IN THE WAITANGI TRIBUNAL **WAI 2180**

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of the Taihape: Rangitīkei ki Rangipō inquiry

GENERIC CONSTITUTIONAL ISSUES CLOSING SUBMISSIONS

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MAY IT PLEASE THE TRIBUNAL

"Ko te waka hei hoehoenga mo koutou i muri i ahau ko te Ture, ma te Ture ano te Ture e aki."

"The canoe for you to paddle after me is the Law, only the Law can be set against the Law."

—Te Kooti Ārikirangi Tūruki

INTRODUCTION

1. These generic closing submissions address **Issue A—Constitutional Issues**:

    1. Tino Rangatiratanga; and

    2. Political Engagement.

    ("the Constitutional Issues")

2. We begin these submissions with an overview of the generic closing submissions. Then, the Constitutional Issues as they are set out in the Tribunal Statement of Issues ("the TSOI") are rendered below for ease of reference. The Crown's position and concessions[1] on the Constitutional Issues are considered and brief submissions are made in response. A section then follows on past findings of the Waitangi Tribunal concerning various aspects of the Constitutional Issues. The technical research that we have relied on for these submissions is listed and discussed.

3. We then provide Level 1 answers to the TSOI questions in accordance with the Tribunal's suggested approach to the preparation of these closing submissions.[2] Following that, a Level 2 overview of particular issues in the inquiry is set out. A Level 3 presentation summary of these submissions will be filed at a later date.

[1] *Crown Memorandum Contributing to the Preparation of a Draft Statement of Issues*, Wai 2180, #1.3.2, at [24] to [29].
[2] *Directions of Judge L R Harvey: Forward Hearing Programme* dated 30 May 2019, #2.6.97, at [26].

4. When preparing the generic closing submissions, it became apparent that submissions, evidence and other information that we provided in response to a particular sub-issue of the Constitutional Issues could also be used in response, either wholly or partly, to other sub-issues. We took the opportunity to do so wherever this was possible in order to avoid unnecessary repetition. We have indicated in the generic closing submissions where we have taken this approach. In particular, we have combined our submissions in response to Tino Rangatiratanga Issue 1(6) and Political Engagement Issues 2(1) to 2(4).

5. The generic closing submissions have been prepared by Tamaki Legal of Auckland in tandem with Sykes & Co of Rotorua. Tamaki Legal have endeavoured to address all of the Constitutional Issues but for Tino Rangatiratanga sub-issues (2) and (3), which were addressed by Sykes & Co.

6. These generic closing submissions regarding the Constitutional issues are filed for the benefit of all claimants within the inquiry district. Counsel notes that the filing of these generic closing submissions does not prevent claimants in this inquiry from taking their own positions and presenting their own submissions on the Constitutional Issues.

7. Throughout these submissions we refer to the Māori text or te Tiriti ō Waitangi, unless otherwise indicated. We also refer throughout to the Crown's "assumption of sovereignty" to denote an interest by the Crown in sovereign rights but not the full acquisition thereof.

TRIBUNAL STATEMENT OF ISSUES

8. We set the Constitutional Issues out below for ease of reference. We note the reference in them to "the Treaty" and it is understood that this is a reference to the English text, the Treaty of Waitangi. However, that is not clear. In fact, it may have been the Waitangi Tribunal's intention to have parties understand that the phrase "the Treaty" is a reference to both versions of the cession document. It is not clear. That said, counsel was remiss in not having sought clarification earlier about the intended meaning

of “the Treaty” before the filing of these generic closing submissions and so we humbly apologise for our oversight in this respect.

9. Nevertheless, as the Waitangi Tribunal is aware and as we have submitted already, the English and Māori texts contain significant differences. This is especially so in relation to terminology that is highly relevant to the Claimants’ constitutional law-related claim interests, such as “kāwanatanga” and “tino rangatiratanga”.

10. We refer to the general principles of treaty interpretation that were set out by the Ōrākei Tribunal in 1987 (“the treaty interpretation principles”). We note in the treaty interpretation principles that, inter alia, neither text is superior, that considerable weight should be given to the Māori text given that almost all Māori signed that version, that any ambiguities in the provisions should be construed against the drafting party, in this case the Crown, and that treaties should be construed “in the sense which they would naturally be understood by Indians”.[3] In light of the treaty interpretation principles, it would appear to be appropriate to regard references by the Waitangi Tribunal in the Constitutional Issues to “”the Treaty” to be, in the least, a reference as well to te Tiriti ō Waitangi. Moreover, reliance by the Claimants on te Tiriti ō Waitangi affords them much preferred outcomes in terms of the submissions made herein and the relief they seek. Accordingly, and with respect, the Claimants intend to regard all references in the Constitutional Issues to “the Treaty” to be references in the first instance to te Tiriti ō Waitangi.

11. That having been said, such an approach would be inappropriate when addressing Issue 1(4)—What was the Crown’s understanding of the Treaty as it related to Taihape Māori? Therefore, the English text is the subject of those submissions.

[3] Waitangi Tribunal, *The Orakei Claim,* 1987, Wai 9, Chapter 11.11 (4) (a).

LEVEL ONE

A. CONSTITUTIONAL ISSUES[4]

1. Tino Rangatiratanga

Issues

1. At what point, and on what terms, did the Crown enter into a relationship with Taihape Māori?

   Given that the Crown did not have an active presence in the Taihape inquiry district before 1860, to what extent, if at all, did this affect the Crown's approach in exercising its kāwanatanga responsibilities toward Taihape Māori as opposed to other Māori?

2. Who among Taihape Māori, if anyone, signed the Treaty?

3. What was the understanding of the Treaty by Taihape Māori and how it related to them (including those Taihape Māori who did not sign the Treaty)? In particular, what expectations did they have of the Crown regarding the continued exercising of their tino rangatiratanga?

4. What was the Crown's understanding of the Treaty as it related to Taihape Māori?

5. Did the Treaty transfer to the Crown *de jure* sovereignty over Taihape Māori and the district? If so, what was the nature of that sovereignty? If not, did the Crown assume or acquire sovereignty through later act(s)?

6. At what point, and through what means, did the Crown acquire *de facto* sovereignty over Taihape Māori and the district?

[4] Taihape: Rangitīkei ki Rangipō (Wai 2180) District Inquiry *Tribunal Statement of Issues*, December 2016, #1.4.3, at 15-17.

2. Political engagement issues

Issues

1. To what extent did the legislative, judicial and administrative arms of government affect the ability of Taihape Māori to exercise their tino rangatiratanga?

    a. If those arms of government were exercised, could the manner of that use be called an imposition on Taihape Māori?

    b. Moreover, did it compromise the agency of Taihape Māori?

2. In what ways did Taihape Māori specifically demonstrate their tino rangatiratanga, and/or the impacts of Crown policies on their ability to exercise tino rangatiratanga? Were these demonstrations consistent with the tino rangatiratanga preserved to Taihape Māori under the Treaty? For example:

    a. The Kōkako and Tūrangarere hui;
    b. The Rūnanga of the 1860s;
    c. The Repudiation Movement, including Te Komiti o Pātea;
    d. The Kotahitanga Parliament;
    e. The Kīngitanga;
    f. Engagement of Taihape Māori rangatira with the Crown, including:

        i. The 1890 telegrams concerning the Awarua hearings;
        ii. The evidence presented to the Rees-Carroll Commission in 1891;
        iii. The 1892 and 1895 letters relating to land use; and
        iv. The hui with Premier Seddon at Moawhango in 1894.

g. The Rātana Church.

3. How did the Crown respond to these demonstrations of tino rangatiratanga by Taihape Māori?

4. Did Taihape Māori at any point in the nineteenth century envisage, or attempt to construct, an autonomous district within the region whose authority did not derive from the Crown?

CROWN STATEMENT OF POSITION AND CONCESSIONS

12. The Crown Statement of Position and Concessions is set out in the *'Crown Memorandum Contributing to the Preparation of a Draft Statement of Issues'* ("the Crown Statement").[5] The Crown filed no evidence on constitutional law-related matters.

13. It appeared to the Crown that since there was little to no contact between the Crown and Taihape Māori prior to the 1860s, it was suggested that the focus should be on how the Crown came to exercise its kāwanatanga role in the district.[6] How the Crown came to exercise its kāwanatanga role in the district is a valid focus of inquiry. However, the alleged legal basis for that kāwanatanga role must stem from earlier Crown actions and omissions such as Hobson's proclamations, the signing of te Tiriti ō Waitangi, Governor Gipps proclamations of 14 January 1840, the Letters Patent of June 1839, Normanby's instructions, the Charter of 1840, settlement orthodoxy and the signing of He Whakaputanga. Thus, it is appropriate for this Tribunal to examine the fount of Crown power in the Taihape district even though it was exercised relatively belatedly.

14. It was submitted by the Crown that it recognised that the Māori tribes held legal sovereignty over New Zealand before the Treaty of Waitangi was signed. This was, strictly speaking, not the case. In the research report on the Declaration of Independence and the Treaty of Waitangi that he

[5] *Crown Memorandum Contributing to the Preparation of a Draft Statement of Issues*, Wai 2180, #1.3.2.
[6] *Crown Memorandum Contributing to the Preparation of a Draft Statement of Issues*, Wai 2180, #1.3.2, at [26].

presented to Te Paparahi ō Te Raki Tribunal, Samuel Carpenter referred to the recognition by the Crown of a limited form of Māori sovereignty:[7]

> A second set of draft instructions anticipated Normanby's final instructions, which suggested a qualified sovereignty only in Māori rangatira and hapū. The sovereignty of Māori in such an uncivilised society could not support 'a lawful dominion in that full and absolute sense . . . of the more civilized parts of the World', again reflecting stadial conceptions that required settled cultivation and use.

And then:[8]

> However, just as the earlier draft instructions (just outlined) had done, Normanby later qualified the acknowledgement of New Zealand 'as a sovereign and independent state' on stadial grounds:

15. The level of sovereignty attributed by the Crown to Māori reeks of racism, of a willing ignorance (about the intricacies of te ao Māori) and of a pronounced superiority complex. There is no proper basis for attributing Māori with a qualified form of sovereignty. Although there was constant internecine fighting in traditional Māori society, the British had a long history of militarism as well. The extent to which Māori had populated and expanded across the length and breadth of the country by the time of te Tiriti ō Waitangi is testimony to a successfully regulated society. There was growth and high levels of health and well-being. The schools of higher learning were a feature of all communities as was a well-developed aristocracy. A deep spiritual component that was attached to most/all activity and conduct had the effect of standardising behaviour as well. A significant body of law exists in the form of tikanga Māori, kawa and ritenga. Acknowledgement by the hapū and iwi of a given takiwā (district) that their district forms a particular part of Te Ika a Māūi can be said to represent nationhood. This was recently stated in

[7] Carpenter, S., *Te Wiremū, Te Pūhipi, He Whakapūtanga me Te Tiriti: Henry Williams, James Busby, A Declaration and the Treaty*, Wai 1040, #A17, at 127.
[8] Carpenter, S., *Te Wiremū, Te Pūhipi, He Whakapūtanga me Te Tiriti: Henry Williams, James Busby, A Declaration and the Treaty*, Wai 1040, #A17, at 129.

the evidence of Bill Taueki for presentation to the Marine and Coastal Area (Takutai Moana) Act Inquiry:[9]

> It is far too simple to start at 1840 when our iwi name of Muaūpoko originates from time immemorial. 'Muaūpoko' is a reference to being in front of, or ahead of, the face or head of the fish of Māūi. Lake Horowhenua is the right eye of Māūi's fish and Lake Wairarapa is the other eye. The East Coast of the North Island is Te-Pakau-a-Te-Ika-a- Māūi (the wing of the fish of Māūi), the Coromandel Peninsula is said to be Te-Tara-a-Te-Ika-a- Māūi (the dorsal fin of Māūi's fish) and, of course, Te Taitokerau is known as Te-Hiku-o-Te-Ika-a- Māūi (the tail of the fish of Māūi). I have seen a reference to Tūhoe people referring to themselves as Te- Manawa-o-Te-Ika-a- Māūi (the heart of the fish of Māūi). The concept of Te Ika-a- Māūi stems back to the point in time when Māūi first pulled his great fish up from its watery home.

16. To have conceived of the North Island in the shape of a great shark or stingray before the days of GPS satellites and cartography is truly remarkable. Just as remarkable is the co-ordinated understanding across otherwise distant communities and takiwā, that together they comprise a singular whole in the metaphorical form of a mythological sea beast. This expression of nationhood goes some way to undoing Governor Gipps' observation about societal relations in te ao Māori:[10]

> So far at least as it is possible to make that acknowledgment 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.

17. In response to the Gipps observation, we cite the Kīngitanga as an example of the ability for large swathes of Māori society to unite for a common cause.

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[9] Brief of Evidence of William Taueki dated 31 August 2020, Wai 2660, #B109, at [10]. Mr Taueki also gave evidence on behalf of Muaūpoko in the Taihape inquiry—see Brief of Evidence of William Taueki, 27 August 2018, Wai 2180, #L3.

[10] Palmer, *Treaty of Waitangi*, at 49, and quoted by Gipps in his address to the NSW Legislative Council on 9 July 1840. CO 209/6, p 280a, cited in Carpenter, S., *Te Wiremū, Te Pūhipi, He Whakapūtanga me Te Tiriti: Henry Williams, James Busby, A Declaration and the Treaty*, Wai 1040, #A17, at 129.

The broad support for the Kīngitanga is evident from the dimensions of the 'Rohe Tapu' boundary that was established at Pūkawa in 1856 and reconfirmed in large part at Kōkako a few years later in 1860. We present submissions on the 'Rohe tapu' in the submissions below pertaining to the Kīngitanga. Also later in these closing submissions we discuss the Kotahitanga movement of the 1890s. Kotahitanga enjoyed a significant support base. The Kotahitanga petition had been signed by 37,000 Māori aged 15 years or older by the late 1890s. Given that the entire Māori population was some 43,112 in 1901,[11] this number of signatories represents an incredible 86% of the entire population. The Kotahitanga petition represents an extraordinary ability on the part of all Māori to act and deliberate in concert. In the Amended Joint Brief of Evidence of Maata Merle Ormsby, Daniel Ormsby and Ti Aho Pillot, the ability of Māori to act in concert en masse was evidenced once again:[12]

> An important *focus* for the Māngai was the unity of the Māori people under the one true God Jehovah. One of the ways in which he achieved this in his time was through the signed *'Petition of Tahupotiki Wiremu Ratana and 30,128 Morehu',* from throughout Aotearoa. . . . It was said that the Māori population was estimated at 42,000 at the turn of the 20th Century. The Māngai's effort in obtaining over 30,000 willing Māori signatories, just 2 decades later, means that a significant percentage of the Maori Adult population supported him. When you read the petition, it becomes clear that the Treaty of Waitangi is a key feature of it.

18. Qualifying Māori sovereignty on the basis of a lack of political cohesion was premature and adjudged with self-serving Eurocentric myopia. Te Wakaminenga was formed with the signing of He Whakaputanga on 28 October 1835 by a number of northern rangatira. It was later signed by Te Wherowhero and Te Hāpuku. Their signings in particular establish the distinct possiblity that He Whakaputanga was a vehicle for rallying Māori under the banner of independence, had it been promoted in this manner. Typical of the Crown's attitude to fomenting Māori unity was its failure to erect a building for Te Wakaminenga to meet in. Although Busby had

[11] New Zealand Censuses per Statistics New Zealand.
[12] Amended Joint Brief of Evidence of Maata Merle Ormsby, Daniel Ormsby and Ti Aho Pillot, 29 September 2017, Wai 2180, #G18, at [63].

acquired framing timber and flooring in 1834 to construct a House of Assembly for Te Wakaminenga, the timber was used for 'another purpose' and so it was never built.[13] A reason why other timber could not be sourced has not been advanced. Whilst far from being comprehensive in its coverage, the signing of te Tiriti ō Waitangi and the English text by more than 500 rangatira was yet another expression of the ability of Māori leadership to act in concert in the earliest days of British colonisation.

19. At paragraph 28 of the Crown Statement, reference was made to "the words of Justice Richardson" in the *Lands* case that Crown sovereignty was "authoritatively established" by the Crown through the gazettal of Hobson's proclamations on 2 October 1840.[14] In response, Crown sovereignty was not "authoritatively established" on 2 October 1840 since the Crown was without *de facto* sovereignty at that point in time. The Crown is estopped from claiming that it later acquired sovereignty over time or through the later acquiescence of Taihape Māori on the basis of its claim that sovereignty had been acquired by 1840's end. Further in response, the Crown failed to meet even its minimal standards for the requisite level of consent from the rangatira of New Zealand. We elaborate on our responses to the Crown's legal position with regard to the transfer of sovereignty below.

20. In the Crown Statement at paragraph 29, it was assumed that the war in the Waikato need not feature in this inquiry viz a viz issues of sovereignty. We disagree. We set out below how the 'Rohe Tapu' established at Pūkawa in 1856 and then confirmed at Kōkako in 1860 included the Mōkai-Pātea region. In light of this boundary inclusion, their anti-seller synergy with the Kīngitanga and in light of other evidence such as the fact that Mōkai-Pātea defended the Kīngitanga aukati against Pākeha intrusion in the Taihape district in 1864, adherence to the Kīngitanga by Taihape Māori and more importantly the consequential effects of that adherence on their relationship with the Crown should be examined by this Tribunal.

[13] Carpenter, S., *Te Wiremū, Te Pūhipi, He Whakapūtanga me Te Tiriti: Henry Williams, James Busby, A Declaration and the Treaty*, Wai 1040, #A17, at 76.
[14] *Crown Memorandum Contributing to the Preparation of a Draft Statement of Issues*, Wai 2180, #1.3.2, at [28].

PAST FINDINGS OF THE WAITANGI TRIBUNAL

21. In order to assist the Waitangi Tribunal, the findings of various Tribunals considered relevant to these submissions and to the issues at hand are discussed below.

General interpretation of te Tiriti ō Waitangi

22. The Ōrākei Tribunal considered it reasonable to apply the general principles of treaty interpretation in accordance with municipal law to the interpretation of te Tiriti ō Waitangi.[15] It listed the relevant principles of interpretation as follows:

a. Attempting to give effect to the expressed intentions of the parties, in light of the surrounding circumstances;

b. Needing to bear in mind the overall aim and purpose of the treaty;

c. That neither text is superior in relation to bilingual treaties;

d. That considerable weight should be given to the Māori text, given that almost all Māori signatories signed that version;

e. That any ambiguities in the provisions should be construed against the party that drafted the provision, in this case the Crown (contra proferentum rule); and

f. That the US Supreme Court "indulgent rule" suggests that treaties with indigenous people should be construed "in the sense which they would naturally be understood by Indians".[16]

Changing Tribunals and textual differences

23. A number of past Tribunals have dealt with the level of authority, if any, that was ceded by Māori when they signed te Tiriti ō Waitangi. Due to the differences in the Māori and English texts, there has been much debate on

[15] Waitangi Tribunal, *The Orakei Claim,* 1987, Wai 9, Chapter 11.11 (4) (a).
[16] Waitangi Tribunal, *The Orakei Claim,* 1987, Wai 9, Chapter 11.11 (4) (a).

whether Māori ceded sovereignty to the Crown or whether something less was ceded.

24. A feature of the Tribunal jurisprudence discussed below is the manner in which views about the meaning and effect of te Tiriti ō Waitangi have developed over time. A distinct pre-*Lands*[17] jurisprudential approach was prominent. There was a greater willingness to equate "tino rangatiratanga" in te Tiriti ō Waitangi with Māori sovereignty. That jurisprudential approach changed in a series of Tribunal findings on the topic of sovereignty in the immediate post-*Lands* era. Then in the new millennium, the Waitangi Tribunal examined the past, relevant events much more closely and with a greater preparedness to conclude accordingly on the basis of the evidence before it, culminating in the Te Paparahi ō Te Raki Tribunal in 2014:[18]

> The rangatira who signed te Tiriti in February 1840 did not cede their sovereignty to Britain. That is, they did not cede their authority to make and enforce law over their people or their territories.
>
> The rangatira agreed to share power and authority with Britain. They agreed to the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Māori interests.
>
> ("the cession finding")

Before the Lands case

25. Article 1 of the English text refers to a cession of sovereignty from Māori to the Crown. Article 1 of the Māori text refers to a cession of kawanatanga from Māori to the Crown. A key submission is that Article 1 of the Treaty is an inaccurate translation of Article 1 of Te Tiriti because kawanatanga does not mean sovereignty. Thus, it is submitted that Māori did not cede sovereignty to the Crown. We refer to the *Report of the Manukau Tribunal*: [19]

[17] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.
[18] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 529.
[19] Waitangi Tribunal, *Report on the Manukau Claim*, 1985, Wai 8, at 93.

> If the matter is in issue at all the sovereignty that assumes that the sea belongs to the Crown was not in fact ceded in the Maori text but only "kawanatanga", the right to make laws for the peace and good order of the country and he security of the realm.

26. We refer to Article 2 of the Maori text and, in particular, to the following phrase:

> ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te **tino rangatiratanga** o o ratou wenua o ratou kainga me o ratou taonga katoa.[20] (emphasis added)

The phrase "tino rangatiratanga" has been afforded various meanings by various judicial officers and legal commentators. President Cooke of the New Zealand Court of Appeal attributed it the meaning of "chieftainship"[21]. Sir Edward Taihakurei Durie considered it to mean "full authority".[22] We refer to the Tribunal in the Motunui-Waitara report:[23]

> The Maori [text] confirms to the Chiefs and the hapu "te tino rangatiratanga" of their lands etc. This could be taken to mean "the highest chieftainship" or indeed "the sovereignty of their lands".

Post Lands

27. In 1987, the Ōrākei Tribunal stated that the chiefs that signed te Tiriti ō Waitangi ceded "kāwanatanga" to the Queen. It was considered that this was something less than sovereignty as it is subject to the protection of Māori interests. The Tribunal concluded that the cession of sovereignty is implicit from the surrounding circumstances.[24]

28. In the *Ngai Tahu Report* 1991, the Tribunal considered that te Tiriti created a duty on the Crown to recognize tribal rangatiratanga. This was understood at the time to mean tribal management and control.[25]

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[20] Treaty of Waitangi Act 1975, Schedule 1.
[21] *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641, per Cooke P, at p.663, line29.
[22] E.T.J. Durie, 'The Treaty in Maori History', in *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, ed. William Renwick, Victoria University Press, 1991, p.157.
[23] *Report on the Motunui-Waitara Claim*, page 51.
[24] Waitangi Tribunal, *The Orakei Claim,* 1987, Wai 9, Chapter 11.11(4)(a).
[25] Waitangi Tribunal, *Ngai Tahu*, 1991, Wai 27, at 236-237 [4.7].

29. During the Māori Electoral Option inquiry in 1994, Professor Kawharu gave evidence on what was ceded:[26]

> …what the chiefs imagined that they were ceding was part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death.

The Tribunal stated that the terms of te Tiriti ō Waitangi entitled Māori to a measure of autonomy, but not full independence. This qualified autonomy could take various forms.[27]

30. In the *Muriwhenua Fishing Claim Report* 1997, the Tribunal stated that tino rangatiratanga in the Maori text does not mean complete tribal control. Instead, it refers to a form of tribal self-management akin to what we now know as local government. Te Tiriti attempted to secure the status of Māori and protect their interests. In order to do this, the Queen's authority had to be supreme.[28] From the evidence presented, it was clear that Māori at the time understood that they were relinquishing the right to govern while protecting their territorial rights.[29] When the Māori text was read alongside contemporaneous statements, the Tribunal was satisfied that sovereignty had been ceded.[30] The Māori chiefs seemed to be trying to preserve a form of autonomy that did not amount to complete control, but some form of local self-government in Māori areas.[31] The Treaty as a whole does not purport to describe a continuing relationship between two separate sovereign states. In effect, it was the reverse, providing the relinquishment of Māori sovereign status in exchange for their guaranteed protection.[32]

31. A number of Tribunals have stated that the acquisition of sovereignty by the Crown was not an absolute right.[33] The rangatiratanga that was guaranteed to Maori by Article 2 of the te Tiriti ō Waitangi qualifies or limits the authority

[26] Waitangi Tribunal, *Maori Electoral Option Report*, 1994, Wai 413, at 3.
[27] Waitangi Tribunal, *Maori Electoral Option Report*, 1994, Wai 413, at 4.
[28] Waitangi Tribunal, *Muriwhenua Fishing Claim*, 1988, Wai 22, at 198 at 10.3.3.
[29] Waitangi Tribunal, *Muriwhenua Fishing Claim*, 1988, Wai 22, at 198 at 10.3.3.
[30] Waitangi Tribunal, *Muriwhenua Fishing Claim*, 1988, Wai 22, at 198 at 10.3.3.
[31] Waitangi Tribunal, *Muriwhenua Fishing Claim*, 1988, Wai 22, at 198 at 10.3.3.
[32] Waitangi Tribunal, *Muriwhenua Fishing Claim*, 1988, Wai 22, at 198 at 10.3.3.
[33] Waitangi Tribunal, *Te Arawa Representatives Geothermal Resource Claim*, 1993, Wai 7, at 31.

of the Crown to govern. When the Crown exercises its sovereignty it must, therefore, respect and guarantee Maori rangatiratanga or Maori mana.[34] This limit has been expressly applied to the settlement process. The Te Arawa Representatives Tribunal stated in 1993 that the Crown must provide iwi and hapu with the ability to exercise their tino rangatiratanga in the settlement of their claims. When making settlement-related decisions, the Crown must consider whether its Treaty obligations warrant an alternative approach to the Government's usual negotiation policy, processes and targets for settlement claims.[35]

32. The fact that the grant of sovereignty by Maori to the Crown is limited does not create constitutional issues according to the Tūrangi Township Tribunal. It stated that few if any western governments enjoy unqualified powers of sovereignty. Governments are constrained in some cases by entrenched constitutions and in other cases by international agreements.[36] Furthermore, overseas jurisdictions have supported the recognition of aboriginal autonomy. It is suggested that these are an aid to national unity and not a barrier to national unity. In order to consolidate the differences of opinions regarding these matters, it is best to attempt to empower Maori instead of suppressing their beliefs.[37]

33. In 2004, the Tūranga Tribunal equated 'kawanatanga' with sovereignty and 'tino rangatiratanga' was deemed to mean tribal autonomy:[38]

> By the terms of the Treaty, tribal autonomy was the only basis for a quality Treaty relationship. That is as true today as it was then. It is now axiomatic that the sovereignty or kawanatanga of the Crown was and remains subject to the guarantee to protect tino rangatiratanga, or in English, tribal autonomy.
>
> By Māori autonomy, we mean no more than the ability of tribal communities to govern themselves as they had for centuries, to

[34] Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report,* 1992, Wai 27, *page 269* & Waitangi Tribunal, *Turangi Township Report*, 1995, Wai 84, page 286, Waitangi Tribunal, *Te Arawa Representatives Geothermal Resource Claim*, 1993, Wai 7, page 31 & Waitangi Tribunal, *Taranaki Report,* 1996, Wai 143, at 17.
[35] Waitangi Tribunal, *Te Arawa Representatives Geothermal Resource Claim*, 1993, Wai 7, at 31.
[36] Waitangi Tribunal, *Turangi Township Report*, 1995, Wai 84, at 286.
[37] Waitangi Tribunal, *Taranaki Report,* 1996, Wai 143, at 16.
[38] Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, 2004, Wai 814, at 112-113.

> determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants. That is not to say that Maori rejected a role for the Crown at the national level. Clearly the alacrity with which Maori leaders engaged with the Government showed that they desired to negotiate and foster a relationship with the colonial state. It was incumbent on the Crown to positively foster Maori autonomy in Turanga, not to conspire to defeat it.

A turning tide

34. Following the Tūranga Tribunal's report, various Tribunals began to veer towards the pre-*Lands* position. In this era, these respective Tribunals had the benefit of much more detailed constitutional claim-specific pleadings, evidence and argument.

35. In 2008, the Central North Island Tribunal stated that indigenous sovereignty is not about independence from the state, but instead the proper exercise of Crown and Māori autonomy in their respective spheres and managing the overlaps in partnership.[39] It went on to state that from 1840 to 1920, the Crown should have honoured Māori tino rangatiratanga by creating institutions which allowed the Claimants in that case to exercise aboriginal autonomy or mana motuhake. The Tribunal stated that by failing to empower the Claimants in this way, the principles of te Tiriti ō Waitangi were breached.

36. The Tauranga Moana Tribunal held in 2010 that tino rangatiratanga equates with mana motuhake and aboriginal autonomy. The relationship between Maori and the Crown is symbiotic and each party must accommodate the other.[40] The Crown has a duty to respect Māori tino rangatiratanga and foster empowerment and autonomy. In its view, strong, confident iwi and hapu are in a better position to contribute to the well-being of the nation as a whole.[41]

37. In the Urewera inquiry, the phrase "tino rangatiratanga" was accorded the customary meaning of "mana motuhake" by the Tribunal. "Mana motuhake" was presented to the Tribunal as being akin to a charter of Tuhoe rights. It has connotations of unique power, authority, freedom, liberty, nationhood,

[39] Waitangi Tribunal, *He Maunga Rongo,* 2008, Wai 1200, page 208.
[40] Waitangi Tribunal, *Tauranga Moana,* 2010, Wai 215, page 18.
[41] Waitangi Tribunal, *Tauranga Moana,* 2010, Wai 215, page 18.

self-determination, independence and sovereignty. It was quoted as being "…a philosophy but also a burning inner drive, to be absolutely and totally independent of outside authority, so as to protect the people and their way of life". Another way of describing it was as "…maintaining the continuity and consistency of our philosophies through the practical expression of our tikanga."[42]

38. Te Paparahi ō Te Raki Tribunal's cession finding is significant in many ways. That Tribunal had the opportunity to test the full range of evidence about the treaty's meaning and effect. The broad ambit of the examination that was undertaken gives the cession finding particular cogency. Notable too is the Te Paparahi ō Te Raki Tribunal's decision to equate 'tino rangatiratanga' with sovereignty as opposed to 'tribal management and control' or 'tribal self-management'. The fullness of argument and evidence before the Te Paparahi ō Te Raki Tribunal on the meaning of the terms of te Tiriti ō Waitangi led it to make this particular determination. A key evidential finding concerned the representations and proposals put to the northern rangatira by "Hobson and his agents".[43] They were such that they caused the signatory rangatira to believe that they were not ceding their sovereignty by signing:[44]

> The authority that Britain explicitly asked for, and they accepted, allowed the Governor to control settlers and thereby keep the peace and protect Māori interests

It seems likely that the representations made by Hobson during the northern signings at Waitangi, Waimate and Mangungu were the same as those made by the Crown's agents when they took te Tiriti ō Waitangi around the country. Unfortunately, very little is recorded about the discussions that took place at other signing events.

39. A particular significance of the cession finding is that it reduces the level of consent by rangatira to the Crown's assumption of sovereignty by some

[42] Te Urewera Waitangi Tribunal, Wai 894, 2012, volume 1, chapter 2.3, page 80.
[43] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 529.
[44] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 528.

40%, further undermining Hobson's objective of 'universal adherence' by rangatira to the transfer of power.[45]

Assistance from he Whakaputanga

40. *He Whakaputanga o te Rangatiratanga o Nu Tirene* ("he Whakaputanga") is otherwise known as the Declaration of Independence. We note that the equivalent word for "rangatiratanga" is "independence". In the context of a Declaration of Independence, it is submitted that the word "independence" can be readily translated to mean sovereignty. The Merriam-Webster dictionary includes the notion of independence in its definition of "sovereignty":[46]

> ***sov·er·eign·ty***
>
> **noun** \ˈsä-v(ə-)rən-tē, -vərn-tē **also** ˈsə-\
>
> *: unlimited power over a country*
>
> *: a country's independent authority and the right to govern itself*

41. It should be noted that the Crown drafted he Whakaputanga, the Treaty of Waitangi and te Tiriti ō Waitangi. In light of the translation given to "rangatiratanga" by the Crown in he Whakaputanga and given the meaning attributed to "tino rangatiratanga" by the recent Urewera Tribunal and by other Tribunals, it is submitted that the phrase "tino rangatiratanga" as it is set out and used in te Tiriti ō Waitangi should be accorded the meaning of sovereignty. If it is agreed that "tino rangatiratanga" means sovereignty, then Article 2 of te Tiriti ō Waitangi is an affirmation of Maori sovereignty. If Article 2 of te Tiriti is an affirmation of sovereignty, then signatory and non-signatory rangatira alike did not cede sovereignty and te Tiriti ō Waitangi cannot be relied on, as it is in Hobson's proclamations, for the cession of the North Island.

[45] Hobson to Russell, 25 May 1840, CO 209/6: 146 at 150, cited in the *Brief of Evidence of Paul McHugh*, Wai 1040, #A21, at [128]. Hobson arbitrarily set the level of consent required to no less than 'universal adherence'.
[46] http://www.merriam-webster.com/dictionary/sovereignty

TECHNICAL RESEARCH

42. The following research reports and academic commentaries were relied on in particular in the preparation of the generic closing submissions. It should be noted that some of the research reports listed below are not on the Taihape inquiry record of inquiry:

a. Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, #A43;

b. Armstrong, D., *Mokai Patea Land, People and Politics*, Wai 2180, #A49;

c. Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12;

d. O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23;

e. O'Malley, *Te Rohe Potae War and Raupatu*, Wai 898, #A22;

f. Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78;

g. Brief of Evidence of Donald Loveridge, Wai 1040, #A18;

h. Brief of Evidence of Dr P G McHugh, Wai 1040, #A21;

i. Williams, D.V., *The Annexation of New Zealand to the New South Wales in 1840: What of the Treaty of Waitangi?*, Australian Journal of Law and Society, Vol 2, No. 2, 1985;

j. Joseph, Philip A., *Constitutional and Administrative Law*, 4th ed.

