IN THE WAITANGI TRIBUNAL

WAI 1040
WAI 1837

IN THE MATTER OF

The Treaty of Waitangi Act 1975

AND IN THE MATTER OF

Northland Inquiry District WAI 1040

AND IN THE MATTER OF

Te Tai Tokerau
Claim WAI 1837 by Deirdre Nehua
for and on behalf of the whanau,
hapu and iwi of Te Tai Tokerau

BRIEF OF EVIDENCE
OF MOANA JACKSON
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INTRODUCTION

1. My name is Moana Jackson. I am Ngāti Kahungunu and Ngāti Porou.

2. I graduated from Victoria University with an LLB and then undertook postgraduate study in the United States. During that time I had the privilege of working with and was exposed to the writings of many indigenous scholars on the rights and authority of their nations. I was struck particularly by the consistent affirmation that their ancestors never gave away the sovereignty or independence of their nations.

3. Since that time I have tried to further my understanding of indigenous rights and the parallels that exist with the efforts of our people to advocate our mana and rangatiratanga. This has necessarily included questions to do with the injustice that we and other Indigenous Peoples have had to endure through the process of colonisation and the particular importance of land and both He Whakaputanga and Te Tiriti o Waitangi in the history of Iwi and Hapū.

4. In 1988, I was able to specifically compare the situation of Maori and other Indigenous Peoples as part of the first Maori delegation to the United Nations Working Group drafting the Declaration on the Rights of Indigenous Peoples. In 1990 I was elected chairperson of the Indigenous Peoples caucus of that Working Group and in that capacity I was also able to undertake research on indigenous rights in the Pacific Islands, North and South America, the Philippines and Southern Africa.

5. In 1988, I co-founded with now Judge Caren Fox, Nga Kaiwhakamarama i Nga Ture, the first Maori Law Centre. Our work included drafting the original Flora and Fauna Claim (Wai 262) and early litigation in fisheries and broadcasting. We also took part in international conferences on indigenous constitutionalism and human rights. Since 1999 I continued that work in my own capacity.

6. In 1993 I was appointed as a judge to the independent International Peoples Tribunal in Hawaii, and in 1995 I was appointed to a similar tribunal in Canada. I have also sat as a judge in hearings in Bolivia,

Mexico, Kenya, and the Philippines. The Tribunals were established following the Russell Tribunal which heard claims of Indigenous Peoples in North and South America in 1972. They consist of international jurists and its jurisdiction is not bound by the so-called domestic law of the colonisers but rather by international and indigenous law.

7. More recently I have studied the history and consequences of colonising law in England, Spain and Portugal, among other places. In England I spent time in the archives of the Colonial Office, the Privy Council and the Church Missionary Society. In Spain I researched the debates held in Valladolid in 1550 which set the baseline for the colonial law relating to Indigenous Peoples. In Portugal I studied the records dealing with the submissions to and eventual promulgation of the 1493 Inter Caetera Papal Bull which outlined some of the other baselines enabling European states to erect their imperium in indigenous territories.

8. At the same time I have been privileged to work with and learn from many Iwi and Hapū. From them, as well as my own Iwi, I have gained some insights into the history and more importantly the tikanga and philosophical baselines of Maori political and constitutional authority. I have also been privileged to give evidence for a number of Iwi before the Waitangi Tribunal, including in the Tuhoe, Rohe Potae claims. I have also of course given previous evidence on constitutional matters before this Tribunal during the earlier stages of Wai 1040.

9. It is that work and history which informs this Brief, and in particular the constitutional implications and essential inadequacy and indeed illegitimacy of the current Crown policy of "Treaty settlements".

10. In presenting it I am mindful and respectful of the statements which will continue to be made before this Tribunal by the people of Te Tai Tokerau. They are the proper experts on the law and history of their people and I acknowledge the power and sincerity of the evidence they will give. In this Brief, as in my earlier statements, I merely seek to contextualise the meaning and significance of the transactions and history of Treaty settlements within Maori law, politics and constitutionality that in my respectful view need to be considered in this particular claim.

11. In dealing with such a broad analysis it is necessary to bear in mind four different contexts:

(a) The first is that all of the Crown policy decisions around so-called "Treaty settlements" need to be understood within the broader history and Maori legal analysis of what it is that actually needs to be settled.

