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Waitangi Tribunal

16 Apr 2013

Ministry of Justice  
WELLINGTON

OFFICIAL

Wai 898, # A116(g)

APPENDIX 1

#A116 – DR. ALEX FRAME – BRIEF OF EVIDENCE

RESPONSES OF DR. ALEX FRAME TO QUESTIONS FROM MS KAREN FEINT  
(Wai 898, #3.3.148(a))

Question 1

1. In your evidence you referred to your 2002 book, *Grey and Iwikau – A Journey Into Custom*.<sup>2</sup> In that book, you describe the journey of Iwikau to Heuheu and Governor Grey through the interior of the North Island, in the course of which Grey observed tikanga in operation. According to traditional Ngati Tuwharetoa korero that will be presented in evidence:

During their travels, Grey observed meetings of council, resolution of disputes, the lifting and the laying down of law by Iwikau and Ngati Tuwharetoa over this period. Grey gained insight into tikanga Maori, ture and the working through of differences, and told Iwikau that he wanted to incorporate tikanga Maori into the laws of the land.

...

Shortly after this journey, Grey departed for other colonies. When he returned, he was a changed man. His actions did not reflect the man who had openly admired what he had observed on his journey with Iwikau. It was said that his wife's affair had broken him. Before he left, Iwikau had sent Grey a waiata tangi. When Grey returned, it became apparent that the waiata tangi had foreshadowed what was to occur.<sup>3</sup>

2. In your book, you refer to the possibility of creative interaction between tikanga Maori and Pakeha law. Do you think there is a sense of opportunity lost here, ie that the possibility that Grey was said to be open to as a result of that journey (of incorporating tikanga Maori as part of the law of the land) was not realised at that time?

Answer 1

3. *One of the central theses of Grey & Iwikau – A Journey into Custom, Victoria University Press, Wellington, 2002, was that tikanga Maori are incorporated in 'the law of the land' by operation of existing legal principles, subject to a qualification and some explanations. See Part VI (pages 63-76).*
4. *It is true that in his second term as Governor from 1861 Sir George Grey seems to have been less open to 'creative interaction' between tikanga Maori and English law. A number of factors could be suggested in explanation. Relations between the tribes and the Crown had deteriorated in the intervening period, especially in the term of Governor Gore-Brown, and Grey may have felt that the earlier freedom was not available. Also, Grey's recent and disastrous experience with the Xhosa during his term as Governor of the Cape Colony, may have made him less optimistic about cultural interaction generally.*

<sup>2</sup> Referred to at footnote 1 of #A116, and Appendix C, "Performance and Maori Customary Legal Process", at pp140-142, and from memory described in your oral evidence.

<sup>3</sup> Evidence of Paranapa Otimi and Louis Chase, #J22, paras [23] and [27].

## Question 2

5. In the recent Supreme Court decision of *Takamore v Clarke* [2012] NZSC 116, the Court held that Maori custom according to tikanga is part of the values of the New Zealand common law.<sup>4</sup> While that is so as a matter of law, do you think that as a matter of fact tikanga Maori has been respected and recognised by the government and the courts?

## Answer 2

6. *Although I have given a number of examples of the accommodation between English law and Maori custom in **Grey & Iwikau** (supra, see pages 70-75), it is true that the process has been limited, sporadic, and fragmentary. Also, as pointed out in the article by Paul Meredith and me in the **Journal of the Polynesian Society** in 2005 (which formed part of my evidence as Appendix C), modification of tikanga has sometimes affected its vitality. For example, see page 152 in relation to adoption customs.*

## Question 3

7. In Appendix C to your evidence, you refer to the Hinana ki Uta Hinana ki Tai hui as a “constitutional performance”. Two issues arise:

7.1 My instructions are that Sir John Grace’s translation of the waiata that you cite on p141 is open to debate, and that an alternative interpretation is that Te Iwikau was expressing a willingness to establish a relationship, but not necessarily paying “allegiance to the Crown” (as Grace’s translation states) in the sense of submitting to the authority of the Crown;