ISSUE 1(1)(a) TIMING AND TERMS OF THE CROWN RELATIONSHIP

43. In this section of the closing submissions, we address Issue 1(1)(a) of the Tribunal's Statement of Issues. We have taken the liberty of ascribing an added designation to Issue 1(1) for ease of differentiation and referencing:

> **1(1)(a) At what point, and on what terms, did the Crown enter into a relationship with Taihape Māori?**

44. With regard to the "terms" upon which the Crown entered into a relationship with Taihape Māori, we have included submissions in response to this particular issue in our response to Issue 1(4)—What was the Crown's understanding of the Treaty as it related to Taihape Māori?

Introduction

45. The submissions below address the point in time when the Crown entered into a relationship with Taihape Māori. We have taken the word "relationship" to mean a constitutional law-based relationship. That is, one that involves the Crown's assumption of sovereignty. That being the case, there are different views on when the Crown assumed sovereignty over Taihape Māori. Many prominent academics and indeed many New Zealand judges would state that New Zealand was a settled colony and so the date when sovereignty was acquired by the Crown was 15 June 1839. On the other hand, the Crown is of the view that New Zealand was a ceded colony and that 2 October 1840 is when sovereignty was transferred. For the Claimants, the Crown's assumption of sovereignty is so fraught with illegality that there is no point in time when sovereignty was acquired by the Crown.

Ceded colony

46. Although the Crown did not have an active presence in the Mōkai-Pātea region for about 20 years after the signing of te Tiriti ō Waitangi, according to the Crown, it had formed a legal relationship with the people of the area by the end of 1840. The legal relationship stemmed from the Crown's assumption of sovereignty over the entire country that year. It is irrelevant to the Crown that Mōkai-Pātea Māori had not signed te Tiriti ō Waitangi and it is irrelevant that there was no Crown presence in the region until the 1860s.

47. Crown counsel in the Te Rohe Potae Inquiry set out the Crown's position as follows:[47]

> 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 Lands Case), 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 relied on that finding as to the fact of its sovereignty.

And then,[48]

> British sovereignty was declared by the May proclamations and confirmed by the gazettal of those proclamations in London. Those two actions were required by British constitutional law and practice. It was the proclamations that were legally effective. The Proclamations referred to, and relied upon, the signing of the Treaty. The British accepted such steps were also required by *jus gentium*.

48. The Crown in the Te Rohe Potae Inquiry relied on the *obiter dicta* of Richardson J in the *Lands* case:[49]

> It now seems widely accepted as a matter of colonial law and international law that those proclamations approved by the Crown and the gazetting of the acquisition of New Zealand by the Crown in the London Gazette on 2 October 1840 authoritatively established Crown sovereignty over New Zealand.

According to the Crown in the Te Rohe Potae inquiry, "[t]he acquisition of sovereignty was done honourably, fairly, reasonably and in good faith and

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[47] *Closing Submissions of the Crown on Constitutional Issues (Topic 1),* Wai 898, #3.4.312, paragraphs 6, 31.
[48] *Closing Submissions of the Crown on Constitutional Issues (Topic 1),* Wai 898, #3.4.312, at [41.2].
[49] *Closing Submissions of the Crown on Constitutional Issues (Topic 1),* Wai 898, #3.4.312, at [6], citing *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 671.

in accordance with the rules of jus gentium that the Crown itself accepted and applied. The Crown therefore acquired sovereignty in a manner that can be said to be consistent with the principles of the Treaty."[50] Crown counsel and the Court of Appeal assert that both de facto and de jure sovereignty were acquired by way of Hobson's proclamations. Associate Professor Noel Cox comports with the Crown and the Court of Appeal in this respect as well.[51] According to Loveridge, "[a]s far as the British Government and the Queen's subjects in general were concerned, Hobson's proclamations were the end of the matter: New Zealand was now British, Maori were British subjects and New Zealand for the first time in its history came under a single central government".[52]

49. During the Stage 1 hearing of Te Paparahi ō Te Raki Tribunal, the Crown argued that sovereignty was transferred unto the Crown by way of the signing of te Tiriti, the issuance of Hobson's proclamations, and the gazetting of Hobson's Proclamations by the Crown in the *London Gazette* on 2 October 1840.[53] Crown counsel concluded that the transfer of sovereignty was completed by October 1840. Dr McHugh concurred with regard to the purported completion date:[54]

> [T]he Crown acquired sovereignty in New Zealand by a series of jurisdictional steps. There was no single moment when the Crown acquired sovereignty in New Zealand, but a process that was certainly complete by October 1840.

50. In reply to questioning from His Honour Judge Coxhead during Hearing Week 4, Dr McHugh confirmed that the transfer of sovereignty from the rangatira to the Crown was a process, that it was finished by October 1840 with the gazetting of Hobson's Proclamations.[55] Dr McHugh also gave testimony that "[t]echnically, in terms of British constitutional law, those proclamations of May amounted to the moment of British sovereignty . . . ".[56]

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[50] *Closing Submissions of the Crown on Constitutional Issues (Topic 1),* Wai 898, #3.4.312, at [6], [31].
[51] Associate Professor Noel Cox, *New Zealand constitution history*, at [146].
[52] *Brief of Evidence of Donald Loveridge*, Wai 1040, #A18, at 12.
[53] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014) page 8; *Closing Submissions of the Crown*, Wai 1040, #3.3.33, 8 February 2011, paragraph 508. In those Closing Submissions for the Stage One Inquiry the Crown relied on both texts for the acquisition of sovereignty, and identified a series of jurisdictional steps by which sovereignty was acquired in 1840.
[54] *Closing Submissions of the Crown*, Wai 1040, #3.3.33, at [508].
[55] *Hearing Week 4 Transcript,* Wai 1040, #4.1.4, at 607, lines 35-38 and at 608, lines 1-6.
[56] *Hearing Week 4 Transcript*, Wai 1040, #4.1.4, at 523, lines 25-26.

We point out that Dr McHugh made his claim about an October 1840 completion date both in his written evidence *and before the* Waitangi Tribunal.

51. It should be noted that on 21 May 1840, Hobson issued 2 proclamations for the vesting of the "full Sovereignty" of New Zealand in Her Majesty Queen Victoria:

    a. Based on the signing of te Tiriti ō Waitangi on the "Fifth day of February" 1840 by the "Chiefs of the Confederation of the United Tribes of New Zealand, and the Separate and Independent Chiefs of New Zealand, not members of the Confederation", and "further ratified and confirmed by the adherence of the Principal Chiefs" of the "The Northern Island", the North Island was ceded to "Her Majesty the Queen of Great Britain and Ireland" ("the North Island Proclamation"); and

    b. Based "on the grounds of Discovery", the "Sovereign Rights of Her Majesty" were asserted over "The Middle Island" and "Stewart's Island" ("the South Island Proclamation").

52. Reliance on the gazetting of Hobson's proclamations means that, according to the Crown, the North Island was vested in Queen Victoria by way of cession and the South and Stewart Islands were vested by way of discovery. By way of many and varied authorities, the Crown considered and continues to consider that sovereignty was established over the Mōkai-Patea region, and over the country as a whole, by 2 October 1840.

53. We submit below that the Crown cannot have acquired sovereignty by 1840's end because it was without de facto sovereignty in the Mōkai-Pātea region as at this date and the Crown is estopped from contending for a later acquisition date. Furthermore, there was no consent by Taihape Māori to the North Island proclamation. They were not even aware of it. Consent to the North Island proclamation was based on the signing of te Tiriti ō Waitangi. Many Taihape Māori did not sign te Tiriti ō Waitangi because it was never presented inland.

54. For the purposes of these closing submissions, it is more appropriate to refer to the North Island proclamation alone since that is the proclamation that is applicable to the Taihape inquiry district. Similarly, any reference to "the cession treaty", "cession", "ceded colony" and so forth is made in relation to the North Island alone.

A settled colony

55. Although the Crown claims that the acquisition of sovereignty was completed by October of 1840, the so-called orthodox view of constitutional law academics such as Professor Joseph, Dr Williams and Dr Foden is that the North Island was not ceded and the South Island was not "discovered". Instead, they say that New Zealand was a settled colony and that sovereignty was assumed by the Crown on 15 June 1839 by Letters Patent. Proponents of the orthodox view would say that the Crown's legal relationship with Taihape Māori began in 1839 and not 1840. Importantly for our purposes, there are different legal consequences as a result of being a settled as opposed to a ceded colony. According to Professor Joseph:[57]

> In settled colonies the settlers took with them such English statute and common law as was applicable to their new situation, while in conquered or ceded colonies the existing legal system remained intact unless and until modified or abrogated by British statute of Crown ordinance. Were New Zealand a ceded colony, there would have no automatic reception of English laws and the early New Zealand courts would have been bound to recognise and apply Māori communal law (such as it existed). However, in decisions dating from *R v Symonds*, New Zealand courts affirmed the application of New Zealand law from the creation of the colony.
>
> . . . .
>
> The inheritance of English laws suggests occupation and settlement as the legal basis of the Crown's claim to territorial sovereignty.

[57] Joseph, Philip A., *Constitutional and Administrative Law*, 4th ed., at 47.

56. To the proponents of a settled colony, the signing of te Tiriti ō Waitangi is considered ceremonial at best:[58]

> The Treaty of Waitangi was benign in intent but did not achieve for the colonial authorities the full and unqualified acquisition of the new territory. Its purpose was more ethereal, importing the concept of the honour of the Crown and ultimately legitimising the Crown's assumption of sovereignty.

57. We examine the orthodox view below. It is inconsistent with the principles of te Tiriti ō Waitangi because its legal origins are racist. Moreover, no judicially recognised precedent was proffered or relied on by the Crown for use of the royal prerogative to extend the territorial jurisdiction of the New South Wales legislature to New Zealand. Legal precedent is a must for use of the royal prerogative in such a constitutionally significant way. Furthermore, consent by Māori to settlement was required. Taihape Māori never had the opportunity to consent.

58. Even though the Crown does not rely on settlement for its assumption of sovereignty, it is important to address settlement nevertheless. We note that one of the earliest proponents of the settlement thesis was Dr Foden, a Crown solicitor and constitutional law historian. Although for some reason the Crown chooses to ignore the orthodoxy nowadays, it should be the subject of examination nevertheless because as a thesis it is well supported and the evidence of its substantive application is compelling.

Claimant date

59. According to the Claimants, New Zealand was neither a settled nor a ceded colony. Neither the orthodox date of 15 June 1839 ("the orthodox date") nor the Crown date of 2 October 1840 ("the Crown date") for the transfer of sovereignty are accepted by the Claimants. Prior to addressing the legitimacy of either process, we observe firstly how incongruous it is for there to be 2 irreconcilable points in time when sovereignty was assumed by the Crown. This state of affairs makes light of the Crown's procedural

[58] Joseph, Philip A., *Constitutional and Administrative Law*, 4th ed., at 48.

adeptness. The Crown's legal struggles with extending its jurisdiction to New Zealand are patently obvious from the record and they are examined below. The second observation is that the Crown is now estopped from claiming that sovereignty was acquired over time. With the doctrine of acquiescence, the sovereignty acquisition thesis championed by Professor Brookfield, it is contended that any legal anomalies with the sovereignty transfer process can be addressed by the passage of time and eventual acquiescence to settler rule by tangata whenua.[59] Even if the acquiescence doctrine was a valid thesis, and we argue below that it isn't, the point is that the Crown cannot now rely on it. The Crown cannot claim to be sovereign by 1840's end in an area such as Taihape where it had no presence at all at this time.[60] A third observation is that the popularly conceived notion that sovereignty was transferred to the Crown on 6 February 1840 with the signing of te Tiriti ō Waitangi is obviously a misnomer.

60. Justice Richardson's pronouncement in the *Lands* case that New Zealand is a ceded colony is *obiter dicta* only. Moreover, Justice Richardson was alive to the settlement orthodoxy:[61]

> The matter is much more complex than that bare narrative indicates. **Scholars differ both as to the precise legal basis for British sovereignty** and as to the legal status of the Treaty under New Zealand law. (emphasis added)

The case for settlement is compelling. Clearly evident is the early application of the common law in New Zealand courts. At Puketona, a Pākeha was killed and one Kihi was the charged with his murder. Although Ngāpuhi chiefs wished to mete out their own form of justice, Kihi was tried and sentenced to death in April 1840 by the 'first British Court of Justice in New Zealand'.[62] The son of a Bay of Islands rangatira, young Maketū was tried, sentenced and executed in Auckland in March 1842 for the murders of Mrs Roberton, her 3 children and the farm worker Thomas Bull. Maketū was not tried in

[59] F.M. Brookfield, *Waitangi & Indigenous Rights: Revolution, Law & Legitimation,* (2nd ed, Auckland University Press, Auckland, 2006).
[60] Stirling, B., *Taihape Nineteenth Century Overview: Responses to Statement of Issues*, Wai 2180, #A43(d). In his response to Issue 1(1) of the Tribunal Statement of Issues, Stirling stated that the Crown did not have "anything" that resembled a relationship with Taihape Māori "prior to commencing large-scale land purchase operations in the district in the 1870s".
[61] *New Zealand Māori Council v Attorney-General* [1987] NZCA 60, at 9, per Richardson J.
[62] Johnson, R., *The Northland War 1844-1846*, Wai 1040, #A5, at 54.

accordance with tikanga Māori, despite defence counsel Brewer's questioning of the court's jurisdiction and the application of British law.[63] We have mentioned already the 1847 case of *R v Symonds*.

61. In circumstances where the legal position may well be one of settlement, and not cession, it is prudent that we should address both forms of sovereignty acquisition for their consistency with the principles of te Tiriti ō Waitangi. We do so below.

ISSUE 1(1)(b) NO CROWN PRESENCE AND KĀWANATANGA

62. In this section of the closing submissions, we address Issue 1(1)(b) of the Tribunal's Statement of Issues. We have taken the liberty of ascribing an added designation to the Issue question for ease of differentiation and referencing:

> **1(1)(b) Given that the Crown did not have an active presence in the Taihape inquiry district before 1860, to what extent, if at all, did this affect the Crown's approach in exercising its kāwanatanga responsibilities toward Taihape Māori as opposed to other Māori?**

Introduction

63. Although the Crown did not have an active presence in the Taihape district before 1860, it needs to be understood that, as far as the Crown was concerned, its kāwanatanga was being exercised, at least in theory, in the Taihape region nevertheless. Therefore, it's responsibilities towards Taihape Māori were the same as they were for any other Māori group in the country. It is clear from the record that the Crown intended to proclaim sovereignty over the entire expanse of New Zealand in one fell swoop. As we set out below, it had to do it this way in order to corner the land market and to ward off any international competition. Given those needs and the intended approach to be taken in order to satisfy them, the Crown would have assumed that it had a legal presence throughout the country, whether it had an actual presence in any given region or not. A consequence for inland areas such as the Mōkai-Pātea of the 'whole of country'/one fell

[63] *R v Maketū* [1842] NZLosC 3 (1 March 1842) SC, Auckland.

swoop approach to acquiring sovereignty was that it diminished and probably obviated the need, in the Crown's eyes, for consent from those of the hard-to-reach places.

The whole of New Zealand approach

64. Significantly, according to Lord Normanby, sovereign authority could be claimed "over the whole . . .of" Aotearoa.[64] By late 1839, Hobson was expecting to claim sovereignty over the entire country:[65]

> May I beg to be informed how my Salary is to be drawn when my consular duties cease, which I assume will terminate **with the cession to Her Majesty of the Sovereignty of New Zealand**. (emphasis added)

65. Earlier in June of 1837, Hobson had travelled to New Zealand as commander of HMS *Rattlesnake*. The earlier visit must have been carried out to prepare Hobson for his later role as Lieutenant-Governor of the colony. At that time however, Hobson's thinking was tied up with the factories approach to the assumption of sovereignty. In a reporting letter to Governor Bourke of New South Wales dated 8 August 1837, Hobson suggested that "if factories were established at the Bay of Islands, at Cloudy Bay and Hokianga, and in other places, as the occupation by British subjects proceeds, a sufficient restraint could be constitutionally imposed on the licentious whites, without exciting the jealousy of the New Zealanders, or any other power".[66] According to Dr Loveridge, Hobson suggested the acquisition of sovereignty over two or three districts already settled by Europeans.[67] However, in fact, Hobson suggested "that sections of the land *be purchased* (emphasis added), inclosed (sic) and placed within the influence of British jurisdiction, as dependencies of this colony".[68] He also recommended a treaty "with the New Zealand chiefs for the recognition of

[64] Lord Normanby's Instructions to Captain Hobson 1839 [1839] NZConLRes 2 (14 August 1839), at [6].
[65] Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 150, footnote 423. Hobson's sovereignty assumption was made in a letter to Lord Palmerston about his salary situation dated 13 August 1839.
[66] Hobson to Bourke, 8 August 1837, British Parliamentary Papers, 1840, vol 238, at 9-11. Cited in the *Document Bank for Evidence of Dr Donald Loveridge "'The Knot of a Thousand Difficulties': Britain and New Zealand, 1769-1840"*, Wai 1040, #A18€, at 630-632.
[67] This is how Dr Loveridge encapsulated Hobson's factory approach—see the Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 122. Unfortunately, Dr Loveridge passed away on 4 April, 2015. He gave evidence as a Crown witness during Stage of Te Paparahi o Te Raki inquiry (Wai 1040).
[68] Hobson to Bourke, 8 August 1837, British Parliamentary Papers, 1840, vol 238, at 9-11. Cited in the *Document Bank for Evidence of Dr Donald Loveridge "'The Knot of a Thousand Difficulties': Britain and New Zealand, 1769-1840"*, Wai 1040, #A18(e), at 631.

the British factories, and the protection of British subjects and property".[69] The treaty recommendation was concerned moreso with the recognition and protection of the factories by rangatira as opposed to being concerned with their consent to British dominion. It is clear that at this stage, Hobson was not considering the assumption of sovereignty by the Crown by way of a cession treaty. It appears that this was because there was another way:[70]

> I am aware of the necessity of a British Act of Parliament to give effect to the whole system, to impart to the colonial courts of New South Wales, more perfectly than at present, jurisdiction over offences committed by British subjects in New Zealand, and to the Colonial Legislature to enact such laws in respect thereof as the more complete local knowledge of the country might from time to time suggest.

66. Hobson was focused on a legislation based jurisdictional boundary extension in order to subject British citizens residing in New Zealand to British law. Although for reasons explained below his suggestion would not gain traction in its entirety, the idea of a jurisdictional boundary extension would. A legislative approach was not going anywhere given the already-encountered difficulties faced by the Crown with establishing territorial jurisdiction in New Zealand by statute. Normanby described the legal difficulties at hand in his instructions to Hobson:[71]

> It remains to consider in what manner provision is to be made for carrying these instructions into effect, as for the establishment and exercise of your authority over Her Majesty's subjects who may settle in New Zealand, or who are already resident there. Numerous projects for the establishment of a Constitution for the proposed colony have at different times been suggested to myself and my immediate predecessor in office, and during the last session of Parliament a Bill for the same purpose was

[69] Hobson to Bourke, 8 August 1837, British Parliamentary Papers, 1840, vol 238, at 9-11. Cited in the *Document Bank for Evidence of Dr Donald Loveridge "'The Knot of a Thousand Difficulties': Britain and New Zealand, 1769-1840"*, Wai 1040, #A18(e), at 631.
[70] Hobson to Bourke, 8 August 1837, British Parliamentary Papers, 1840, vol 238, at 9-11. Cited in the *Document Bank for Evidence of Dr Donald Loveridge "'The Knot of a Thousand Difficulties': Britain and New Zealand, 1769-1840"*, Wai 1040, #A18(e), at 632.
[71] Historical Records of New Zealand, Enclosure No. 1, Marquess Normanby to Captain Hobson – (No.1), 14 August 1839, at 735— http://nzetc.victoria.ac.nz/tm/scholarly/tei-McN01Hist-t1-b10-d120.html#n739

> introduced into the House of Commons, at the instance of some persons immediately connected with the emigrations then contemplated. The same subject was carefully examined by a Committee of the House of Lords. But the common result of all inquiries, both in this office and in either House of Parliament, was to show the impracticability of the schemes proposed for adoption, and the extreme difficulty of establishing at New Zealand any institutions, legislative, judicial, or fiscal, without some more effective control than could be found amongst the settlers themselves in the infancy of their settlement.

It is clear that the "establishment of a Constitution for the proposed colony" was a particularly vexing issue. "Numerous projects" had been suggested. Unlike Australia, sovereignty could not be assumed by way of discovery, although, as we will see, this is precisely how sovereignty was assumed over the South Island in the end.

67. Earlier legislation such as the Murders Abroad Act 1817, the New South Wales Act 1823[72] and the Australian Courts Act 1828[73] had failed to establish British jurisdiction in New Zealand. In fact, according to McHugh, the Crown "expressly disavowed any sovereignty over New Zealand"[74] through this legislation. The Murders Abroad Act 1817 stated, for instance, that New Zealand was "not within his Majesty's dominions". The statutes also provided for the appointment of a British Resident, a position which James Busby held from 1833 to 1840. Although he was instructed to apprehend criminals and escaped prisoners fleeing to New Zealand, Busby was without any legal authority to do so.[75] The Crown's inability to gain dominion over New Zealand through the British Parliament is as much a statement about the legal difficulties at play as it is about the sovereign authority of iwi and hapū at the time.

68. Perhaps Hobson was simply unaware of the earlier legislation and its jurisdictional limits. In any event, the legal position was abundantly clear to the Crown at the time. As we shall see however, the British Crown executed

[72] 4 Geo IV c 96.
[73] 9 Geo IV c 83.
[74] Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, at 30.
[75] Joseph, Philip A. *Constitutional and Administrative Law*, 4th ed., at 44.

a jurisdictional boundary extension of the New South Wales legislature in 1839 but as opposed to reliance on an act of Parliament, the royal prerogative was used. We examine later whether doing so was treaty consistent because on its face extending the jurisdiction of the New South Wales legislature and courts to include New Zealand was an act of sovereignty. Having done so, the Crown became a law-making entity here in circumstances where Maori consent thereto was required but where it was not sought let alone acquired.[76]

69. In the end however, Hobson decided against the factory approach. He set out its drawbacks out in a letter to Lord Glenelg dated 21 January 1839:[77]

> First. New Zealand will still, with the exception of the Factories, be open to the encroachment of all other Nations.
>
> Second. British subjects and Natives will be liable to the aggressions of Foreigners, for whom it is not in the power of this Country to Legislate.
>
> Third. Vast tracts of land will be held by British Subjects without recognised title, and these will be devised and sold without any Legal record, creating confusion and strife, that I fear will at last baffle the Powers of the executive to control.

70. The factory system's shortcomings caused Hobson to determine that sovereignty should be assumed over the entire country:[78]

> Her Majesty's Government [to] at once resolve to extend to that highly gifted Land the blessing of civilisation and liberty, and the protection of British Law, **by assuming the sovereignty of the whole Country**, and by transplanting to its Shores, the Nucleus of a moral and industrious population. (emphasis added)

[76] In relation to the meaning of sovereignty, the Te Paparahi o Te Raki Tribunal understood sovereignty to be "the power to make and enforce law"—Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 9.
[77] Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 135.
[78] Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 135.

Although it was not accepted at first, Hobson's rationale for the Crown's assumption of sovereignty over all of New Zealand would eventually take hold amongst Crown officials.[79] It was a rationale that kept foreign powers at bay and it assured Crown control of the local land market. The whole of New Zealand approach would have a marked effect on the extent to which Māori consent would be required.

71. At around the same time that Hobson was compiling his settlement ruminations, Sir James Stephen prepared a proposal in which the Crown itself would provide governance but allow for the systematic colonisation of New Zealand by private interests. A Governor would be appointed to utilise "the ancient prerogative" to acquire from Māori "the Sovereignty of such parts of New Zealand as may be best adapted for the proposed Colony".[80] Stephen's proposal included an act of Parliament to establish a non-representative government with, inter alia, a pre-emptive right to purchase land from Māori. Also proposed was a Charter of Incorporation in the name of the New Zealand Company to, inter alia, act as the Crown's agent for the sale of Crown lands.[81]

72. As it turned out, the New Zealand Company's Charter of Incorporation was not continued with. This change of plan was noted in a draft set of instructions prepared specifically for Hobson by Stephen dated 24 January 1839 ("the 24 January instructions"). Nevertheless, the New Zealand Company would still feature in the Crown's assumption of sovereignty just over a year later. The idea of an act of Parliament was also dropped in order to "overcome the risk of a drawn-out parliamentary process, during which settlers could continue to buy up significant amounts of land."[82] Notably, the Governor was authorised to exercise dominion over "some parts of" New Zealand only.[83] Clearly then, Stephen sought to implement Hobson's 'factory' plan not knowing at the time perhaps that Hobson had dispensed

[79] Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 160. Loveridge considered that "by July of 1839 the Colonial Office . . . had decided that it would be desirable to acquire sovereign authority over the whole of the Islands for the Crown, rather than a few scattered enclaves."
[80] Per Sir James Stephen, Permanent Under Secretary of the Colonial Office, dated 21 January 1838—cited in the Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 136.
[81] Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 136.
[82] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 314.
[83] Draft Instructions of 24 Jan. 1839: CO 209/4 pp. 203b-221a, per Sir James Stephen—cited in the Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 137.

with it himself. Despite receiving Hobson's advice as to its drawbacks, Lord Glenelg also endorsed the factory approach two weeks later.[84] Of further note for our purposes is Stephen's intended use of the "ancient prerogative" to acquire sovereignty from Maori.

73. Loveridge noted that Hobson was shown the 24 January instructions and that he did not continue to argue in favour of the changes outlined in his letter to Glenelg dated 21 January 1839.[85] It is inferred by Loveridge that Hobson left matters at that upon receipt of the 24 January instructions. But it does seem that that is not the case. Although there may be no available written record of Hobson arguing in favour of assuming sovereignty over the whole of New Zealand, it seems hardly likely that he would not have relayed his concerns with the 'factory' system to Crown officials such as Stephen and Normanby given the sheer scale and importance of the issues that he was addressing. Moreover, in the end, Hobson received instructions from Normanby to gain dominion "over the whole or any parts" of New Zealand ("the whole approach"). The inclusion of all of New Zealand is an indication, in the least, that Colonial Office officials were now aware of the factory system's shortcomings. In any event, Hobson proceeded to New Zealand with the authority to annex the entire country and with the discretion to do so should he see fit.[86] The piece-meal approach to the acquisition of sovereignty that characterised the factory system was discontinued with. Given the authority and the discretion that Hobson had and since the impetus for annexing all of New Zealand may well have been his, it was inevitable in the end that Hobson would claim dominion over the entire country.

74. It is this inevitability that is the concern. To counter foreign interest and to monopolise the land market, sovereignty over the whole of the country became the order of the day. The need to achieve these particular objectives became such an imperative that they diminished and likely obviated the need for Maori consent to British dominion in the Mōkai-Pātea and other out-

[84] Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 139.
[85] Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 139, footnote 389.
[86] The Marquis of Normanby to Captain Hobson, 14 August 1839, BPP, 1840, vol 33 [560], at 42. Normanby's final words were to emphasise the extent to which Hobson would have to rely on his own judgment and on the advice of Governor Gipps.

of-the-way places. Acquiring Māori consent became a façade. Mere ceremony. It even obviated the need for rangatira to sign te Tiriti o Waitangi.

75. Before the Te Paparahi o Te Raki Tribunal, Loveridge's evidence was that the Colonial Office "had decided that it would be desirable to acquire sovereign authority over the whole of the Islands for the Crown, rather than a few scattered enclaves."[87] Although he refers to Hobson's "carefully outlined" concerns with the partial acquisition of sovereignty, Loveridge does not attribute the Colonial Office's change of heart to Hobson. Rather, the change of heart is attributed to "the decision made in May to adopt the New South Wales strategy, and the colonial Land Fund policy which came with it".[88]

76. The "Land Fund policy" was described—"[i]f the colony was to prosper, it became imperative to bring all of the lands in the Islands under the control of the Crown, for to leave large districts outside of the Land Fund system was almost certain to render the latter unworkable within areas under British control."[89] We compare this policy with the third of Hobson's drawbacks with partial dominion in New Zealand—"Third. Vast tracts of land will be held by British Subjects without recognised title, and these will be devised and sold without any Legal record, creating confusion and strife, that I fear will at last baffle the Powers of the executive to control" ("Hobson's third drawback"). The Land Fund policy and the third drawback share verily one and the same concern; that being the control of New Zealand's land market.

77. The "New South Wales strategy" was described by the Te Paparahi o Te Raki Tribunal:[90]

> Then, at some time in the second half of May 1839, somebody in the Colonial Office (it is not clear who) had the idea of simply making New Zealand a part of New South Wales. Altering a colony's boundaries could potentially be achieved via the Royal prerogative, and doing so in this case would instantly overcome

[87] Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 160.
[88] Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 160.
[89] Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 160.
[90] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 314.

> the risk of a drawn-out parliamentary process, during which settlers could continue to buy up significant amounts of land. Given that there was already a government in New South Wales, its authority could be automatically expanded to encompass New Zealand.

The New South Wales strategy sounds remarkably similar to the suggestion made by Hobson to Bourke in 1837 concerning the use of an act of Parliament to establish British jurisdictionalism in New Zealand, except that instead of an act of Parliament, the Crown would rely on the royal prerogative. Hobson's idea of a jurisdictional boundary extension is at the heart of the New South Wales strategy. More importantly, however, is the reason for utilising the royal prerogative as opposed to an act of Parliament. According to the Te Paparahi o Te Raki Tribunal above, the change was prompted in order to avoid "a drawn-out parliamentary process".[91] We have discussed already the 3 failed attempts by the Crown to establish territorial jurisdiction in New Zealand by legislative means. As opposed to parliamentary delay, surely the reason for not utilising an act of Parliament was the patent limit on legislating in a foreign country. It seems that this was Lord Glenelg's view at the time.[92] Furthermore, the parliamentary delay factor falters against Stephen's observation that consulting Crown lawyers on the use of the royal prerogative "will occupy no short time"[93] and that "[e]ven if things went smoothly, . . . , all of this was likely to take "some months"".[94] Loveridge also concluded that use of the royal prerogative "was likely to require a good deal of time."[95] Although an act of Parliament was inoperable in the circumstances, in our submission the prerogative was preferred, in any event, because Crown action taken pursuant to the prerogative "could not be traduced before the Crown's courts."[96] Just as

[91] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 314.
[92] Cheyne, Sonia, *Act of Parliament of Royal Prerogative: James Stephen and the First New Zealand Constitutional Bill*, New Zealand Journal of History, Volume 24, No.2, 1990, at 185. Cheyne divulged the following—"It might not be practicable, he wrote, to ask Parliament to pass such a measure in anticipation of the proposed cession of sovereignty. The reason for this was not explained. It would seem that past experience, particularly the defeat of Howick's bill in 1833 and the recent defeat of the New Zealand Association's bill in 1838, made it clear that Parliament would not pass legislation while sovereignty was still vested in the Maori chiefs. To Glenelg, there was no choice but to wait until the cession of sovereignty had been made."
[93] Letter of 18 May 1839 from Stephen to Labouchere: CO 209/4, at 243b-247b—cited in the Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 137.
[94] Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 146.
[95] Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 147.
[96] Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, at [132].

importantly, use of the royal prerogative to acquire sovereignty meant that the sufficiency of Māori consent would be determined by Hobson alone.[97] In this way, Hobson could deem the consent of Taihape Māori (and numerous others) to the transfer of sovereignty to be inessential and so he did.[98]

78. Loveridge suggests that Crown officials opted to acquire sovereignty over the entire country because of the New South Wales strategy. This is a misnomer. The New South Wales strategy was merely a means to an end. Crown officials opted to acquire sovereignty over all of New Zealand in order to prevent encroachment by other nations and to corner the land market. The imperative of keeping the French, Russians, Germans and Americans at bay drove the British assumption of sovereignty. Hobson's deeming of sufficient Maori consent would be tempered by the Crown's greater interest in securing New Zealand's rich, natural resources against all-comers. Whether or not Taihape Māori agreed with the imposition of British dominion was of negligible importance in the geo-political circumstances.

79. Additional evidence of the negligible importance of Māori consent to the assumption of British sovereignty can be gleaned from the following events. Hobson received a draft of Normanby's instructions in late July 1839 and on 1 August 1839 he addressed several questions concerning them to Henry Labouchere, the Colonial Minister. Of note is Hobson's request to acquire sovereignty over the South Island by way of discovery because "with the wild savages of the southern islands, it appears scarcely possible to even observe the form of a Treaty . . .".[99] As opposed to a reprimand for dispensing with the need to acquire the "free and intelligent consent of the natives", Normanby readily agreed to Hobson's request in his reply letter of 15 August 1839.[100] Hobson would go on to proclaim sovereignty over the South Island on the basis of discovery. The obviation of the consent requirement for South Island Māori established the Crown's proclivity to forego the consent requirement elsewhere, including the Mokai-Patea region.

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[97] Hearing Week 4 Transcript, Wai 1040, #4.1.4, at 544, per Dr McHugh.
[98] We analyse the so-called New South Wales strategy further in these closing submissions when we consider the effect of Governor Gipps' Letters Patent of 15 June 1839 on the Crown's assumption of sovereignty.
[99] Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, at 161.
[100] Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, at 161-162.

ISSUE 1(2) and 1(3) MĀORI SIGNATORIES AND UNDERSTANDINGS

80. In this section of the closing submissions, we address Issues 1(2) and 1(3) of the Tribunal's Statement of Issues:

1(2) Who among Taihape Māori, if anyone, signed the Treaty?

1(3) What was the understanding of the Treaty by Taihape Māori and how it related to them (including those Taihape Māori who did not sign the Treaty)? In particular, what expectations did they have of the Crown regarding the continued exercising of their tino rangatiratanga?

Introduction

81. Facing this Tribunal is the task of reaffirming rights and obligations that have been frayed and warped for at least the past century and a half. The rights and obligations that require attention from the Tribunal within this inquiry are not just those of Nga Hapū me Ngā Iwi ō Taihape but also, those of the Crown. The analysis that follows will elaborate on these points of principle.

82. Before this task can be undertaken however, an appreciation of the relationship that has developed must be gauged through the history of Crown interplay with Taihape Māori as it has evolved throughout the generations that this relationship has been impacted upon. This interplay was by no means uniform across the region particularly in the early contact period following the signing of te Tiriti ō Waitangi.

