Waitangi Tribunal directed parties to file a response to the Crown statement of position, presented on 13 February 2026, by 20 February 2026.
3. In the time available, the Alliance has been unable to hui to discuss a detailed response to the Crown statement of position.
4. Many of these issues were addressed in the Waitangi Tribunal's Wai 1040 Te Paparahi o Te Raki (Northland) Inquiry. Rather than provide an explicit response, the Alliance has instructed that the section of closing submissions filed for that inquiry which relates to the themes addressed in the Crown's statement.<sup>1</sup>
5. The Alliance also respectfully invites the Tribunal to the evidence of the late Bishop Waiohau Ben Te Haara which, although provided in support of the Alliance's claims in 2013, remains relevant to the kaupapa that confronts the panel today:<sup>2</sup>

In the aftermath of such a history we witness the resurgence of Maoritanga in its many varied and rich forms including its colonised form and we challenge the 'one people' approach, which is a mild version of ethnic cleansing.

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<sup>1</sup> Wai 1040 #3.3.329(a).

<sup>2</sup> Bishop Waiohau Ben Te Haara Wai 1040 #H18(a) at [28]–[29].

I wish to refer the Tribunal and the Crown to a paper written by John Bluck as part of the Theological Education by Extension, which highlights some of the fundamental obstacles in our way. Obstacles that when identified and acknowledged are easier to overcome:

“For those who have grown up in a monoculture mode, Pakehatanga might involve facing up to the fact that we have lost the right we have long claimed and exercised to decide what is culturally normal, natural and orthodox. That means giving up and letting go any suggestion that we have a central and defining role shaping New Zealand's future. Bicultural development, based on the Treaty of Waitangi, sees one nation shared by two peoples of equal dignity, two cultures of equal value. So the centre of such a society must always be shared. The nation vision is bi-focal. Such a division has got little to do with numerical size, quantity of resources, or even historical vintage. The issue at stake is to do with a covenant of mutual respect between two cultures that give each other the right and the space to be different. Without that, the two cultures cant work together on any long term basis. Only a covenant of equal dignity can remove the fear of the stronger assimilating the weaker.

The Treaty of Waitangi for all its historical ambiguities, is such a covenant. To avoid facing up to Pakehatanga in this way, an impressive selection of avoidance tactics has developed”.

6. Beyond this, counsel are instructed to record that the Alliance disputes the Crown’s position, and that this will be addressed through evidence and submissions as the inquiry progresses.

Dated: 20 February 2026



Bryce Lyall  
Counsel



Hannah Swedlund

**IN THE WAITANGI TRIBUNAL  
OF NEW ZEALAND**

**WAI 1040**  
Wai 421  
Wai 1890  
Wai 1383  
Wai 1247  
Wai 466  
Wai 869  
Wai 593

**IN THE MATTER OF**

the Treaty of Waitangi Act 1975

**AND**

**IN THE MATTER OF**

Te Paparahi o Te Raki District  
Inquiry

**AND**

**IN THE MATTER OF**

A combined claim for and on behalf of  
the hapu of Te Waimate Taiamai

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**AMENDED BRIEF OF EVIDENCE OF WAIOHAU BEN TE HAARA**

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**RECEIVED**

Waitangi Tribunal

**4 Sep 2013**

Ministry of Justice  
WELLINGTON

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## Brief of Evidence of Ben Te Waiohau Te Haara

1. From the preface to the English Church of New Zealand by HT Purchas, I quote:

*"If asked why I took in hand a task of such difficulty and delicacy as that of writing a history of the church of our dominion I can really find no more truthful answer than that of a school boy, "Please, sir, I couldn't help it". From boyhood days in the old country, when a copy of the Life of Marsden fell into my hands, I felt drawn to the subject; the reading of Selwyns biography strengthened the attraction; the urging of friends in later years combined with my own inclinations; and thus the work was well on its way when the General Synod of 1913 committed it to my hands as a definite duty. HT Purchas writes in his history: For the seed plot of Christianity and civilization in New Zealand we must look away from the present centres of population to the beautiful harbor which cluster around the extreme north of this country. Chief among these stand, the Bay of Islands.*

*This noble sheet of water, with its hundred islands, its far-reaching inlets, its wooded coves and sheltered beaches, was for more than a quarter of a century, the focus of whatever intellectual or spiritual light New Zealand enjoyed.*

*Here, the gospel of Christ was first proclaimed, and the first missionary stations were established. Here, were founded the first schools, the first printing press, the first theological college, the first library. Here, the first bishop fixed his headquarters, and here, he convened the first synod. Here, was signed the Treaty of Waitangi by which the islands passed under British rule and here, was the temporary capital of the first governor. Here, too was the first theatre of the first war between Maori and Pakeha, here, stood the flagstaff which Heke cut down, from these hills on the west the missionaries beheld the burning of Kororareka whose smoke rose up "like the smoke of a furnace."*

2. You may well ask, why I am here, nearly 200 years later, the first Maori Bishop elected to the Tai Tokerau and now retired. As a schoolboy of the past, my ancestors have allowed me to touch the hem of their garments. No different from the boyhood of Purchas.
3. I was born on a battlefield known as Ohaeawai. The specific land blocks are Puketapu 1A – the battlefield, Marunui Cemetery, and St Michael's Church. Puketapu 2A, the marae, homestead and my birthplace. Puketapu 3, the school and Puketapu 4, the Post Office.

4. My name is Waiohau Rui Te Haara, grandson of Heta Te Haara, and my father Rui Goffe Te Haara, eldest son of Heta died when I was only 3 years old.