(b) The second is that such an analysis is necessarily situated within a particular Maori narrative about political power, He Whakaputanga, and Te Tiriti o Waitangi, which in turn shape the understanding of colonisation and the egregious dispossession that all Iwi and Hapū have suffered since the early 19th century.

(c) The third is that the current Crown policy of "Treaty settlements" is itself framed in the context of that dispossession and determined by the same historic ideologies and presumptions about Crown authority and right that motivated the original assumptions of absolute Crown sovereignty over Aotearoa/New Zealand. Indeed the understanding the Crown brought and still brings to any policy of "settlement" is a text in the centuries-long context of the European colonisation of Indigenous Peoples.

(d) The fourth is that the whole artifice of settlement is merely part of the deliberate subordination of the political and constitutional authority of Iwi and Hapū, and in particular the assumptions the Crown has long made in defining the rights, status and authority of Iwi and Hapū.

The Brief itself has four Parts:

(e) The first Part briefly considers and analyses the ideologies and philosophies of authority within which Iwi and Hapū operated and understood the world prior to 1840. While it does so as a matter of historical record which others will allude to further it also establishes and re-positions Iwi and Hapū authority within a broader framework that acknowledges its legitimacy in both theoretical and tikanga terms. Where appropriate it makes comparisons with the law and constitutionality of other

Indigenous Peoples in order to reinforce the inherent if culturally unique suppositions of authority that Iwi and Hapū brought to the land and later to the development and understanding of their relationship with the Crown – a relationship which the Crown sought to reinterpret in 1840 and still endeavours to misconstrue within the very ethos of its so-called "Treaty settlements" policy.

(f) The second Part of the Brief looks specifically at Te Tiriti as an expression of mana and the concomitant right to treat and make binding commitments with other polities or individuals. It stresses that within the context of Iwi and Hapu reality it was a serious political arrangement that necessarily runs counter to all of the historical and indeed contemporary Crown presumptions about the events after 1840, including the very ethos of the Crown's so-called "Treaty settlements" policy.

(g) The third Part of the Brief specifically analyses the history of colonisation because it is crucial to any understanding of the Crown's attitude to "Treaty settlements" and indeed the very question of what it thinks needs to be settled. In particular it considers the development in Europe of a political, legal and social consensus about a right to dispossess Indigenous Peoples and its subsequent expression in British practice as a so-called authority to "erect an imperium" and thus rationalise its jurisdiction over indigenous nations. It does so to illustrate the context which justified colonisation as a process, and in particular its ongoing rationalisation of Crown power and thus all of its ongoing policy imperatives, including the "Treaty settlements" policy.

The first Two Parts of this Brief dealing with the law and politics of our people are outlined in some detail because Iwi and Hapu history requires it. However the detail is also necessary to counter the essentialist racism of colonising history which presumed that non-European peoples either did not have "real" law or government or only possessed a notion of political authority and independence which could easily be subsumed under the allegedly superior and "real" sovereignty of a

colonising State. It is that specific presumption which underpinned the Crown's original assertion of authority and its subsequent exercise of power, including its power to develop the current ethos of so-called "Treaty settlements".

The final Part of this Brief dealing with the colonising context that shaped both the 19th century Crown response to our people is also addressed in some detail because it backgrounds the policies and purported justifications that now drive its proposals for settlement. It provides some insight into why it continues to pursue a so-called "Treaty settlements" policy that is not just contrary to Te Tiriti but also clearly unjust, inadequate, and sadly mean-spirited.

Indeed such a response is based ultimately on its own presumptions about the lesser capacity of Indigenous Peoples and the superior legitimacy of its colonising. It is also based on the kind of fundamentally dishonest assumption evidenced in the very first Colonial Office Instructions to Governor Hobson that "the price paid to the natives [for their land] will bear an exceedingly small proportion to the price for which the same lands will be re-sold by the government to the settlers". That the Colonial Office could then claim that there was no "real injustice in this inequality" indicates a colonising duplicity which has unfortunately been reiterated in the current Crown "Treaty settlements" policy.

12. Each part of this Brief thus proceeds from my considered view that the conduct of the tīpuna in relation to the Crown were consistent with Iwi and Hapū law which clearly rendered any subsequent assertions of an overarching Crown authority as a clear breach of that law and tradition.