83. While the intention of Taihape Māori has been to come before this Tribunal in an attempt to initiate a process towards the healing of historic pain and suffering, a key underlying objective is for Taihape Māori to be reunified with the dominions of their ancestors in their entirety as they have described them including their authority to protect those spaces for present and future generations.

84. These submissions cover specific answers to the question posited but also deal with some of the general propositions arising from the analysis of the constitutional and political engagement between and amongst Taihape Māori and the Crown to give context to the propositions contended for.

85. Submissions on behalf of specific claimant groups are to follow and they will no doubt elaborate on the specific experiences of colonisation of those claimant groups and their hapū to highlight further these important matters of principle.

86. These submissions also provide counsel's comments on a number of other matters, including the development and application of Treaty Principles, and other selected issues. We have attempted to avoid duplication of matters traversed in other parts of the body of this issue however recognise there has been some overlap notwithstanding those efforts.

Issue 1(2) Māori signatories

87. Te Hāpuku also known as Te Hāpuku (Te Ikanui-o-te-moana) of Ngāti Te Whatu-i-āpiti, Ngāti Kahungunu and Te Rangi-ko-ia-anake signed the Treaty of Waitangi in the Hawke's Bay on 24 June 1840. It is significant that Te Hāpuku is also noted as a signatory to the Declaration of Independence of the United Tribes of New Zealand or the He Whakaputanga o Nga Rangatira o Niu Tireni as it is recalled by Māori when referring to one of the constitutional foundations stones of the modern New Zealand Aotearoa State.

88. Te Ota also known as Wi Te Ota was reputed to be of Rangitāne, Ngāti Kahungunu, Ngāi Te Upokoiri and Te Paneira, signed at Manawatū on 26 May 1840.

89. Paturoa also known as Rāwiri Paturoa was reputed to be of Rangitāne, Ngāti Kahungunu, Ngāti Hauiti, Ngāi Te Upokoiri, Te Paneiri, and Ngāti Hinemanu, is also recorded as having signed the Treaty of Waitangi at Manawatū, on the 26 May 1840.

90. Te Tohe of Ngāi Te Upokoiri is also reputed to have signed the Treaty of Waitangi at Manawatū, 26 May 1840.

91. Counsel notes that a very in-depth whakapapa for Te Hāpuku showing his connections to Ngāti Hinemanu, Ngāti Upokoiri and Ngāti Paki were provided to the Tribunal by Mr Gerry Hapūku during evidence given at

Omahu Marae, Hastings. We attach that herewith as Appendix '**A**' to these submissions.

Issue 1(3) Māori Understandings

Key Propositions

92. In the context of the political engagement and constitutional issues under consideration there are a number of key propositions that have guided counsels approach We set those out in this preliminary way to assist in assessing submissions that respond to the Statement of Issues.

93. Taihape Māori have not, under te Tiriti ō Waitangi/the Treaty of Waitangi ("te Tiriti/the Treaty"), since 1840 and up until the current day, ceded their tino rangatiratanga to the Crown.

94. Taihape Māori have never consented or acquiesced to the imposition by the British Crown of kāwanatanga over them. Any engagement that Taihape Māori have had or continue to have with the British Crown subsequent to the signing of te Tiriti/the Treaty was, and is a result of, or underpinned by, the following:

a. a lack of free informed consent;

b. imposed constitutional and legal frameworks inconsistent with te Tiriti/the Treaty guarantees; and

c. force and coercion.

95. The Tribunal's essential conclusion in He Whakaputanga me te Tiriti/The Declaration and the Treaty, its Report on Stage One of Te Paparahi o Te Raki Inquiry ("Stage One"), was that:[101]

> In February 1840, the rangatira who signed te Tiriti did not cede their sovereignty. That is, they did not cede their

[101] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at xxii.

> authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal - equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapū and territories, while Hobson was given authority to control Pākehā.

96. Taihape Māori seek similar findings in this Inquiry.

97. The Crown did not share Taihape Māori understandings of te Tiriti/the Treaty. Instead it consistently strove to impose and extend its authority and kāwanatanga to include all Taihape Māori, their lands and resources. This objective was broadly achieved by around the end of the nineteenth century. It was achieved incrementally, through a series of broken promises and the application of a range of Crown policies antithetical to the exercise of tino rangatiratanga and Taihape Māori authority.

98. The evidence reveals that during the decades following the signing of te Tiriti/the Treaty, Taihape Māori strove to exercise their tino rangatiratanga and establish a relationship with the Crown based on their understanding of te Tiriti/the Treaty, as defined by the Waitangi Tribunal in its Stage One Report. In other words, they consistently sought to exercise authority over their own land, resources and people.

99. At no point did Taihape Māori wittingly acquiesce to the gradual Crown encroachment on their rangatiratanga. At all material times, they objected or put forward alternative proposals of their own. These proposals, from the Taihape Māori perspective, were based on the terms of te Tiriti/the Treaty.

100. The Crown's proposition that sovereignty was acquired through a series of constitutional and jurisdictional steps beginning with the Proclamations, and not through te Tiriti/the Treaty itself is rejected. The Proclamations, in particular the North Island Proclamation, relied upon sovereignty being ceded by way of the consent of Taihape Māori, purportedly freely given, via te Tiriti/the Treaty.

101. A further grave breach of te Tiriti/the Treaty which resulted in extreme prejudice to Taihape Māori and their exercise of tino rangatiratanga was brought about by the various policies, acts and omissions of the Crown in relation to Māori lands and resources of Taihape Māori.

102. A crucial Crown policy was to undermine tribal structures and organisation, and stymie the exercise of rangatiratanga, through the Native Land Court and land title individualisation. This form of tenurial change struck at the heart of the ability of Taihape Māori to exercise rangatiratanga. It severely eroded tribal structures and organisations, which were the means through which rangatiratanga was expressed, thereby ultimately reducing Taihape Māori to a disconnected mass of individuals.

Crown's Recognition and Perceptions of Te Tino Rangatiratanga

103. From 1817 to 1836, the British Crown disclaimed any possessive rights to New Zealand on at least eight occasions, primarily because of other distractions on what one scholar describes as the Crown's "moving frontier."[102]

104. The recognition at this time of tribal independence is evident within contemporaneous observations prior to the creation of the United Tribes confederation, which noted that New Zealand's North Island had been "divided into several [Māori] states perfectly independent of each other, exercising all the prerogatives of such a condition".[103]

105. This perception was also reflected by Lord Glenelg, who in a memorandum of 15 December 1837, made clear the British Government's recognition of New Zealand's independence:[104]

> They are not savages living by the Chase, but Tribes who have apportioned the country between them, having fixed Abode, with

[102] Price Grenfell A., *White Settlers and Native Peoples: An Historical Study of Racial Contacts Between English-Speaking Whites and Aboriginal Peoples in the United States, Canada, Australia and New Zealand* (Greenwood Press, Connecticut, 1972) at pages 156-157.
[103] Captain J.C. Johnstone, *The Maories and the Causes of the Present Anarchy in New Zealand* (Southern Cross, Auckland, 1861) at 5.
[104] Lord Glenelg, memorandum 15 December 1837; Great Britain: *Parliamentary Papers* 1844, Colonial Office papers 209/2: 409.

> an acknowledged Property in the Soil, and with some rude approaches to a regular System of national Government …. It may therefore be assumed as a basis for all Reasoning and all Conduct on this Subject, that Great Britain has no legal or moral right to establish a Colony in New Zealand, without the free consent of the Natives, deliberately given, without Compulsion, and without Fraud.

106. The fear of French inroads into New Zealand led Busby to persuade the United Tribes to issue the He Whakaputanga o te Rangatiratanga o Nu Tirene, (1835 Declaration of Independence), on October 28, 1835,[105] which requested British protection for an independent state in New Zealand and contained a Māori pledge to create a formal European style judicial and legal system.

107. Significantly the Declaration is a recognition of the independence of New Zealand, containing an unambiguous assertion of Māori sovereignty which ironically was drafted by Busby.[106]

108. The document is also an affirmation of the authority which British legislators already had recognized in statutory enactments dating from 1817, 1823, and 1828, which explicitly stated that New Zealand was not within the King of England's dominions.[107]

109. What is evident is that prior to 1840, Māori sovereignty over New Zealand not only went unquestioned by the Crown, it was recognised explicitly.[108]

110. This state of affairs was further amplified by Colonial Secretary Lord Normanby in his 1840 instructions to Captain William Hobson of the Royal Navy. Hobson was admonished that:[109]

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[105] Orange, *The Treaty of Waitangi*, (Bridget Williams Books, Wellington, 1987) at page 10.
[106] Lambourn, A., *The Treatymakers of New Zealand: Heralding the Birth of a Nation* (Benton-Guy, Auckland, 1990) at page 105.
[107] Joseph, Philip A., *Constitutional and Administrative Law in New Zealand*, 2nd ed, Brookers, Wellington, 2001, at pages 35–36.
[108] Frame, A. *Kauwaeranga Judgment: Law in the Pacific*, (Victoria University of Wellington Law Review, Vol 14, 1984) at 232.
[109] Temm, Paul B., *The Treaty of Waitangi in the 1980s*, in *Te Reo O Te Tiriti Mai Rano: The Treaty is Always Speaking* (Tertiary Christian Studies Programme of the Combined Chaplaincies, Victoria University, Wellington, 1989) at page 41 (quoting 1840 instructions from Colonial Secretary Lord Normandy to Captain Hobson.

> the Māori title ... to the Sovereignty of New Zealand is indisputable and has been solemnly recognised by the British Government.

111. Hobson was instructed to act scrupulously in his dealings with Māori. New Zealand was not to be annexed:[110]

> unless the free and intelligent consent of the natives, expressed according to their native usages, shall first be obtained.

112. As summarized by the Chief Judge of New Zealand's Native Land Court in 1870, prior to 1840, "New Zealand was regarded by her Majesty as a free and independent State in alliance with Great Britain."[111]

Achieving the Colonial Objective

113. The Colonial Office in supplementary instructions to Hobson, confirmed that the title to British dominion over New Zealand rested: [112]

> on the deliberate act and cession of the chiefs, on behalf of the people at large.

114. The Crown's acknowledgement of the Sovereignty of Māori, along with other less subtle factors relating to the relative numbers of Māori to non-Māori meant that it was obvious that New Zealand could only be governed with the consent of Māori for the foreseeable future.

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[110] Normanby to Hobson 14 August 1839 (no 16) Great Britain Parliamentary Papers NZ 3 1840

[111] Frame, A. *Kauwaeranga Judgment: Law in the Pacific*, (Victoria University of Wellington Law Review, Vol 14, 1984) at 235; see also at 238 ("For many years, up to and including 1840, the King, Lords, and Commons of England have distinctly and absolutely disavowed all pretensions to the sovereignty of the New Zealand Islands, or to any dominion or authority over them.").

[112] Russell to Hobson 9 December 1840 (no 17) Great Britain Parliamentary Papers NZ 3 1841 (311) XVII, 27 quoted by Fletcher, cited by E Fletcher *A Rational Experiment: the bringing of English Law to New Zealand* (unpublished Master of Arts thesis, Auckland University, 1998) 139. See Judicial Paper presented at UK-NZ Link Foundation London, UK by the Rt. Hon Dame Sian Elias Chief Justice of New Zealand, "Sailing in a new direction": the laws of England in New Zealand"

115. As the country could not be taken by force at that time, a strategy to *create indigenous consent* was required to facilitate the British goal of completing the colonial project of taking sovereignty of New Zealand.[113]

116. McHugh has outlined two theoretical sovereignty models:

a. "territorial" or "exclusive" sovereignty, which is an absolute and complete power;[114] and

b. "extraterritorial" or "nonexclusive" sovereignty,[115] which McHugh defines in the New Zealand context as "the capacity to erect the institutions of government for newly acquired territory, or to reconvene the established institution in British territory."[116]

117. Unlike territorial or exclusive sovereignty, extraterritorial or nonexclusive sovereignty is qualified in that it is restricted to certain constituent individuals and does not extend to all inhabitants of a particular land mass.[117]

118. That a nonexclusive sovereignty approach was embarked upon by the British is evidenced in their encouragement to certain Māori tribes to sign the 1835 Declaration of Independence. A treaty of some sort therefore became a legal necessity because of the Crown's existing recognition of some degree of extraterritorial or nonexclusive sovereignty as vested within the many chiefs of this country.[118]

119. This approach was also in line with the United States treaty making practice of the period and the Swiss Jurist Vattel's, sovereignty philosophy, both of

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[113] Dr Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at page 21.
[114] Dr Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at pages 22-25. See also Robert Beck, *Britain and the 1933 Refugee Convention: National or State Sovereignty* (International Journal of Refugee Law, Vol 11, No 4, 1999) at 600. Beck discusses the concepts of State Sovereignty, which stresses links between sovereign authority, and National Sovereignty, which emphasizes a link between sovereign authority and a defined population.
[115] Dr Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at pages 23-25.
[116] Dr Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at page 22.
[117] Dr Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at page 23.
[118] Dr Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at pages 24-25 and page 30.

which relied on a general and prevalent idea that the lawfulness of government is based upon the consent of the governed. This consent was frequently and more specifically located in some form of "original contract" between ruler and subject. Not only did this contract provide the original justification for the ruler's assumption of power, it also laid down the conditions for the lawfulness of his continued exercise of sovereign power.[119]

120. The fickle nature of the Crown's penchant for 'Humanitarianism' was revealed soon after 1840, and the Treaty, as a legal mechanism of hegemonic construction, was manipulated as the relationship between the Crown and the Māori, was transformed.

121. The Crown shifted the paradigm of limited authority that had been granted to it and unilaterally converted it from a limited, nonexclusive, nonterritorial sovereign, to an absolute, exclusive, territorial sovereign.

122. Any interpretation that asserts that the Treaty of Waitangi recognized the Crown's complete legal sovereignty is an affirmation of the Crown's unilateral ability to remove Māori rights or obligations within a process of transformation that sees them augmented and then delimited by parliamentary will.

123. The reward that Māori achieved for the Crown's assumption of power was recognised by Lord Normanby to be the imposition of the new sovereign's legal system. Writing to Hobson, he stated enthusiastically in 1839 that:[120]

> the benefits of British protection, by laws administered by British Judges, would far more than compensate for the sacrifice by the natives of a national independence which they are no longer able to maintain.

[119] Dr Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at page 39.
[120] Historical Records of New Zealand, Enclosure No. 1, Marquess Normanby to Captain Hobson – (No.1), 14 August 1839, at 731 http://nzetc.victoria.ac.nz/tm/scholarly/tei-McN01Hist-t1-b10-d120.html#n731

The Civilising Mission

124. The English version of Treaty of Waitangi reflected prevailing British attitudes of the time and thus its preamble notes the need:[121]

> to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her [Majesty's] subjects ....

125. Thus, a state apparatus was required through which the Crown could achieve its economic, political and ideological objectives.

126. In this sense the myth was created that peace and unity could only be grounded on the primacy of "necessary" Anglo-Saxon values and institutions from the outset in a paradigm of colonisation that cast Māori as the evil and lawless Other onto the periphery of consideration as aliens within their own domains.

127. These British notions are based on the prognosis that though Māori were a 'savage' or 'semi-barbarian' people, in need of governing, who nevertheless had the capacity for graduating to civilisation as exemplified by European nations.

128. Such a mind-set is epitomized in the explanation of the laws of England for Māori, compiled by Francis Dart Fenton for Governor Gore-Browne in 1858:[122]

> The people of England were not so fortunate in days of old as are the people of New Zealand now. When they began to frame for themselves laws, in generations long past, they had no example to direct them. They had to open for themselves a road through the thick bush; sometimes right, sometimes wrong; try it here, and find it wrong; try it there; try it on the right hand, if

[121] Treaty of Waitangi [English version], February 6, 1840.
[122] Francis D. Fenton, *The Laws Compiled and Translated into the Māori Language* by Direction of His Excellency Colonel Thomas Gore-Browne, C.B. Governor of New Zealand, (Auckland, New Zealand, 1858) at *§ 3*.

> wrong, try it on the left hand; where should the right road be found? …

129. In the present day, the Māori is more fortunate. A path has been cleared and opened through the forest, it lies before him; he has but to walk in it. A wise and generous people, the English, have settled in his land; and this people are willing to teach him and to guide him in the well-made road which themselves have travelled for so many generations; that is, in the path of the perfected law – in the path by which themselves have attained to all the good things which they now possess; wisdom, prosperity, quietness, peace, wealth, power, glory and all other good things which the Pākehā possesses. Let there now be no doubt nor hesitation but be patient and earnest and follow the direction of those who have been appointed to show you the right and finished path.

130. Such sentiments find judicial expression most classically in the judgment of Prendergast CJ in Wi Parata v Bishop of Wellington, where Māori were deemed not to have any law because they did not maintain institutional structures and practices that replicated those of the (English) common law:[123]

> On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. ... The Crown was compelled to assume in relation to the Māori tribes, and in relation to native land titles, these rights and duties which, jure gentium, vest in and devolve upon the first civilized occupier of a territory of thinly peopled by barbarians without any form of law or civil government.

131. Having discovered Māori, colonial society then set about instituting processes with the intention to tame their savagery and to elevate them out of the wilds. They were to be made more English, or as close to English as they could get.

[123] Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) 72 at 77.

132. In 1974, Dr Keith Sorrenson read a paper to a Cambridge University audience, published the next year, on ‘How to Civilize Savages’. This was an examination of the ‘British civilizing mission’ in New Zealand that identified three vital agents of civilisation - commerce, Christianity and colonisation. The combined impact of these agents of civilisation was, as Sorrenson put it, ‘confidently expected to bring about what Europeans in the nineteenth century called the amalgamation of the races'. The civilized Māori were ultimately to be absorbed or assimilated into the European population’.[124]

Antecedent Systems

133. That indigenous systems of political and social control existed and operated in this country is hardly groundbreaking. This standpoint has been recognised across a spectra of fora which includes the Waitangi Tribunal, and is, we submit, one of the fundamental keystones of te Tiriti ō Waitangi. It is evident too that prior to 1840, Māori sovereignty over New Zealand was not only asserted by Māori, it was also recognised explicitly by the Crown,[125] and the judiciary of the time. For example, in 1870, the Chief Judge of the Native Land Court summarised the fact that prior to 1840, “New Zealand was regarded by her Majesty as a free and independent State in alliance with Great Britain.”[126]

134. The Tribunal’s first three substantive reports recognised that the Tribunal’s interpretation must be informed by the understandings of those iwi and hapū who signed te Tiriti, and that they had not ceded sovereignty to the Crown nor had they endorsed the application of English law. At most, they had relinquished that element of their exclusive sovereignty that was necessary for the Crown to ensure their safety and security

[124] Sorrenson, M. P. K. *How to Civilize Savages* (New Zealand Journal of History, Vol 9, No. 2, 1975) at 97.
[125] See Frame, A. *Kauwaeranga Judgment: Law in the Pacific* (Victoria University of Wellington Law Review, Vol 14, 1984) at 232 (outlining English statutes passed prior to 1840 that characterized New Zealand as outside of the Crown’s dominion).
[126] Frame, A. *Kauwaeranga Judgment: Law in the Pacific* (Victoria University of Wellington Law Review, Vol 14, 1984) at 235; see also at 238 (“For many years, up to and including 1840, the King, Lords, and Commons of England have distinctly and absolutely disavowed all pretensions to the sovereignty of the New Zealand Islands, or to any dominion or authority over them.”)

135. The Tribunal in the Motunui-Waitara report concluded that: [127]

> The Māori [text] confirms to the Chiefs and the hapū "te tino rangatiratanga" of their lands etc. This could be taken to mean "the highest chieftainship" or indeed "the sovereignty of their lands".
>
> …
>
> The Treaty was an acknowledgement of Māori existence, of their prior occupation of the land and an intent that the Māori presence would remain and be respected. It made us one country but acknowledged that there were two people. It established a regime not for uni-culturalism, but for bi-culturalism[128]

136. Then in the Kaituna Report the Tribunal found that Māori: [129]

> …would have believed they were retaining their rangatiratanga intact apart from a license to kill or inflict material hurt on others, retaining all their customary rights and duties as trustees for their tribal groups.

137. Then in the Manukau Report, the Tribunal affirmed that taonga meant that tino rangatiratanga extended over harbours and foreshores, and confined the exercise of 'kawanatanga' to making laws for peace, good order and security: [130]

> If the matter is in issue at all the sovereignty that assumes that the sea belongs to the Crown was not in face ceded in the Māori text but only "kawanatanga", the right to make laws for the peace and good order of the country and the security of the realm.

[127] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui-Waitara Claim*, (Wai 6, 1983) at 51, cited in Brief of Evidence of Elizabeth Jane Kelsey, Wai 894, #J11, at 22.
[128] Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim*, (Wai 6, 1983) at 52, cited in Brief of Evidence of Elizabeth Jane Kelsey, Wai 894, #J11, at 22.
[129] Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna Claim* (Wai 4, 1984), at 13-14, cited in Brief of Evidence of Elizabeth Jane Kelsey at 23.
[130] Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) at 69, cited in Brief of Evidence of Elizabeth Jane Kelsey at 24.

138. It is submitted that a clear reading of these early Tribunal findings refutes any implication that would suggest that the te Tiriti/ the Treaty is a deed that cedes sovereignty. Accordingly, any practical assertion otherwise asserted by the Crown would seem to be in breach of the early jurisprudential context a position as we have emphasised in the opening parts of this submission have been reaffirmed in more recent Tribunal Jurisprudence.

139. It is important we say too to recognise that the Tribunal possesses the exclusive authority 'to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them', pursuant to Section 5(2) of the Treaty of Waitangi Act 1975.

140. Eminent Jurist Professor Kelsey considered the implications of this provision in the context of analysing competing jurisprudence to the propositions contended for in both the Te Urewera Tribunal (Wai 894) and the Te Paparahi o Te Raki Tribunal (Wai 1040). She reminded that Somers J assertion in his Court of Appeal judgement that Hobson's May 1840 proclamation put the sovereignty of the Crown beyond dispute[131] is a departure from the Māori understanding of these sacred covenants , the He Whakaputanga (the Declaration of Independence) and te Tiriti ō Waitangi (the Treaty of Waitangi) and cannot be the definitive position if a Treaty Lens is brought to the context of that assertion .

141. Though the Court cannot be found to have breached the Treaty, we submit, the Crown's reliance on the decision and the practical assertion of Crown Sovereignty deriving on the basis of Hobson's proclamation, in itself constitutes an absolute contravention of the Treaty by unilaterally removing the Sovereignty of Ngā Hapū ō Taihape without further inquiry.

142. Regarding this issue , the Waitangi Tribunal is deemed to be a commission of inquiry under the Commissions of Inquiry Act 1908.[132] As a commission of inquiry it is not a court of law[133] and their reports "do not alter the legal rights of the persons to whom they refer".[134]

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[131] *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641 (CA), per Somers J, at p. 690.
[132] Treaty of Waitangi Act 1975, Schedule 2, cl 8.
[133] *Peters v Davison* [1999] 2 NZLR 164 (CA), at 109.
[134] Re Erebus Royal Commission (No 2) [1981] 1 NZLR 618 (CA) at 653.

143. While we accept the influential nature of Court of Appeal findings, we would submit that it would be prudent in this case before confirming a similar approach to:

a. firstly, take cognisance of the history surrounding assertions of continuing and pre-existing Mana Motuhake;

b. secondly have regard to the Crown recognition of autonomy that in our submission, illustrates the practical fact that Taihape remained Sovereign within their dominions after Hobson's 1840 proclamation notwithstanding the legal reinterpretations of the 1980's; and

c. thirdly look for extrinsic evidence around how other groups have treated with and accepted the sovereignty of the Taihape peoples.

144. A purely Diceyan approach that separates history from law within a framework of legal positivism, we submit, would in this case deny proper consideration of the impacts that colonisation has effected upon Nga Hapū me Nga Iwi o Taihape, as indeed, the 'principles approach' to te Tiriti interpretation precludes a simple analysis of the text itself.

The Impact of Not Signing the Treaty

145. In the main Taihape Māori were not signatories to te Tiriti ō Waitangi, and prior to the Crown's incursions in the 1860s, they were largely beyond the bounds of British control, exercising complete authority over their lands, forests, fisheries, taonga and other resources. We have established however that prominent Statesmen of the period like Te Hapūku did sign the Treaty and was also a signature to the Declaration of Independence, He Whakaputanga o Nga Hapū o Niu Tireni.

146. The claimants assert therefore that their pre-existing rights and obligations continue. Professor Jane Kelsey discussed the significance of the claim in this way during cross examination from the Crown:[135]

[135] *Hearing Week 10 Transcript*, Wai 894, #4.13, at 47-48.

> Kelsey: My understanding of, of history is that Ngati Hinemanu has never stopped either asserting its mana motuhake or seeking redress through a wide diversity of avenues. What is particularly unique about the current claim in my understanding of the arguments that have been put before the Tribunal in all its lifetime is that the logic of the argument about tino rangatiratanga has been taken to its critical point, and in a sense is a challenge therefore to the Tribunal that if its mandate is to explore, examine and report on violations of Te Tiriti, then it needs to do so in all integrity in looking at the essence of those violations which are the fundamental constitutional violation of the exertion of Crown sovereignty. And so, in that sense the Tribunal is being put to the ultimate test.

147. The fact that many Taihape Māori did not sign the Treaty is evidence that has not been contested.

148. There is however a clear divergence in the evidence on the essential point.,

Tangata Whenua Rights

> Those general parameters within which Māori law and authority functioned are also the imperatives that have guided and determined the specific rangatiratanga and legal processes of Nga Hapū o Taihape..
>
> As an exercise of that rangatiratanga Nga Hapū o Tūhoe did not sign Te Tiriti ō Waitangi/Treaty of Waitangi. Indeed the ability to treat or not treat with another is an integral part of any political authority.[136]

149. The rights and obligations of Ngā Hapū ō Taihape must be seen to fit within their indigenous parameters.

150. We hesitate at this juncture to list these rights. The following list is not contemplated as a definition of Mana Motuhake, merely a framework of inseparable rights that represent some key elements which we consider to

[136] Brief of Evidence of Moana Jackson, Wai 894, #J28, at [99]-[100].

be requisite to the concept of tino rangatiratanga which forms a part of the assertion of identity.

The right to be distinct peoples albeit adapting with time

151. Today, as in the past, Ngā Hapū ō Te Urewera are steadfastly resisting policies designed to assimilate them into the dominant society and foster divisions and inequalities among themselves.

152. Instead, they have the right to be recognized culturally speaking, as peoples and nations and this includes the right to be distinct peoples even among themselves.

The right of hapū to the territorial integrity of their land base.

153. If Nga Hapū me Ngā Iwi ō Taihape are to retain their self-understanding as distinct peoples with distinct cultures, the ongoing possession of their territories is essential. All indigenous societies are rooted in a special relationship between the people and the land which forms the basis of their unity. A land-base with adequate resources is also necessary for developing and sustaining a viable economy.

154. Rights of territorial integrity we submit go far beyond mere rights of occupation and access and extend to the control of these activities within their domains.

155. Territorial integrity, we submit is a pre-requisite to the effective and practical exercise of indigenous regulatory regimes such as kaitiakitanga.

156. In the absence of this territorial integrity, Taihape peoples are forced to live upon the marae of others, where, as manuhiri they are bound to honour the customs of others.

The right of hapū to self-government

157. The ability to self-determine, implies the right of self-government

158. Self-government is a means by which Nga Hapū me Ngā Iwi ō Taihape can give concrete expression of themselves as distinct nations, develop the social, economic, and political potential of their own lands, and design their own cultural, social and religious institutions to meet the needs of their own people.

159. Through this process, indigenous people can throw of the shackles of dependency and retain a sense of human dignity and self-worth as self-determining sovereign peoples and nations in this country, and in the world.

160. This right creates accountability as Nga Hapū me Ngā iwi again become responsible for their own mistakes as they are freely able to contract socially, diplomatically as well as economically as they are once again able to give practical expression to their Iho Matua through the internal regulation of their marae.

The right of hapū to have previous injustice remedied

161. The importance of this right is has been spelled out by the Tribunal with such lucidity that we do not really need to add to their sentiment. The Tribunal has stated that:[137]

> When one significant section of the community burns with a sense of injustice, the rest of the community cannot safely pretend that there is no reason for their discontent. That is a recipe for social unrest and all that goes with it. Recent events in other places illustrate this fact with tragic vividness

162. Within this outlook the importance this right is elucidated. The question that must be asked however, is how such issue must be addressed.

163. Addressing this right, is we submit, a matter of process, not one of substance.

[137] Waitangi Tribunal, *Waitangi Tribunal Report on the Te Reo Māori Claim* (Wai 11, 1986) para 6.3.9 at 38.

Similarity to Treaty Principle

164. We submit that the rights outlined above do indeed show similarity to that which is contemporarily protected within the construct of the principles of te Tiriti as they have developed.

165. As a starting point the claimants observe the text of te Tiriti ō Waitangi and consider the guarantees contained therein to be honoured, which rely on principles of Respect, Fairness and Natural Justice to guide their subjective understanding of the covenant in order that indigenous philosophical foundations and cosmogonical connections be preserved.

166. They consider that the Crown should deal with Māori in an honourable and good faith way and should ensure the protection and prosperity of Māori as a people including their economic, physical, spiritual and cultural wellbeing.

167. In addition, the claimants understand the Crown's to have accepted fiduciary obligations which extend to:

a. **Active Protection** of Ngā Hapū ō Taihape to the fullest extent practicable in possession and control of their:[138]

i. property and taonga[139] and their rights to develop and expand such property and taonga using modern technologies;[140]

ii. ongoing distinctive existence as a people albeit adapting as time passes and the combined society they develop;[141]

iii. economic position and their ability to sustain their existence and their ways of life;[142] and

[138] Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) at 64; *New Zealand Māori Council v. Attorney General* (1987) 1 NZLR 641 (CA), per Cooke P, at 678.
[139] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC), at 517.
[140] Waitangi Tribunal *Muriwhenua Fishing Claim*, 1988, Wai 22, at 220; Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report* (Wai 27, 1992) at 253–254.
[141] *Taiaroa v Minister of Justice* (unreported HC Wgn CP 99/94, decision McGechan J, 29 August 1994 at 69).
[142] Waigangi Tribunal, *The Orakei Claim*, 1987, Wai 9, at 147.

iv. the Crown does not take advantage of the poverty of Māori, created at least in part by the Crown, to acquire land from Māori which Māori are selling just so the Māori can buy food to survive.

b. Ensuring that Ngā Hapū ō Taihape benefit from **Good Government** exhibited by the Crown ensuring the protection and promotion of:

i. Ngā Hapū ō Taihape entitlements to peace and law and order;[143]

ii. the absence of discrimination in the eyes of the law and law makers;[144]

iii. the determination of matters affecting Māori land by Māori in accordance with their own methods of reaching agreements;[145]

iv. conditions that would enable the survival and progress of Ngā Hapū ō Taihape;[146]

v. interests particular to Ngā Hapū ō Taihape;[147] and

vi. an inability to avoid the Crown's obligations by any delegation of the Crown's duties under the Treaty.[148]

c. The claimants assert further that the Crown should **remedy past breaches** and not take advantage of levels of poverty and subordination that Ngā Hapū ō Taihape have been burdened with following Crown injustice.[149]

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[143] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA), per Bisson J, at 715.
[144] Note the Labour Government Statement of 1989 *'Principles for Crown Action on the Treaty of Waitangi'* – Principle (c).
https://trc.org.nz/sites/trc.org.nz/files/Treaty%20education%20resources/principles%201989.pdf
[145] Waitangi Tribunal, *Taranaki Report*, 1996, Wai 143 at 281–282.
[146] Waitangi Tribunal, *Muriwhenua Fishing Claim*, 1988, Wai 22, at 194.
[147] Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) at 69.
[148] Waitangi Tribunal *The Ngawa Geothermal Resource Report* (Wai 304, 1993) at 100.
[149] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA), per Cooke P, at 664-665.

d. As a consequence of the Crown's duties, the Crown was and is generally required to:

i. ensure that the claimants and Ngā Hapū ō Taihape retained rangatiratanga over their turangawaewae;

ii. actively protect recourse to spiritual and physical resources traditionally managed by Ngā Hapū ō Taihape;

iii. ensure that any change to traditional social structures adopted by Ngā Hapū ō Taihape is entirely instigated and promoted by Ngā Hapū ō Taihape;

iv. ensure that the claimants and Ngā Hapū ō Taihape retain rangatiratanga over their taonga, social structures, property and resources in accordance with their own laws, cultural preferences and customs;

v. recognize and protect the laws, customs, cultural and spiritual heritage of the claimants and the whānau and hapū descendants;

vi. avoid policies and practices which would impact detrimentally on the spiritual expression which Ngā Hapū ō Taihape have traditionally enjoyed; and

vii. ensure that the impact of government and regulation upon the claimants Ngā Hapū ō Taihape is consistent with the Treaty and its principles and to actively protect Māori rangatiratanga, customs, laws and properties.

ISSUE 1(4) CROWN UNDERSTANDING

168. In this section of the closing submissions, we address Issue 1(4) of the Tribunal's Statement of Issues:

> **1(4) What was the Crown's understanding of the Treaty as it related to Taihape Māori?**

Introduction

169. There are numerous aspects to the Crown's understanding of te Tiriti ō Waitangi as it related to Taihape Māori. We set just some of them out here; those we consider to be the more salient. Facets of closing submissions we have made in response to Issue questions 1(1)(a), 1(1)(b), 1(5) and 1(6) help to shed light on the Crown's understanding of the Treaty of Waitangi and so they should be borne in mind in this regard as well.

170. The Crown's base understanding of the Treaty of Waitangi is that it was one of a series "of constitutional and jurisdictional steps" that saw sovereignty "authoritatively established" by the Crown through the gazettal of Hobson's proclamations on 2 October 1840 in the London *Gazette*.[150] The closing submissions referred to here should be read in reply to Issue 1(4).