***E hara nga tai katoa  
Me nga Rangatiratanga  
He Rangatiratanga A-pori  
Ka Pa Ko Au  
Ko te titi ko te Aporei  
Ko Tama Purupuru Marire  
Ko Ngati Rangī  
Ko te Anga Anga titi iho I te Rangī***

***Boast not of the lordliness of other seas  
And of the fairness of these climes  
Described by unknown castaways of no particular country;  
Unlike myself, a fixture reflecting the beauty of a land  
Wherein my fathers from time immemorial  
Have played in childhood, as I myself have played,  
Who know not as I myself know,  
Not of any other sky,  
Save that now crowning my head.***

5. I am giving evidence on behalf of the hapu Ngati Rangī in respect of the Northern War and Rangatiratanga issue as it affected our hapu.
6. At the outset I wish to state that Te Hara who signed Te Tiriti did not do so believing he was giving up his authority. He is recorded by Colenso as saying:

*“What do you think I wont do what I like with my own”<sup>1</sup>*

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<sup>1</sup> See Phillipson, Wai 1040 #A1, page 303

## The Battle of Ohaeawai

7. On June 23<sup>rd</sup> 1845 Lt. Colonel Despard lead his troops to Ohaeawai, the following day they attacked the Pa. Despite Despard's troops using 'two 6 pounder field guns and two 12 pounder carronades or mortars' the attack failed to damage the Pa, the damage that was caused was repaired by the defenders at nighttime. Some of the mortar bombs failed to explode which the defenders used the gunpowder from. The lack of damage to the Pa from Depard's week long attack was due to its construction. Kawiti assisted by Ngati Hine and others extended the Southern end of the Pa site and reinforced the palisades on the North-East side to accommodate more fighting men.

*The main stockade, or "Kiritangata" consisted of heavy Puriri posts - some so heavy that it needed thirty men with ropes to raise them - set about six feet into the ground, and rising to a height of nearly twenty-four feet. Inside this stockade was a trench in which the defenders stood to fire their muskets and "tupara" through loopholes at ground level. Outside this main stockade, with a gap of only about four feet, was the "Pekerangi" - a further stockade of lighter timber. The "Pekerangi" was masked with a thick paddling of bundles of green flax, down to about a foot above the ground line, to deaden the force of cannon or musket balls, and to minimise flying splinters. The flax padding also hid the structural details of the Pa from the attacking forces, and the outer stockade itself, while of lighter construction than the main one, was sufficiently strong to delay a storming party, trying to pull it down, long enough for the defenders in the trench behind the main stockade to shoot them down.*

*Another feature of the defences was the provision of "koki", bastions or flanking angles, jutting out from the main lines of the stockade, to enable the defenders to bring enfilading fire to bear on an assault party. In several of these flanking angles the defenders also mounted ships' guns - two 9 pounders, one 4 pounder iron cannon, and a 2 pounder swivel gun.*

*Within the main stockade, and connected with the firing trench by tunnels, were deep dugouts roofed over with logs and with up to six feet of earth piled up on top of the logs. During bombardment the garrison was able to rest in the dugouts, safe from cannon balls or mortar bombs, and the firing trench needed to be manned only when the sentries reported troops advancing towards the pa.*

*Colonel Despard, of course, could not see what was behind the flax-padded 'Pekerangi' or outer stockade, so he had no idea of the great strength of the whole fortification, which, in his conceited ignorance, he looked upon as a mere barricade erected by natives, to be overcome with ease by British troops.*

*He would not heed the advice of his own officers, some of whom had a fair idea of the hidden strength of the defences, nor could his allies Waaka Nene and Te Taonui convince him that it would be suicide to storm the Pa unless a breach were first made, not only in the "Pekerangi", but in the main stockade behind it.<sup>2</sup>*

8. After not making any progress using light artillery Despard requested the loan of a 32-pounder naval gun from H.M.S Hazard. On the 30<sup>th</sup> of June Despard and his troops used this naval gun on the Pa, this attack also failed to damage the Pa. Despard decided to relocate the naval gun on to "Waaka's Hill".
9. Whilst this was happening one of our Rangatira Kou (also a signatory to Te Tiriti) went to the camp of Waka Nene and Aperahama Taonui which they had set up on Puketutu hill, and captured the flag they flew there, brought it back to our Pa and flew it upside down under Heke's flag. This is what incensed Despard and is probably the catalyst for him to plan a decisive and quick defeat.
10. Heke himself was in Tautoro getting treatment from a tohunga for a wound he suffered in a previous skirmish. We understand that what has been referred to by historians as 'Heke's flag' was really a cloak or kakahu. Regardless of what the flag was we understand that it was intended as a symbol for our enduring rangatiratanga. It was intended to send a message and it did. Obviously we understood that it would be considered an insult by Despard and his men.
11. We are also aware that Nene and Taonui had originally flown their own flag on the flagstaff they had erected on Puketutu for the purpose. Later it was taken down and replaced with the union jack. Quite likely if this hadn't happened, the flag capture would not have occurred.

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<sup>2</sup> Phillip Williams, The Ohaeawai Story

12. After this Despard ordered an attack on the Pa and unwittingly attacked the strongest and oldest part. The battle lasted eight minutes and British soldiers fell right and left and took far heavier losses than our side did. After the short bout of fighting our warriors, chanted a victory chant or ngeri which boasted and taunted the British further.

13. Belich refers to the Maori victory chant after the battle as being:

*Oh sons of warrior strength  
Behold the trophy n my hand  
Fruit of the battle strife  
The head of the greedy cormorant that haunts the ocean floor!*

*We shall fight, we shall fight!  
Ah! You did not remain  
In your home land in Europe  
[here] you lie overwhelmed  
by the swift driving wave of the battle*

14. Our people evacuated the Pa on the 10<sup>th</sup> of July. It has been recorded that the British on entering the empty Pa the next day, found about 6 months worth of food stores and possessions so they did not leave the pa because they were forced to. They left because they chose to.

15. Haratua Pa at Pakaraka was then attacked on the 16<sup>th</sup> of July by Despard. It was empty when the troops arrived. Again it was another Pa possessing a large supply of provisions and it was burnt to the ground.

#### **Burial of those Fallen in Battle**

16. Heta Te Haara who was only a young man at the time of the battle (late teens) would not allow Williams and the other missionaries to come and take the bodies for burial. They were allowed to remove the bodies two days later after discussions with Pene Tau and Haratua from Pakaraka where an agreement was reached.