7.2 In the Ngati Tuwharetoa traditional korero, it is said that:

In 1850 Governor Grey gave Iwikau a Union Jack flag. In 1856 Grace suggested that Iwikau should fly the Union Jack at the Hinana hui, but Iwikau refused and chose to fly the Declaration of Independence flag received by Te Heuheu Mananui in 1835 from the Confederation of Tribes.<sup>5</sup>

8. Do you have any comment on the above? In particular does this information affect your analysis?

## Answer 3

9. *The translation provided in Appendix C of my evidence (the **JPS** article ‘Performance and Maori Customary Legal Process’) in relation to the hui **Hinana ki Uta Hinana ki Tai** was from Sir John Te Herekiele Grace’s book **Tuwharetoa**, Reed Books, Wellington, 1959, pages 438-439. I do not claim expertise in the Maori language and therefore refrain from commenting on Sir John Grace’s translation. However, even my limited knowledge of the*

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<sup>4</sup> By virtue of the English Laws Act 1858, s 1, pursuant to which the laws of England applied only “so far as applicable to the circumstances of the...colony”; *Takamore*, paras [73] and [94].

<sup>5</sup> #J22, at para [33]. It is said that this was one of the four Declaration of Independence and Confederation of Tribes flags, which was sent to Mananui as a symbol and an acknowledgement of their decisions; para [14].

*Maori language enables me to see that the general words used in the Maori text would be capable of translations other than that given by Sir John Grace.*

10. *As to the flag given by Grey to Iwikau on the visit to Pukawa in January 1850, I am again reliant on Sir John Grace's account that the flag was 'patterned after the one presented to the North Auckland tribes, prior to 1840 by King William IV' (Grace, 1959, supra). That is consistent with its being a 'Declaration of Independence Flag'. There seems to be no dispute that this flag was the one flown at the masthead at the Hinana hui in 1856.*
11. *Whether Sir John Grace's account, or the korero reported by counsel, is the correct version, my analysis that the event had constitutional significance in Maori customary law is not affected.*

#### **Question 4**

12. *You conclude in your evidence that what the "Crown acquired from the Treaty of Waitangi and its subsequent Proclamations was a sovereignty qualified and limited by the Treaty itself".<sup>6</sup> How do you reconcile your conclusion about the constitutional status of the Treaty with the position of iwi such as Ngati Tuwharetoa, whose great chief Mananui famously repudiated the Treaty?*
13. *In this regard, it is interesting that it was Mananui's descendant, Hoani te Heuheu, who took the case to the Privy Council arguing for the enforcement of the Treaty, and that the accompanying memorial to be sent to the Queen described the Treaty as a "binding covenant" that was "pledged to the Maori people upon the honour of the Crown".<sup>7</sup>*

#### **Answer 4**

14. *The proposition in paragraph 13 of my evidence that 'What the Crown acquired from the Treaty of Waitangi and its subsequent Proclamations was a sovereignty qualified and limited by the Treaty itself' (emphasis in original) does not say anything about who might be subject to that 'sovereignty'. Therefore no question of consistency arises.*
15. *However, and without purporting to resolve the question of the position of non-signatory tribes, there are several matters which might be relevant to the question whether non-signatory tribes could be seen as having subsequently acceded to the Treaty by conduct. In Ngati Tuwharetoa's case, the **Memorial** in 1940, described in Appendix A of my evidence, might be relevant. So might the fact of claims by non-signatory groups to the Waitangi Tribunal. The legal adage reported in paragraph 13(a) of my evidence that one cannot both 'approve and reprobate' a treaty applies as much to claimants as it does to the Crown.*

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<sup>6</sup> #A116, at para [13].

<sup>7</sup> See proposition (a) of the memorial, annexed as Appendix A to Appendix B of your evidence, "Hoani te Heuheu's Case in London 1940-1941: an Explosive Story".