171. In terms of further understandings, the record shows that the Crown appreciated that Māori consent to the transfer of sovereignty was required. We step through numerous representations by various Crown officials in this regard. Although consent was an important requirement for the Crown, the level of consent required was set by Hobson alone and any flaws therewith could not be the subject of court proceedings.

172. It was also recognised by the Crown that *de facto* sovereignty was required. We set that record out below. At the same time, we note that *de facto* sovereignty was not acquired by the time the Crown assumed full, legal, territorial sovereignty over these isles on 2 October 1840 and so how can that be?

[150] *Crown Memorandum Contributing to the Preparation of a Draft Statement of Issues*, Wai 2180, #1.3.2, at [28].

173. On a related but different note, the Crown understands that there can be only one sovereign and that bi-jural sovereignty cannot exist. We elaborate on this topic below.

Consent requirement

174. It was, it appears, an imperative for the Crown that Māori consent to the Crown's assumption of sovereignty. The first recorded requirement in this regard is attributed to Sir James Stephen, Permanent Under-Secretary of State for the Colonies from 1836 to 1847, in a draft set of instructions he is said to have written for Hobson in December of 1838 or January of 1839:[151]

> The Queen disclaims any pretension to regard their lands as a vacant Territory open to the first future occupant, or to establish within any part of New Zealand a sovereignty to the erection of which the free consent of the Natives shall not have been previously given.

175. According to the Te Paparahi ō Te Raki Tribunal, Normanby's instructions are "the key statement of British intentions in New Zealand prior to the signing of te Tiriti, . . .".[152] The Muriwhenua Land Tribunal declared that the instructions "so illuminate the Treaty's goals that, in our view, the Treaty and the instructions should be read together".[153] The consent requirement was reconfirmed in Normanby's instructions to Hobson dated 14 August 1839:[154]

> The Queen, in common with Her Majesty's immediate predecessor, disclaims, for herself and for her subjects, every pretention to seize on the islands of New Zealand, or to govern them as a part of the dominion of New Zealand, or to govern them as a part of the dominion of Great Britain, **unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained**.

[151] Consular instructions, second draft, 8 March 1839, CO 209/4: 221 at 226-7; cited in the Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, at 57. The historian Donald Loveridge maintained that Stephen penned the draft instructions at some point during the indicated period of time—see Brief of Evidence of Dr Donald Loveridge, Wai 1040, #A18, at 140.
[152] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 315.
[153] Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), at 117.
[154] The Marquis of Normanby to Captain Hobson, 14 August 1839, BPP, 1840, vol 33 [560], at 37-38.

(emphasis added)

176. Furthermore, Normanby instructed Hobson to treat with Māori in order to gain their consent:

> Her Majesty's Government have resolved to authorise you to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority **over the whole** or any parts of those islands which they may be willing to place under Her Majesty's dominion. I am not unaware of the difficulty by which such a treaty may be encountered. (emphasis added)

177. Through Lord Normanby, the Colonial Office placed a consent requirement on Hobson. The Lords Commissioners of Her Majesty's Treasury did the same. On 13 June 1839, Stephen approached the Treasury for funding to provide specifically "for the government of the Queen's subjects resident in or resorting to New Zealand".[155] In response, Treasury agreed on the need to establish "some competent control over British subjects" in New Zealand. Funds would be available but an important condition was placed on their provision. A cession treaty with Māori was necessary and this would have to be "obtained by amicable negociation with, and free concurrence of, the native chiefs".[156]

178. A cession treaty was clearly envisaged and with that, Māori consent was made a requirement for the transfer of sovereignty. However, no cession treaty with Taihape Maori was attempted, let alone achieved. Even where rangatira signed te Tiriti ō Waitangi, such as at Waitangi on February 6 1840, it has been found by the Te Paparahi ō Te Raki Tribunal that consent to the British assumption of sovereignty was not acquired.[157]

179. Crown witness Dr McHugh considered that the Crown was and is able to assert that sovereignty was transferred by 1840's end because by that time, Hobson had discharged his office as Lieutenant-Governor in relation to the

[155] Brief of Evidence f Donald Loveridge, Wai 1040, #A18, at 149. The erection of a British imperium in New Zealand was aimed at British subjects alone and not at all of the country's inhabitants. We return to this point later.
[156] Letter of 22 June 1839 from GL Pennington to Stephen: BPP 1840 [238] pp 33-34 No.11, cited in the Brief of Evidence of Donald Loveridge, Wai 1040, #A18, at 150.
[157] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 529.

requirements placed upon him for the acquisition of sovereignty including, in particular, the compilation of sufficient consent from rangatira to the cession of sovereignty. Under cross-examination, Dr McHugh stated as follows:[158]

> . . . the Crown appointed Hobson to obtain the session (sic) of sovereignty, the Crown had recognised as a prerequisite, but as part of the prerogative there was also implicit in that in the nature of the office and the discharge of that office that Hobson was given to estimate when, in his view, discharge of that had occurred. So the way in which the British officials would have seen and regarded their task would have been in terms of discharge of office rather than meeting particular requirements in a legal positive sense. So we have to (sic) careful how we reconstruct their legal world because in looking at it in terms of consent or texts (sic) we are looking at it essentially from a modern legal perspective rather than their understanding of their discharge of their office.

180. In other words, on the basis of his appointment as Lieutenant-Governor pursuant to the royal prerogative embodied in the 1839 Letters Patent, and as long as Hobson carried out the tasks considered necessary for the acquisition of sovereignty *to Hobson's satisfaction*, the cession of sovereignty was effected. Hobson's appointment rendered him impervious to the courts.[159] He was bound by no duties other than those of his appointment.[160] According to McHugh, there were no requirements on Hobson "in a legal positive sense". Such is readily apparent from the response of Sir James Stephen to the opinion of Attorney-General Swainson that "[a]s regards the aborigines, our title to the sovereignty over the whole of New Zealand appears to be incomplete".[161] Brookfield recorded the following:[162]

> . . . Stephen was prompt to reject this understanding of the matter. His minute on the opinion asserted the acts of state by

[158] *Hearing Week 4 Transcript*, Wai 1040, #4.1.4, page 544.
[159] *Hearing Week 4 Transcript*, Wai 1040, #4.1.4, page 520, lines 28-33.
[160] *Hearing Week 4 Transcript*, Wai 1040, #4.1.4, page 520, lines 34-40.
[161] Cited in Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, Auckland, 2006), page 108.
[162] Cited in Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, Auckland, 2006), page 108.

> which the Crown had claimed government of the whole of the country, commenting that 'Mr Swainston [sic] may think this is unjust — or impolitic — or inconsistent with the former acts. But still it is done'.
>
> Then came a rebuke to Swainson by the Secretary of State:
>
> I do not think it necessary or convenient to discuss with Mr Swainson the justice of the policy of the course which the Queen has been advised to pursue. For the present purpose, it is sufficient to say that Her Majesty has pursued it.

181. Brookfield advised that "[o]ne should note carefully what the Secretary and Under-Secretary were in effect saying". And then,[163]

> . . . as with all revolutions, whatever ideological justification the revolutionaries may claim, the revolution must rest finally upon its success, upon what is 'done', rather than what is just or moral or legal (since the revolution is by definition illegal, in this case in relation to the legal orders of Maori). As both ministers recognised, the justice and morality of what was 'done' might be defective; . . .

182. According to the McHugh and Stephen, Hobson's execution as Lieutenant-Governor of the sovereignty-related tasks at hand was all that mattered—that it was done—and any flaws therewith, such as illegality or a lack of consent, were inconsequential. The ultimate outcome was described by Dr McHugh at hearing:[164]

> Yes, and Hobson has obtained sovereignty, there has been the proclamation and so the officer's (sic)[165] been discharged and it is incontrovertible by anyone and that is the end of the matter.

According to McHugh, "[f]or constitutional purposes the May Proclamations amounted to an announcement through the prerogative that the process of

[163] Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, 2006), page 109.
[164] *Hearing Week 4 Transcript*, Wai 1040, #4.1.4, page 548, lines 11-13.
[165] Author's note: As opposed to "officer's", Dr McHugh must have stated "office has".

acquiring sovereignty over all inhabitants was formally over and thereafter could not be traduced before the Crown's courts. This was the technical position . . ."[166] And so, for instance, it did not matter if Māori mis-understood the cession process at hand.[167] On further application of the Crown's thesis, the affirmation of tino rangatiratanga in the Māori text of te Tiriti is also inconsequential. From this it would follow too that reliance by the Crown on the cession treaty for the North Island proclamation, in circumstances where numerous rangatira did not sign the treaty, does not invalidate the proclamation.

183. Avoiding judicial review of its sovereignty assumption remains an important objective for the Crown. The very fact of this objective is worrisome to say the least and likely duplicitous at worst. It infers that the Crown has something to hide (and that's because it does). The highly convenient unchecked licence the Crown afforded itself and the vulnerability that Maori were exposed to as a result means that the objective of avoiding judicial review cannot be compliant with principles of te Tiriti ō Waitangi such as partnership, good faith and active protection.

184. In any event, and as we discuss below, numerous courts have readily reviewed executive use of the royal prerogative and the constitutional legitimacy of governments. Without doubt, its statutorily derived jurisdiction to review Crown acts and omissions gives the Waitangi Tribunal the ability to inquire into the Crown's sovereignty transfer process.

De facto sovereignty required

185. In a letter to Governor Gipps dated 17 February 1840, Hobson reported on progress with the treaty of cession:[168]

> I considered that on the conclusion of the Treaty of Waitangi, the sovereignty of Her Majesty over the northern districts was

[166] *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, paragraph 132.
[167] *Hearing Week 4 Transcript*, Wai 1040, #4.1.4, page 545, lines 40-42 and page 546, lines 1-10.
[168] Letter of 17 February 1840 to Sir George Gipps from W. Hobson, attached to Despatch from Lieutenant-Governor Hobson to the Marquis of Normanby, 16 February 1840, 'Copies of Extracts of Correspondence Relative to New Zealand' (1841) (311) Vol. XVII *British Parliamentary Papers*, 10. Cited in Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, (Victoria University Press, Wellington, 2008) page 53. As it turned out, Hobson soon abandoned his plan to issue proclamations as consent to the cession of sovereignty was acquired "southward", because the "publication of such proclamations might operate unfavourably on further negotiations with Maori.

> complete. I can now only add that the adherence of the Hokianga chiefs renders the question beyond dispute. I therefore propose to issue a proclamation announcing that Her Majesty's dominion in New Zealand extends from the North Cape to the 36th degree of latitude. As I proceed southward, and obtain the consent of the chiefs, I will extend those limits by proclamation; until I can include the whole of the islands.

Of note is the claim by Hobson that, with the signing of the cession treaty, the acquisition of sovereignty "over the northern districts was complete" and "beyond dispute". As a result of the acquisition of the free consent of the Northern chiefs, he could issue a proclamation announcing the Queen's sovereignty from Cape Reinga to just north of Great Barrier Island. The issuance of the proclamation could ensue only upon the acquisition of "complete" sovereignty and this, according to Hobson, had been achieved when the Northern chiefs signed te Tiriti ō Waitangi. It it inferred that his reference to "complete" sovereignty is a reference to the acquisition of both *de jure* and *de facto* sovereignty.

186. There is a distinct awareness on Hobson's part of the need to acquire not just *de jure* sovereignty but *de facto* sovereignty as well. We note that Busby was also possessed of this understanding[169] and so even during the earliest stages of the colony, it is clear to Crown officials that the cession of sovereignty over New Zealand entailed the acquisition of **both** *de jure* and *de facto* sovereignty. Hobson elaborated on his approach to acquiring *de facto* sovereignty in his letter to Major Bunbury dated 25 May 1840:[170]

> The treaty which forms the base of all my proceedings was signed at Waitangi on 6th February 1840, by 52 chiefs, 26 of whom were of the confederation, and formed a majority of those who signed the Declaration of Independence. **This instrument I consider to be de facto the treaty,** and all the signatures that are subsequently obtained are merely testimonials of adherence to the terms of the original document. (emphasis added)

[169] Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, (Victoria University Press, Wellington, 2008) pages 44-46.
[170] Letter from W. Hobson, Lieutenant-Governor to Major Bunbury, 25 April 1840, enclosed with Despatch from Lieutenant-Governor Hobson to the Secretary of State for the Colonies, 25 May 1840. Cited in Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, (Victoria University Press, Wellington, 2008) page 54.

187. Although Hobson was aware of the need to acquire both *de facto* and *de jure* sovereignty, it is self-evident that at the time of the North Island proclamation, the Crown was without *de facto* sovereignty across most if not all of the North Island, including the Mōkai-Pātea region. Dr McHugh readily acknowledged that this was the state of affairs in 1840:[171]

> Nevertheless, in constitutional language, the chiefs' enjoyment of authority over the tribes depended upon either their retention of some legal sovereignty, or a delegation of authority from the Crown. It should be remembered that here we are speaking of *de jure* authority. *De Facto* such authority was exercised by the chiefs after British sovereignty and until the Crown was practically able to exercise what it had claimed as a matter of law. The benchmark in that process was the New Zealand Wars. A declaration of sovereignty – mere legal ceremony – could hardly of itself have changed the *de facto* government of the tribes (whatever English lawyers might have thought *de jure*).

Dr McHugh's contemporaneous admission that the North Island proclamation "could hardly of itself have changed the *de facto* government of the tribes" undoes the assumption of sovereignty by the Crown.

188. It is not controversial that as at 1840, the Maori population of the North Island far outweighed the British settler population.[172] Across New Zealand, the total settler population at the time has been estimated at 2000.[173] If, as Orange avers, the Maori population was some 90,000 in the least, then the percentage of Pākehā living in New Zealand was not much more than 2% of the total population.[174] According to Moana Jackson:[175]

> The almost received wisdom that Iwi and hapu were somehow vulnerable also flies in the face of demographics. Even by 1840 the colonisers were still just a distinct if sometimes unruly little

[171] Dr Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, Oxford University Press, 1991, page 46.
[172] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014) page 239.
[173] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014) page 239.
[174] Orange, *The Treaty of Waitangi*, (Bridget Williams Books, Wellington, 1987) page 7.
[175] *Brief of Evidence of Moana Jackson*, Wai 898, #A117, paragraph 67.

> population in the midst of independent polities, it is simply not a human reality, let alone a Maori one, that the presence of a tiny minority would bring about a surrender of long held and deeply cherished concepts of power.

More than any other reality of the day, the demographic record undermines any pretence by the Crown that it was sovereign by 1840's end.

189. It is uncontroversial that there was no permanent Crown presence in the Mōkai-Pātea in 1840 and nor, for that matter, for 2 decades thereafter. Therefore, it is impossible for the Crown to claim that it had acquired *de facto* sovereignty in the Mōkai-Pātea by 1840's end and without *de facto* sovereignty by this point in time, the Crown cannot have acquired the 'full Sovereignty' referred to by Hobson in the North Island proclamation. It is clear from the historical record that Hobson was patently aware of the Crown's need to acquire *de facto* sovereignty. The entire signature gathering process was the Crown's approach to manifesting *de facto* sovereignty. This is evident from Hobson's 'southward plan' which we discuss at paragraphs 228 to 231.

There can be only one

190. Before the Stage 1 Te Paparahi o Te Raki Tribunal, Dr McHugh's evidence was that with British constitutional law, since adopted here in New Zealand, "there can be only one sovereign".[176] From 21 May 1840 on, according to the Crown, the Crown was the only sovereign in New Zealand. There is no room in British constitutional law for 2 sovereign entities within the territorial bounds of one country. Thus, according to the Crown, it is not legally possible for the Crown to recognise and provide for the Claimants' tino rangatiratanga and so, as a result, the Crown has not done so. We contrast the Crown's position with that of the Taranaki Tribunal:[177]

> On the colonisation of inhabited countries, sovereignty, in the sense of absolute power, cannot be vested in only one of the parties. In terms of the Treaty of Waitangi, in our view, from the day it was proclaimed sovereignty was constrained in New

[176] *Hearing Week 4 Transcript,* Wai 1040, #4.1.4, at 534, lines 39-44 and at 535, lines 1-13, per Dr McHugh.
[177] Waitangi Tribunal, *Taranaki Report*, 1996, Wai 143, at 20.

> Zealand by the need to respect Maori authority (or 'tino rangatiratanga', to use the Treaty's term).

Based on the finding of the Taranaki Tribunal, the Crown claim that there can be only one sovereign is a breach of treaty principle.

191. Some consider that the Native Exemption Ordinance 1844 culminated in Crown recognition of the Claimants' tino rangatiratanga since, in accordance with the 1844 Ordinance, criminal offending by one Māori against another did not subject the offender to a British arrest warrant unless an information was laid by two chiefs of the victim's tribe.[178] Thus, according to Adams, "European interference was made dependent on Māori request".[179] Any arrest warrant for criminal offending by Māori against Pākeha, outside of a settlement or town, required sanctioning by the offender's chief.[180] Whilst the 1844 Ordinance recognised separate law for Maori, its preamble divulged what was really afoot:

> Whereas it is greatly to be desired that the whole aboriginal native population of these Islands, in their relations and dealings amongst themselves, be brought to yield a ready obedience to the laws and customs of England : And whereas this end may be more speedily and peaceably attained by the gradual than the immediate and indiscriminate enforcement of the said laws, so that in course of time, the force of ancient usages being weakened and the nature and administration of our laws being understood, the Native population may in all cases seek and willingly submit to the application of the same :

On its face, the 1844 Ordinance appeared to provide for a separate legal system but none was ever intended by the Crown. In fact, the universal application of English law was intended. At the same time, the jurisdictional plurality represented by enactment of the 1844 Ordinance should not be taken to mean that, according to the Crown, it was without sovereign authority.[181] Dr McHugh considered its enactment to be a display of the

[178] Native Exemption Ordinance 1844, Vic No 18, Clause 1.
[179] Adams, P., *Fatal Necessity: British Intervention in New Zealand, 1830-1847* (Auckland University Press, Auckland, 1977), at 224.
[180] Native Exemption Ordinance 1844, Vict No 18, Clause 2.
[181] *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, at [140].

Crown's constitutional capacity.[182] In other words, Maori were able to practice some of their customary laws pursuant to the 1844 Ordinance but only because the Crown allowed it. In this sense, the 1844 Ordinance was consistent with the term that there is "only one sovereign". Accordingly, the affirmation of tino rangatiratanga in Article 2 of te Tiriti o Waitangi was swept aside *ab initio*[183] in breach of the treaty principles of active protection, good faith and partnership.

192. In submissions at paragraph 353, we discuss the manner in which the Charter of 1840 established unrepresentative government in New Zealand and how the 4 member Executive Council and 7 member Legislative Council excluded Māori participation.

193. The New Zealand Constitution Act 1852 is discussed at paragraphs 354 to 357. There was no Māori representation in the General Assembly. In fact, most Māori were ineligible to vote. Professor Sinclair linked the beginning of the Kīngtanga to the racial segregation that was authorised by the 1852 Act. Section 71 was enacted for the creaiton of 'native districts' in which tikanga Māori would prevail. No such regions were ever formed even though the provision remained on New Zealand's statute books until 1986.

ISSUE 1(5) TRANSFER OF DE JURE SOVEREIGNTY

194. In this section of the closing submissions, we address Issue 1(5) of the Tribunal's Statement of Issues:

> **1(5) Did the Treaty transfer to the Crown *de jure* sovereignty over Taihape Māori and the district? If so, what was the nature of that sovereignty? If not, did the Crown assume or acquire sovereignty through later act(s)?**

[182] *Hearing Week 4 Transcript,* Wai 1040, #4.1.4, at 538, lines 18-36.

[183] It is submitted that Article 2 of te Tiriti o Waitangi culminates in an affirmation of Maori sovereignty. In light of the translation given to "tino rangatiratanga" by the Crown in the English version of he Whakaputanga/the Declaration of Independence and given the meaning attributed to "tino rangatiratanga" by the Urewera Tribunal and by other Tribunals, it is submitted that the meaning to be given to the phrase "tino rangatiratanga" is sovereignty. If this is so, then Article 2 of te Tiriti is an affirmation of Maori sovereignty. We elaborate on the meaning of "tino rangatiratanga" below.

Introduction

195. We submit that te Tiriti ō Waitangi did not transfer *de jure* sovereignty to the Crown. We have alluded already to the patent limits on the Queen's writ in 1840, especially in the Mōkai-Pātea, which is the date of transfer according to the Crown. There is an illogical sequence of events here. Furthermore, before he issued the North Island proclamation, Hobson did not have the "universal adherence" of Taihape and many other rangatira to British dominion. We establish that deficiency below.

196. We then expose an elaborate, albeit flawed, plan on the Crown's part to circumvent the need for consent from anywhere else other than Te Taitokerau. The evidence is that the Crown reposed *de facto* sovereignty in Te Wakaminenga when the Chiefs of the Confederation of the United Tribes of New Zealand signed he Whakaputanga on 28 October 1835. Hobson then made specific arrangements for a number of Wakaminenga rangatira to sign te Tiriti ō Waitangi at Waitangi on 6 February 1840 and when they did, according to Hobson, they ceded the *de facto* sovereignty that had been reposed in them when they signed he Whakaputanga to the Crown.

197. The Waitangi Tribunal has sought submissions on whether the Crown acquired sovereignty through later acts following the signing of te Tiriti ō Waitangi and issuance of the North Island proclamation. For reasons stated and for reasons we elaborate on below pertaining to the legality of the New Zealand government, it is not considered that the Crown acquired sovereignty through later acts. That having been said, the so-called orthodox view of constitutional law posits that New Zealand was a settled colony and that the Crown acquired sovereignty by acts *antecedent* to the signing of te Tiriti ō Waitangi and the North Island proclamation. It behoves this Tribunal to consider the settlement orthodoxy because it may well be the means by which the Crown acquired sovereignty in New Zealand although, at the end of the day, it appears to falls away as a contender in this regard. There was no consent to settlement by Taihape Māori, there was no legal precedent for use of the royal prerogative to extend the territorial jurisdiction of the New South Wales legislature into New Zealand and settlement law is racist at heart.

Limits on the Queen's writ

198. As we have discussed, the Crown considers that the transfer of sovereignty was complete by 1840's end with Hobson having discharged his office by that time. Brookfield raises a significant concern with such purport, one that the Claimants share:[184]

> But there are complications here. In the 1840s, and for decades after, the revolution was far from completely effective throughout the country, notwithstanding that persons in the Queen's service (like Swainson), and for that matter her subjects generally, were in law bound to regard it as if it were. What Sir James Stephen asserted was 'done' was in part only notionally done. The Court of Appeal noted in *Hohepa Wi Neera v Bishop of Wellington* (1902) that '[t]he Queen's writ did not run throughout all districts of New Zealand till long after 1865', and indeed it did not run until about the end of the century when the seizure of power by the Crown, partly through ultimately successful warfare or (as at Parihaka) other employment of force or pressure became generally complete.

199. The manifest limits on the Queen's writ in the Taihape region and around the rest of the country as at 1840, and for many, many years thereafter, undermines the discharge of office thesis ("the office discharge thesis" or "the thesis") because there is no factual basis for the Crown's assumption of power/sovereignty. Even Hobson was aware that both *de jure* and *de facto* sovereignty were required before sovereignty could be proclaimed and yet "full Sovereignty" was proclaimed In the North Island proclamation in the absence of *de facto* sovereignty. A fundamental concern is that the office discharge thesis defies and/or conveniently ignores the demographic and military reality of the day, thereby entailing an "illogical suspension of disbelief" for there to be buy-in. Another just-as-significant concern is that the requisite consent was not achieved, at all, because the rangatira affirmed their sovereignty and did not consent to it being ceded or, as with the Mōkai-Pātea region, many rangatira did not sign. Other issues concern the lack of authority in support of the office discharge thesis. It is merely asserted by the

[184] Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, Auckland, 2006), page 109.

likes of Crown Law, Sir James Stephen and Dr McHugh. We elaborate on our complaint in this regard below. Furthermore, there is no evidence that signatory rangatira were advised by Crown officials about the thesis; that it could obviate consent and make irrelevant any mis-understanding on their part about the cession process at hand.

Consent was not acquired

200. The Crown has maintained the importance of gaining Māori consent to the cession of sovereignty. In his written evidence, Dr McHugh stated "that the Crown refused to erect any imperium in New Zealand without Maori consent. This consent was regarded as a legal necessity . . ."[185] Rather confusingly however, Dr McHugh also advised that as opposed to the requirement being a "legal necessity", for the Crown it is a "self-imposed necessity",[186] a "prerequisite it had set itself before such annexation could occur".[187] It would appear that the requirement is not a legal one. In fact, in testimony before the Waitangi Tribunal, Dr McHugh stated:[188]

> . . . this idea of Maori consent as being a legal necessity is not – we have got to think of law in the 1830 sense. It is not a law that is going to be enforced against the Crown by any Court, . . .

The confusing relegation of the consent requirement from a legal to a moral or ceremonial component of the sovereignty transfer process by the Crown is patently self-serving. It is difficult to see how the consent of an entire people to the cession of their sovereignty should be so arbitrarily determined and monitored. It cannot be that the unilateral relegation of the consent gathering process to mere ceremony is treaty compliant. In any event, the signing of te Tiriti ō Waitangi cannot have been mere ceremony, if, as the Crown has submitted, its execution was one of the "constitutional and jurisdictional" steps that led to the Crown's assumption of sovereignty by 1840's end.[189]

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[185] *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, paragraph 133, 144.
[186] *Summary of Brief of Evidence of Dr Paul McHugh*, Wai 1040, #A21(a), paragraph 8.
[187] *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, paragraph 131.
[188] *Hearing Week 4 Transcript*, Wai 1040, #4.1.4, page 520, lines 29-32.
[189] *Closing Submissions of the Crown on Constitutional Issues (Topic 1),* Wai 898, #3.4.312, paragraphs 6, 31.

201. We have noted above that, according to Dr McHugh, Hobson need only discharge his office to his level of satisfaction. With regard to the gathering of Māori consent, the requisite level of consent was that which Hobson unilaterally ascribed to it. We submit that measuring the appropriate level of consent in this manner is an arrant breach of the Treaty principles of good faith, active protection and partnership. It excluded signatory and non-signatory rangatira from the process of determining when the level of consent was sufficient and they were excluded from determining what exactly constituted consent. As it turns out, the Crown's failings in both respects have been particularly prejudicial to the Claimants because non-signatory rangatira were deemed by the Crown to have consented. We know this because the legal status of non-signatory rangatira was at the heart of Sir James Stephen's rebuke of Attorney-General Swainson.[190] Moreover, Hobson proclaimed that sovereignty was vested in Queen Victoria for "The Northern Island", including those parts of the island where no rangatira had signed.

"Universal adherence" not achieved

202. In explaining the premature issuance of his proclamations to Lord Russell, Hobson stated as follows:[191]

> Availing myself of the **universal adherence** of the native chiefs to the Treaty of Waitangi, as testified by their signatures to the original document in my presence, or to copies signed by me in the hands of those gentlemen who were commissioned and authorised by me to treat with them, I yielded to the emergency of the case arising out of events at Port Nicholson, and without waiting for Major Bunbury's report proclaimed the sovereignty of Her Majesty over the Northern Island. Actuated by similar motives, and a perfect knowledge of the uncivilised state of the natives, and supported by the advice of Sir George Gipps previously given, I also proclaimed the authority of Her Majesty over the Southern Islands, on the grounds of discovery.

[190] Cited in Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, Auckland, 2006), at 108.
[191] Hobson to Russell, 25 May 1840, CO 209/6: 146 at 150, cited in the *Brief of Evidence of Paul McHugh*, Wai 1040, #A21, paragraph 128.

(emphasis added)

We establish below that **at the time** of the issuance of the North Island proclamation, Hobson did not have "the universal adherence" of the rangatira to British dominion.

203. In making this submission, it is necessary in the first instance to cast the net of non-adherence wider than the boundaries of the Taihape inquiry district. This is appropriate because the issuance of the North Island proclamation, which included the hapu of the Mōkai-Pātea, was said by Hobson to have been based on the "universal adherence" of rangatira who signed at Waitangi and elsewhere in the north and on the signatures of those gathered by the signature gathering commissionees. That is, Bunbury, Williams and the like Firstly, we briefly address the non-signatory rangatira of the north.

204. A number of northern rangatira did not sign te Tiriti ō Waitangi, including Tāreha of Ngati Rehia.[192] Hemi Kepa Tūpe, Hāre Hongi Hika and Pāora Ururoa of Whangaroa did not sign either,[193] although they had signed He Whakaputanga.[194] There is evidence as well of hapū and rangatira approaching Hobson to withdraw their signatures from the agreement.[195] Orange writes in relation to the northern signings:[196]

> Support had not been unanimous. Two major chiefs refused to sign, another returned a gift of money and others attempted to withdraw their commitment to the agreement. According to one account, just as Hobson was about to depart from Hokianga, he received a letter signed by a chief and fifty of his tribe, asking that they be disassociated from the treaty and stating that they were not prepared to acknowledge the Queen.

205. Elsewhere around the country, a number of important rangatira did not sign te Tiriti ō Waitangi including Te Wherowhero of the Waikato. Although the future Māori king had signed the Declaration of Independence on 22 July

[192] *Opening Submissions on Behalf of Wai 492 and Wai 1341,* (8 June 2015), Wai 1040, #3.3.133, paragraph 10.
[193] Te Uira Associates, *Oral and Traditional History Report for Te Rohe o Whangaroa*, Wai 1040, #E32, page 164.
[194] Te Uira Associates, *Oral and Traditional History Report for Te Rohe o Whangaroa*, Wai 1040, #E32, page 159.
[195] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014) page 364.
[196] Orange, *The Treaty of Waitangi*, (Bridget Williams Books, Wellington, 1987) pages 65-66.

1839, just six months before te Tiriti ō Waitangi was offered for signature,[197] Te Wherowhero refused to sign te Tiriti ō Waitangi.

206. We submit that he refused to sign on at least 3 separate occasions. Symonds is recorded as having encountered Te Wherowhero at a signing event during March 1840, where there was a refusal.[198] In his report, Dr O'Malley said that Symonds returned to Manukau on 26 April 1840 where he secured the agreement of a further seven chiefs to the copy of the te Tiriti ō Waitangi sent to Maunsell. Symonds noted, however, that Te Wherowhero and several others had once more refused to sign, "though they manifested no ill-will to the Government." According to Dr O'Malley, Symonds attributed this partly to the influence of the Catholic Bishop, Jean-Baptise Pompallier, "partly to the extreme pride of the Native chiefs, and in great measure to his being alone and unable to make that display and parade which exerts such influence on the minds of savages."[199] According to Tāwhiao, Maunsell made an attempt to get Te Wherowhero to sign at Āwhitu.[200] O'Malley states that this was "more than likely" the same occasion when Symonds made his attempt at the signing event at Manukau Harbour on 26 April 1840 but that cannot be because Maunsell was not at Manukau Harbour that day.

207. There is record of numerous other parties not signing te Tiriti ō Waitangi. According to Palmer, some rangatira did not sign because of suspicions of British motives. Some feared that te Tiriti ō Waitangi may lead to loss of land and some were sceptical of the British ability to deal with tribal conflicts. Others were worried about a loss of status in relation to the Queen and were reassured on the point. Bishop Pompallier and certain Pākehā were thought to be opposed to te Tiriti ō Waitangi and to have exerted influence accordingly.[201] Hobson was concerned enough about their suggestions that land would be taken from Māori and their customs abolished that he issued a circular letter in Māori that denied those suggestions and repeated

[197] Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, (Victoria University Press, Wellington, 2008) page 41.
[198] Vincent O'Malley, *Te Rohe Potae Political Engagement 1840-1863*, December 2010, Wai 898, #A23, page 64.
[199] Symonds to Colonial Secretary, 12 May 1840, in Turton (comp.), *Epitome*, A 1 Part I, page 27, as cited in Vincent O'Malley, *Te Rohe Potae Political Engagement 1840-1863*, December 2010, Wai 898, #A23, page 68.
[200] Wily and Maunsell, *Robert Maunsell*, page 69, as cited in Vincent O'Malley, *Te Rohe Potae Political Engagement 1840-1863*, December 2010, Wai 898, #A23, page 68.
[201] Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, , (Victoria University Press, Wellington, 2008) page 54.

assurances he had given at Waitangi and Hokianga that he would "ever strive to assure unto them the customs and all the possessions belonging to the Māori".[202]

208. Prior to the arrival of the Crown, ngā hapū o Ngāti Tūwharetoa exercised their mana, tino rangatiratanga and kaitiakitanga with respect to their people, land, waters, resources and other taonga. They were governed by and operated according to their tikanga (laws) and traditions.[203] Ngāti Tūwharetoa has never agreed to cede their sovereignty to the Crown.[204] Te Heuheu Tūkino II was vehemently opposed to the signing of Te Tiriti o Waitangi, and he renounced the Treaty before the Crown's representative in Rotorua.[205]

209. Chiefs of the Manukau Harbour refused to sign.[206] Many Te Arawa rangatira refused to sign te Tiriti.[207] Tūpāea of Ngāi Te Rangi and Te Kani ā Takirau of the East Coast did not sign.[208] The paramount chief of the South Island, Tūhawaiki, had refused to sign an alternative treaty document proposed by Governor Gipps in Sydney in January but did sign te Tiriti ō Waitangi on Ruapuke Island in June.[209] No Tūhoe rangatira signed te Tiriti ō Waitangi.