17. It has been recorded that the Rangatira were trying to reach an agreement with the British for a month long term of peace in exchange for the dead troops, however we understand the British did not agree to this 'time out' and I have attached a different version of events which describes the discussions thus:

*Late in the afternoon, Colonel Despard asked Henry Williams to try to obtain permission from the defenders of the Pa to remove the dead and wounded lying close to the palisades, and he accordingly went forward carrying a white flag. He was not perturbed that he could be in danger if the white flag were not respected, for he was used to dangerous situations. He had joined the Navy as a lad of fourteen as a midshipman, and had fought against the Danish fleet at Copenhagen in 1807, and against the French in various theatres of war, and against the Americans off their Atlantic seaboard, until the peace following the battle of Waterloo.*

*But the defenders of the Pa were in no mood to parley, and ordered him to withdraw, in the failing light of that winter afternoon. So he reported his failure to Colonel Despard, and then helped the two army surgeons dressing the many wounded till 10 pm, when he and Rev Burrows rode back to Te Waimate.*

*Next morning, 2 July, Williams and Burrows left very early for the camp near Ohaeawai, and at the Colonel's request they both approached the Pa, carrying a white flag. Te Haara first came out of the Pa to say that the bodies could be removed only if the Colonel withdrew his whole force at once to Te Waimate, and from thence to the Bay. Nevertheless, some five other chiefs, (but not Pene Tauī or Kawiti) joined Te Haara, and a "korero" ensued with the two Pakehas, sitting on a log in 'no-man's-land', for about an hour and a half! They were allowed to inspect, but not touch, the bodies, among which they recognised those of Lieut. "Toby" Phillipotts of HMS "Hazard", son of the Bishop of Exeter, and of Captain Grant. And hanging from the palisades he had been trying to climb when shot at close range, was "Toby's" monocle!*

*As the 'korero' came to an end and the envoys were returning to report to the Colonel, Pene Tauī called out to them from inside the Pa, saying that under any circumstances – that is, whether the troops were withdrawn to the Bay or not – they would be allowed to remove the bodies the following day, early in the morning.*

*On Thursday, 3 July, Williams and Burrows were up before daylight, but Burrows felt too ill to venture on horseback, so Williams rode alone to Ohaeawai, where a white flag had been hoisted in the pa, and a messenger sent to say that the bodies might be removed. By the time Burrows arrived on the scene about midday, over thirty bodies had been*

*recovered and laid in one huge grave, over which Henry Williams then conducted the funeral service.*

18. The above extract is taken from a speech given by Henry Williams grandson, Phillip Williams in 1974 at the 150 year commemoration of the battle of Ohaeawai. His information was directly from Henry Williams' diary. As it was taken from a first hand account and fits with our understanding of what happened I believe this to be a reliable account.
19. There is also an official account of the battle from the New Zealand Army which hangs on the wall of St Michaels Church.
20. The bodies were buried not far from where they fell in a mass grave. Once our family had established the Church my grandfather exhumed the bodies from Puketapu 3 and reinterred them into the cemetery on the battle site out of respect and admiration for their courage. This was also done as a symbol of peace and remembrance of the events that had occurred.

### **Building Of St. Michaels Church**

21. A Church was built on the site of the battle in 1871.
22. There is a story behind the erection of St. Michaels, which begins in 1863 when a party of 18 Maori went to England with William Jenkins a Methodist Lay Preacher and interpreter. They learned about the futility of war and were shown the might and power of the British Empire. They were paraded and sought after by royalty including Queen Victoria, who became godmother to a child born to a couple travelling in the party. The child was baptised and named Edward Victor Pomare. When they were left stranded in a poor house in London, a Miss Weale came to their rescue and paid return fares back to New Zealand for many of the abandoned party.
23. As a result of Miss Weale's generosity, on their return to New Zealand they raised funds to pay her back in appreciation of her good will. She

refused repayment and suggested that they build a church instead. The people of Mangakahia, built the first church, the Church of the Good Shepherd, and the people of Ngawha built the second church, St Michaels. Subsequently, other churches were built.

24. It was decided to build the church on the site of Pene Tau's Pa, where a quarter of a century earlier, Colonel Despard's troops met such a terrible defeat. Here the church would be both a symbol of peace and a memorial to the valor of the troops. The church was duly built on this historic site and was consecrated in 1871 by Bishop Cowie.
  
25. A further tribute by our people towards their former opponents was paid in 1872 on the 27<sup>th</sup> anniversary of the battle when the remains of the British dead were reinterred in the churchyard of St Michael's, a fine stone cross marking their final resting place. The people of Ohaeawai will always remember Miss Weale. The stone font presented by her is still in use, as is the set of communion vessels sent out later. The latter is engraved, "For the Church of St Michael, Ohaeawai, New Zealand. Mo te Whare Karakia o Mikaera kei Ohaeawai, Niu Tireni, 1873."

### **Lessons**

26. So in recounting briefly one of the physical struggles between our hapu and the Crown I reflect on what is the point to all of this? All the death and conflict and mistrust and broken promises, during the northern war and throughout the decades since. It is and must be for nothing if nothing has been learned from it. So I ask the Crown to reflect on what it has learned as a result of its relationship with us for the past 200 years.
  
27. As the missionaries were inextricably bound up in the processes of colonisation and the good tidings they brought as the good news, I too have to admit that we too are inextricably bound up in the process of colonisation existing in this country of the Bay of Islands where the first of most things happened that was supposed to herald a utopia. You could ask the question, who was this utopia created for when so many Maori are leaving this country in large numbers in search of a better life

for themselves and their families in Australia. Interestingly, it was to Australia that the English banished the poor of their society to serve out their sentences and to build a new colony in the New World of Aotearoa.

28. In the aftermath of such a history we witness the resurgence of Maoritanga in its many varied and rich forms including its colonised form and we challenge the 'one people' approach, which is a mild version of ethnic cleansing.
29. I wish to refer the Tribunal and the Crown to a paper written by John Bluck as part of the Theological Education by Extension, which highlights some of the fundamental obstacles in our way. Obstacles that when identified and acknowledged are easier to overcome.

*For those who have grown up in a monoculture mode, Pakehatanga might involve facing up to the fact that we have lost the right we have long claimed and exercised to decide what is culturally normal, natural and orthodox. That means giving up and letting go any suggestion that we have a central and defining role shaping New Zealand's future. Bi-cultural development, based on the Treaty of Waitangi, sees one nation shared by two peoples of equal dignity, two cultures of equal value. So the centre of such a society must always be shared. The nation vision is bi-focal. Such a division has got little to do with numerical size, quantity of resources, or even historical vintage. The issue at stake is to do with a covenant of mutual respect between two cultures that give each other the right and the space to be different. Without that, the two cultures cant work together on any long term basis. Only a covenant of equal dignity can remove the fear of the stronger assimilating the weaker.*

*The Treaty of Waitangi for all its historical ambiguities, is such a covenant. To avoid facing up to Pakehatanga in this way, an impressive selection of avoidance tactics has developed.*

30. We have grappled with these issues in the Anglican Church and I know they are not easy issues to deal with and resolve but they cannot continue to be avoided. It is the fundamental premise of the Treaty relationship that the Crown has continually avoided. That is the true and meaningful expression of rangatiratanga as its sits alongside any

structure of government. Surely we have learnt that this must be meaningfully addressed.