13. It also proceeds from my considered view that the Crown responses to, and consequent breaches of those understandings by it and others flow from its determination to consolidate its imperium or authority in another indigenous land. In effect they are little more than an attempted legitimising of its own presumed right to dispossess and are therefore neither ethical nor logical. They are certainly not legitimate according to

the law of Iwi and Hapū.

14. Indeed because the very idea of erecting an imperium was merely a justification for the overthrow of existing indigenous polities and presumed a voluntary giving away or ceding of authority by those polities, it is contrary to everything that underlay the political, constitutional and legal reality of all Indigenous Peoples. It is thus also contrary to everything expected and understood by Iwi and Hapū.

15. (a) Finally, and perhaps most importantly, it proceeds from my considered view that because the overthrow of existing Iwi and Hapū polities was contrary to the extant law and authority in this land it is the nature and degree of that overthrow which needs to be addressed in any "settlements" regime. What needs to be settled are not discrete acts of wrongdoing by the Crown that are now deemed to be breaches of its somehow legitimately acquired power, but the grievously wrong process of colonisation within which they occurred and within which the Crown claims to legitimacy are made.

(b) In a very simple but in my view irrefutable sense, what needs to be "settled" are not apparent breaches of a treaty as defined by the Crown or even a set of Crown-controlled Treaty principles. Rather true settlement requires a legal, political and constitutional addressing of colonisation itself.

16. Before discussing the four Parts of this Brief it is important to make two further prefatory comments.

(a) Firstly it is appropriate to acknowledge that this Brief is being presented in the wider context of claims in Te Tai Tokerau, and in particular the quite specific evidence given to the Tribunal about the meaning and significance of He Whakaputanga and Te Tiriti. That evidence clearly outlines the illogicality as well as the unacceptable costs of the contrary assertions of Crown authority and contextualises the equally illogical and unacceptable presumptions that underpin its "Treaty settlements" process.

(b) Secondly, it is apposite that underpinning this Brief is the

realisation that our people's understanding of the past has long been distorted and submerged by the colonising need to privilege its own sense of history and its own claims to legitimacy. Yet we have always clung to our own view of the world, and if our own history is long known but not often publicly articulated it is because the telling has so often been disrespected and ignored. Throughout the last thirty years however, and particularly through the hearings of the Waitangi Tribunal, Maori people throughout the country have told our histories with a quiet dignity and a determination to never be silent or disrespected again. In this particular hearing a similar re-telling will occur and this Brief merely contextualises the truths they will articulate. In doing so it presents not just facts but what may be called a history of thought or the ideas and values that have shaped the historical actions of our people, and indeed the actions of the Crown and others.

Part One – Law and Concepts of Power

17. In earlier evidence to this Tribunal I endeavoured to point out the lesson of history that every society realises very early on that it cannot survive in a lawless state. All societies therefore establish ways of ensuring social cohesion by developing a philosophy or jurisprudence of law and a discrete legal system to give effect to it. Both are shaped by the land, history and values of the people - the idea and ideals of law are unique cultural creations.

18. Iwi and Hapū thus developed a law that grew out of the stories and the culture that developed here. Ani Mikaere of Ngāti Raukawa has called the resulting tikanga the 'first law'[1] of this land and while it was specific and unique to Maori it does share certain commonalities with the examples referred to above. It developed from philosophies to do with the sacred and the interrelatedness of whakapapa as well as from precedents and custom. It recognised the need for sanctions but stressed ethics and sought reconciliation rather than punishment. In every sense it was a 'full' law that recognised the relationships between people and every part of the universe, both seen and unseen, physical

[1] Ani Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Maori', in Michael Belgrave, Merata Kawharu and David Williams, eds, *Waitangi Revisited: Perspectives of the Treaty of Waitangi*, 2nd ed., Oxford University Press, Auckland, New Zealand, 2005, p. 334.

and spiritual.

19. The normative guidelines it contained formed part of a values-laden jurisprudence upon which decisions were made to settle disputes, regulate trade, ensure peace after war and reconcile all of the competing interests in human existence. Justice Edward Durie has stressed the importance of those values and has noted that law depended upon 'whether there were values to which the community generally subscribed. Whether those values were regularly upheld is not the point but whether they had regular influence. Maori operated not by finite rules alone...but by reference to principles, goals and values'.[2] Law set the 'ought to be' of conduct and recognised the fact of human fallibility.