210. We note that there were no signings in South Taranaki where Māori remembered the HMS *Alligator*'s criminal bombardment. In fact, there were no signings in the expansive region that runs from Kāwhia Harbour south to

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[202] T. Lindsay Buick, *The Treaty of Waitangi: How New Zealand Became a British Colony*, 2nd edition, New Plymouth, Thomas Avery and Sons Limited, 1933, page 191, as cited in Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, (Victoria University Press, Wellington, 2008) page 54.
[203] *Ngāti Tūwharetoa Second Amended Statement of Claim* (24 October 2013) Wai 898, #1.2.117(a), paragraph 11.
[204] *Ngāti Tūwharetoa Second Amended Statement of Claim* (24 October 2013) Wai 898, #1.2.117(a), paragraph 12.
[205] Paranapa Otimi et al, *Te Taumarumarutanga o Ngāti Tūwharetoa*, Traditional and Oral History Report (2006), pages 277-279; as referenced in *Ngāti Tūwharetoa Second Amended Statement of Claim* (24 October 2013) Wai 898, #1.2.117(a), paragraph 13.
[206] Orange, *The Treaty of Waitangi*, (Bridget Williams Books, Wellington, 1987) pages 68.
[207] Orange, *The Treaty of Waitangi*, (Bridget Williams Books, Wellington, 1987) pages 76.
[208] Orange, *The Treaty of Waitangi*, (Bridget Williams Books, Wellington, 1987), pages 72.
[209] He then immediately presented Bunbury with a memorandum concerning the registration of a ship being built for him and request of guarantee, written in English, of his and his tribe's ownership of the island – Claudia Orange, *The Treaty of Waitangi*, (Bridget Williams Books, Wellington, 1987) page 79. Bunbury spells the chief's name "Tooiaki" and gives his nickname as "Bloody Jack". He apparently appeared in the full dress staff uniform of a British aide-de-camp. Letter from Major Bunbury to Captain Hobson, 28 June 1840, enclosed in the Despatch from Governor-Hobson to the Secretary of State for the Colonies, 15 October 1840 – Copies or Extracts of Correspondence Relative to New Zealand, 1841, 311 Vol. XVII, *British Parliamentary Papers*, page 107. As cited in Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, (Victoria University Press, Wellington, 2008) page 55.

Whanganui.[210] Dr O'Malley gave evidence that a relatively small number of Ngāti Maniapoto rangatira signed te Tiriti ō Waitangi, which was perhaps attributable to the failure to take copies of the agreement to any of the inland settlements.[211] Dr O'Malley notes that Ngāti Maniapoto were quite poorly represented among the signatories, while it is not apparent that any Ngati Raukawa signed Te Tiriti in Waikato. On the east coast from Poverty Bay south to Cape Palliser, there were just 3 signings in the entire region.[212]

211. We note that almost half of the total number of signings occurred in the region from Auckland north to Cape Reinga, with 216 of those signatures being penned within the relatively confined areas of Waitangi, Waimate, Hokianga, the Bay of Islands and Kaitaia ("the Northland signatories").[213] The second largest iwi in New Zealand are the Ngāti Porou people of the East Coast. Their traditional rohe extends from Tūranga-nui-ā-Kiwa north to Pōtikirua. We compare their 16 signatories[214] with the 216 signatures of mainly Ngāpuhi rangatira and readily infer that numerous Ngati Porou rangatira did not sign. We would venture to state the same thing in relation to the comparatively numerous Waikato-Tainui rangatira, who, guided perhaps by Te Wherowhero's determined refusal to consent, also withheld their consent.

212. The other feature regarding the 216 Northland signatories is that with the cession finding of Te Paparahi o Te Raki Tribunal in 2014, almost half of the signatories to te Tiriti ō Waitangi did not cede sovereignty. Even by Hobson's arbitrary and questionable standards, the minimum threshold for consent was not met.

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[210] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014) Signing locations of the Treaty of Waitangi, page 388.
[211] *Hearing Week 7 Transcript*, Wai 898, #4.1.12, page 792.
[212] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), Signing locations of the Treaty of Waitangi, page 388.
[213] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), Signing locations of the Treaty of Waitangi, page 388.
[214] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), Signing locations of the Treaty of Waitangi, page 388. We have not included those who signed at Tūranga (Gisborne) because of the likelihood that the Turanga signatories belonged to other iwi such as Ngāi Tāmanuhiri, Rongowhakaata, Te Aitanga ā Mahaki, Te Whānau ā Kai and Te Aitanga ā Hauiti.

213. There were no signings of te Tiriti ō Waitangi in the Mōkai-Pātea region. The brothers Wi Te Ota and Rāwiri Paturoa are Ngāti Hauiti and Ngāti Hinemanu. They signed te Tiriti ō Waitangi "somewhere in the Manawatu district" on 26 May 1840 in the presence of Henry Williams.[215] There is no evidence that there was consultation with inland Mōkai-Pātea Māori before they signed. The great majority of Mōkai-Pātea rangatira did not sign te Tiriti ō Waitangi. A non-exhaustive list of non-signatory rangatira of the day includes Te Oti Pohe, Ihakara Te Raro, Karaitiana Tainui, Retimana Te Rango, Kiwakiwa, Te Kaipou, Te Weu, Ngāwaka, Te Hau Paimarire and many others. Moeroa and Pōtaka of Ngāti Hauiti did not sign.[216] There were minimal signings because the Mōkai-Pātea is an inland region and we know that, other than in the Northland region, te Tiriti ō Waitangi was not taken inland by Crown agents such as Robert Maunsell, Reverend Taylor, Henry Williams and Major Bunbury.[217]

214. In light of the number of rangatira who did not consent to the cession of sovereignty, we submit that Sir James Stephen's apprehension that "the assent of the preponderating majority of the Chiefs is binding on the Dissentient minority" was misplaced.[218] It is moreso the case that a "Dissentient" majority did not sign te Tiriti ō Waitangi, especially since Stephen could not include the northern signatory rangatira in his "preponderating majority", who did not ceded sovereignty according to Te Paparahi ō Te Raki Tribunal.[219] However, the real issue for the Claimants is that the office discharge thesis renders nugatory the inaccuracy of Hobson's assertion as to the level of consent acquired. The Crown's failure with regard to achieving "universal adherence" does not matter because Hobson deemed himself to have discharged his office on the basis of the signatures that were secured. Given the flaws that beset the process that is said to have warranted the Crown's assumption of sovereignty in 1840, it is submitted

[215] Stirling, B., *Muaūpoko Customary Interests,* Wai 2200, #A182, at 107.
[216] This list is drawn from the Mōkai-Pātea rangatira who opposed private and Crown land purchasing attempts in the 1840s. Submissions are made in relation to these events below at paragraphs 305 to 311.
[217] *Hearing Week 7 Transcript*, Wai 898, #4.1.12, at 792, per Dr O'Malley.
[218] Stephen to Hope, cypher, 19 May 1843, CO 209/16: 454r, cited in the *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, paragraph 138.
[219] It being found by the Te Paparahi o Te Raki Tribunal in its cession finding that northern signatory Rangatira did not cede their sovereignty—see Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 529.

that the aforesaid assumption was committed in breach of the Treaty principles of partnership, good faith and active protection.

Circumventing the consent gathering process

215. As discussed, the office discharge thesis brings into question whether or not Maori consent to the cession of sovereignty was even necessary. It appears to mean that a level of consent was necessary but it can also certainly mean that the consent of Taihape Māori was not necessary. Although McHugh professed that consent was a legal necessity,[220] on another occasion he admitted that the consent requirement was not a legal one[221] and that it was self-imposed by the Crown. Dame Claudia Orange's assertion in her time-honoured text on te Tiriti ō Waitangi is apposite:[222]

> After the Waitangi signing, certainly after the northern signings, it was inconsequential whether Maori signed the treaty or not. Hobson's intention, of which Maori were unaware, was to assume British sovereignty anyway. The freedom of choice for those Maori involved in the treaty negotiations through 1840 was more apparent than real.

216. Undoubtedly, Orange was compelled, at least in part, to make her assertion by the following passage in a letter from Hobson to Bunbury dated 25 May 1840 ("the Bunbury letter"):[223]

> The treaty which forms the base of all my proceedings was signed at Waitangi on 6th February 1840, by 52 chiefs, 26 of whom were of the confederation, and formed a majority of those who signed the Declaration of Independence. This instrument I consider to be de facto the treaty, **and all the signatures that are subsequently obtained are merely testimonials of adherence to the terms of the original document.** (emphasis added)

Following the Waitangi signings, it was inconsequential to Hobson whether Taihape Maori consented to te Tiriti ō Waitangi or not. The premature

[220] *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, paragraph 133.
[221] *Hearing Week 4 transcript*, Wai 1040, #4.1.4, page 570, lines 40-42 and page 546, lines 1-10.
[222] Orange, *The Treaty of Waitangi*, (Bridget Williams Books, Wellington, 1987) page 91.
[223] Letter from W. Hobson, Lieutenant-Governor to Major Bunbury, 25 April 1840, enclosed with Despatch from Lieutenant-Governor Hobson to the Secretary of State for the Colonies, 25 May 1840. Cited in Palmer, *'The Treaty of Waitangi in New Zealand's Law and Constitution'*, (Victoria University Press, Wellington, 2008) page 54.

issuance of Hobson's proclamations establishes that the post-Waitangi gathering of signatures was inconsequential. As Orange asserts, this is because as far as Hobson was concerned, he had acquired adequate consent to the Crown's assumption of sovereignty by 6 February 1840.

217. Dr McHugh counsels that we should not read anything into the premature issuance of Hobson's proclamations.[224] This is because "the failure to abort the signature-gathering process symbolised the sincerity of the Crown's commitment to its perception of the requirements of the law of nations, or jus gentium".[225] In particular, McHugh states that "no serious thought was given to calling Bunbury back from his mission".[226] It is not considered that Bunbury's continuation of his mission necessarily means that the signature gathering process was as sincere as it has been held out to be. During his mission, Bunbury issued his own proclamation over the "Middle Island" (the South Island) on 17 June 1840.[227] Clearly then, Bunbury was gathering consent signatures after 21 May 1840 simply because he was not aware that the May Proclamations had been declared. If Bunbury had known about the South Island proclamation of 21 May 1840, he would not have doubled up and needlessly issued his own proclamation. We would submit that the same holds true for the other signature gatherers. That is, they carried on collecting signatures after 21 May 1840 simply because they were so distant at the time from Russell, where Hobson made his declarations, that they simply did not know that Hobson had issued the proclamations and so they carried on gathering signatures. In support of this contention we note that very few signatures were collected after June 1840, by which date it can be expected that the signature gatherers would have been made aware of developments in Russell. The post-21 May gathering of signatures was not the result of a sincere Crown commitment thereto. It was the result of a communication breakdown. Thus, we maintain that the premature issuance of Hobson's Proclamations is evidence that Hobson cared little for the consent process once he had orchestrated the February 6 signings.

[224] Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, paragraph 132.
[225] Summary of Brief of Evidence of Dr Paul McHugh, Wai 1040, #A21(a), paragraph 8.
[226] Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, paragraph 132.
[227] Brief of Evidence of Donald Loveridge, Wai 1040, #A18, paragraph 280.

218. We submit that Hobson desisted with the consent gathering process once he issued the proclamations because he was of the view that the transfer of sovereignty was completed by that time. As we discuss in paragraphs 185 to 189, it is clear that Hobson was aware that he needed to acquire both *de facto* and *de jure* sovereignty. We set out an extract from Hobson's letter to Gipps dated 17 February 1840 ("the Gipps letter"): [228]

> I considered that on the conclusion of the Treaty of Waitangi, the sovereignty of Her Majesty over the northern districts was complete. I can now only add that the adherence of the Hokianga chiefs renders the question beyond dispute. I therefore propose to issue a proclamation announcing that Her Majesty's dominion in New Zealand extends from the North Cape to the 36th degree of latitude. As I proceed southward, and obtain the consent of the chiefs, I will extend those limits by proclamation; until I can include the whole of the islands.

What is abundantly clear from the Gipps letter is Hobson's claim that *de facto* sovereignty "over the northern districts" had been acquired on 6 February 1840. This is consistent with the statement in the Gipps letter that the acquisition of sovereignty "was complete" and "beyond dispute". The reference in the May 1840 Bunbury letter to "[t]he treaty which forms the base of all my proceedings . . ." [229] is consistent with these submissions. It establishes that Hobson anchored his bid at transferring sovereignty to the 6 February signings. Essentially, the signings at Waitangi were all that mattered, even in the distant Mōkai-Pātea region.

219. Hobson elaborated on his approach to acquiring *de facto* sovereignty in a letter to Major Bunbury dated 25 May 1840 ("the Bunbury letter"):[230]

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[228] Letter of 17 February 1840 to Sir George Gipps from W. Hobson, attached to Despatch from Lieutenant-Governor Hobson to the Marquis of Normanby, 16 February 1840, 'Copies of Extracts of Correspondence Relative to New Zealand' (1841) (311) Vol. XVII *British Parliamentary Papers*, 10. Cited in Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, (Victoria University Press, Wellington, 2008) page 53. As it turned out, Hobson soon abandoned his plan to issue proclamations as consent to the cession of sovereignty was acquired "southward", because the "publication of such proclamations might operate unfavourably on further negotiations with Maori.

[229] Letter from W. Hobson, Lieutenant-Governor to Major Bunbury, 25 April 1840, enclosed with Despatch from Lieutenant-Governor Hobson to the Secretary of State for the Colonies, 25 May 1840. Cited in Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, (Victoria University Press, Wellington, 2008) page 54.

[230] Letter from W. Hobson, Lieutenant-Governor to Major Bunbury, 25 April 1840, enclosed with Despatch from Lieutenant-Governor Hobson to the Secretary of State for the Colonies, 25 May 1840. Cited in Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, (Victoria University Press, Wellington, 2008) page 54.

> The treaty which forms the base of all my proceedings was signed at Waitangi on 6th February 1840, by 52 chiefs, 26 of whom were of the confederation, and formed a majority of those who signed the Declaration of Independence. **This instrument I consider to be de facto the treaty,** and all the signatures that are subsequently obtained are merely testimonials of adherence to the terms of the original document. (emphasis added)

220. The reference in the Bunbury letter to the treaty signings by the Chiefs of the Confederation of the United Tribes of New Zealand, referred to hereinafter as Te Wakaminenga, is crucial to understanding the terms upon which the Crown entered into a legal relationship with Taihape Māori. Loveridge records that on reaching the Bay of Islands at the end of January 1840, one of Hobson's "very first actions . . . was to ask all of the signatories of the Declaration – "all the chiefs of the Confederation of New Zealand" – to meet with him at Waitangi".[231] Busby is known to have drawn personal invitations up. We discuss below the reasons why was it essential to the Crown that these particular rangatira attend the signing of te Tiriti ō Waitangi at Waitangi.

221. It is important to understand that in the Bunbury letter Hobson revealed that *de facto* sovereignty was acquired with the signing of the cession treaty by, especially, the chiefly signatories to He Whakaputanga. The overriding purpose of He Whakaputanga was its facilitation of the acquisition of *de facto* and *de jure* sovereignty by way of the cession treaty. We further submit that the Crown's constitutional purpose for the signatory rangatira to He Whakaputanga was that they act as a repository of *de facto* sovereignty for all Maori, including those of the Taihape district. The Crown's sovereignty acquisition plan was wholly dependent upon reposing *de facto* sovereignty in Te Wakaminenga by arranging the signatory rangatira to sign He Whakaputanga. Once that was done, all that was then required was the transfer of that *de facto* sovereignty unto the Crown by way of te Tiriti ō Waitangi. Thus in this way, the transfer of both *de jure* and *de facto* sovereignty would be achieved in one, fell swoop. More importantly, the cession of complete or "full Sovereignty" would be achieved immediately,

[231] *Brief of Evidence of Donald Loveridge*, Wai 1040, #A18, paragraph 239.

with much less fuss and with a great deal more certainty (for the Crown). This is why Hobson was no longer interested in gaining consent signatures once the North Island proclamation was issued. He did not feel that he had to. The sovereignty transfer was done.

222. Consistent with this understanding of the claim that Hobson made to Bunbury is:

a. Hobson's statement that the signing of te Tiriti ō Waitangi at Waitangi "forms the base of all my proceedings";

b. his advice that subsequent treaty signings by other rangatira were "merely testimonials of adherence to the terms of the original document". They were not essential because *de facto* sovereignty had been acquired by 6 February 1840; and

c. his issuance of the North Island proclamation about a month after writing his letter to Bunbury.[232] That the North Island proclamation may have been issued in response to the activities of the New Zealand Company in Port Nicholson does not preclude the possibility that the North Island proclamation was also issued because Hobson believed that he had acquired *de facto* sovereignty across the entire North Island.

223. We posit that the Crown's determined efforts to get Te Wherowhero to sign te Tiriti in 1840 are consistent with the submissions above, given that on 22 July 1839, the great chief had signed He Whakaputanga. If Te Wherowhero had signed te Tiriti, in like fashion, the Crown could then claim *de facto* sovereignty over much of Tainui's rohe. Once that was done, the areas on either side of newly established Auckland would have been under the Crown's sovereign control, thus enhancing British security in the region.

[232] That the North Island proclamation may have been issued in response to the activities of the New Zealand Company in Port Nicholson does not preclude the possibility that the North Island proclamation was also issued because Hobson believed that he had acquired *de facto* sovereignty across the entire North Island.

224. Further in support we refer the Waitangi Tribunal to Article 2 of He Whakaputanga, the particular article that was formulated by the Crown to repose *de facto* sovereignty in Te Wakaminenga. We would ask the Tribunal to note the flavour of the language that is used and the assertions that are made in order to create a repository of *de facto* power for ease of transfer of that power later.

225. Sir James Stephen expressed the view that "without the authority of Parliament, the Crown can create no Legislature in New Zealand, except by establishing there a Representative Assembly which I suppose everyone would agree in pronouncing an absurdity". Based on Stephen's comment, the prospect of Te Wakaminenga becoming a law-making body was never seriously entertained by the Crown and so, in our submission, the Crown sponsored its formation for the purpose of reposing sovereignty in a body of rangatira for the purpose of their ceding their sovereignty at some later stage by cession treaty.

226. If the Tribunal should find some credence in these submissions, it will change the orthodox purpose ascribed to He Whakaputanga and it will change the regard that has been previously had for the Crown's apparent reluctance to intervene in the affairs of this country before 1840. If it should be found that the design of He Whakaputanga was for the purpose of reposing *de facto* sovereignty in a body, which, in turn, was for the purpose of acquiring full, legal sovereignty by way of an eventual cession treaty, then the Crown promoted and then used He Whakaputanga for the purpose of acquiring sovereignty. To understand the Crown's motivation for going to such lengths, we refer again to the following statement by McHugh:[233]

> Nevertheless, in constitutional language, the chiefs enjoyment of authority over the tribes depended upon either their retention of some legal sovereignty, or a delegation of authority from the Crown. It should be remembered that here we are speaking of *de jure* authority. *De facto* such authority was exercised by the chiefs after British sovereignty and until the Crown was practically able to exercise what it had claimed as a matter of law. The benchmark in that process was the New Zealand Wars. A

[233] Dr Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, Oxford University Press, 1991, page 46.

> declaration of sovereignty – mere legal ceremony – could hardly of itself have changed the de facto government of the tribes (whatever English lawyers might have thought de jure).

In other words, McHugh claimed that "a declaration of sovereignty" such as the North Island proclamation could not have affected the *de facto* sovereignty of the iwi, hapu and rangatira. In order to "change the de facto government of the tribes", the Crown needed *de facto* sovereignty and nothing less. Without it, the issuance of a proclamation by the Crown was ineffective, a "mere legal ceremony" as McHugh put it. The Crown's long-held plan, going back perhaps as much as a decade, was to avoid this legal difficulty by reposing *de facto* sovereignty in Te Wakaminenga when they signed He Whakaputanga, and then having the reposed *de facto* sovereignty of the Wakaminenga rangatira ceded unto itself when those particular rangatira signed te Tiriti ō Waitangi at Waitangi on 6 February 1840. Such an approach was a short-cut. It was hatched as a plan to circumvent the obvious limits on the Queen's writ in 1840 and for many years thereafter, and the difficulties such limits presented with regard to acquiring "full Sovereignty. We submit that the plan as it was hatched failed because, as we discuss elsewhere, the Queen's writ was limited in places such as the Mōkai-Pātea region as at 1840 and for many years thereafter. Furthermore, the Te Paparahi ō Te Raki Tribunal's cession finding meant that the Wakaminenga rangatira who signed te Tiriti ō Waitangi affirmed their sovereignty when they did so; it cannot be said that the sovereignty that was reposed in them as a result of signing He Whakaputanga was transferred away.

Consent was inconsequential to Hobson

227. We refer to Loveridge's riposte to Claudia Orange's claim that consent was inconsequential to Hobson.[234] He argued that consent remained important because Hobson was never given permission to annex any part of the North Island by way of discovery. As we submit above, Hobson relied on the Waitangi signings for the transfer of both *de facto* and *de jure* sovereignty. Hobson considered that he had acquired sufficient signatures for this purpose by 6 February 1840. His obviation of the need to gather further signatures need not be taken to mean that he intended to annex part or all

[234] *Brief of Evidence of Donald Loveridge*, Wai 1040, #A18, paragraph 272.

of the North Island by way of discovery. Rather, as we have discussed, Hobson intended to rely on the 6 February signings to support the transfer of sovereignty for all of the North Island since, as Hobson stated, "all the signatures that are subsequently obtained are merely testimonials of adherence to the terms of the original document."[235]

228. To further deflect Claudia Orange's claim, Loveridge referred to the following in the Gipps letter:[236]

> As I proceed southward, and obtain the consent of the chiefs, I will extend those limits by proclamation; until I can include the whole of the islands.
>
> ("the southward plan")

Loveridge claimed that the southward plan is evidence that Hobson intended to gather consent signatures from across the North Island. However, Loveridge's claim is flawed because Hobson cancelled the southward plan not long after he had relayed it to Gipps, "as the promulgation of such notice might operate unfavourably on my negociations."[237]

229. We discussed the settlement of New Zealand in paragraphs 55 to 58 and then again at paragraphs 235 to 271. This is the view that sovereignty was acquired pursuant to the Letters Patent of June 1839. Hobson's cancellation of a sufficient consent gathering process is consistent with the settlement orthodoxy. As we have already discussed, Hobson's clearly stated intention to claim sovereignty over 'the whole of New Zealand' relegated the importance of gaining sufficient consent in places such as the Taihape region. The cancellation of the southward plan is also consistent with Hobson's view that the Waitangi signings by the Wakaminenga rangatira

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[235] Letter from W. Hobson, Lieutenant-Governor to Major Bunbury, 25 April 1840, enclosed with Despatch from Lieutenant-Governor Hobson to the Secretary of State for the Colonies, 25 May 1840. Cited in Palmer, *'The Treaty of Waitangi in New Zealand's Law and Constitution'*, (Victoria University Press, Wellington, 2008) page 54.

[236] Letter of 17 February 1840 to Sir George Gipps from W. Hobson, attached to Despatch from Lieutenant-Governor Hobson to the Marquis of Normanby, 16 February 1840, 'Copies of Extracts of Correspondence Relative to New Zealand' (1841) (311) Vol. XVII *British Parliamentary Papers*, 10. Cited in Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, (Victoria University Press, Wellington, 2008) page 53. As it turned out, Hobson soon abandoned his plan to issue proclamations as consent to the cession of sovereignty was acquired "southward", because the "publication of such proclamations might operate unfavourably on further negotiations with Maori.

[237] *Brief of Evidence of Donald Loveridge*, Wai 1040, #A18, at [273].

were “de facto the treaty” and all other signatures were “merely testimonials of adherence to the terms of the original document”.

230. We submit that the cancellation of the southward plan was an act of bad faith on Hobson’s part. It expresses a concern by Hobson that if unsigned rangatira got wind of the meaning and intent of the proclamations, they would not sign te Tiriti ō Waitangi. We submit that this is why Hobson changed his mind about the southward plan. If we are correct, cancellation of the southward plan is a serious matter. It is evidence of duplicitous conduct on the Crown’s part.

231. By way of the southward plan, Hobson had split the country into regions with the intention of obtaining the consent of rangatira in a given region and then proclaiming dominion over that region before moving to the next. This is not what happened because of the intervention of the New Zealand Company, apparently. More to the point however is that Hobson intended to gain the consent of rangatira in a relatively thorough way. It is important to understand what this means. The Gipps letter contains Hobson’s self-imposed requisite level of consent, albeit in somewhat broad terms, but nevertheless it provides an understanding of what Hobson saw as being an appropriate level of consent. The relatively thorough southward plan was not carried out because Hobson issued the North Island proclamation on 21 May 1840. Thus, *against his own standard*, Hobson failed to achieve sufficient consent to the transfer of sovereignty. This evidence alone undoes the office discharge thesis and the claim of “universal adherence”.

232. It may be countered that due to circumstances beyond his control, Hobson was prevented from attaining his self-imposed standard of “universal adherence”. Whilst the New Zealand Company intervention may have interrupted the signature gathering process, it need not have wound it down it altogether. As we have stated already, few signatures were gathered after June 1840 likely as a result of the signature gatherers, Maunsell, Taylor, Williams and Bunbury *et al*, being made aware of the proclamations by that time. That the signature gathering process wound down in relatively quick fashion following the issuance of Hobson’s proclamations is consistent with Hobson’s stated view that the Waitangi signings, especially by Te Wakaminenga rangatira, provided sufficient consent for the entire country.

233. In the Gipps letter, Hobson made the assumption that he had gained the consent of northern rangatira to the transfer of sovereignty. He included the entire region from North Cape to just north of Great Barrier Island in his consent assumption. The recent finding by the Te Paparahi ō Te Raki Tribunal that northern signatory rangatira did not cede sovereignty further undoes the sufficiency of Hobson's claim to "universal adherence". That Tribunal found as follows:[238]

> The rangatira who signed te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain. That is, they did not cede authority to make and enforce law over their people or their territories.

The breadth of evidence before the Te Paparahi ō Te Raki Tribunal on the cession of sovereignty was significant and unprecedented. This gives the cession finding particular cogency in counsel's submission. The evidence before that Tribunal concerning Hobson's representations at some of the signing sessions in the north made it abundantly clear that sovereignty cannot have been ceded. Given that northern **signatory** rangatira did not consent, Hobson's ability to proclaim British sovereignty in the region from North Cape to just north of Great Barrier Island was without any on-the-ground-support. Hobson fell hopelessly short of even his self-imposed consent requirement.

234. It is in Te Taitokerau where the Crown first established itself, beginning with the arrival of Thomas Kendall, Samuel Marsden and others in December 1814. In a few short years, they had overseen the development of trade by Hongi Hika and other Nga Puhi rangatira in flax, potatoes, wheat, timber and other goods across the Tasman to Sydney. The chiefs received muskets and ordnance in payment, as well as tools of agriculture, construction materials, clothing and other goods. Hongi Hika received a significant number of muskets and ordnance as a result of his visit to England in 1820. Given the length of the Crown-Māori relationship in the north and the benefits of that relationship to northern Māori, the refusal by northern rangatira to consent to British dominion acts as a barometer on the likely response of other iwi

[238] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 529.

and hapū to the prospect. In fact, it reduces the likelihood that iwi and hapū below the 36th degree of latitude, with little or probably no relationship with the Crown prior to signing te Tiriti ō Waitangi, would have entertained the prospect of transferring their mana to Queen Victoria by the stroke of a pen let alone actually effecting such a transfer. The events of the north where even signatory chiefs were deemed by the Waitangi Tribunal to have not consented to British dominion should also be brought to bear on what not signing te Tiriti o Waitangi means. If signatory rangatira did not cede their sovereignty, Sir James Stephens' rejection of Swainson's opinion about non-signatory rangatira should be questioned.

Settlement of Aotearoa

235. The settlement of New Zealand would be achieved by way of the royal prerogative. The role of the royal prerogative in Britain's assumption of sovereignty warrants close examination. Dicey provided a definition of the prerogative that has often received approval from the courts:[239]

> The prerogative appears to be historically and as a matter of fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. The prerogative is the name of the remaining portion of the Crown's original authority . . . . Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of the prerogative.

What was once the personal power of the monarch "became to all intents and purposes government or even prime ministerial prerogative"[240] by the 19th century. Although its exercise is legislative in nature, prerogatives do

[239] For example, *Attorney General* v *De Keyser's Royal Hotel Ltd* [1920] A.C. 508 at 526; *Burmah Oil Company Ltd* v *Lord Advocate* [1965] A.C. 75 at 99. Dicey, A.V., Introduction to *The Study of the Law of the Constitution* (10th ed., 1967), at 424. William Blackstone's definition has also been preferred:

> By the word prerogative we usually understand that special pre-eminence that the King hath, over and above all other persons, and out of the ordinary course of common law, in right of his regal dignity . . . it can only be applied to those rights and capacities which the King enjoys alone, in contradiction to others, and not to those which he enjoys in common with any of his subjects.

William Blackstone, *Commentaries on the Laws of England*, 1765-1769.

[240] Markesinis, B.S., *The Royal Prerogative Re-visited*, Cambridge Law Journal, 32 (2), November 1973, at 288.

not require the approval of Parliament.[241] Its exercise includes the executive power to, inter alia, make treaties, declare war, deploy the armed forces, regulate the civil service and grant pardons. Prerogatives can be abolished, restricted or regulated by the express words of statute. They can also be confirmed by statute.

236. Although they may identify and even limit their scope, the courts are generally unwilling to question or interfere with how prerogatives are used.[242] The judicial reticence stems, according to Thomas Poole, from "the prerogative's connection with the idea of "the Crown", a nebulous but structurally central concept within U.K. public law that tends to act, in the words of the constitutional historian F.W. Maitland, as "a convenient cover for ignorance," which "saves us from asking difficult questions".[243] Nevertheless, in the form of an arbitrary right of executive action, the prerogative sits uncomfortably next to Parliamentary supremacy and the rule of law. Accordingly, in the last 100 years or so in particular, the manner of exercise of the prerogatives has been more readily examined by the judiciary.

237. Compensation awards for the taking or destruction of private property by Crown agents during war-time pursuant to the use of prerogative powers involved court regulation of the way in which the respective prerogative powers were exercised.[244] In *Conway* v *Rimmer*, Lord Denning actively reviewed the Crown's refusal to disclose documents in a trial:[245]

> Crown privilege is one of the prerogatives of the Crown. As such, it extends only so far as the common law permits. It is for the judges to define its ambit; and not for any government department, however powerful.

[241] Poole, Thomas, *United Kingdom: The royal prerogative*, 2010, Oxford University Press and New York University School of Law, at 146.
[242] *Case of Proclamations* (1611) 12 Co.Rep 74; *China Navigation Company Ltd* v *Attorney-General* [1932] 2 KB 197; *Chandler* v *DPP* [1964] AC 763.
[243] Poole, Thomas, *United Kingdom: The royal prerogative*, 2010, Oxford University Press and New York University School of Law, at 148.
[244] The *Zamora* case [1916] 2 AC 77; *Attorney General* v *De Keyser's Royal Hotel Ltd* [1920] A.C. 508 at 526; *Crown of Leon (Owners)* v *Admiralty Commissioners* [1921] 1 KB 595; *Burmah Oil Company Ltd* v *Lord Advocate* [1965] A.C. 75 at 99.
[245] *Conway* v *Rimmer* [1967] 1 WLR 1031, at 1037.

238. The *GCHQ* case of the mid-1980s concerned prime ministerial refusal of trade union membership at a military and signals intelligence centre. The House of Lords held that an instruction made under an order in council, the main form of prerogative legislation, could be subject, in principle, to judicial review.[246] However, although orders in council are justiciable in principle, the Law Lords then excluded from judicial review the making of treaties, defence of the realm, the prerogative of mercy, grants of honours, the dissolution of Parliament and the appointment of ministers.[247] Notably, the power to extend a jurisdictional boundary or to proclaim sovereignty over a region or area were not excluded.

239. In *Bancoult (No.2)*, islanders from the Chagos Archipelago in the Indian Ocean were expelled in the late 1960s and early 1970s to make way for a U.S. military base.[248] The majority judges considered that whereas an act of Parliament is not susceptible to the ordinary principles of judicial review because of its representative character, an exercise of the prerogative lacks this quality even though it is legislative in character. That being so, the court saw no reason why prerogative legislation should not be subject to judicial review in the same way as any other executive action.[249] However, in terms of its legality, the majority judges found that the exercise of the prerogative was a governmental concern and not properly a matter for the courts. In their dissenting judgment however, Lords Bingham and Mance argued that the English courts have an inherent jurisdiction to delineate the scope of the prerogative power of colonial governance. Their Lordships complained that the prerogative power was exercised in relation to the land as if the people "were an insignificant inconvenience . . . liable to be dispossessed at will for any reason that might seem good to the executive in the interests of the United Kingdom."[250] Notably, the dissenting judges aligned with all of the lower court judges on the matters at hand. In counsel's submission, the minority judgment in *Bancoult (No.2)* assists with consideration of the Crown's use of its prerogative for the assumption of sovereignty.

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[246] *Council of Civil Services Unions* v *Minister for the Civil Service* (1985) A.C. 374.
[247] *Council of Civil Services Unions* v *Minister for the Civil Service* (1985) A.C. 374, at 418.
[248] *R (Bancoult)* v *Secretary of State for Foreign & Commonwealth Affairs (No.2)*, (2007) EWCA Civ. 498.
[249] *R (Bancoult)* v *Secretary of State for Foreign & Commonwealth Affairs (No.2)*, (2007) EWCA Civ. 498, at [35].
[250] *R (Bancoult)* v *Secretary of State for Foreign & Commonwealth Affairs (No.2)*, (2007) EWCA Civ. 498, at [157].