Ben Waiohau Te Haara

3 September 2013

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Waitangi Tribunal

**30 June 2017**Ministry of Justice  
WELLINGTON

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## APPENDIX A

### ISSUE 1: CROWN FAILURE TO PROTECT HAPU RANGATIRATANGA TINO RANGATIRATANGA, KAWANATANGA AND AUTONOMY: POLITICAL ENGAGEMENT BETWEEN MAORI AND THE CROWN

*For those who have grown up in a monoculture mode, Pakehatanga might involve facing up to the fact that we have lost the right we have long claimed and exercised to decide what is culturally normal, natural and orthodox. That means giving up and letting go any suggestion that we have a central and defining role shaping New Zealand's future. Bicultural development, based on the Treaty of Waitangi, sees one nation shared by two peoples of equal dignity, two cultures of equal value. So the centre of such a society must always be shared. The nation vision is bi-focal. Such a division has got little to do with numerical size, quantity of resources, or even historical vintage. The issue at stake is to do with a covenant of mutual respect between two cultures that give each other the right and the space to be different. Without that, the two cultures cant work together on any long term basis. Only a covenant of equal dignity can remove the fear of the stronger assimilating the weaker. The Treaty of Waitangi for all its historical ambiguities, is such a covenant.<sup>1</sup>*

1. This section sets out the claimants' closing submissions on Issue 1.
2. We note that the claimants do not rely on the generic submission for Issue 1<sup>2</sup> unless specifically stated.
3. The claimants do support and rely on:
  - a) B Lyall / L Thornton, Further Submissions on Tino Rangatiratanga;<sup>3</sup>

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<sup>1</sup> B Te Haara, Amended Brief of Evidence for Wai 421, 1890, 1383, 1247, 466, 869 & 593 Wai 1040 #H18(a) at [29] quoting John Bluck

<sup>2</sup> J Mason, Stage 2 claimant generic issue closing submissions, Issue 1, 27 Mar 17 Wai 1040 #3.3.228

<sup>3</sup> Wai 1040 #3.3.230

- b) The closing submissions filed for Wai 1507;<sup>4</sup>
  - c) Supplementary Claimant Closing Submissions dated 15 May 2017, filed by Wackrow Williams & Davies Ltd.<sup>5</sup>
  - d) A. Sykes, Memorandum of Counsel dated 10 May 2017.
4. The claimants also wish to support the oral and traditional history report prepared for the Alliance. Rather than repeat that in detail, we confirm that the history set out there is adopted as background to these submissions.<sup>6</sup>
  5. Under te Tiriti, the Crown has an active duty to protect hapū rangatiratanga, and to ensure that Maori are accorded all the rights and privileges of British citizens.
  6. Since the time te Tiriti was signed, the Crown knowingly sought to appropriate the power and authority of the people of the claimant hapū and their rangatira.
  7. The Crown failed to provide for or take account of traditional hapū structures, refusing to understand and recognise the autonomy and authority of the rangatira and the hapū.
  8. The Crown failed to allow for the claimants to regulate their own affairs within their rohe according to their own laws and cultural and customary norms, and to

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<sup>4</sup> Wai 1040 #3.3.257

<sup>5</sup> Wai 1040 #3.3.234

<sup>6</sup> Drs Manuka Henare, Hazel Petrie and Adrienne Puckey, *'Ko Te Tino o Taiamai' Te Waimate-Taiamai Oral and Traditional History Report* Aug 2009 Wai 1040 #E33

continue to practice and develop their leadership and decision making processes.

9. The claimants begin where this Tribunal concluded in *He Whakaputanga me Te Tiriti* (“**Stage One Report**”): that, in February 1840, the Northern Rangatira did not cede their sovereignty when signing te Tiriti:

*“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 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 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”.<sup>7</sup>*

10. Today, the New Zealand Crown claims sovereignty over New Zealand. Exactly how they came to be in any position to claim this is unclear.
11. While counsel for the Crown gave their position in the Statement of Position and Concessions (“**SOPAC**”)<sup>8</sup> this was prior to release of the Stage One Report. In spite of requests from counsel to update the SOPAC in the

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<sup>7</sup> *He Whakaputanga me Te Tiriti: The Declaration and the Treaty* (Waitangi Tribunal, 2014) 526-527

<sup>8</sup> H Carrad/A Irwin (Crown) *Final Crown Statement of Position and Concessions*, 6 July 2012, Wai 1040 #1.3.2 [106]-[162]

course of the stage two hearings<sup>9</sup> the Crown declined to do so.

12. While we have little guidance of the Crown's likely approach in Northland, the arguments that the Crown presented in Rohe Potae do suggest the argument that will be advanced. We address that here.
13. In closing submissions before the Rohe Potae Tribunal the Crown stated:

*"this Tribunal will be aware that the Crown is considering the Tribunal's stage 1 report issued as part of its Te Paparahi o Te Raki inquiry. That report concerns claims about the circumstances surrounding the entering into of the Treaty of Waitangi and subsequent questions of interpretation about the meaning and effect of the Treaty of Waitangi. The Crown is continuing to review that report."*<sup>10</sup>

14. Having stated that, the Crown continued:

*"The Crown's submission is that, through the Treaty texts, signatories agreed to the Crown establishing a government in New Zealand that would have authority over all people and over all land in New Zealand";*<sup>11</sup> and

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<sup>9</sup> See L Thornton / B Lyall (Wai 2010, 2149, 1666, 1507, 2058, 1832 & 2181) Memorandum of Counsel regarding the Crown position in its Statement of Position and Concessions, 20 Aug 14 Wai 1040 #3.2.645 and L Thornton/B Lyall/R Zwaan (Wai 421, 593, 869, 1247, 1383, 1507, 1666, 1725, 1832, 1890, 2010, 2058, 2149 & 2181) Memorandum of counsel requesting the Crown to update its statement of position and concessions, 7 Jul 15 Wai 1040 #3.2.1152