20. In the same way that societies learn that they cannot exist in a lawless state they also learn that social order cannot be maintained in a power vacuum. They therefore simultaneously develop political and constitutional ideas and practices to govern themselves.

21. Constitutionalism and government are often regarded as complex ideas but they are really very simple. Government is the process that people choose to regulate their affairs and a constitution may be understood as the code they use to describe how government will function. An essential part of that process is the creation of what may be described as concepts and sites of power.

22. A concept of power is the idea of political and constitutional power. It is the philosophical base that a people develop about what government should be, as well as the values upon which the will of the people should be manifest. A site of power is the governing institution through which the concept of power is given effect.

23. In its broadest sense a concept of power is a particular society's reflection of the universal desire humans have to determine their own destiny and to do so through their own uniquely constructed polities and institutions.

24. The concept of power which was developed in this land reflected a

[2] Edward Durie, 'Custom Law' (Unpublished Paper, January 1994, distributed by Chief Judge's Chambers, Māori Land Court, 14 February, 1994).

similar focus on the land and on the relationships implicit in the notion of whakapapa. The generic name given to the concept was mana, although it was specifically rendered in some Iwi and Hapu as mana motuhake, mana taketake, mana to rangapu, and mana whatu ahuru.

25. Each of these definitions imply that the political independence implicit in mana was dependent upon the land so that mana as a political power could only be legitimised in concert with mana whenua, mana moana, and mana atua. If law was designed to meet all the possibilities of human existence, mana emerged to meet all the relationships our people might have with each other, with manuhiri, and above all with the land.

26. After 1840 the term tino rangatiratanga was also used to represent the concept of power. Dame Mira Szazy once defined it as 'the self determination' implicit in 'the very essence of being, of law, of the eternal right to be, to live, to exist, to occupy the land'.[3]

27. The concept of mana as a political and constitutional power thus denotes an absolute authority. It was absolute because it was absolutely the prerogative of Iwi and Hapu, but it was also absolute in the sense that it was commensurate with independence and an exercise of authority that could not be tampered with by another polity.

28. Such powers were the inevitable correlates of political and constitutional independence.

29. Together the concept and sites of power were situated in the discrete polities of Iwi and Hapu. Indeed in the hundreds of years prior to 1840 the common land mass that made up the islands of Te Ika a Maui and Te Waka a Maui was occupied by a number of distinct polities that exercised their own mana and lived according to their tikanga secure in the uniqueness they had developed over centuries. Just as the common land mass of Europe was occupied by a number of distinct polities exercising their authority and living according to their law so Iwi and Hapu did the same. They were recognised and constitutionally regulated

[3] Miraka Szazy, oral submission on behalf of Te Aupouri and Ngati Kuri (Wai 22: Muriwhenua Fishing Claim), first hearing, Te Reo Mihi Marae, Te Hapua, 8 - 11 December 1986.

polities.

30. Within this reality four constitutional prescriptions and proscriptions underpinned mana and determined how it could be exercised within any particular site of power:

(a) Firstly, the power was bound by law and could only be exercised in ways consistent with tikanga.

(b) Secondly the power was held by and for the people, that is it was a taonga handed down from the tīpuna to be exercised by the living for the benefit of the mokopuna.

(c) Thirdly the power necessarily entailed an obligation to promote and protect the wellbeing of the people through the constant mediation of relationships within the boundaries of the land recognised by the Iwi or Hapu.

(d) Fourthly the power of each Iwi and Hapū was inseparable from the mana of the land. Its exercise was both necessarily dependent upon and evidence of the relationships people had with the land.

31. One ramification of those prescriptions was that mana was absolutely inalienable. No matter how powerful rangatira might presume to be, they never possessed the authority nor had the right to give away or subordinate the mana of the collective because to do so would have been to give away the whakapapa and the responsibilities bequeathed by the tipuna. The fact that there is no word in Te Reo Maori for 'cede' is not a linguistic shortcoming but an indication that to even contemplate giving away mana would have been legally impossible, politically and constitutionally untenable, and culturally incomprehensible.

32. In general terms then mana as a concept of power was a culturally and tikanga-specific understanding of political authority. It grew from this land and the history, knowledge and experience which the people took from it. It was a concept of independence and if it was rarely articulated as such it was only because independence was known and lived as the norm by a people who were neither dependent upon nor beholden to any other. In a very real sense mana represents a vibrant reality that should

also not need to be stated – that the tīpuna lived in a politically and constitutionally structured society. The tīpuna were a power-full people.