240. In relation to settled territories, Lords Bingham and Mance found that "the Crown's prerogative power was at common law confined to establishing a constitution granting settlers the right to legislate for themselves".[251] Professor Joseph would agree that "[i]n a settled colony, the Crown retained a narrower, constituent legislative power to establish the machinery of government".[252] However, in conquered or ceded colonies, the Crown retained plenary prerogative powers to legislate by proclamation, Order in Council, or Letters Patent.[253] There are schools of thought as to whether New Zealand is a settled or ceded colony. Professor Joseph considers that at law, New Zealand was "established by settlement rather than cession under the Treaty of Waitangi".[254] Likewise, Dr McHugh contended before the Te Paparahi o Te Raki Tribunal that New Zealand's constitutional status is as a 'settled' rather than a 'ceded' colony.[255] We discuss what Joseph refers to as the "orthodox view"[256] below. On the other hand, Sir Kenneth Keith has argued that because European state practices before 1840 supported the Maori capacity to enter into international treaties, New Zealand was a ceded colony.[257]

Settled and not ceded

241. It may come as a surprise to some that "the creation of New Zealand as a separate colony actually followed on from its incorporation into the British Empire as a dependency of New South Wales."[258] In other words, the Treaty of Waitangi and Hobson's proclamations of 21 May 1840 are ***not*** the fount of the Crown's law making capacity in Aotearoa. In his legal text *Constitutional and Administrative Law*, Joseph refers to other historians, academics and lawyers in support of the orthodox view[259] including

[251] *R (Bancoult)* v *Secretary of State for Foreign & Commonwealth Affairs (No.2)*, (2007) EWCA Civ. 498, at [144], per Lord Mance.
[252] Joseph, Philip A., *Constitutional and Administrative Law*, 4th ed., at 523.
[253] Joseph, Philip A., *Constitutional and Administrative Law*, 4th ed., at 523.
[254] Joseph, Philip A., *Constitutional and Administrative Law*, 4th ed., at 523.
[255] Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, paragraph 146. Earlier in his academic career, McHugh had argued that indigenous peoples possessed international standing and that by 1840 there were sufficient European state practices to establish a pattern of treaty relations with tribal societies—See PG McHugh, *The Maori Magna Carta* (Oxford University Press, Auckland, 1991), at 178-179.
[256] Joseph, Philip A., *Constitutional and Administrative Law*, 4th ed., at 62 and 63.
[257] McNair, A.C., *The Law of Treaties* (Clarendon Press, Oxford, 1961) at 38-39.
[258] Williams, D.V., *The Annexation of New Zealand to the New South Wales in 1840: What of the Treaty of Waitangi?*, Australian Journal of Law and Society, Vol 2, No. 2, 1985, at 41.
[259] Joseph, Philip A., *Constitutional and Administrative Law*, 4th ed. At 60.

McLintock,[260] Robson and Scott,[261] Malloy[262] and Williams.[263] Dr Foden should also be included in that list.[264] Williams wrote that "British claims to sovereignty over New Zealand may clearly be traced to Letters Patent of 15 June 1839[265] which amended the Commission of the Governor of New South Wales by enlarging his colony to include 'any territory which is or may be acquired in sovereignty by Her Majesty . . . within that groups of Islands in the Pacific Ocean, commonly called New Zealand . . . '"("the 1839 Letters Patent").[266] The 1839 Letters Patent were implemented pursuant to the New South Wales strategy. Given the orthodox view, the words "or may be" in the phrase "which is or may be" are to be disregarded and so Governor Gipps enlarged his colony to include 'any territory which is . . . acquired in sovereignty by Her Majesty' ("the acquired thesis").

242. One of the consequences of the acquired thesis is that, with respect, the "words of Justice Richardson" in the *Lands* case that British sovereignty was "authoritatively established" by Hobson's proclamations of 21 May 1840 were made in error. As discussed, Crown counsel in both the Te Rohe Potae and Te Paparahi o Te Raki Tribunal inquiries relied on Justice Richardson's "words". Moreover, the different dates and modes of acquisition of sovereignty affect the constitutional status of Taihape Maori in different ways. Ultimately, the different schools of thought on the mode and date of acquisition prompt questions as to whether the acquisition of sovereignty was legal and/or consistent with the principles of te Tiriti o Waitangi.

243. On 30 May 1839, Normanby sought advice on "whether it would be lawful for Her Majesty to annex" New Zealand to New South Wales ***and*** "whether the legislative authority of New South Wales could be exercised over British

[260] McLintock, A.H., *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) at 62-63.
[261] Robson, J.L. and Scott, K.J., (ed) *New Zealand: The Development of its Laws and Constitution* (2nd ed., Stevens & Sons, London, 1967) at 3-5.
[262] Molloy, A.P., *"The non-Treaty of Waitangi"* [1971] NZLJ 193.
[263] Williams, D.V., *The Annexation of New Zealand to the New South Wales in 1840: What of the Treaty of Waitangi?* (1985) 2 Australian Journal of Law and Society at 41.
[264] Foden, N.A., *The Constitutional Development of New Zealand in the First Decade* (1938) LT Watkins, Wellington.
[265] Letters Patent are a form of the royal prerogative.
[266] Williams, D.V., *The Annexation of New Zealand to the New South Wales in 1840: What of the Treaty of Waitangi?* (1985) 2 Australian Journal of Law and Society at 41-42.

subjects" in New Zealand ("Normanby's letter").[267] Norfolk Island had been annexed to New South Wales on an earlier occasion.[268] In their brief, 1 page legal opinion dated 4 June 1839, (then) Attorney-General Campbell and Solicitor-General Rolfe ("the Crown lawyers" or "Crown Law") affirmed that, by way of the "new Commission", "Her Majesty may lawfully annex to the Colony of New South Wales any territory in New Zealand the sovereignty of which may be acquired by the British Crown, and that the legislative authority of New South Wales created by 9 Geo. IV., c. 83, p. 21.[269] may then be exercised over British subjects inhabiting that territory" ("the Crown Law opinion").[270] The reference to "Her Majesty" in the Crown law opinion denotes the use of the royal prerogative to annex "any territory in New Zealand".

244. A "new Commission" was referred to in the Crown Law opinion. It conferred prerogative powers to allow Gipps to:

a. extend the New South Wales boundary ("the territorial prerogative"); and

b. exercise New South Wales legislative authority in New Zealand ("the authority prerogative").

245. Given the jurisdictional quandary that the Colonial Office had persisted with for some time on how sovereignty should be acquired and in light of the gravity of the matters at hand, the Crown Law opinion's brevity is disconcerting. More concerning however is that no case law was cited in support of the advice. As discussed, Normanby sought advice on "whether it would be lawful for Her Majesty to annex" New Zealand to New South Wales and "whether the legislative authority of New South Wales could be exercised over British subjects" in New Zealand.[271] In essence, Crown Law

[267] Historical Records of New Zealand, Letter from J Campbell and R.M. Rolfe to the Marquis of Normanby dated 4 June 1839, Volume 1, Enclosure No.13, at 749-750. http://nzetc.victoria.ac.nz/tm/scholarly/tei-McN01Hist-t1-b10-d133.html
[268] Brief of Evidence of Donald Loveridge, Wai 1040, #A18, at 148.
[269] Australia Courts Act 1828.
[270] Historical Records of New Zealand, Letter from J Campbell and R.M. Rolfe to the Marquis of Normanby dated 4 June 1839, Volume 1, Enclosure No.13, at 749-750. http://nzetc.victoria.ac.nz/tm/scholarly/tei-McN01Hist-t1-b10-d133.html
[271] Historical Records of New Zealand, Letter from J Campbell and R.M. Rolfe to the Marquis of Normanby dated 4 June 1839, Volume 1, Enclosure No.13, at 749-750. http://nzetc.victoria.ac.nz/tm/scholarly/tei-McN01Hist-t1-b10-d133.html

was asked whether prerogative powers of this nature existed. The fact of the matter is that they don't.

246. The prerogative is a common law creature—the product alone of judge-made law. The scope of the royal prerogative to legislate in council is "a pure question of English law".[272] In the *Case of Proclamations* (1611), Coke CJ stated rather famously to King James that "the King hath no prerogative, but that which the law of the land allows him".[273] King James I was prevented from utilising prerogative power on the basis that no such power had previously been recognised by the courts. When the existence or effect of a royal prerogative is in question, historical inquiry must be conducted to ascertain whether there is any precedent for the exercise of the power in the given circumstances. Other maxims of relevance to these proceedings were enunciated by Lord Coke:[274]

a. The King by his proclamation of other ways cannot change any part of the common law, or statute law, or the customs of the realm; and

b. The King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not.

247. The leading constitutional law case of *Entick v Carrington* is celebrated for the dictum of Lord Camden—"If it is law, it will be found in our books. If it is not to be found there, it is not law".[275] In that case, reported in 1765, the scope of executive power was limited by the court because there was no common law precedent for the executive power that was sought to be exercised. A similar historical inquiry was carried out by the Court of Appeal[276] and by the House of Lords in the war damages case of *Attorney-General v De Keyser's Royal Hotel Limited.*[277] In *Burmah Oil Company*

[272] *Sammut v Strickland* [1938] AC 678. Further, in determining the scope of the royal prerogative, the courts will look for guidance to its previous mode of exercise. Considering the scope of the admittedly residual prerogative power to take property in times of war in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101D, Lord Reid said that the proper approach was "a historical one: how was it used in former times and how has it been used in modern times?".
[273] *The Case of Proclamations* (1611) 12 Co Rep 74, at 76.
[274] *The Case of Proclamations (1611)* 12 Co Rep 74, at 75.
[275] *Entick v Carrington* (1765) 19 St Tr 1030, 1066.
[276] *Attorney-General v De Keyser's Royal Hotel Limited* [1919] 2 Ch 197.
[277] *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, 524-528, 538-539, 552-554, 563, 573.

(Burma Trading) Limited v Lord Advocate, Lord Reid also emphasised the need for historical inquiry when determining the existence or not of the prerogative:[278]

> The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute. So I would think the proper approach is a historical one: how was it used in former times and how has it been used in modern times?

248. No case law was cited in the Crown Law opinion in support of either the territorial prerogative or the authority prerogative. No historical inquiry was undertaken even though the *Case of Proclamations* and *Entick v Carrington* had long since been decided at the time the Crown Law opinion was prepared. It was merely asserted by Crown Law that the "new Commission" could be applied as it was. For this reason, the New South Wales legislature's jurisdictional boundary extension to include Aotearoa should be impugned for want of legality and thus for being inconsistent with the principles of Te Tiriti o Waitangi.

249. In his tome *Commonwealth and Colonial Law*, Sir Kenneth Roberts-Wray wrote the following:[279]

> **There is no doubt**, that at common law, the sovereign had prerogative rights to exercise jurisdiction acquired outside British territory. It would be absurd if the common law, through recognising that the making of treaties of protection is a matter for the Royal Prerogative, had nothing to say with regard to the exercise of rights acquired by such treaties; and certainly before the passing of the first Foreign Jurisdiction Act (in 1843) jurisdiction was exercised and its basis in English law could only be to the Prerogative.
>
> (emphasis added)

Although Roberts-Wray was in "no doubt" that the British sovereign could exercise extra-territorial jurisdiction, it is significant that no case law was

[278] *Burmah Oil Company (Burma Trading) Limited v Lord Advocate* [1965] AC 75, 101.
[279] Roberts-Wray, Sir K.O., *Commonwealth and Colonial Law*, Stevens & Sons, London, 1966, at 165.

cited to support his assertion in circumstances where the common law is clear with regard to the need for historical precedent.

250. Where a settled colony is involved, the scope of the "prerogative power of Crown governance" is limited to constituting government. As we know however, prerogative power was used by Gipps to extend the territorial jurisdiction of New South Wales and it was used by Hobson to proclaim sovereignty in 1840. It is debateable whether the use of the prerogative in these ways equates with establishing the machinery of government. Whilst Gipps and Hobson may have provided the essential element of legality with their respective uses of the prerogative, substantive activity of this nature is distinguishable from the administrative, procedural endeavour that typifies the setting up of courts and/or a non-representative legislature.

251. In returning to our review of *Bancoult (No.2)*, Lord Mance relayed that the British Settlements Act 1887 was passed to make such laws as appear "necessary for the peace, order and good government of Her Majesty's subjects and others within any British settlement".[280] The aim of the legislation was to equate the monarch's prerogative powers in British settlements with her powers over ceded colonies.[281] Since that was the purpose of the 1887 Act, its content informs our understanding of the content of the prerogative powers in ceded colonies. Section 2 of the British Settlements Act 1887 reads as follows:

> It shall be lawful for Her Majesty the Queen in Council from time to time to establish all such laws and institutions, and constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts and for the administration of justice, as may appear to Her Majesty in Council to be necessary for the peace, order and good government of Her Majesty's subjects and others within any British settlement.

252. We note that the statute contains a power to make laws and establish courts. Although, the (then) Queen could delegate power,[282] confer jurisdiction on

[280] British Settlements Act 1887, section 2. A "British settlement" was defined in the Act to mean any British possession "which has not been acquired by cession or conquest." The Act has since been repealed but it was on New Zealand's statute books for many years.
[281] *R (Bancoult)* v *Secretary of State for Foreign & Commonwealth Affairs (No.2)*, (2007) EWCA Civ. 498, at [144], per Lord Mance.
[282] British Settlements Act 1887, section 3.

certain courts[283] and make Orders in Council,[284] we note that there is no power to proclaim sovereignty in the 1887 Act.

253. In *Post Office v Estuary Radio Ltd* [1968], a judgment which was approved by the Australian High Court in *Wacando v The Commonwealth* (1981),[285] Lord Diplock found for extra-territorial jurisdiction:[286]

> It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land over which it has not previously claimed or exercised sovereignty or jurisdiction. For such an extension, the authority of parliament is not required.

Having done so, we note that Lord Diplock cites no case law in support of his pronouncement about the prerogative power. Along with various other judges,[287] legal commentators,[288] legal dictionaries[289] and the Crown law opinion,[290] the finding by Lord Diplock is a mere assertion.

254. Having made the above finding, Lord Diplock provided a consequential procedural formulation that was based on *The Fagernes*:[291]

> The Queen's courts, upon being informed by Order in Council or by the appropriate Minister or Law Officer of the Crown's claim to sovereignty or jurisdiction over any place, must give effect to it and are bound by it: see *The Fagernes*.

We examined *The Fagernes*.[292] In our respectful submission, it does not provide Lord Diplock with precedent for the procedural formulation enunciated.

255. *The Fagernes* involved a collision between the plaintiff's steamship *Cornish Coast* and the defendant's ship *The Fagernes*. The plaintiff brought

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[283] British Settlements Act 1887, section 4.
[284] British Settlements Act 1887, section 5.
[285] *Wacando v The Commonwealth* (1981) 148 CLR at 9.
[286] *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, at 753.
[287] *R (on the application of Bancoult (No 2)) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 35 at [32], [47] citing *Campbell v Hall* (1774) 1 Cowp 204.
[288] Roberts Wray *Commonwealth and Colonial Law* (Steven & Sons, London, 1966) at 157.
[289] *Halsbury's Laws of England* (4th ed, reissue, 2003) vol 6, at [823].
[290] J. Campbell and R. M. Rolfe To The Marquis of Normanby, dated 4th June, 1839.
[291] Post Office v Estuary Radio Ltd [1968] 2 QB 740, at 753
[292] [1927] P. 311; 43 T.L.R 746, W.L.R. 765.

proceedings *in personam* against the defendant, an Italian shipping company. The issue before the court was whether the British courts had jurisdiction to hear the case as the collision took place 10.5-12.5 nautical miles off the English coast and 7.5-9.5 nautical miles from the Welsh coast. Tasked with answering whether the court could exert jurisdiction, the Attorney-General for England and Wales answered in the negative—"the spot where this collision is alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends".[293]

256. The position of the common law on the scope of the royal prerogative is well established. The scope of the royal prerogative to legislate in council is "a pure question of English common law".[294] The 6th of Lord Mansfield's propositions in *Campbell v Hall* (1774)[295] demonstrates that the Crown's prerogative power to legislate in Council was not regarded as an equivalent or parallel power to that of Parliament and that the primary legislative body was the latter. We set the 6 propositions out below. Although they are concerned primarily with conquered states, the propositions establish the courts' willingness and ability to examine and circumscribe the scope of the royal prerogative:

> I will state the propositions at large, and the first is this: A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.
>
> The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.
>
> The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.
>
> The 4th, that the law and legislative government of every dominion, equally affects all persona and all property within the

[293] *The Fagernes* [1927] P. 311, at 330.
[294] *Sammut v Strickland* [1938] AC 678, at p. 697; endorsed by the *R (on the application of Bancoult (No 2)) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 35 at [149].
[295] *Campbell v Hall* (1774) 1 Cowp 204, at 208-209.

> limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives, [209]
>
> The 5th, that the laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in Calvin's case, shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian sera; and in all probability arose from the mad enthusiasm of the Crusades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known.
>
> The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles : he cannot exempt an inhabitant from that particular dominion ; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.

All of the judges in *Bancoult (No 2)* were ready and able to attach appropriate limits to the Crown's power to legislate in Council.[296] In determining the scope of the royal prerogative, the courts will look for guidance from its previous mode of exercise.[297] Over the centuries the scope of the royal prerogative has been steadily eroded, and it cannot today be enlarged.[298]

257. The use of the royal prerogative to extend the New South Wales legislature into New Zealand was unprecedented and it went against the trend of court

[296] *R (on the application of Bancoult (No 2)) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 35 at [149].
[297] *R (on the application of Bancoult (No 2)) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 35 at [149].
[298] *British Broadcasting Corporation v Johns (Inspector of Taxes)* [1965] Ch3 32, at 79E).

abrogation since at least the *Case of Proclamations* in 1611. We are led to submit that there is no case law to validate either the territorial prerogative or the authority prerogative and that accordingly both can be impugned for want of legality. As discussed, the Crown lawyers failed to provide any case law precedent to Normanby when asked for their opinion. The illegal extension of British jurisdiction into the Taihape region was inconsistent with the treaty principles of active protection, good faith and partnership. The prejudice suffered by the claimants as a result of this unwarranted action is substantial and ongoing.

Instantaneous sovereignty

258. The legal effect of the 1839 Letters Patent was immediate as far as the Colonial Office was concerned. According to Loveridge, New Zealand "would instantly and by definition become part of New South Wales."[299] Certainly the Crown acted as if sovereignty had already been acquired. By mid-August 1839, Hobson was commissioned as Lieutenant Governor of New Zealand "in and over that part of Our Territory so described as aforesaid in Our said last recited Letters Patent [of 15 June 1839] which is or may be acquired in Sovereignty by Us our Heirs of Successors within that group of Islands in the Pacific Ocean commonly called New Zealand . . .".[300] Governor Gipps treated Hobson as a Lieutenant Governor from the date of his arrival in Sydney on 24 December 1839. He drew full salary for both the office of Consul and Lieutenant-Governor from this time.[301]

259. Dr Foden argued in the 1930s that New Zealand was annexed by the 1839 Letters Patent:[302]

> New Zealand joined the Empire as the result of the Act of State by which it was added to New South Wales in 1839. The Act of State was based on the fact of settlement which rendered British intervention a matter of imperative necessity.

[299] Brief of Evidence of Donald Loveridge, Wai 1040, #A18, at 147.
[300] Brief of Evidence of Donald Loveridge, Wai 1040, #A18, at 150.
[301] Williams, D.V., *The Annexation of New Zealand to the New South Wales in 1840: What of the Treaty of Waitangi?* (1985) 2 Australian Journal of Law and Society at 42.
[302] Foden, N.A., *The Constitutional Development of New Zealand in the First Decade* (1938) LT Watkins, Wellington, at 38.

Dr Williams agrees, saying that "the Letters Patent [are] the *fons et origio* of British sovereignty."[303]

260. That sovereignty was instantaneous, according to the Crown, can also be deduced from New South Wales legislation in 1840 "to declare that the Laws of New South Wales extend to Her Majesty's Dominions in the Islands of New Zealand". Coming into force on 16 June 1840 as 3 Vic No. 28 ("the 1840 Act"), its preamble affirmed New Zealand's annexation to "the Government of New South Wales". Since there is no reference to Hobson's proclamations of 21 May 1840 in the act,[304] Gipps must have relied on the 1839 Letters Patent for the enactment to have any force in New Zealand. Gipps did not rely on Hobson's proclamations because the bill was introduced on 28 May 1840 "before news reached Sydney that any such proclamations had been made".[305] Clearly then, the Crown assumed sovereignty on 15 June 1839. There are obvious issues with this date of assumption, one of them being that this date is at odds with Justice Richardson's dicta in the *Lands* case that 21 May 1840 is the date of assumption.

261. On 14 January 1840, Governor Gipps issued a proclamation that declared the boundaries of New South Wales to be enlarged to include "any territory which is or may be acquired in sovereignty by Her Majesty . . . within that group of islands in the Pacific Ocean, commonly called New Zealand". In a second proclamation of the same date, Gipps administered the prescribed oaths of a Lieutenant-Governor to Hobson and in a third proclamation, it was declared that no purchase of Maori land made after 14 January 1840 would be valid until they had been investigated and a Crown title issued ("the Gipps proclamations").[306] The effect of the Gipps proclamations was described by the Te Paparahi o Te Raki Tribunal in its Stage 1 report: [307]

> The date of the proclamations in New South Wales, 14 January, held a particular significance. From it, for example, the

[303] Williams, D.V., *The Annexation of New Zealand to the New South Wales in 1840: What of the Treaty of Waitangi?* (1985) 2 Australian Journal of Law and Society at 46. 'Fons et origion' is Latin for the source and origin.
[304] We discuss the Gipps and Hobson proclamations below.
[305] Brief of Evidence of Donald Loveridge, Wai 1040, #A18, at 214.
[306] Brief of Evidence of Donald Loveridge, Wai 1040, #A18, page 188.
[307] Waitangi Tribunal, He Whakaputanga me te Tiriti—The Declaration and the Treaty: The Report on Stage 1 of Te Paparahi o Te Raki Inquiry (Wai 1040, 2011) page 525.

> establishment of a British system of land tenure in New Zealand was to be dated, and it would also be selected as the date from which English laws operated throughout the new colony.

Professor Ward considered that with the Gipps proclamations, "the British were acting as if they had governmental authority in New Zealand before the Treaty was even drafted".[308]

262. In his evidence given before the Waitangi Tribunal, Dr McHugh stated that "[o]ne of the key arguments I will be making concerns what I have termed jurisdictionalism".[309] McHugh went on to explain that British imperial intervention in New Zealand as a sovereign authority was a matter of acquiring and asserting jurisdiction over British subjects.[310] Apparently, this was the end game. Further to his assertion, Dr McHugh also claimed that when Hobson issued his proclamations on 21 May 1840, "[t]heir compass might have been territorial, but they were aimed jurisdictionally at the European settlers".[311] It was stressed that Hobson's proclamations were about asserting royal authority over the New Zealand Company as opposed to an obviation of the consent gathering process with Maori.[312] There are numerous other references in McHugh's evidence about the jurisdictional objective.[313] However, urgings that te Tiriti o Waitangi and moreso Hobson's proclamations were executed for the purpose of transplanting British jurisdiction take on a distinct hollowness in circumstances where the sought after jurisdiction was already established by the Letters Patent of 15 June 1839. Notably, Dr McHugh is alive to the apparent anomaly.[314] He said:

> At the same time as imperial officials were insisting upon the necessity of Māori consent prior to assertion of any *imperium* in New Zealand, they were also acting on the basis that any colony — or series of them — would be designated as 'settled' (as opposed to 'conquered or ceded'). Does not, one might ask, that constitutional designation as a 'settled' colony negate the

[308] Waitangi Tribunal, He Whakaputanga me te Tiriti—The Declaration and the Treaty: The Report on Stage 1 of Te Paparahi o Te Raki Inquiry (Wai 1040, 2011) page 432.
[309] Hearing Week 4 Transcript, Wai 1040, #4.1.4, page 514, lines 32-33.
[310] Hearing Week 4 Transcript, Wai 1040, #4.1.4, page 514, lines 38-41.
[311] Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, paragraph 129.
[312] Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, paragraph 132.
[313] Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, paragraphs 39, 40, 42, 45-49, 74, 80, 85, 89, 91, 94, 96, 131-133.
[314] Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, paragraph 144.

> purported recognition of Māori sovereignty, which should (one would have thought) have resulted in status as a 'ceded colony'? This seeming contradiction has baffled historians and lawyers, and it has led to them dismissing the recognition or original Māori sovereignty as mere window-dressing at best, or, worse, bad faith.

263. It is important to examine how the Gipps proclamations could initiate the operation of English law in Aotearoa prior to, for instance, the "amicable negociation" with Maori that the Lords Commissioners of Her Majesty's Treasury had required of the Colonial Office.[315] The jurisdiction that was established was not insignificant. It included the formation of a British system of land tenure that affected all settlers with land interests. The office of the Lieutenant-Governor was established as were the associated powers therewith to make and enforce laws in New Zealand and establish formal government. As discussed above, Gipps was commissioned to exercise legislative authority in New Zealand pursuant to the 1839 Letters Patent. We referred to the commission as the authority prerogative. Its application was contingent upon a commission which expanded the territorial jurisdiction of the New South Wales legislature to include Aotearoa. We termed that commission the territorial prerogative. The authority and territorial prerogatives are the only possible bases for the jurisdiction that the Gipps proclamations purported to establish but since they were without common law precedent and thus defective, the Gipps proclamations must also be defective. Gipps erected British imperium on a foundation of sand.

264. Furthermore, the fact of Gipps proclamations is added evidence that, according to the Crown, the annexation of New Zealand pursuant to the 1839 Letters Patent was instantaneous. It is more evidence that New Zealand was a settled and not a ceded colony. The Stage 1 Te Paparahi o Te Raki Tribunal made law-making capacity central to its definition of sovereignty. On 14 January 1840, the Gipps proclamations established a land tenure system in Aotearoa. The land tenure system and the law-making

[315] We referred earlier to Treasury's funding-related requirement. Cited in the Brief of Evidence of Donald Loveridge, Wai 1040, #A18, at 150. We refer as well to a similar requirement placed on Hobson by Normanby in his instructions—see The Marquis of Normanby to Captain Hobson, 14 August 1839, BPP, 1840, vol 33 [560], pp 37-42.

that led to it further establishes that the Crown had assumed sovereignty prior to the signing of te Tiriti o Waitangi and prior to Hobson's proclamations.

265. In light of the purported jurisdiction that resulted from the 1839 Letters Patent and the Gipps proclamations, there was no need for Hobson's proclamations, if, as McHugh avers, "they were aimed jurisdictionally at the European settlers". British jurisdiction had been established by the time Hobson issued his proclamations. Thus, in our submission, the phrase—"which is . . . acquired in sovereignty"—was purposefully included in the Gipps proclamations to both accommodate and reflect that sovereignty had been assumed before te Tiriti o Waitangi was signed. The Waitangi Tribunal refers to how academics such as Dr McHugh "have expressed considerable doubt that the Crown would have asserted sovereignty over New Zealand, or parts of it, without signatures on the treaty".[316] Although McHugh and others may have expressed doubt, the Gipps proclamations constituted a sovereign act over all New Zealand subjects, including Taihape Maori, and the act was committed before Maori consent had been sought let alone acquired. The incongruity of the Crown's actions wasn't lost on Claudia Orange:[317]

> This series of actions placed the British government in the ambiguous position of asserting an authority that would not be formally requested from Maori chiefs until a few days later at the Waitangi meeting.

Racist and discriminatory

266. We have discussed already the view of Professor Joseph that New Zealand came under British rule by settlement and not by cession.[318] Joseph refers to how "[t]he English Acts Act 1854, and subsequently the English Laws Act of 1858 and 1908, gave statutory recognition to the inheritance of English laws as from 14 January 1840, before the signing of the Treaty of Waitangi on 6 February 1840".[319] The reference by Joseph to the date of 14 January 1840 confirms the role of Gipps proclamations in the application of English

[316] Waitangi Tribunal, He Whakaputanga me te Tiriti—The Declaration and the Treaty: The Report on Stage 1 of Te Paparahi o Te Raki Inquiry (Wai 1040, 2011) page 432.
[317] Orange, *The Treaty of Waitangi*, (Bridget Williams Books, Wellington, 1987) page 34.
[318] Joseph, *Constitutional and Administrative Law*, 4th ed., page 48.
[319] Joseph, *Constitutional and Administrative Law*, 4th ed., page 47.

laws in New Zealand. McHugh has stated that the constitutional status of New Zealand is as a 'settled' rather than 'ceded' colony.[320] Consistent with the Lords Commissioners of Her Majesty's Treasury and Normanby's instructions to Hobson, Joseph makes it clear that British rule by settlement was "contingent upon the free consent of Maori".[321]

267. There are 3 types of British colony—those acquired by settlement, or by conquest or by cession. In the past, a distinction arose between settled colonies and conquered or ceded colonies for the purpose of determining the application of English law. In conquered or ceded colonies, the existing legal system in the new colony remained as it was unless it was modified by way of English statute or Crown ordinance. Whereas with settled colonies, English statute and common law were applied upon settlement. Joseph *et al* have stated that New Zealand was a settled colony because English laws were applied immediately.[322]

268. In his evidence, Dr McHugh briefly explained why New Zealand was designated a 'settled' rather than a 'ceded' colony. We are referred to Lord Coke's ratio in *Calvin's Case* (1608):[323]

> And upon this ground there is a diversity between a conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath *vitae et necis postestatem*,[324] he may at his pleasure alter and change the laws of that kingdom; but until he doth make an alteration of those laws the ancient laws of the kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there ipso facto the laws of the infidel are abrogated, for that they not only be against Christianity, but against the laws of God and nature, contained in the Decalogue;

[320] *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, paragraph 146.
[321] Joseph, *Constitutional and Administrative Law*, 4th ed., page 48. Doctor McHugh also noted the need for Maori consent—see *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, paragraph 155.
[322] Joseph, *Constitutional and Administrative Law*, 4th ed., page 47.
[323] *Calvin's Case* (1608) 7 Co Rep 1a at 17b, cited in the Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, paragraph 147.
[324] Author's note: Latin for power over life and death.

269. Coke does little to hide views that are clearly discriminatory against non-Christians, including Maori.[325] McHugh's citation of *Calvin's Case* as the legal basis for the designation of New Zealand as a settled colony is worrisome in the least. In *Blankard v Galdy* (1693), Chief Justice Holt stated in obiter that English laws were in force in the "case of an uninhabited country newly found out by English subjects".[326] McHugh stated that this case and one subsequent to it[327] were the first to distinguish between conquered or ceded colonies and those acquired by settlement. As such, we submit that the original basis for deeming a colony to be settled was that it is uninhabited and recently discovered by British subjects. Later in *Freeman v Fairlie* (1828), Master in Chancery James Stephen amended the basis for the settled designation to involve an evaluation of the relevant legal system:[328]

> the true general distinction to be, in effect, between Countries in which there are not, and Countries in which there are, at the time of their acquisition, any existing civil institutions and laws, it being, in the first of those cases, matter of necessity that the British settlers should use their native laws, as having no others to resort to; whereas, in the other case there is an established lex loci, which it might be highly inconvenient all at once to abrogate; and therefore, it remains till changed by the deliberate wisdom of the new legislative power.

In applying *Freeman v Fairlie*, the Crown deemed New Zealand to be 'settled' because the Maori legal system did not suffice for the purposes of English settlers.

270. We submit that the rationale for the settlement mode of acquisition is racist and discriminatory. As a legal construct, its earliest English roots stem from Lord Coke's preference for Christian kingdoms over "infidels" in circumstances where there is no explanation for his preference. The near proximity of the criterion of "uninhabited lands" to settlement gives cause for

[325] Although by 1840, many Maori in the north had converted to Christianity, the Maori polity as a whole were seen by the Crown as being non-Christian.
[326] *Blankard v Galdy* (1693) Holt 341, 90 ER 1089; 2 Salk 411, 91 ER 356 (KB), cited in the *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, paragraph 150.
[327] *Dutton v Howell* (1693) Shower PC 24, 1 ER 17 page 21.
[328] *Freeman v Fairlie* (1828) 1 Moo Ind App 305 pages 324-6, 18 ER 117 (Ch), cited in cited in the *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, paragraph 154.

concern. The criterion fomented the creation of uninhabited lands from inhabited lands by way of the downgrading of humanity. One well known example is Hobson's South Island Proclamation. It was based on discovery which, in turn, was based on the assumption that the South Island was terra nullius. The land was not empty of human life. Notably, Bunbury had gathered the signatures of 16 South Island rangatira by 17 June 1840.[329] Bunbury's treaty signatories fly in the face of Hobson's discovery-based South Island Proclamation. However, despite its evident fallaciousness, the South Island Proclamation remains intact to this day. We submit that overt racism is central to the 'genealogy' of the case of *Freeman v Fairlie* but when it was decided in 1828 by Sir James Stephen's father, the entrenchment of the libertarian and abolitionist movements of the day would not allow such blatant racist chicanery any longer. Accordingly, the Master in Chancery focused on denigrating the institutions of the non-Christians, the infidels and the Maori, as opposed to the denigration of the people of those institutions. Tikanga Maori was insufficient for the purposes of the English settlers and so it was discarded altogether in all its various forms.[330] We submit that the deeming of New Zealand as a settled colony is repugnant because it is founded on notions of Eurocentrism and the institutionalisation of racism. Crown activity of this kind is an egregious breach of Treaty principle.

271. As we have discussed above, settlement must be consented to by the colonised peoples. The Gipps Proclamations were declared prior to the February 6 signings and so there was no consent at their time of issue. Moreover, there was no consent to settlement subsequent to the February 6 signings either because the signatory rangatira affirmed their sovereign status—they did not cede it. What was consented to was that the Crown could govern the British settler population and no more.

[329] *Brief of Evidence of Donald Loveridge*, Wai 1040, #A18, page 280.
[330] For a discussion of the jural system of Maori law, see the Brief of Evidence of Nin Tomas, Wai 1040, #C1.

ISSUE 1(6) ACQUISITION OF DE FACTO AND DE JURE SOVEREIGNTY, POLITICAL ENGAGEMENT WITH THE CROWN

Introduction

272. In this section of the closing submissions, we address Issue 1(6) of the Tribunal's Statement of Issues:

> **1(6) At what point, and through what means, did the Crown acquire *de facto* sovereignty over Taihape Māori and the district?**

273. We also address the political engagement issues, Issues 2(1)-2(4) of the Tribunal Statement of Issues:

> **2(1) To what extent did the legislative, judicial and administrative arms of government affect the ability of Taihape Māori to exercise their tino rangatiratanga?**
>
> **a. If those arms of government were exercised, could the manner of that use be called an imposition on Taihape Māori?**
>
> **b. Moreover, did it compromise the agency of Taihape Māori?**
>
> **2(2) In what ways did Taihape Māori specifically demonstrate their tino rangatiratanga, and/or the impacts of Crown policies on their ability to exercise tino rangatiratanga? Were these demonstrations consistent with the tino rangatiratanga preserved to Taihape Māori under the Treaty? For example:**
>
> **a. The Kōkako and Tūrangarere hui;**
> **b. The Rūnanga of the 1860s;**
> **c. The Repudiation Movement, including Te Komiti o Pātea;**
> **d. The Kotahitanga Parliament;**
> **e. The Kīngitanga;**
> **f. Engagement of Taihape Māori rangatira with the Crown, including:**

i. **The 1890 telegrams concerning the Awarua hearings;**
ii. **The evidence presented to the Rees-Carroll Commission in 1891;**
iii. **The 1892 and 1895 letters relating to land use; and**
iv. **The hui with Premier Seddon at Moawhango in 1894.**

g. The Rātana Church.