<sup>10</sup> G Melvin / A Williams, Closing submissions of the Crown on constitutional issues (Topic 1), 4 Feb 15 Wai 898 3.4.312 at [2]

<sup>11</sup> G Melvin / A Williams, Closing submissions of the Crown on constitutional issues (Topic 1), 4 Feb 15 Wai 898 3.4.312 at [3]

*“Under its own laws and practice, the Crown did not acquire sovereignty simply through the Treaty of Waitangi itself, but through a series of constitutional and jurisdictional steps. These steps included obtaining the consent of some 512 rangatira who signed the Treaty and culminated in the gazetting of Captain Hobson’s proclamations of 21 May 1840 in the London Gazette of 2 October 1840. In New Zealand Māori Council v Attorney-General, the Court of Appeal found that the Crown’s sovereignty over New Zealand was beyond dispute once Captain Hobson’s proclamations were gazetted. The Crown relies on that finding as to the fact of its sovereignty”.*<sup>12</sup>

15. Indeed this is the orthodox position applied by the Courts today.<sup>13</sup>
16. We fail, however, to see how a proclamation published in another country can have any effect on the sovereignty of indigenous peoples. This is discussed more fully below.
17. The Crown also states there that this Tribunal has no jurisdiction to determine the legality of Crown authority.<sup>14</sup>
18. The Crown’s position ignores that the issue of sovereignty was not before the Court of Appeal in *New*

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<sup>12</sup> G Melvin / A Williams, Closing submissions of the Crown on constitutional issues (Topic 1), 4 Feb 15 Wai 898 3.4.312 at [6]

<sup>13</sup> See *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 [28 February 2017] at [301]

<sup>14</sup> G Melvin / A Williams, Closing submissions of the Crown on constitutional issues (Topic 1), 4 Feb 15 Wai 898 3.4.312 footnote 2

*Zealand Māori Council v Attorney-General*, and that the Courts have no more jurisdiction to determine the legality of Crown authority than the Tribunal does. In fact the Courts have expressed an unwillingness to do so:

“... the function of judges is to recognise constitutional arrangements, but not to create them”;<sup>15</sup> and

“The legitimacy of a government is recognised by the courts but, significantly, not created by the courts”.<sup>16</sup>

19. The Crown also mischaracterises what the claimants are asking of this Tribunal. Rather than seeking to “determine the legality of Crown authority”, the claimants ask this Tribunal to inquire into whether the Crown’s authority was achieved through breach of te Tiriti.

20. This is not a task that the Courts of New Zealand will take on, as the High Court recently stated:

*“This Court has no jurisdiction to address the issue as to what the correct interpretation of the Treaty as to the issue of sovereignty. That is part of the legitimacy narrative. It is essentially a political issue, to be worked out over time by Parliament”*.<sup>17</sup>

21. It is, however, squarely within the jurisdiction of the Tribunal.

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<sup>15</sup> *Taylor v Attorney-General* [2016] NZHC 355 at [56]

<sup>16</sup> *Taylor v Attorney-General* [2016] NZHC 355 at [55]

<sup>17</sup> *Taylor v Attorney-General* [2016] NZHC 355 at [153]

22. We now review how the Crown got to the point where it claims to have full sovereignty over New Zealand, to the exclusion of Māori expressions of *rangatiratanga*. Then we consider the prejudice caused.
23. At its most basic level, the current picture of Crown supremacy was achieved by two tracks of Crown conduct that ran parallel to each other, beginning immediately on the signing of te Tiriti.
24. These two tracks, much like one hand washing the other, were promotion of the idea of British Crown sovereignty over New Zealand, and suppression of Māori tino rangatiratanga.
25. The British Crown began by asserting the right to govern everyone by overreaching any authority it had actually been granted in te Tiriti.
26. The key to the entire process is simple—land. As noted in the Generic Closing Submissions for Issue 2 at [35], at the time of its 15 January 1840 Proclamation, Britain had no land in New Zealand.
27. At that point, despite the terms of the Proclamation, the British Crown had no basis to sell land to settlers or otherwise make Crown grants—it had no land to grant or sell. This undermines the Crown’s reliance on the proclamation in Rohe Potae.
28. Although frequently overlooked, the case of *Johnson v M’Intosh*<sup>18</sup> (a decision of the United States Supreme Court), carefully describes the colonisation process the

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<sup>18</sup> 21 U.S. (8 Wheat.) 543 (1823). We note that ‘M’Intosh’ is pronounced ‘McIntosh’.

British Crown used and the basis for Crown grants, particularly dealing with the rights of private citizens to buy lands from the Indians.

29. The Court in *Johnson* reviews several charters from the British Crown. They all involve grants of land, claimed by the British Crown on the basis of discovery. No such claim is made by the British Crown over the area that this Tribunal is investigating.
30. Neither Normanby's Instructions of 1839 nor the Charter of 16 November 1840 purports to claim New Zealand on the basis of discovery or conquest. Rather, the British government was to obtain land through purchase. It was to obtain sovereignty through cession, but that cession did not take place.
31. *Johnson* describes the legal effect of a charter that does not claim land as "a charter intended to convey political power only" because it did not contain language granting "the land, the soil, and the waters." This holding affects the scope of British authority under Te Tiriti.
32. Without a claim to land, the claim of sovereignty was merely the right to establish a government over Pākehā and buy land from Maori who wished to sell.
33. Under te Tiriti, the Crown was given the right to deal with land, but was not given and did not claim the right to all of the land. This is consistent with the Stage One Report.
34. The notion underlying the Old Land Claims process was that te Tiriti granted the British Crown sovereignty.

This meant it had radical title over all the lands of New Zealand which was subject only to customary title. The idea was that customary title could be extinguished by grants from Māori. The Crown's Land Claims process set up a deed to a settler as a relinquishment of title, ignoring the *tukuwhenua* of *tikanga* Māori.