33. In Europe too, the unique history and cultural/religious ideologies of its people led to the development of a particular concept of power called sovereignty. It was thus a concept of power defined in Europe by Europeans. It was both shaped by and gave expression to European ideas of hierarchy, individuated authority, and of course the teachings of Christianity. Like the law and legal systems of Europe it is a culturally specific creation.

34. However the discourses of colonisation framed the specificity of sovereignty within the racism of a "chain of being" running from the primitive savage "tribes" of Indigenous Peoples to the superior civilised "States" of Europe. In this depiction the former were pre-literate and pre-political and thus lacked the prerequisites for what Europe regarded as civilised and legitimate polities, including a lack of constitutional government and an incapacity to treat. In that discourse sovereignty was the only "real" concept of power.

35. It is within that discourse that the Colonial Office Instructions to William Hobson were drafted in 1839. They clearly reflect the presumption that whatever constitutional authority might be possessed by Iwi and Hapu it was necessarily of an inferior nature, a point made specifically by Lord Normanby –"I have already acknowledged New Zealand as a sovereign and independent state so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes who possess few political relations to each other, and are incompetent to act or even deliberate in concert".

36. That statement is of course both fundamentally flawed and inaccurate. It is flawed because with typical colonising arrogance it fails to consider the possibility that there may be differently constructed but equally legitimate concepts of power other than sovereignty and instead assumes that those who do not possess a European-type political structure based on sovereignty have only a kind of limited or not really "real" authority. It is inaccurate because Iwi and Hapu were clearly organised polities and any differences and commonalities among Iwi and

Hapu arose from the normal flux of political interaction not some inbred incompetence.

37. Mana clearly was (and is) a legitimate concept of power which for centuries was exercised effectively and unquestioningly by Iwi and Hapu. In that context it is my respectful view that the question often asked by the Crown "Were Maori a sovereign people prior to the arrival of Europeans?" is the wrong question because sovereignty was not a concept of power developed in this land. A more apposite question would be "Were Maori, and specifically were Iwi and Hapū independent polities exercising the absolute and inalienable authority of mana to treat and otherwise determine their own destiny?" and the answer would be "Of course they were".

Part Two: Treaty Making and the Mana To Make Political Compacts –

38. It is obvious that any independent polity possesses the capacity to treat and that Iwi and Hapū freely exercised that capacity prior to 1840. The relational nature of mana as a concept of power meant that treating was not only expected as a means of maintaining balance by sustaining or mending relationships but was a diplomatic practice used to ensure and enhance mana itself. Making treaties did not suddenly fall out of the sky over this land in 1840.

39. Most particularly the capacity to treat arose inevitably from the interdependence that was a necessary correlate of mana and dealings in land were merely another way of seeking reciprocal obligations, rather like Robert Williams' description of treaty-making among native American Nations as a 'rite of making relatives' through 'diplomatic conversations'.

40. The inter-polity (indeed the inter-nation) character of treaties naturally meant that they were always extremely political exercises but they were also imbued with the special sacredness that came from the committing of rangatira to a particular course of action and the honouring of relationships. There was a certain tapu too in the recognition that in a treaty the honour as well as the pride and independence of the collective was at stake which meant that treaties could only be negotiated by those

rangatira or ariki whom Monita Delamere described as "diplomats well-schooled in whakapapa and tikanga as well as the give and take of politics".

41. Those who negotiated them therefore had to have the legal standing to do so, and the agreement they made had to be consistent with the prescriptions and proscriptions inherent in the tika exercise of mana. Indeed treating was not a task for the unskilled or politically naive but for those who were mandated by the people and were recognised as having the ability to weigh up all the risks or benefits that any agreement might produce. Mahi tūhono was mahi mana and it was never undertaken without a shrewd calculation of the potential risks and benefits and a careful consideration of the prevailing circumstances.

42. In the whole political and constitutional tradition that underpinned the rite of 'making relatives' Iwi and Hapu talked treaty talk and accepted the obligations that were heard and spoken about. It was the words placed upon the atea that acknowledged the mana of the participants and gave mana to the guarantees that were agreed to – 'Ko te kupu te mana, ko te mana te kupu'.