2(3) How did the Crown respond to these demonstrations of tino rangatiratanga by Taihape Māori?

2(4) Did Taihape Māori at any point in the nineteenth century envisage, or attempt to construct, an autonomous district within the region whose authority did not derive from the Crown?

274. As we prepared the submissions in response to Issue 1(6) and Issues 2(1)-2(4), it became apparent that there was significant overlay. So much so that to have addressed the various matters in a distinct fashion would have resulted in the needless repetition of material. Accordingly, we have combined our response to the aforementioned Tribunal Statement of Issues.

275. In the submissions below, it is contended that the Crown has not acquired *de facto* sovereignty over Taihape Māori. Neither was *de jure* sovereignty acquired for that matter. Since the Crown acquired neither *de jure* nor *de facto* sovereignty in 1840, the Crown can be deemed a revolutionary government. Professor Brookfield has described a "revolutionary government" in the following way: [331]

> . . . [t]he overthrow and replacement of any kind of legal order, or other constitutional change to it – whether or not brought about

[331] Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, Auckland, 2006) page 13.

> by violence … – which takes place contrary to any limitation or rule of change belonging to that legal order.

The claim that the New Zealand government is illegal is supported by case law precedent. Increasingly, judges in various common law jurisdictions around the globe have adjudged the legality of different revolutionary governments on the basis of their effectiveness, the morality of the new legal orders and their justiciability. Notably, many of the common law jurisdictions involved were former British colonies.

276. We encapsulate the relevant law and then we apply it to the Taihape inquiry district. A four-step test for the legality of a revolutionary regime has been developed. It is clear from the evidence that is available that the Crown fails the test for legality. The Crown used violent suppression to overcome the valid nationalist interests of the Kīngitanga and there is sufficient evidence that Mōkai-Pātea Māori were Kīngitanga. Even if the Kīngitanga adherence evidence is not accepted, there should be no doubt that the Crown engaged in the purposeful and consummate oppression of Mōkai-Pātea Māori and failed thus to satisfy the 4th limb of the legality test.

277. In applying the 3rd and 4th limbs of the legality test, there is analysis of the various institutions of government that adversely impacted on the tino rangatiratanga of Taihape Māori including in particular representative government, the Native land legislative regime, the Native Land Purchase Department, the education system, the Native Department and so forth. We step through the numerous initiatives taken by Mōkai-Pātea Māori to retain their independence and right to self-determine such as participation in anti-seller hui, the Kīngitanga movement, land-based rūnanga, the New Zealand economy, Ngāti Hokohē, komiti Māori, the education system and Kotahitanga. We document how at every turn the Crown thwarted all attempts by Mōkai-Pātea to be self-sufficient and to be autonomous. The record of Crown conduct in breach of the principles of te Tiriti ō Waitangi is laid bare before this Tribunal and it is damning of the Crown.

278. We submit that the Crown's assumption of sovereignty in 1840 was revolutionary because the Crown sought to overthrow the established Māori legal order. Therefore, it is appropriate to assess the legality of the Crown's

actions against the jurisprudence concerning revolutionary governments. There are two approaches to determining the legality of revolutionary governments. In the section below we describe the different tests and argue for the application of the wider test in Aotearoa.

Narrow view of legality

279. Brookfield argues that the legality of a revolutionary government should be determined by the principle of effectiveness alone. This was the approach taken by the Privy Council in *Madzimbamuto v Lardner-Burke*.[332] In that case, Stella Madzimbamuto challenged the validity of her husband's detainment pursuant to emergency regulations issued by way of Rhodesia's 1965 Constitution. The case concerned:[333]

> a challenge to the legality of the post-unilateral declaration of independence [sic] rule in Rhodesia and of the validity of the 1965 Constitution passed simultaneously with the declaration on 11th November 1965 by the Ian Smith Government. As soon as this happened, the Governor of the Colony dismissed the Prime Minister and his ministers. But they continued in office as before and the legislature also, in spite of the facts that the British Parliament had on the 16th November 1965 passed the Southern Rhodesia Act 1965 declaring its continued responsibility for the territory, and the Southern Rhodesia Constitution Order-in-Council 1965, which declared all legislative and administrative acts of the rebellious colony null and void. They acted on the basis that the 1965 Constitution had superseded the 1961 one… The country was run as smoothly and as effectively as before.

280. Special leave was granted in *Madzimbamuto* for the Privy Council to hear the case. The Privy Council agreed that the test was one of efficacy but found that because a rival government still existed, the rebellious regime could not be said to have attained *de jure* status.[334]

281. Despite the lack of clarity regarding the basis of the Privy Council's decision in *Madzimbamuto,* it has been taken it to mean in subsequent cases that the

[332] *Madzimbamuto v Lardner-Burke* [1968] 3 All ER 561.
[333] As cited in *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada) at 61, 62.
[334] *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada) at 63.

legality of a revolutionary government is determined by mere effectiveness.[335] The narrow test was first enunciated by the High Court of Lesotho in the case of *Mokotso*:[336]

> A court may hold a revolutionary government to be lawful, and its legislation to have been legitimate *ab initio*, where it is satisfied that (a) the government is firmly established, there being no other government in opposition thereto: and (b) the government administration is effective, in that the majority of the people are behaving, by and large, in conformity therewith.

Wider view of legality

282. There is another body of case law which enunciates a wider test to determine the legality of a revolutionary government. According to this approach, legality is determined with reference to considerations of morality and justice in addition to effectiveness. The Courts in Ghana,[337] Pakistan,[338] the Seychelles,[339] Grenada,[340] and Fiji[341] have adopted various formulations of this wider test for legality. Below we discuss the various enunciations of the wider view of legality.

283. In *Bhutto*, the Supreme Court of Pakistan rejected the test in *Madzimbamuto*:[342]

> . . . making effectiveness of the political change the sole condition or criterion for its legality, it excludes from consideration sociological factors of morality and justice which contribute to the accepted or effectiveness of the new legal order... The legal consequences of an abrupt political change … must be judged not by the application of an abstract theory of law in a vacuum,

[335] *Mokotso v HM King Moshoeshoe II* [1989] LRC (Const) 24 (Les HC) pages 132-133; *Matanzima v President of Transkei* 1989 (4) SA 989 (Transkei General Divn) at 996-997; *Mangope v Van der Walt* 1994 (3) SA 850 (Bophuthatswana General Divn) at 865-866.
[336] *Mokotso v HM King Moshoeshoe II* [1989] LRC (Const) 24 (PC) at 132-133.
[337] *Sallah v Attorney-General of Ghana* (Constitution Case No.8 1972). This case was one of the first rejections of the Kelsenite principles outside of Pakistan.
[338] *Jilani v Government of the Punjab* [1972] PLD 139 (SC Pakistan) (unreported); *Bhutto v Chief of Army Staff* [1977] PLD 657 (SC Pakistan).
[339] *Vallabhaji v Controller of Taxes* (1981) 7 CLB 1249 (CA Seychelles).
[340] *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada).
[341] *Republic of Fiji v Prasad* [2001] 2 LRC 743 (CA Fiji).
[342] *Bhutto v Chief of Army Staff*, [1977] PLD 657 (SC Pakistan), at 692, 721-722, per S Anwarul Haq CJ.

> but by consideration of the total milieu in which the change is brought about …

284. The Court held instead that morality and justice required consideration of:[343]

> the objective political situation prevailing at the time, its historical imperatives and compulsions; the motivation of those responsible for the change, and the extent to which the old Legal Order is sought to be preserved or suppressed. Only a comprehensive view of all these factors can proper conclusions be reached as to the true character of the new Legal Order.

285. In *Vallabhaji*, the Seychelles Court of Appeal found that the new regime was indeed legal on the basis that:[344]

> the smoothness and efficacy of the revolutionary transition that the new regime had … received **such widespread and unqualified acceptance and consent** that it was, already a legal authority at the time. (emphasis added)

In the Seychelles therefore, a revolutionary government could not be considered legal unless it has the unqualified support of the vast majority of the people. This is clearly a consideration of morality and justice, rather than mere effectiveness.

286. In *Mitchell*, the Court of Appeal in Grenada adopted the approach taken in *Bhutto* and considered the totality of the facts in order to determine the legality of the government.[345] In that case, the Appellants appealed the dismissal of their application that challenged the competence of the High Court to hear murder charges that had been brought against them. The High Court had been established by the People's Revolutionary Government, which was in control of Grenada from 1979 to 1983 following a bloodless coup. The murder charges related to the deaths of the Prime Minister Maurice Bishop and some of his Ministers by the 'Revolutionary Military Council', of which the Appellants were allegedly members. Their deaths meant that no Government was in existence and so the Governor General assumed power in order to restore law and order. The Governor General

[343] *Bhutto v Chief of Army Staff*, [1977] PLD 657 (SC Pakistan), at 721-722, per S Anwarul Haq CJ.
[344] *Vallabhaji v Controller of Taxes* (1981) 7 CLB 1249 (Court of Appeal of the Seychelles), per Hogan P.
[345] *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada) at 69.

made a number of proclamations to maintain the judicial system established and fundamental rights and freedoms. During the trial, the Governor General promulgated the Constitution of Grenada Order 1984 on 9 November 1984, which established that the 1983 Constitution was duly in force, save and except for certain specific provisions. National elections were subsequently held with the New National Party winning office on 3 December 1984. A constitutional government was subsequently established, which then confirmed the validity of the laws that were made during the revolution.[346]

287. The Grenadian Court of Appeal adopted a wider test for determining the legality of the revolutionary government. It was held that such a test was appropriate because it was "right and acceptable to Caribbean jurisprudence."[347] The test for legality was set out in the judgment of Haynes P.:[348]

> ... I would hold that for a revolutionary government to achieve de jure status, that is, to become internally a legal and legitimate Government, the following conditions should exist: (a) the revolution was successful, in that the Government was firmly established administratively, there being no other rival one; (b) its rule was effective, in that the people by and large were behaving in conformity with and obeying its mandates; (c) such conformity and obedience was due to popular acceptance and support and was not mere tacit submission to coercion or fear of force; and (d) it must not appear that the regime was oppressive and undemocratic. In my view unless all four of these conditions exist no Court in a democratic country should pronounce a revolutionary regime legitimate. Every one of them (a), (b), (c) and (d) raises a question of fact ... I do not think these are unduly stringent conditions, (a) and (b) can exist without popular acceptance and support, because of submission to force or fear of it or weakness. This Court should not take an approach which might encourage power-seeking politicians or over-ambitious army officers to believe that, if by force of arms they can gain and retain governmental powers for a few years, their government will become consequentially lawful and legitimate. We must bear in

[346] *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada), at 41-50.
[347] *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada) at 51.
[348] *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada) at 69.

> mind the warning of Fieldsend, A.J., in *Madzimbamuto v Lardner-Burke* that "nothing can encourage instability more than for any revolutionary movement to know that if it succeeds in snatching power it will be entitled *ipso facto* to the complete support of the pre-existing judiciary in their judicial capacity. It may be a vain hope that the judgment of a court will deter a usurper, or have the effect of restoring legality, but for a court to be deterred by fear of failure is merely to acquiesce in illegality." Hence the importance of conditions (c) and (d). A revolutionary regime should not be accorded legitimacy by this Court unless it is satisfied that, on the whole, the regime had the people behind it and with it. Legality should be achieved only if and when the people accept and approve for in them lies political sovereignty, and the Court so finds. This approval they may give *ab initio* or subsequently. Length of time might or might not be sufficient to infer it. It might be expressed or tacit approval. But it is that which should give legitimacy to a successful and effective revolutionary regime. The support of a real majority is sufficient. This could be shown by its majority vote at a general election or a referendum or a majority percentage at polls.

288. From the judgment, we note in particular that all 4 conditions must be met. With some reliance being placed on the judgment of Fieldsend, A.J., in *Madzimbamuto v Lardner-Burke*, the extra conditions were added in *Mitchell* to deter would-be revolutionaries from all too readily satisfying the test that was set out in *Mokotso*.

289. On the basis of their test, the Grenadian Court of Appeal could not find that the government had become *de jure* because of “a lack of sufficient proof of that popular acceptance and support”.[349] The Court of Appeal applied this test on the basis that “legality should only be achieved if and when the people accept and approve for in them lies political sovereignty … the support of a real majority is sufficient.”[350] What was lacking in the case was a majority vote in a general election.[351]

[349] *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada) at 69.
[350] *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada) at 69.
[351] *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada) at 69.

290. The inclusion of extra conditions by the Grenadian Court of Appeal in *Mitchell* was criticised by Ackermann J.A., delivering the judgment of the Lesotho Court of Appeal in *Makanete v Lekhanya* (1992):[352]

> It may well be that, to use Professor Kelsen's words, 'the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order,' because the new regime is popular and because it is not oppressive or undemocratic. But that … is not the test. Throughout the course of history, there have been regimes, indeed dynasties, holding sway for many years, indeed centuries, whose rule could not be said by any manner of means to be popular and could even be described as oppressive; but who is there to say that a new legal order was not created with their coming and going?

In a similar vein, Brookfield has complained that the inclusion of 'considerations of justice and morality' are matters going to the legitimacy of a regime rather than its legality and that in any event, some moral deficiencies in a regime may be affected by the passage of time.[353]

291. We note that in their decision in *Prasad*, the Fijian Court of Appeal expressed concern with the prevalence of Kelsenian theories in the relevant case law and how it "might too readily reward a usurper".[354] The Fijian Court of Appeal also added that:[355]

> Many of the authorities were decided before the modern shift towards insistence on basic human rights in a raft of international treaties and, more importantly for present purposes, the 1997 Fiji Constitution.

In other words, the complaint by Ackermann A.J. and others about the extra conditions in *Mitchell* ignores the significant developments that have occurred in the area of human rights over the last 250 years or so. There is no longer any need to consign oneself to "the course of history" as Ackermann and Brookfield so willingly do.

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[352] *Makenete v Lekhanya* [1993] 3 LRC 13, page 63, cited in Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, Auckland, 2006) at 27-28.
[353] Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, Auckland, 2006) at 28.
[354] *Republic of Fiji v Prasad* [2001] 2 LRC 743 (Fiji CA) at 763.
[355] *Republic of Fiji v Prasad* [2001] 2 LRC 743 (Fiji CA) at 763.

292. Clearly influenced by *Mitchell*, the Fijian Court of Appeal in *Republic of Fiji v Prasad* produced a more elaborate test that incorporates morality and justice considerations.[356] In that case, the Fijian Court of Appeal held that the interim government was illegal.[357] We submit that the test in *Prasad* is largely an elaboration of the test in *Mitchell*, appropriately tailored to the circumstances as they were in Fiji. While Brookfield believes that in *Prasad*, "the Court accepted the view of this book that such considerations [of morality and justice] go to 'the legitimacy of the regime rather than its legality,"[358] we respectfully disagree. Professor Brookfield's reading of the judgment is somewhat selective. While the dicta referred to by Brookfield was stated by Sir Maurice Casey of the Fiji Court of Appeal, if we look at the judgment as a whole, it is clear that considerations of morality and justice were taken into account when determining the legality of the regime. We refer to our submissions above concerning *Prasad* in this regard. We also note that the Fijian Court of Appeal expressly rejected the test in *Mokotso,* saying that "the efficacy test [was] too narrowly expressed."[359] Further, the Fiji Court of Appeal did not reject the wider test in *Mitchell* but merely suggested that Haynes P may have gone too far with the requirement that the new regime not appear to be oppressive or undemocratic.[360] Although that suggestion was made, we do not consider it fatal to our claim that notions of justice and morality were taken into account by the Court of Appeal in *Prasad*. We say this because the Court of Appeal's articulation of the legality test included the following consideration:[361]

> Such conformity and obedience to the new regime by the populace as can be proved by the de facto government must stem from popular acceptance and support as distinct from tacit submission to coercion or fear of force.

We submit that the wording of this consideration resembles the equivalent requirement in *Mitchell.* Although the Fiji Court of Appeal was cautious to accept that the regime could not act in a manner that was undemocratic or oppressive, they did in fact accept the requirement that the conformity of the

[356] *Republic of Fiji v Prasad* [2001] 2 LRC 743 (Fiji CA); [2001] NZAR 385.
[357] *Republic of Fiji v Prasad* [2001] 2 LRC 743 (Fiji CA) at 773.
[358] Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, Auckland, 2006) at 187.
[359] *Republic of Fiji v Prasad* [2001] 2 LRC 743 (Fiji CA) at 768.
[360] *Republic of Fiji v Prasad* [2001] 2 LRC 743 (Fiji CA) at 768.
[361] *Republic of Fiji v Prasad* [2001] 2 LRC 743 (Fiji CA) at 770.

majority must stem from their acceptance and support of the government. In light of the above, it is clear that the Court of Appeal in *Prasad* considered morality and justice in their assessment of the legality of the interim civilian government. Such considerations are clearly at odds with Brookfield's claim that effectiveness alone was here applied to determine the legality of the revolutionary government.

293. On the basis of its formulation of the wider test for legality, the Court of Appeal in Prasad concluded that the interim civilian government had "failed to establish that it [was] the legal government of Fiji."[362] Of particular concern to the Court was the short amount of time the government had been in power, a mere seven months, that the government had placed severe restrictions on public protest, which prevented people from expressing their lack of support, and the evidence that substantial sections of the community did not accept the interim civilian government.[363]

Application of the legality test to Taihape

294. We respectfully submit that the wider test for legality that was enunciated in *Mitchell* ("the *Mitchell* legality test" or "the wider test") should be applied by the Tribunal for the purpose of measuring the manner in which the Crown acquired sovereignty against the principles of te Tiriti ō Waitangi. The wider test allows for consideration of all of the circumstances in which the transfer of sovereignty occurred. As discussed, all 4 elements of the *Mitchell* legality test need to be met. It is not possible for the Crown to satisfy the test.

(i) Successful revolution and government firmly established

295. For many years after the signing of te Tiriti ō Waitangi, the Queen's writ did not run in the Taihape region and elsewhere around New Zealand. Nevertheless, the Crown's claim is that sovereignty was transferred by October 1840. In these circumstances, the Crown is estopped from asserting that it acquired *de facto* sovereignty and therefore the Crown is without the "full Sovereignty" referred to by Hobson in the North Island proclamation. Neither was Maori consent provided to the Crown for the purpose of cession or settlement. New Zealand was not a settled colony because use of the

[362] *Republic of Fiji v Prasad* [2001] 2 LRC 743 (Fiji CA) at 773.
[363] *Republic of Fiji v Prasad* [2001] 2 LRC 743 (Fiji CA) at 773.

royal prerogative to extend the boundaries of the New South Wales legislature in 1839 to include New Zealand was without legal precedent and thus wrong in law. Although the first Native Land Court title investigation was carried out in the region in 1872, there was strong opposition to the court at the time from Mōkai-Pātea Māori. Earlier opposition to land selling and ongoing opposition to the Native Land Court would culminate in active participation by many Mōkai-Pātea Māori in the Kotahitanga movement up until the early years of the 20th century. Amongst other objectives, Kotahitanga sought the establishment of a Maori Parliament to dispense tikanga Māori. During the latter part of the 19th century, the Crown began to erode the language and culture of Taihape Māori through the public school system. Unfortunately, all of the initiatives taken by Mōkai-Pātea Māori to uphold their tino rangatiratanga, to maintain their lands, to develop their own economy and to maintain their identity as a people were actively thwarted by the Crown in abject breach of the principles of te Tiriti ō Waitangi. Bereft of any political or legal power, economically marginalised and culturally undermined, Taihape Māori were forced to conform with the dictates of the Crown so that by the early years of the 20th century, the Crown had established itself in the Mōkai-Pātea region through the operation of institutions such as the New Zealand Parliament, the Native land legislative regime, the Native Land Purchase Department, the Resident Magistrate, the New Zealand court system, the Native Department, the Education Department, Inland Revenue, the Aotea District Maori Land Board and others.

(ii) Effective rule as evidenced by the conformity of the majority

296. In the *Mitchell* test for legality, Haynes P. referred to a "real majority" of the country's populace as a whole and how this could be shown by a majority vote at a general election or a referendum for example.[364] Regional majorities were not the Grenadian Court of Appeal's concern and nor were the majorities of minority groups. Unfortunately, the relevant case law is silent on the application of the majority conformity element of the *Mitchell* legality test in a bi-cultural society such as New Zealand where there are such disparate population proportions between the various cultures.

[364] *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada) at 69. Other examples were provided including a majority percentage at polls and in court by way of an agreed statement of facts or by affidavit evidence.

297. Nevertheless, in circumstances where those of Māori descent are a minority of almost 17% of the total New Zealand present day population,[365] it would be improper, in counsel's submission, for the Waitangi Tribunal to consider that the majority non-Māori populace's conformity with Crown rule in New Zealand satisfies the majority conformity element of the *Mitchell* legality test. In fact, for the non-Māori population to "speak for" the Māori population in this way would be an oppressive act in breach of principles of te Tiriti ō Waitangi such as active protection, partnership and good faith.

298. In any event, it is accepted that there is conformity with the New Zealand government by a majority of Māori and so there is effective rule by the New Zealand government.

(iii) Such conformity is due to popular acceptance and support of the government and was not mere tacit submission to coercion or fear of force

Introduction

299. For most of the 20th century and in recent times, Mōkai-Pātea Māori have acted in conformity with the government of the day. Although there is conformity with and acceptance of the government, it is due to tacit submission to coercion or fear of force.

300. It is not controversial that there was ardent and prolonged opposition by Mōkai-Pātea Māori to the sale of their lands to Crown purchasing agents for much of the 19th century. Their sustained anti-seller stance began in the early years of the colony and it was matched by many of the hapū and iwi around them. It was a natural progression for Taihape Māori to hui with like-minded groups to strategise as to how they would hold their lands from the Crown in a collective fashion. One such strategy involved the formation of a massive boundary in 1856 that was inclusive of the Mōkai-Pātea region and within which there would be no land sales. Having formed such a boundary,

[365] Stats NZ (2018 Census)—https://www.stats.govt.nz/tools/2018-census-place-summaries/new-zealand#population-and-dwellings

there was a natural progression by Taihape Māori to support for the Kīngitanga and Māori nationalism.

301. Support for the Kīngitanga by Taihape Māori signifies an overt rejection of the Crown and a distinct interest in having sovereignty reside in the Māori king. However, at some point, Taihape Māori went from overt rejection of the Crown to conformity with it. We document below how that happened.

302. We describe the military invasion by the Crown to violently suppress the Kīngitanga and all those who supported the movement. Hundreds of Kīngitanga supporters were killed in the fighting and many more were wounded. The Crown's forces plundered, burnt and destroyed villages and kainga. Over a million acres of Māori land was confiscated. Having lost the war, the Kīngitanga established and then withdrew behind the aukati of the Rohe Pōtae for just over 2 decades. Following peace talks with the Crown in the mid-1880s, it was eventually agreed to take the aukati down.

303. Although the Kīngitanga survived as an institution, it would never engage in open warfare with the Crown again. The military defeats, the loss of life and limb, the raupatu of highly valued lands and the wounded sense of national pride compelled conformity to Crown rule by the end of the 19th century. The movement towards eventual conformity that was initiated by the war's outcome swept Taihape Māori along with it. Although the war never reached the Mōkai-Pātea region on the ground, its repercussions certainly did. Through its violent suppression of the Kīngitanga, the Crown made Taihape Maori conform to its rule.

Anti-sellers

304. Opposition to Crown land purchasing by Mōkai-Pātea Māori was long-held and initially it was successful. Walzl documents protest action within Mōkai-Pātea in response to some early private and Crown land purchasing in the, even though, strictly speaking, the lands being purchased came close to but did not extend into Mōkai-Pātea.[366] Hue Te Huri gave evidence before the Native Land Court. He told of orders received from Ngāti Tūwharetoa rangatira Te Heuheu by Ngāti Pikiahu and Ngāti Waewae in 1842 to leave

[366] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 306.

their "kaingas" at Taupō for Ōtara in the south "to retain the land".[367] The Ngāti Pikiahu and Ngāti Waewae heke was said to have received support from a number of people on its way to Ōtara including Te Oti Pohe, Ihakara Te Raro, Karaitiana Tainui, Retimana Te Rango "and many others" and that Ngāti Whitikaupeka escorted the heke.[368] Ngāti Hauiti chiefs Moeroa and Pōtaka joined the heke at Ōtara.[369] The party was gifted land in the vicinity and according to Ūtiku Pōtaka:[370]

> We lived on this land with N'Pikiahu and N'Waewae some of Heuheu's people. They lived at Ōtara. We were living there when they arrived and we all lived together.

It is evident that as early as 1842, Mōkai-Pātea Māori were wary of settler land purchasing antics and a concerted effort was made to monitor events in this regard. The trouble that was gone to by Mōkai-Pātea Māori to arrest land selling represents a deep-seated concern on their part with settler and Crown intent.

305. In May 1849, Ngāti Apa rangatira finalised the sale to the Crown of their interests in the Rangitikei-Turakina land block.[371] The inland boundary of the block quickly became the subject of dispute, with a strong stand being taken by "all Mōkai-Pātea groups to halt the boundary at Taraketi."[372] Walzl continued:[373]

> Ultimately the protest was overwhelmingly successful and the Crown boundary was kept outside of Mokai Patea. Subsequently Mokai Patea commentators clearly recorded their role in opposing the original siting of the inland boundary as far north as Otara and in forcing it to be fixed further south. Within the context of the dispute over the inland boundary, Ngati Pikiahu and Ngati Waewae left their home at Otara and moved south to protect the

[367] Evidence of Hue Te Huri, Otairi Title Investigation 1880, W2/433, cited in Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 307. Ihakara Te Raro and Noa Raunihi gave similar evidence—see Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 307 and 308.
[368] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 308.
[369] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 309.
[370] Evidence of Ūtiku Pōtaka, Mangaōhāne Title Investigation 1884, N9/83, cited in Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 310.
[371] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 325.
[372] Walzl, T., *Tribal Landscape Overview Presentation Summary*, Wai 2180, #A12(a), at 22.
[373] Walzl, T., *Tribal Landscape Overview Presentation Summary*, Wai 2180, #A12(a), at 22.

> new boundary at Te Houhou by taking up residence at Te Reureu.

306. Rangatira such as Ihakara Te Raro, Te Oti Pohe and Kiwakiwa grouped with the Ngāti Pikiahu, Ngāti Waewae and Ngāti Hauiti living at Ōtara to erect a pou at the junction of the Rangitikei River and Pourewa Stream.[374] A meeting was held with Donald McLean at Parewanui on 30 July 1850 which resulted in the boundary being fixed at Te Houhou or Whauwhau. According to Ūtiku Pōtaka, the Parewanui hui was attended by many Mōkai-Pātea representatives:[375]

> The N'Whiti, N'Tuwharetoa, N'Pikiahu, N'Waewae & others went to Parewanui on this occasion, intending, if possible, to set aside the sale of the land, as far up as Otara, to McLean. I did not go myself. The elders went. I remained at Otara. Those who went were Te Oti Pohe, Te Kaipou, Te Weu, Potaka, Ngawaka, the N'Pikiahu, & Paranihi; the chiefs of those tribes. Paranihi was a N'Waewae: the four first were N'Whiti & N'Hauiti.

307. It is apparent from the record that numerous Mōkai-Pātea hapū were involved with preventing the sale of land at this time. The stance taken was well organised and very determined. Walzl records that "the protests at Pourewa almost escalated to armed combat."[376] The willing use of arms by Taihape Māori to protect the pou that had been erected represents serious intent with regard to holding the land.

308. From 1850, land purchasing proceeded to the east of Mōkai-Pātea in Ahuriri, Heretaunga and other Hawkes Bay districts. There was much internal conflict between the groups involved. Several of the groups, such as Ngāti Hinemanu and Ngāi Te Ūpokoiri, held land interests in the eastern-most parts of Mōkai-Pātea.[377] Ūtiku Pōtaka spoke of a pou being erected in response to the land selling:[378]

> After this [the erection of the post at Pouwera] the people of Patea brought another post to stop the sale of land on the

[374] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 332.
[375] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 333.
[376] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 333.
[377] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 366.
[378] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 377.

> Heretaunga side and place[d] it at Whanauwhana on the Ngaruroro. It (the post) was called Whitikaupeka and Hawea.

Te Oti Pohe also spoke of the erection of a post in relation to land selling on the 'Heretaunga side',[379] as did Te Hau Paimarire of Ngāti Tamakōpiri.[380]

309. During the 15-year period from 1840, Mōkai-Pātea Māori maintained a determined and successful stance against the sale of their land interests. Pou were erected at certain points to mark the boundary within which there would be no land sales. There is evidence that Mōkai-Pātea Māori were prepared to defend the no-sale zone with their lives.[381] The opposition to land sales that was begun in the early 1840s remained a feature of the relationship between Mōkai-Pātea Māori and the Crown until at least the end of the 19th century. Despite the anti-seller stance and against the will of many, the Crown would wrest Taihape lands from the original owners in relentless fashion.

310. The erection of pou by Taihape Māori and their preparedness to use armed force in 1850 in order to hold their lands is clear evidence that sovereignty was not transferred to the Crown by Taihape Māori in 1840. It should be noted that there is no record of any attempt by McLean to use force to overcome the resistance of Taihape Māori to land sales. At no point did McLean threaten the chiefs of Taihape with arrest. Such a remedy was not at the Crown's disposal. Of course, the Crown would resort to the use of force to get its way with the land in the end but at this point in time, no stand-over tactics were employed.

Inclusion in the Rohe Tapu

311. In 1856, Iwikau Te Heuheu called a great hui at Pūkawa on the side of Lake Taupō that involved tribes from throughout the North Island. The hui was held to establish a Māori king under whom the land would be held. Although Stirling and Walzl found no specific record of participation by Mōkai-Pātea

[379] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 377.
[380] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 378.
[381] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 333.

at the hui, the boundary recorded by the Reverend Richard Taylor within which no more land was to be sold included the Mōkai-Pātea region:[382]

> Tongariro was the centre of a circle of which the circumference was the Hauraki, Waikato, Kawiamōkau [Kāwhia and Mōkau], Taranaki, Ngatiruanui, Waitotara, Wanganui, Rangitikei, Titiōkura; that was to be the Rohe Tapu . . .

A boundary line running from the mouth of the Rangitikei River to the Tītīōkura Saddle in the Hawkes Bay means that much of the Mōkai-Patea region was included in the Rohe Tapu. Furthermore, given the non-seller stance already taken by many Taihape Māori, the likelihood of their participation at Pūkawa and their support for the Kīngitanga was high. Interestingly, Stirling stated that Tūwharetoa were "scarcely alone" in the Mōkai-Pātea in joining the Māori king.[383] His testimony before the Waitangi Tribunal was that "there's not really any evidence of hostility to[wards the] Kīngitanga either".[384] Furthermore, none of Grey's "new institutions" appear to have infiltrated the Mōkai-Pātea region,[385] yet another sign that the Rohe Tapu included Taihape.

312. In addition to holding the land, the Kīngitanga agenda included the practice of law-making. Te Heuheu explained to Governor Gore Browne "that the laws they intended to make should be binding on all those who chose to reside among the natives".[386] In 1862, John Gorst criticised but gave testimony nevertheless to Parliament about the existence of a nascent Kīngitanga legal system.[387] Walzl referred to "Kīngitanga-based rūnanga" in the central North Island district "enacting laws, and administering justice."[388]

313. There is sufficient evidence that Taihape Māori shared the goal of land retention with the Kīngitanga. The "first large hui to discuss tribal boundaries

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[382] Richard Taylor, Journals, 14 December 1856, cited in Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 379.
[383] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 18.
[384] Waitangi Tribunal, *Hearing Week 3 Transcript,* Wai 2180, #4.1.10, at 585.
[385] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 7. Stirling stated that the 'new institutions' weren't dealt with in his research report because they "either have little or no impact or no useful records relating to them have been located during research". This was probably because there were no "new institutions" in the region and this, in turn, was because the whenua was within the Rohe Tapu, an area within which the "new institutions" were banned.
[386] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 379 and 380.
[387] Appendices to the Journals of the House of Representatives, E-9, Sec III, 1862, at 10-11.
[388] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 380.

and related political issues" was held at Kōkako, in the nearby Murimotu district, in March of 1860.[389] The size of the hui and its significance led the Whanganui Tribunal to describe the Kōkako hui as "ground-breaking".[390] Stirling viewed the attendance of Taihape Māori at Kōkako as an exercise in tino rangatiratanga.[391] Te Hau Paimarire and others stated in 1881 that Te Oti Pohe had a role in proposing the hui and that he, along with Ngāti Tama, invited the people.[392] Te Oti Pohe's role in convening the hui is consistent with his earlier opposition to land sales. Amongst those in attendance at the hui were representatives from Ngāti Whiti, Ngāti Tama, Ngāti Hinemanu, Ngāi Te Ūpokoiri and Ngāti Tūwharetoa. Stirling wrote:[393]

> What emerged from Kōkako was not only the laying down of a boundary for the Whanganui and other tribes, but also the laying down of a boundary for those pledging allegiance to Kīngitanga and wishing to place their lands under its protection.

314. Tony Walzl saw the hui at Kōkako against a Kīngitanga setting:[394]

> In 1860, within the context of the rise of the Kīngitanga, opposition to land selling and inter-iwi tensions over land rights, Mōkai Pātea became hosts to a significant hui to try and gain some agreement in relation to inter-iwi spheres of influence. A grand meeting was arranged at Kokako, a Ngāti Rangituhia kainga in the Murimotu district, for the purpose of arranging tribal boundaries.