35. The Crown's stated assumption was that once customary title was extinguished, the land would belong to the Crown. This theory was beneath the Crown's claim to surplus lands claims arising out of the Land Claims Commission. These surplus lands yielded over 200,000 acres to the Crown without one pence payment.
36. So could the Crown claim radical title? The elements of radical title are tenure and sovereignty.<sup>19</sup>

### **Tenure**

37. When the Crown undertakes to colonise a land already settled and inhabited, the rights of aboriginal people to lands are enforceable against the Crown, unless relinquished by consent. Tenure was therefore dependent upon the consent Maori.
38. In the 1921 case of *Amodu Tijani v Southern Nigeria (Secretary)* <sup>20</sup> Lord Haldane set out two propositions: The acquiring sovereign takes only the beneficial interest of the former sovereign; and the meaning of radical title is dependent upon the legal nature of the former sovereign's title.<sup>21</sup>

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<sup>19</sup> U. Sacher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, 2014) at 2

<sup>20</sup> *Amodu Tijani v Southern Nigeria (Secretary)* [1921] 2 AC 399

<sup>21</sup> See *Amodu Tijani v Southern Nigeria (Secretary)* [1921] 2 AC 399

39. In *Cherokee Nation v Georgia*,<sup>22</sup> it was held that absolute title did not take effect until the possession of the Indians ceased:

*“[The Indians] are acknowledged to have an unquestionable, theretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government. . . . They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases . . .”*<sup>23</sup>

40. In the 1832 case of *Worcester v Georgia*,<sup>24</sup> the doctrine of discovery was examined and found to apply only between those European countries which accepted it, but it did not “annul the previous rights of those who had not agreed to it”.
41. In New Zealand it was a matter of decades before actual possession was taken. Hence the explanation that New Zealand was not ceded but was settled, and that property rights did not pass under te Tiriti.
42. Or put another way: “Both imperial and colonial judicial and official opinion held, and modern scholarly opinion has affirmed, that the Treaty of Waitangi was juridically irrelevant in terms of the Crown acquiring sovereignty.”<sup>25</sup>

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<sup>22</sup> 30 U.S. 1. U.S. Supr. Ct. 1831

<sup>23</sup> See *Cherokee Nation v Georgia* 30 U.S. 1. U.S. Supr. Ct. 1831

<sup>24</sup> 31 U.S. (6 Pet.) 515 (1832)

<sup>25</sup> U. Sacher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, 2014) at footnote 191. The author relies on *Wi Parata* (n 189) 78 (Prendergast CJ); *Tamihana Korokai v Secretary-General*

43. This is also consistent with the Stage One Report.

### **Sovereignty**

44. The Māori retention of sovereignty in signing te Tiriti defeats the element of sovereignty needed to establish radical title in New Zealand because the Māori retained tino rangatiratanga—for purposes of this discussion, their own rights of self-government and self-determination.

45. The limited sovereignty granted to the British Crown—to govern Pākehā, without a grant of land—is inadequate to achieve a radical title because it is conceded that the only people with the land were Māori.

46. Without radical title upon which to base its claims to land in the Old Land Claims process, the takings of surplus lands there (and elsewhere) were not a legitimate basis for acquiring land and thus the basis to rule those Pākehā who occupied and settled that land.

47. This places the focus of the Crown's expanding sovereignty on its land purchases, which are covered below. Under its process, land as a place to put more people to govern was the sine qua non of expanding Crown sovereignty.

48. Reasoning from the Courts decision in *Amodu*, which addresses the limits of acquisition of land from the indigenous people, requiring full investigation in the system of aboriginal sovereignty and acceptance of its limits in an acquisition process, the Crown purchase process used in New Zealand lacks legitimacy.

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(1912) 32 NZLR 321 (NZCA) 345; *Re Ninety-Mile Beach* (1963) NZLR 456 (NZCA) 475-76; and others.

49. In addressing a system of communal ownership, the Crown failed to determine the Māori system of tenure, not the least of which was the complete absence of a process of permanent alienation. Eventually, the Crown accepted that the land was held in common. Rather than protect this land tenure element as promised under te Tiriti, there is evidence that it resolved to undermine the 'beastly communism'<sup>26</sup> of Māori tenure and living.
50. The Crown failed to determine all the hapū who held interests in the land and the nature of their collective interests and tenure. Possibly the largest question arising from early land acquisition was the question of consent to relinquish rights in land.
51. In light of the tukuwhenua tikanga of land transactions, early transactions were not permanent alienations. This Tribunal can conclude as much.
52. The cultural disconnect between Māori tikanga whenua and the British common law of property raises serious questions about the permanence of the land alienations relied upon to develop the Crown's extensive real estate portfolio.
53. The application of these principles shows that the British process of land acquisition could not be the legitimate foundation of sovereignty because the acquisition of land was not legitimate. Flawed Crown title as the basis for settlement based upon Crown grants and sales cannot be the basis of legitimate Crown

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<sup>26</sup> V. O'Malley, *Northland Crown Purchases 1840-1865* (CFRT, 2006) pages 137 and 444, quoting C W Richmond

sovereignty, particularly in the face of over 170 years of objection to these processes.

54. In the 1860s, the Native (and later Māori) Land Court became an important element to land acquisition. It has been repeatedly said that this system destroyed the leadership structures of the hapū by individualisation of title. This will be discussed more fully when we address Issue 5.
55. Collective ownership, use and management was supplanted by title registration, giving the ability to alienate land to people the Crown had registered as owners. In some cases, this may have been the rangatira and natural leadership of their hapū, but the system allowed individuals to come forward, hear and register land without the consent of the collective and thereafter alienate the land without hapū consent.
56. This allowed the colonial government to obtain land against the collective will, thus expanding the base for settlement of those who accepted the colonial government as sovereign.
57. More importantly, however, the destruction of the traditional leadership and decision-making structures of the hapū marked the process of undermining and destroying *tinō rangatiratanga*.
58. This was not to happen, though, because of the full assault of the government's assimilation policy and strategy that engaged in the following: Suppression of leadership structures and tikanga; Suppression of language; Suppression of matauranga Māori; Alienation of resources; Relocation of people and family

fragmentation; Systematic impoverishment through land alienation, relocation, marginalisation, and discrimination and other like actions.