43. Treating as an exercise of mana is the philosophical base from which derives any Iwi and Hapū Maori understanding of the actions of the Crown in 1840 and subsequently. The act of treating through the stating of bottom line positions and much korero tempered by an astute awareness of the situation on the ground is the complementary political base within which their particular terms need to be understood.

44. And it is those jural, constitutional and indeed moral baselines from which it is also possible to measure whether the British Crown's behaviour, motives and subsequent assertions are sustainable, tika, and just. More specifically they are the base from which it is possible to discern what now needs to be "settled".

Part Three – Te Tiriti Within the Context of Maori Law and Power

45. The certainties of tikanga and mana were beset by a new set of challenges with the arrival of Pākehā but the evidence also clearly shows that the increasing numbers of strangers did not alter the

fundamental legal and political perceptions which Iwi and Hapū brought to the new and rapidly changing situation.

46. In a most basic cultural sense the strangers were manuhiri whom Iwi and Hapu were obligated to welcome according to tikanga. They represented new relationships as well as the possibility of benefits and threats to the established order. Their presence therefore needed to be carefully measured according to where and how they might best be accommodated and what entitlements or rights (if any) they might be granted. They were in a sense entering the marae atea of Iwi and Hapū who clearly had the legal competence and political power to determine the terms of engagement. Like any iwi arriving in the rohe of another, they were expected to abide by the kawa and jurisdiction of the hosts.

47. That simple reality, sourced in culture as well as law and power, did not change in the period immediately prior to or after 1840. It has long been argued by the British Crown and many historians that disease and the so-called 'musket wars' had reduced Iwi and Hapu to almost helpless and hapless victims begging for the protection and salvation of a greater power. While the consequences of encounter should not be underestimated it is simply contrary to Iwi and Hapu realities to presume that new experiences and even worrying new trends in any way forced our people to retreat from or believe in a sudden diminishing of the authority implicit in history and whakapapa

48. As a result an initiative such as Te Tiriti o Waitangi would be acceded to by Iwi and Hapu only if it was deemed to be consistent with the political and legal traditions that had been nurtured for so long. Logic and common sense, let alone simple realities, made such a conclusion inevitable. Indeed Te Tiriti was necessarily derivative of Maori law and of mana because it could only have been discussed and understood by rangatira in that context.

49. Indeed in 1840 all Iwi and Hapu continued to know and exercise their mana as culturally unique and independent polities, and while many were desirous of formalising some relationship with the new arrivals by treating with the British Crown they were clear on the legal as well as the political criteria which that relationship had to meet if it was to be

legitimate. An agreement would only ever be contemplated if it clearly ensured the maintenance of both mana and tikanga.

50. That was the Maori reality and there are two important considerations in situating Te Tiriti within that reality –

(a) Firstly the language of that reality was naturally te reo Maori. In 1840 most rangatira were still monolingual and the korero about whether to treat with the Crown and what the terms of that treating should be were conducted in the reo. In most places where signings were held it was only the words in Te Tiriti that were discussed and signed. Even when moko were appended to the words in English, as they were at Manukau, the discussion was in te reo and the text was orally transmitted in the reo as well.

(b) Secondly it is important to bear in mind that for rangatira the issue was not a question of whether they understood sovereignty (the continuing preoccupation of Pakeha historians and jurists) but whether they understood mana. Because sovereignty was a foreign concept of power and because all of the understandings reached by the rangatira were concluded in Te Reo rather than a foreign language the key interpretive lens was obviously mana with all of its implications and absoluteness, including the absolute impossibility that any thought might be given to ceding that mana.

51. The evidence of all of the korero in the reo before and at the time of the signing clearly indicates that rangatira were mindful of their responsibility to preserve and even enhance the mana they were entrusted with. In 1840 they too could only act according to law and commit the people to a relationship that was tika in terms of their constitutional traditions.

52. In a very real sense that expectation situates Te Tiriti in a legal, political and constitutional framework that was (and is) absolutely consistent with Maori law, politics, and indeed the very 'essence of being'. Logic and common sense, let alone simple realities, would again seem to make such a conclusion inevitable.

53. The question that is often now posed by the Crown "Did Iwi cede sovereignty to the Crown through Te Tiriti" is therefore also the wrong

question. The more apposite question is did they cede mana and the answer is obviously that they could not and did not.

54. That the Crown subsequently and repetitively asserted the opposite does not make the opposite true. That the Crown subsequently exercised its power, including the power to define what should be "settled," does not make it true either. It certainly does not make any settlements policy based on its assertions true or tika or just. Instead it positions them within the context of colonisation and simply renders them as yet another breach of Te Tiriti.

Four: Colonisation and British Crown Discourses That Frame The Settlements Policy.

55. The British Crown discourses on Te Tiriti and thus the subsequent development of its "settlements" policy are situated in what Paul McHugh has acknowledged as the legal history of 'erecting a British imperium in territory occupied by non-Christian and tribal people.[4] However that history is part of a broader context in which arguments in politics, religion, philosophy, science and economics were used to rationalise the brutal colonisation of Indigenous Peoples after 1492.

56. The legal history then is not merely some reasoned debate about points of jurisprudence or even esoteric arguments about whether 'the legal formats of its imperialism were a variegated pattern of 'jurisdictionalism'. Rather it is the deliberate construction of a legal artifice to justify taking away the lands, lives, resources and power of innocent peoples who had done Europeans no harm nor posed any threat to them. It was the transformation of a European will to dispossess Indigenous Peoples into a putative right which is directly relevant to any consideration of the Crown's settlement strategy.

57. In earlier evidence to this Tribunal I outlined Europe's long history of fratricidal wars States and the assumption that they had a so-called prerogative to 'acquire and erect rights of government – some form of sovereign authority (an imperium) in territory beyond the realm'. After 1492 they refined this prerogative by classifying Indigenous Peoples as

[4] Paul McHugh, 'Brief of Evidence', Crown Commissioned Evidence for Wai 1040, 16 April 2010, p. 7.

an 'other' that was inferior because it was un-Christian, uncivilised, and un-White.[5] – a kind of legal incorporation of the chain of being.

58. The rationalisations used by the British Crown in relation to Te Tiriti derive inevitably from that same jurisprudence. For 'annexation' was just the 19th century euphemism for their right to dispossess, and the justifications advanced for it are part of its often logic-defying history. Indeed they can only be understood in that context. They may now be seen in the apparent reason of law or as unchallengeable cultural certainties but they were a means to a colonising end.

59. The history of every Iwi and Hapū shows that such presumptions have neither credence nor legitimacy in Maori law. Indeed colonisation itself is unavoidably contrary to that law. The willingness of our people to allow access to land and to manaaki those whom we shared with, was a noble attempt to ensure compliance and co-operation within the dictates of tikanga and Te Tiriti. The fact that the Crown chose to diminish its significance and flagrantly breach the understandings within them does not diminish either their legitimacy in our terms.

60. It is that reality which this Brief has tried to address while reframing the actions and ideals of Iwi and Hapū within the more ethical and reaffirming history of our own law and authority. If the mahi tūhono of our ancestors can be viewed in that way it may provide the key to finally settling the grievances that the people have had to bear for too long.

61. Because the current Crown "settlements policy" continues to ignore the efficacy of that law and continues to promote the contrary colonising assumptions of absolute Crown authority it is neither conducive to the creation of any ideal of "full and final" settlements nor consistent with the terms and obligations of Te Tiriti.

62. In the strange illogic that has characterised the whole development of colonising law the 'settlements policy" is itself a breach of Te Tiriti because it so fundamentally seeks to maintain an essentially colonising status quo. That it is clearly inadequate in fiscal terms is merely one consequence of that fact.

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[5] Ibid., p. 5.

63. It may be argued by some that the policy is now "the reality" and that participation by Iwi and Hapū gives it legitimacy. However participation or adaptation is never the same as acceptance or acquiescence, and "reality" is not necessarily a synonym for justice or indeed the honouring of a treaty.

64. As I stated at the beginning of this Brief our people deserve better than the burdens that history and dishonour have imposed upon us. That we are still prepared to deal in good faith with the Crown is a tribute to the tikanga that has sustained us through even the hardest of times. That we have endured at all is a tribute to the inner strength and trust we have in the sense of justice and honesty that should prevail in any relationship. It is my hope that through this process the Crown may at last have the dignity to respond in a similar way and seek to end the wrong of colonisation.

Moana Jackson.

12th October 2013

Northland.

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