59. While busy suppressing rangatiratanga, the British colony promoted its claim of sovereignty by conducting itself as if it had sovereignty. It began its preparation to become an active, effective part of the British Empire. It began passing laws, requiring customs payments, and issuing rulings on the pre-Tiriti land transactions and purchasing land. It engaged in law enforcement. It established a capital and issued scrip for land, moving settlers. It promised hospitals and schools.
60. In addition to assuming a sovereignty it was not granted, the colonial government began a long series of Tiriti-breaches that allowed it to further over-reach and give the appearance of sovereignty that it had not been granted. When government was devolved and so-called democratic systems were imposed, they were carefully constructed to limit Māori participation undermining their political authority.
61. One of the over-arching objectives of this newly-empowered colonial government was the coerced assimilation of Māori. This of course was to be achieved by further and continued undermining of Māori culture, knowledge, language, and the like.
62. Māori who have been involuntarily urbanised have lost their connection to their culture, their hapū, their land, their matauranga and their history.
63. Assimilation policies by the Crown pay off—when there is no longer a culture to protect, there is no longer a

duty to protect it. Add that the Crown is busy “settling” Treaty claims and making apologies yet it does not alter its Tiriti-breaching ways as it continues to conduct its daily business of over-reaching sovereignty.

64. It is through all the foregoing mechanisms that the Crown is able to assert that it has sovereignty. To be sure, the Crown has stamped its power all over this country, but it has achieved its power by means that violate te Tiriti. We must not mistake the abuse of power for legitimate sovereignty.

### **Economic Sovereignty**

65. Tied to the Crown’s efforts to undermine Maori Rangatiratanga was the shift from an economy of mana to an economy of profit maximisation.
66. Dr. Henare coined the expression “economy of mana” in attempting to explain “a worldview and kinship (tribal) modes of production that - among other things - consider spiritual and human ancestors and descendants not yet born, and prioritise holistic well-beings and value creation - including creation of taonga and art-aesthetics -over profit maximisation”.<sup>27</sup> He considers it a key tenant of Maoritanga.<sup>28</sup>
67. Thus, as Henare states: “when James Cook observed ‘a good Anchorage and every kind of refreshment for

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<sup>27</sup> Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at

[29]

<sup>28</sup> See Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at [30] where Henare considers that the overall condition of the economy of mana is determined by: [spiritual capital] + [ecological capital] + [kinship capital] + [economic capital] = Māoritanga

Shipping' in the Bay of Islands, he was witnessing the result of more than 5000 years of inclusive prosperity".<sup>29</sup>

68. In 1820, New Zealand's Gross Domestic Product ("NZGDP") was estimated as \$42 million and constituted a 100% Māori effort. Māori lead research found in 2010 the Māori contribution to the NZGDP was only 3-4% of the national total.<sup>30</sup>
69. The clash of philosophies between Maori and the Crown has therefore had disastrous, and measurable, effects on the economy of mana.

### **Beggar thy neighbour**

70. We see another example of the Crown's strategy for claiming sovereignty in application of its 'beggar thy neighbour. Or as Dr. Henare calls this "a pōhara Economy of Mana: Forced poverty as an effect of deliberate Crown policy".<sup>31</sup>
71. We go further than Dr. Henare. The deliberate impoverishment of Maori, the suppression of reo and tikanga, desecration of waahi tapu, and appropriation of taonga all amounts to nothing short of cultural genocide.
72. Adam Smith made reference to this principle in *An Inquiry into the Nature and Causes of the Wealth of Nations*: "...nations have been taught that their interest consisted in beggaring all their neighbours. Each nation has been made to look with an invidious eye upon the

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<sup>29</sup> See Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at [27]

<sup>30</sup> See Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at [28]

<sup>31</sup> See Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at 6

prosperity of all the nations with which it trades, and to consider their gain as its own loss. Commerce, which ought naturally to be, among nations, as among individuals, a bond of union and friendship, has become the most fertile source of discord and animosity."

73. Or as Henare states:

*"The beggar-thy-neighbour principles of competition whereby the British attitude was to cripple completely one's opponent, in this case Māori endeavour, beyond recovery, as opposed to simple gain marginal advantage. These Crown initiatives ensured that its settlers were to be advantaged at all times".<sup>32</sup>*

74. Te Waimate Taiamai ki Kaikohe was once the economic powerhouse of the north. The claimants are in a unique position. As Dr. Henare stated, Te Waimate Taiamai ki Kaikohe's:

*"history differs in specific ways from other parts of the country in that it was the location in which the first official European mission settlements were established; the first site of contact with English officialdom; and the 'cradle' of New Zealand government. Before the government was instituted/constituted, and before He Whakaputanga o te rangatiratanga o Nu Tīreni and Te Tiriti o Waitangi/Treaty of Waitangi enabling its establishment was entered into, Māori in this region had deliberately and*

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<sup>32</sup> Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at [97]

*determinedly proclaimed their autonomy as a sovereign state/nation. From these initial contacts stemmed many of the inequities that followed, particularly (but by no means restricted to), the pre-Treaty land arrangements transacted between European settlers and local Māori”.*<sup>33</sup>

75. The claimants’ rohe is also different as due to the fertility of the whenua, there was a very dense population.
76. The area was also attractive as it was part of a corridor between east and west coasts—Te Waimate Taiamai lies on a line between two harbours on each coast: the east coast harbour of the Bay of Islands and Hokianga Harbour on the west.<sup>34</sup> A large amount of trade passed through this corridor to the harbour ports at each end.<sup>35</sup>
77. The same characteristics that made this area—Te Tino o Taiamai<sup>36</sup>—attractive to Maori made it attractive to Pakeha.<sup>37</sup>
78. In order to occupy and control the area, the Crown realised early that a two-pronged approach of asserting authority while applying the beggar thy neighbor principle would place them at an advantage. If this approach was not intentional, hindsight and the prejudice show us that it might as well have been.

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<sup>33</sup> Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20

<sup>34</sup> Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at [32]

<sup>35</sup> Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at [21]

<sup>36</sup> Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 [22]-[34]

<sup>37</sup> Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 [22]-[24]

79. These factors were to have the effect of magnifying the prejudice caused to the region during the Northern War and its aftermath.
80. The crippling the economy of Ngapuhi is a common thread in the years from signing te Tiriti to today. The Crown has treated its relationship with the claimants, both politically and economically, as a zero-sum game, when had te Tiriti been observed both parties would have benefited.
81. As Wattie Watling told this Tribunal in reference to the extractive industries, the Crown has most often aimed at asserting its own authority. The Crown did not directly protect natural resources valued by Maori nor did they create supportive conditions for Maori to help themselves in their own protection of their natural resources. Rather the Crown supported the extraction of minerals and resources to the fullest extent possible.<sup>38</sup> This aligns with the beggar thy neighbour principle.
82. As Mr. Watling stated: “What we are really talking about here is power. The Crown stripped Maori of our assets and resources which reduced our power, and increased the Crown’s power. Once the Crown was in a position of strength over Maori, well from that point on it was a situation where whatever the Crown said, went”.<sup>39</sup>
83. Dr. Henare’s evidence shows a clear example of beggar thy neighbour in practice:

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<sup>38</sup> W Watling, brief of evidence for Wai 421, 593, 869, 1247, 1383 & 1890, 7 Oct 15 Wai 1040 #T1 at [21]

<sup>39</sup> W Watling, brief of evidence for Wai 421, 593, 869, 1247, 1383 & 1890, 7 Oct 15 Wai 1040 #T1 at [22]

*“The Crown was focused on the areas south of this rohe. The earlier production efforts of Bay of Islands Māori could not be sustained with a reduced population, and their products could not be transported readily to the new markets. The drop in the Bay of Islands’ population occurred in tandem with a drop in the value of exports. In 1853, these amounted to £511. 15s (already much reduced from pre-1840 figures), whereas by 1855 they were down to a mere £43.85 The drop in value was mainly due to a corresponding drop in volume of exports, but prices were then also affected by an Australasian-wide recession over 1856 into the 1860s. Moreover, there was substantial variation between the western and eastern sectors of the Bay of Islands. According to Resident Magistrate Robert Barstow, by 1862, there was a ‘vast difference’ in their relative prosperity, with the eastern or Bay of Islands Māori becoming ‘daily .... more pauperized.’<sup>40</sup>*

84. Another side of this principle was stereotyping Maori as lazy—thereby the blame for being poor was imposed on the Māori people.<sup>41</sup>
85. As Henare states: “Stereotyping Māori has been used in many ways, including barring or restricting their entry to various occupations and educational opportunities. Significantly, the characterisation of Māori as lazy, improvident or undeserving has also supported the

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<sup>40</sup> Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at [99]

<sup>41</sup> Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at [134]

agendas of those who have sought to alienate their land”.<sup>42</sup>

86. In a society where the vast majority of citizens have never been to a marae, and have virtually no idea about traditional Māori culture, other than as negatively depicted on the media, this facet of beggar thy neighbour is particularly prejudicial to Maori, and to all New Zealanders who wish to live in a just, fair and functioning society.

### **Establishment of a Representative Government**

87. In 1852 the Crown enacted the New Zealand Constitution Act (“NZCA”) which provided for an elected or representative government with a general assembly.
88. After responsible government was established, following zero consultation with Maori, and a fistfight in Parliament between members, Parliament enacted the English laws Act 1854, which was followed by the English Laws Act 1858.
89. These Acts identified a number of British statutes deemed retrospectively to be in force in New Zealand from the point of the proclamation. We contend that Maori were not bound by these, but the British were.
90. As set out by the Supreme Court in *Wakatu*:

“With the jurisdiction established in 1841 came fundamental principles established by ancient Charters and statutes and by the common law. The Crown had only the prerogative powers

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<sup>42</sup> Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at [135]

allowed by law and recognised by the courts. Magna Carta protected property from being taken by the Crown, except by law. This protection was expanded in a statute of 1351 which provided that no one could be “put out of his Freehold, nor of his Franchises, nor free Custom, unless it be by the Law of the Land” and no property could be taken except by “the Course of the Law”. Another statute of 1354 provided that “no Man of what Estate or Condition that he be, shall be put out of Land or Tenement ... without being brought in Answer by due Process of the Law”. In New Zealand, the powers conferred upon the Governor, Executive Council and Legislative Council by the 1840 Charter were specifically subject to Maori customary rights of occupation, enjoyment, and inheritance of land”.<sup>43</sup>

91. The Crown breaches of its own laws, such as the Magna Carta as set out above, will be detailed in closing submissions on other issues.

### **The Assembly and Representation**

92. The assembly was comprised of a governor, an elected House of Representatives and a Legislative Council whose members were nominated by the Governor. Six provincial legislatures were subordinate to the general assembly.

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<sup>43</sup> *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 [28 February 2017] at [302]

93. The NZCA also provided for Maori to conduct their own affairs in their own districts pursuant to Section 71. As the Turanga Tribunal stated: “It provided... a mechanism by which the Crown could have developed a positive relationship with rangatira in their respective regions, acknowledging the authority of runanga as expressed through their rangatira”.<sup>44</sup>
94. Section 71 was on the statute books for 134 years, yet never implemented and finally repealed by the Constitution Act 1986.<sup>45</sup> No separate Maori government was to be tolerated.<sup>46</sup>
95. We make the point here that had Section 71 been implemented this still would have been in breach of te Tiriti, as such a system only allowed expression of rangatiratanga on the Crown’s terms.
96. The first session of New Zealand's parliament was held in May 1854.
97. The claimants, and all Northern Maori, were unrepresented until after the 1867 Maori Representation Act provided four Maori seats within the House of Representatives.<sup>47</sup>
98. The inclusion of four Maori seats in 1867 had little impact on the ability of Maori to influence decisions over their affairs. Northland Maori had one representative.

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<sup>44</sup> Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims Volume I (Waitangi Tribunal, 2004) at 60

<sup>45</sup> *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake Report on the Māori Community Development Act Claim* (Waitangi Tribunal, 2014) at 54

<sup>46</sup> *The Kaipara Report* (Waitangi Tribunal, 2006) at 352

<sup>47</sup> Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at

Proportionally, Maori ought to have been entitled to 14-16 seats.<sup>48</sup>

99. The Crown failed to ensure fair practice and equal franchise for the claimant hapū members in respect of their ability to vote. Combined with a lack of seats, maori were virtually without voice.
100. As set out in closing submissions on other issues, the claimant hapū attempted to make use of Parliamentary representation to assert their influence and address the issues arising from their loss of authority but continued political impotence was the driving force behind the repeated calls for Maori autonomy and for section 71 of the Constitution Act to be given effect.<sup>49</sup>
101. The common theme is the Crown failure to live up to expectations, and Maori protest for self-government and for a greater involvement with government continued throughout the 20th century.
102. These expectations were made on the basis of the declarations in He Whakaputanga and the agreements in the articles and principles of Te Tiriti.

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<sup>48</sup> Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at [129]

<sup>49</sup> See Brief of Evidence for Manuka Henare, 24 Nov 14 Wai 1040 #O20 at [129]