Although Walzl then stated that Mōkai-Pātea Māori emphasised tribal boundaries and preventing land sales at Kōkako as opposed to the Kīngitanga, later in response to questions from Ms Sinclair he agreed that the topic of the Kīngitanga and the fixing of tribal boundaries were not mutually exclusive.[395]

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[389] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 16.
[390] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 2015, at 294, cited in Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 16.
[391] Hearing Week 3 Transcript, Wai 2180, #4.1.10, at 514, lines 30-31, at 522, line 5, lines 15-18.
[392] Te Hau Paimarire, 10 May 1881, Taupo MB 2, at 179, cited in Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 17. Walzl also records attribution to Te Oti Pohe convening Kōkako by Te Hau Paimarire, Winiata Te Pūhaki of Ngāti Rangi and Ihakara Te Raro—see Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 382.
[393] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 19.
[394] Hearing Week 1 Transcript, Wai 2180, #4.1.8, at 154.
[395] Hearing Week 1 Transcript, Wai 2180, #4.1.8, at 244-5.

315. It is clear from the evidence on the record of inquiry that boundary korero was a key part of Kōkako. However, there is no evidence to suggest that the Kīngitanga's Rohe Tapu boundary set at Pūkawa in 1856 had changed in relation to its south-western component other than the adjustment that Whanganui Māori sought for the sale of their land. This adjustment was allowed. Instead of the Rohe Tapu boundary running from Waitōtara, to Whanganui (river mouth), to Rangitikei (river mouth) and then to Tītīōkura, as it did in 1856, it was adjusted to run from Waitōtara to Te Houhou (on the Rangitikei) and then to Tītīōkura.[396] Te Houhou was, of course, where the pou was set to ward McLean off from coming any further inland with the Rangitikei-Turakina purchase. Both Ratima Te Aoterangi[397] and Hiraka Te Rango[398] gave evidence before the Native Land Court that the southern boundary was at Te Houhou. In a letter to *Te Wananga* dated 4 September 1875, Renata Kawepo rendered the southern boundary at Te Houhou,[399] as did Winiata Te Whaaro[400] and Horonuku Te Heuheu Tūkino.[401]

316. Te Houhou was also known as Pourewa.[402] According to Walzl, Pourewa was where the pou to ward off further incursions by McLean was placed a decade before; at the junction of the Pourewa Stream and the Rangitikei River, a few miles east of Marton.[403] A predominant issue at Kōkako was where the Whanganui boundary adjustment went. That issue was resolved in the end, largely leaving the Rohe Tapu intact. Despite the Whanganui-required boundary amendments, the Rohe Tapu remained a very large area. It is clear that it included the Mōkai-Pātea region.

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[396] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 20. Stirling drew on the evidence of Te Keepa Te Rangihiwinui for the Te Houhou boundary marker. It should be noted that Te Keepa also stated that the southern-most boundary marker went to Huriwaka. Whether the boundary is at Te Houhou or Huriwaka, most if not all of the Mokai-Patea remained in the Rohe Tapu. On a separate occasion, Te Keepa gave evidence before the Native Land Court of a boundary that included both Te Houhou and Huriwaka—see Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 21.
[397] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 21.
[398] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 23.
[399] Renata Kawepo letter, *Te Wananga*, 4 September 1875, at 195, cited in Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 24.
[400] Winiata Te Whaaro, Mangaōhāne Rehearing 1890, N20/376, cited in Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 385.
[401] Te Heuheu, Rangipō-Waiū 1881, TMB 2/95-6, Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 385.
[402] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 24. Te Houhou was also known as Te Whauwhau. Walzl refers to the "Whauwhau boundary"—see Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 330.
[403] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 332.

317. There is other evidence of support for the Kīngitanga in the Mōkai-Pātea region. Te Keepa Te Rangihiwinui "linked the Kōkako hui directly to Kīngitanga affiliation".[404] Bill Taueki's evidence is that the iwi of Muaūpoko were ardent Kīngitanga, standing with them at the Battle of Ōrākau in 1863.[405] Jordan Winiata-Haines stated that not all the Mōkai-Pātea chiefs agreed to their lands being protected by the Kīngitanga.[406] But he also stated that his Kui Pāpara, a daughter of Winiata Te Whaaro, "and her husband Koro Tau Wilson were staunch supporters of the Kīngitanga. Tūheitia's sister (well she's the youngest I think) Te Manawanui was a whāngai of Kui Pāpara and Koro Tau".[407]

318. In testimony he provided to the Tribunal, Bruce Stirling was equivocal with regard to the level of support for the Kīingitanga, stating that "there is not a lot of evidence of strong suport. But then again you know there's not much evidence, there's not really any evidence of hostility to Kīngitanga either".[408] Earlier in his testimony though there was a reference to "Awarua people" wanting "to whakatapu their land to the King in the sense of protecting it under that mantle".[409] Puruhe Smith's evidence was that "[a]ll the marae at Te Reureu from Waitapu to Rangataua, Te Kōtuku, Poupatate, Te Tikanga, Maraehine and Te Hiiri ō Māhuta. Those are our marae who support strongly the King Movement".[410] Hare Arapere confirmed Mr Smith's evidence strong support for the Kīngitanga at Te Reureu.[411] When questioned at hearing as to whether Ngāti Tamakopiri supported the Kīngitanga, David Armstrong answered "yes most certainly."[412]

Kīngitanga purpose and intent

319. Since the Rohe Tapu included the Mōkai-Pātea region, Mōkai-Pātea Māori were Kīngitanga devotees at this time. Not only did they not accept the

[404] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 19.
[405] Brief of Evidence of William James Taueki, 11 November 2015, Wai 2180, #L3(c), at [85]. The evidence of the iwi's stand at Ōrākau is sourced from the research of Bruce Stirling, *Muaūpoko Customary Interests*, September 2015, Wai 2200, at 168 and Louis Chase, *Muaūpoko Oral Evidence and Traditional History Report*, Wai 2200, #A160, at 77.
[406] Brief of Evidence of Jordan Winiata-Haines, 21 September 2017, Wai 2180, #G17, at [12].
[407] Hearing Week 1 Transcript, Wai 2180, #4.1.8, at 713.
[408] Hearing Week 3 Transcript, Wai 2180, #4.1.10, at 585, lines 1-4.
[409] Hearing Week 3 Transcript, Wai 2180, #4.1.10, at 584, lines 25-28.
[410] Hearing Week 2 Transcript, Wai 2180, #4.1.9, at 401.
[411] Hearing Week 2 Transcript, Wai 2180, #4.1.9, at 410.
[412] Hearing Week 1 Transcript, Wai 2180, #4.1.8, at 420.

Crown's sovereignty assumption of 1840, they actively asserted their own in direct opposition thereto. A boundary was put up inside of which the Crown was excluded, but, as opposed to curtailing the Queen's writ, the Claimants' tīpuna merely forestalled the Crown's assumption of power. In the very least however, Mōkai-Pātea Māori made it clear that by the early 1860s, the Crown had not acquired *de facto* sovereignty over them. In the following section, we describe the origins of the Kīngitanga in order to shed light on its purpose and intent. Adherence to the Kīngitanga can be equated with the retention of Māori sovereignty and a belief in Māori nationalism.

320. It is said that the Kīngitanga began with the 1845 visit to England of the Ngāti Toa and Te Ātiawa chief Pirikawau, who travelled to England with Beauchamp Halswell in 1843, living there with his family for some time and touring Europe. On his return to New Zealand he became Governor Grey's interpreter and a contributor to Grey's work of understanding and recording Maori culture.[413] Whilst in England, Pirikawau was present when the Queen of England asked Governor Grey which chief had the greatest power in Aotearoa. Grey responded without hesitation, "Te Wherowhero of Waikato".[414] Upon his return to New Zealand, Pirikawau introduced the idea of the Kīngitanga, sending out letters describing the enslavement of native races by the Pākeha that he had seen abroad.[415] Eventually, the kaupapa of a Māori king would be pursued by Matene Te Whiwhi and Tamihana Te Rauparaha in particular, also of Ngāti Toa and Te Ātiawa.[416]

321. Professor Sinclair traced the first signs of emerging Māori unrest to the New Zealand Constitution Act 1852 ("the 1852 Act"). It denied most Māori the right to vote for or be represented in the new settler assemblies.[417] Ashwell noted an important event in the development of the Kīngitanga that very year. He told of a "meeting of the Waikato Natives" "to forbid the Europeans purchasing land in the Waikato".[418]

[413] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 174.
[414] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 173.
[415] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 173.
[416] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 378.
[417] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 139.
[418] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 178.

322. The Kīngitanga gained further impetus from a major hui that was held at Manawapou in Taranaki on 7 May 1854 when Ngāti Ruanui hosted Ngāti Raukawa chiefs and other rangatira including Tamihana Te Rauparaha and Matene Te Whiwhi. Over 1000 people are said to have attended. The meeting was held in a whare rūnanga that Matene Te Whiwhi named Taiporohēnui (the coast where the great wrong will end). There it was resolved that:

a. a boundary be established within which no further land sales would be tolerated;

b. the boundary was to extend from New Plymouth via Kai Iwi to the Whanganui River; [419] and

c. no European magistrate would have jurisdiction within the boundary.[420]

323. In April 1856, Octavius Hadfield recorded growing Māori unrest to Governor Gore-Browne: [421]

> There is, however, a certain kind of restlessness among some of the Chief[s] and leading men, which has manifested itself within the last three or four years…there is a secret intention of assembling if possible most of the leading Chiefs of the centre and southern parts of this island, in the ensuing summer for the purpose of raising the authority of the Chiefs.

324. Grey identified the obvious issue for Māori:[422]

> The race which is in the majority is much the more powerful of the two; the people belonging to it are well armed, proud, and independent; and there is no reason…to think that they would be satisfied with and submit to the rule of the minority, while there are many reasons to believe that they will resist it the utmost.

[419] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 378.
[420] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 177.
[421] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 179.
[422] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 139, 140.

Grey also pointed out that a majority of Maori were able to read and write in their own language and they were possessed of a great amount of wealth of which they were fully aware.[423] In the North Island, Māori remained in the majority and with their thriving economies they were contributing substantially in tax revenues. Under the 1852 Act however, their tax revenues were appropriated by the various provincial councils from which Maori were effectively excluded.[424]

325. Hadfield further warned that if, as a consequence of some untoward event, there was a further war with Maori, its consequences would be so much more serious as 'the communication between the distant tribes has become much more frequent of late years, [and] there would be more unanimity of purpose and action".[425]

326. Governor Gore-Browne visited the Waikato in 1856 and reported that Māori there declared in the most emphatic terms that they would never recognise the General Assembly in any way, speaking of it in contemptuous terms, and calling it the "English Committee".[426] Wi Hikairo of Ngāti Hikairo was unwilling that the administration of his affairs should be put into the hands of others, and especially those of a responsible ministry, declaring that "it must remain with us and the Governor."[427] Hone Wetere also believed that 'the ruling power of New Zealand' was vested in the chiefs in conjunction with the government, and rejected any change to that arrangement, as did Hone Te Waru of Ngāti Apakura.[428]

327. At Pūkawa in November 1856, G.S. Cooper reported that the object so far as he was able to ascertain was the inauguration of a Māori Parliament to be composed of deputies from all of the tribes who agreed to join the confederation.[429] The Māori Parliament was to have regular sessions at

[423] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 140.
[424] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 140.
[425] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 179.
[426] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 142.
[427] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 142.
[428] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 142.
[429] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 179.

specified times and was to be presided over by a chief to be named at the meeting:[430]

> The principal subject proposed for discussion in this Parliament is the devising [of] some plan by which, by a united action on the part of the Maoris as a nation, some check may be applied to the growing influence of the colonists whilst the power of the native chiefs, which they perceive to be waning in proportion as that of the colonists increases, shall be restored as far as possible to its former status.[431]

328. Cooper's report shows that those in attendance at Pūkawa thus do not seem to have been opposed to European settlement per se but rather wished to reassert some control over the pace of this.[432] Cooper also noted that the gathering discussed the need to enter into some kind of treaty with the government to place the criminal law on a more satisfactory footing with respect to their own communities. The chiefs, he noted, complained of the tardiness and uncertainty of English law, and they proposed to deal with certain matters affecting their own countrymen by themselves. There is an obvious implication that the hui-goers were prepared to work in tandem with the governor in matters affecting both peoples.[433]

329. Meanwhile a plea by Wiremu Tamihana Tarapipipi in 1857 for Maori to be allowed representation in the General Assembly fell on deaf ears, and later proposals for a 'Maori General Assemble' to be convened under the mantle of the governor fared no better. Tamihana later informed the Waikato missionary Benjamin Ashwell of his efforts to visit to Governor Browne in Auckland to discuss this in person:[434]

> Between three and four years ago – We the Rangatiras (Chiefs) of Ngatihaua and other Chiefs had a rūnanga (a council) to consider how we might have laws etc. like the Europeans[;] at last we thought we ought to have a rūnanga in Auckland and

[430] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 180.
[431] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 180.
[432] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 180.
[433] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 180, 181.
[434] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 152.

> have one Tikanga (Law Govt.) for all – we drew up a paper signed by the Chiefs which I took to Auckland.

330. A large gathering of tribes to discuss a proposed kingship was held at Paetai, on the banks of the Waikato River in May 1857. At that gathering, Wiremu Tamihana endorsed the Kīngitanga in the interests of Māori law and order:[435]

> I want orders and laws. The king could give us these better than the Governor; for the Governor has never done anything except when a pakeha is killed: he lets us kill each other and fight. A king would stop these evils.

331. The desire for a king grew as much out of concerns with land sales and exclusion from the law-making process as it did from Pakeha mistreatment and rudeness. Tamihana talked of attending the Native Office on a Monday, then again on Tuesday and each time Europeans were being attended to who came after him, but they would not meet with him. Tamihana said to himself, "We are treated as dogs". He then left and went to Mangere to speak with Te Wherowhero, advising him that they should go back to Waikato to consider their own tikanga.[436] Soon after, Tamihana received a letter from Matene Te Whiwhi wherein he suggested a king. It was only after receiving this advice that Tamihana began to throw his weight in behind the Kīngitanga:[437]

> This King was to be in close connexion with the Governor, to stand in the same relation to the Maories as the Governor does to the Pakeha.

332. Wiremu Tamihana sought to portray the King movement as a genuine attempt to find solutions to the problems that were plaguing Māori communities.[438] At a gathering at Ihumātao in May 1857, Te Heuheu Tūkino expressed his support for the Kīngitanga.[439]

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[435] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 187.
[436] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, at 153.
[437] Tamihana speaking to H T Clarke in January 1861 as discussed in O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, at 155.
[438] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, at 187.
[439] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, at 189.

333. Before the Waikato Committee, James Armitage advised that the Māori interest in self-government emanated from a fear of being subjugated.[440] He told committee members that he had attended many of the rūnanga convened in the Waikato and had watched the development of the movement with considerable interest. Also before the Waikato Committee, the influential Ngāti Te Rangiwewehi rangatira, Wiremu Maihi Te Rangikāheke, summed up the reasons for the formation of the Kīngitanga: [441]

> I know why the thoughts of the Māori Chiefs have turned away from the system of the Pakeha; the mana of this island is trampled upon by the Pakeha system; the Pakeha system is taught to the tribes; the Māories therefore consider that it is taking the mana and enslaving this island. This is the principal cause of the present darkness of the Māories, they are not admitted to share in the Government administration of justice. The Pakehas say that their regulations alone should be law for both races; the Māori Chiefs say that the two should be joined, so that the bodies of the Pakeha and Māori may be joined (or united), and also the thoughts of their hearts. If the bodies only of the Pakeha and Māori are joined, but there is no joining of systems, what is the good of there being one mana, one law, one system of administering justice, and one King? These are the things which have caused the hearts of the Māori Chiefs of this island to turn in a contrary direction.

334. Waata Kukutai of Ngāti Tipa linked similar concerns with the emergence of the Kīngitanga, informing the committee that:[442]

> The cause was, it was following our mana, lest it should be taken away by the Pakehas, lest the mana should be completely trampled upon by that of the Pakehas.

The Kīngitanga, according to Dr Joseph, "acknowledged they had that sovereign power and authority".[443]

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[440] Vincent O'Malley, *Te Rohe Potae Political Engagement 1840-1863*, December 2010, Wai 898, #A23, at 263-264.
[441] Minutes of Evidence, 6 October 1860, AJHR, 1860, F-3, at 24.
[442] Minutes of Evidence, 10 October 1860, AJHR, 1860, F-3, at 35.
[443] *Hearing Week 2 Transcript,* Wai 2180, #4.1.9, at 141.

335. On 2 June 1858, Pōtatau was formally installed as king at Ngāruawāhia.[444] Tamihana set out his aspirations for the king. He wanted the king to protect landowners against quarrels, wars and murders, and that every man was to live upon his own land. The king to put a stop to all evils to the land, and to all men.[445] The role was essentially one of protection, according to Tamihana. By June 1858, the Kīngitanga flag was being flown at Kāwhia and elsewhere.[446]

336. A final gathering regarding the setting up of the king was then held at Ngāruawāhia on 2 May 1859, when chiefs from all over the island came together. Wiremu Tamihana told those assembled:[447]

> Commencing at Pūkawa (Lake Taupo) the words were these: Firstly, the King be set up to hold the mana or prestige over the land; secondly, the mana over man; thirdly, to stop the flow of blood. The Maori King and the Queen of England to be joined in concord. God be over them both.

A reverberating war

337. In July 1863, the Kīngitanga was forced into a defensive war when British troops invaded across the Mangātawhiri River. Most of the Māori combatants were from Waikato-Tainui, Ngāti Maniapoto, Ngāti Raukawa, Ngāti Hikairo and Ngāti Paretekawa, but there were also combatants from Ngāi Tūhoe, Ngāti Whare, Muaūpoko, Ngāti Raukawa, Ngāti Te Kohera, Ngāti Tūwharetoa, Te Aitanga ā Hauiti, Taranaki, Ngāti Pāoa, Ngāi Te Rangi, Ngāti Kahungunu, Whanganui and elsewhere.[448]

338. In the wake of their defeat at Rangiriri, Kīngitanga leaders made concerted efforts to negotiate an end to the war, even complying with British demands that Ngāruawāhia be given up before peace talks could commence. But no talks followed and some Crown officials expressed a determination to carry the war deep into Ngāti Maniapoto territory. While colonial ministers were

[444] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, at 196.
[445] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, at 201.
[446] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, at 202.
[447] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, at 211.
[448] O'Malley, *Te Rohe Potae War and Raupatu*, Wai 898, #A22, at 48, 152, 153, 173.

widely believed to have their eyes on the rich agricultural lands around Rangiaōwhia and Kihikihi, Grey doubted that the King's supporters had been sufficiently crushed or humiliated. Despite further Māori efforts to talk peace, British forces pushed southwards, bypassing Pāterangi but inflicting a sharp defeat on a force containing many Ngāti Hikairo and Ngāti Maniapoto at Wiari in February 1864. Thereafter the British made a surprise raid on the settlement of Rangiaōwhia, which has been widely understood by Māori to be a place of refuge for women, children and the elderly. The deaths which followed, including those of a number of occupants of a pā torched by the British, were long remembered with great bitterness.

339. Following the sacking of Rewi Maniapoto's pā *Hui Te Rangiora* at Kihikihi in late February 1864 and the heroic stand by Kīngitanga forces at the Battle of Ōrākau on 2 April 1864, the King movement was defeated but not destroyed. The Kīngitanga retreated behind the aukati, a boundary beyond which unauthorised movement was prohibited, that was established south of the Puniu River. The large area that comprised the aukati would become known as the Rohe Pōtae (or King Country). Over time, the aukati came to mark off the limits of the area conquered and/or confiscated by the Crown. At a fundamental level, the aukati was intended to prevent fresh conflict and it was a barrier against further loss of land and authority.[449] By 1883, Pākeha still could not wander into the territory.[450]

340. There is evidence that the aukati extended into parts of the Mōkai-Pātea. Marr reported that Pākeha runholders trying to move into the Rangipō and Murimotu areas to obtain extensive leases were "stopped by aukati implemented to control entry into the King territory from this area."[451] A large party of Kīngitanga Māori were reported to be cultivating lands at the head of the Manawatu and Rangitikei Rivers in 1864 with the intention of blocking entry along this route and to stop the movement of European settlers into the area.[452] In March 1867, it was reported that Ngāti Raukawa were preventing European speculators trying to penetrate into the territory from the south.[453]

[449] O'Malley, *Te Rohe Potae War and Raupatu*, Wai 898, #A22, at 231.
[450] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, at 59.
[451] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, at 85.
[452] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, at 85.
[453] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, at 85.

341. In the years immediately after the war, the Kīngitanga insisted they wanted peace but not under the mana of the Pākeha and his 'contemptible laws' and not if the title of king could not be used for Tāwhiao.[454] From the mid-1860s until the mid-1870s, the Kīngitanga maintained a semi-autonomous territory. There were strains and internal tensions as a result of war, raupatu and socio-economic dislocation. Despite the difficulties, the Kīngitanga took a pro-active and positive approach to maintaining pan-tribal unity. A relationship had been developed with Native Minister McLean from 1869 and by 1876, progress was being made in terms of political engagement.[455] Eventually, peace would be achieved between the parties. The presentation of the taiaha 'Māhuta' to the Government and the people of New Zealand saw the aukati lifted in 1885. A peaceful alternative to maintaining the boundary had been achieved.[456]

342. The Kīngitanga was about Māori nationalism.[457] Its coat of arms brandishes the words "Ko Te Mana Motuhake". The principal concern for Kīngitanga adherents was the maintenance of their tino rangatiratanga or mana motuhake. Rewi Maniapoto made it clear that the Kīngitanga was there to rival the Crown:[458]

> I objected because I saw that there could not be two chiefs for one house, or two captains for one ship. I said: "Let us fight the Europeans and if they kill us all, let them take our lands.

Even Governor Gore-Browne saw the Kīngitanga in this light.[459]

343. Hundreds of Kīngitanga supporters were either killed or wounded as a result of military invasion by the Crown of the Waikato. James Belich estimated some 500 killed or wounded.[460] Cowan listed 410 Māori killed and 100 wounded.[461] In 1928, the Sim Commission accepted that the total area confiscated at Waikato was 1,202,172 acres, with 314,364 acres 'returned

[454] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, 292.
[455] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, at 288.
[456] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, page 148.
[457] Wai 898, A023 O'Malley, Te Rohe Potae Political Engagement 1840-1863, p. 217.
[458] C.W. Vennell, *Such Things Were*, page 62.
[459] Wai 898, A023 O'Malley, Te Rohe Potae Political Engagement 1840-1863, at 217.
[460] Belich, *New Zealand Wars*, at 197.
[461] Cowan, *New Zealand Wars*, vol 1, at 466.

to the Natives'.[462] There is no evidence that Mōkai-Pātea Māori were killed in the fighting or that any of their lands were confiscated. Nevertheless, Taihape Māori would have been acutely aware of the war in the Waikato and of the property destruction, injury and death that the fighting led to. The perils of armed aggression against the Crown would have been patently obvious to them and keenly felt.

344. There were deliberate acts of coercion by the Crown in other parts of the country during the war and it seems feasible to believe that Taihape Māori were subjected to the same coercive acts. In the north, for instance, a £300 reward was offered for information concerning persons who may have aided Waikato in obtaining "munitions of war".[463] Ngai Tai of Auckland were made to swear the oath of allegiance to the Queen if they were to remain in Auckland during the fighting.[464] Northland Māori were made to express their loyalty to the Crown and denounce the Kīngitanga.[465] There was a proclamation against the sale of "edged tools" because they could be put to warlike use.[466] The mere mention of raupatu gave Aperahama Tāonui and 41 Hokianga chiefs cause to express their concern to the Governor about the raupatu of their lands.[467]

345. Taihape Maori included their lands in the Rohe Tapu in 1856 and reconfirmed their inclusion at Kōkako in 1860. They maintained the aukati against Pākeha intrusion in 1864. As discussed, by 1883 Pākeha could still not wander behind the aukati (proper)[468] whereas by 1870, the Native Land Court was already operating in the southern part of the Mōkai-Pātea district.[469] In other words, despite the later advent of Ngāti Hokohē and Te Kōtahitanga, the process of conforming with the Crown had begun. What

[462] Wai 898, A023 O'Malley, Te Rohe Potae Political Engagement 1840-1863, at 568.
[463] Armstrong and Subasic, *Northland Land and Politics: 1860-1919*, Wai 1040, #A12, at 515.
[464] Murdoch, *'A Brief History of the Human Occupation of the Hunua Occupation of the Hunua Catchment Parkland'*, compiled by G.J. Murdoch, Historian, ARC Environment for the ARC Regional Parks Services, December 1993, at 15-16.
[465] Armstrong and Subasic, *Northland Land and Politics: 1860-1919*, Wai 1040, #A12, at 504.
[466] Armstrong and Subasic, *Northland Land and Politics: 1860-1919*, Wai 1040, #A12, at 511.
[467] Armstrong and Subasic, *Northland Land and Politics: 1860-1919*, Wai 1040, #A12, at 514.
[468] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, at 59. By 1883, the aukati was not of the same dimensions and boundaries as the Rohe Tapu referred to above. It was a much reduced area. Marr included the Heaphy and Hill aukati maps in her research report—see Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, at 56 and 57. They depict the southern boundary of the aukati running west from the southern end of Lake Taupō to the mouth of the Mōhakatino River on the west coast. The southern boundary was no longer at Te Houhou.
[469] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 39.

had changed since Kōkako just 10 years previously? Clearly, the most significant event was the war in the Waikato, the resultant carnage, property destruction and land confiscation. The violent suppression of the Kīngitanga's forces in the southern Waikato must have traumatised the people of te ao Māori, including places such as the Taihape district where the war had not been fought and where war casualties had not been incurred. There was, according to Stirling, an understanding amongst Taihape Māori of "the futility of resistance to the Crown's ultimate authority having been well and truly established during the New Zealand Wars".[470] Dr McHugh highlighted the legal effect of the war:[471]

> Nevertheless, in constitutional language, the chiefs' enjoyment of authority over the tribes depended upon either their retention of some legal sovereignty, or a delegation of authority from the Crown. It should be remembered that here we are speaking of de jure authority. De Facto such authority was exercised by the chiefs after British sovereignty and until the Crown was practically able to exercise what it had claimed as a matter of law. The benchmark in that process was the New Zealand Wars.

Taihape Māori were forced to accept British dominion or suffer the consequences of raupatu, loss of life or loss of liberty. In these circumstances, the third element of the *Mitchell* legality test cannot be met by the Crown. The New Zealand government cannot be *de jure* given that there is "a lack of sufficient proof of … popular acceptance and support" by Māori of the Mōkai-Pātea region.[472]

346. Not only do we establish this fact below, we refer as well to Professor McHugh's ready acknowledgement of this state of affairs in 1840:[473]

> Nevertheless, in constitutional language, the chiefs' enjoyment of authority over the tribes depended upon either their retention of some legal sovereignty, or a delegation of authority from the Crown. It should be

[470] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 246.
[471] Dr Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, Oxford University Press, 1991, at 46.
[472] *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada) at 69.
[473] Dr Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, Oxford University Press, 1991, page 46.

> remembered that here we are speaking of de jure authority. De Facto such authority was exercised by the chiefs after British sovereignty and until the Crown was practically able to exercise what it had claimed as a matter of law. The benchmark in that process was the New Zealand Wars. A declaration of sovereignty – mere legal ceremony – could hardly of itself have changed the de facto government of the tribes (whatever English lawyers might have thought de jure).

(d) it must not appear that the regime was oppressive and undemocratic.

Introduction

347. The Crown is unable to satisfy the fourth element of the *Mitchell* legality test. The overwhelming evidence is that the Crown has oppressed Taihape Māori and acted in an undemocratic way. With the advent of the English law, tikanga Māori was subjugated. Attempts by Taihape Māori to maintain their autonomy through the Kīngitanga, the creation of rūnanga or komiti Māori, support for Ngāti Hokohē and for Te Kotahitanga were thwarted by the Crown through political marginalisation, militarism, sharp land purchasing tactics, the manipulation of Māori land laws and a policy of ignoring Taihape Māori and their political, social, cultural and economic issues. By destroying their economy, making local government off-limits and creating a homogenous society through an English-only school system, Taihape Māori were harshly oppressed across all spheres of their daily lives.

348. We submit that the submissions we provided above concerning the third element of the *Mitchell* legality test regarding tacit submission to coercion or fear of force should be taken into account when considering the Crown's oppressive and undemocratic conduct as well.

349. The Native land laws were an insidious form of oppression. Under the guise of a judicial process, the Crown engineered Māori land from its customary owners by individualising land title and compelling its sale. However, as opposed to a lengthy treatise on the topic of Native land laws in these closing submissions, the Claimants intend to rely on and adopt the generic claimant closing submissions on the Native Land Court that address Issues 3(1) to 3(34) of the Tribunal Statement of Issues ("the Native Land Court closing submissions"). At the time of filing these closing submissions

however, the Native Land Court closing submissions were not available for consideration. It is anticipated that the Native Land Court closing submissions will disclose how oppressive the Crown's Native land laws were of Taihape Māori. Upon receipt of the Native Land Court closing submissions in their final form, having given them due consideration and if appropriate, the Native Land Court closing submissions will be adopted to the extent that they disclose the oppressive nature of the Native land laws.

350. The callous and conniving manner in which the Crown purchased land from Mōkai-Pātea Māori was a particularly injurious form of oppression. We refer to the Claimant Generic Closing Submissions Nineteenth Century Crown Purchasing ("the generic Crown purchasing closings").[474] As opposed to an emulation of the generic Crown purchasing closings in these closing submissions, we rely on and adopt the generic Crown purchasing closings in so far as they reveal and disclose how the Crown's land purchasing policies and practices led to the oppression of Taihape Māori by, in particular, the indiscriminate alienation of their lands from them by the Crown.

Unrepresentative government and violence

351. As discussed earlier in these submissions at paragraphs 55 to 58 and then again at paragraphs 235 to 271. above, it is said that New Zealand was a settled colony and that sovereignty was assumed by the Crown on 15 June 1839 by Letters Patent. As stated by Professor Joseph, "[i]n settled colonies the settlers took with them such English statute and common law as was applicable to their new situation . . .".[475] The Māori legal order was effectively and immediately replaced with one stroke of Queen Victoria's pen. In testimony given before Te Paparahi ō Te Raki Tribunal, Dr McHugh stated that "there can be only one sovereign".[476] When unitary sovereign rule is combined with the instantaneous implementation of English statute and common law by the Crown, there is oppressive and undemocratic rule. Without notice let alone consent or legal precedent, Taihape Māori were

[474] *Claimant Generic Closing Submissions Nineteenth Century Crown Purchasing*, 30 September 2020, Mahony Horner Lawyers, Wellington.
[475] Joseph, Philip A., *Constitutional and Administrative Law*, 4th ed., at 47.
[476] *Hearing Week 4 Transcript,* Wai 1040, #4.1.4, page 534, lines 39-44 and page 535, lines 1-13.

made subject to numerous laws enacted by successive governments from 1840 on.

352. If the Crown is correct and New Zealand is a ceded colony, sovereignty was assumed by the Crown without the free, prior and informed consent of Mōkai-Pātea Māori. Furthermore, the Crown's claim that it acquired "full Sovereignty" by the end of 1840 cannot be so if it was clearly without *de facto* sovereignty in the Taihape region at that date. Nevertheless, if sovereignty was somehow acquired by the Crown by cession treaty and not by settlement, the result was largely the same for Taihape Māori. They were made subject to laws that were enacted by governments about which they had no say and which never represented them.[477]

353. Unrepresentative government was established by the Charter of 1840. It set out how the Crown would govern New Zealand. For advice and assistance, the Governor summoned an Executive Council consisting of the Colonial Secretary, the Attorney-General and the Treasurer. A 7 member Legislative Council was also formed to make laws for "the peace, order and good government of the colony". It consisted of the Executive Council and three Justices of the Peace. There were no Māori members on either the Executive or Legislative Councils and they were so unrepresentative that their infrequent, Governor-dominated operation fomented calls for representative government amongst *the settler population*. It could be argued that in its earliest years, the British colony was subject to a dictatorship.

354. The New Zealand Constitution Act 1846 was an act of the British Parliament that was intended to grant self-government to the colony of New Zealand. Although it received the royal assent on 28 August 1846, it was never fully implemented. O'Malley revealed the inequity of the 1846 constitution:[478]

[477] According to Joseph, in ceded colonies the Crown retained plenary prerogative powers to legislate by proclamation, Order in Council or Letters Patent whereas in a settled colony, the Crown retained the legislative power to establish representative government—see Joseph, Philip A., *Constitutional and Administrative Law*, 4th ed., at 523. In the colony's fledgling years from 1840 to the mid-1850s, the office of the Governor of New Zealand enacted all legislation. This particular practice is characteristic of a ceded colony. For this and various other reasons, it is often said that New Zealand is a hybrid settled-ceded colony.

[478] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, at 139.

> Grey pointed out that the 1846 constitution would not, as intended, 'confer…the inestimable advantages of self-government, but…will give to a small fraction of her [the Queen's] subjects of one race the power of governing the large majority of her subjects of a differing race.' Nor (since Māori contributed very substantially to the colonial treasury through customs duties and other levies) would it allow those who paid taxes to decide how these should be spent, so much as giving 'a small majority of one race the power of appropriating as they think proper a large revenue raised by taxation from the greater majority of her subjects of another race.'

A small minority would administer government and the taxes of the "greater majority".[479] Furthermore, potential electors had to be able to read and write in English.[480]

355. The New Zealand Constitution Act 1852 repealed the 1846 constitution and granted *Europeans* representative self-government. It was "representative" in name only however since it "effectively denied the overwhelming majority of Māori the right to vote for or be represented in the new settler assemblies."[481] The franchise for provincial councils and the House of Representatives was extended to all men over the age of 21 with a freehold estate within the electorate valued at £50, or a leasehold or tenement with an annual value of £10 in a town and £5 in rural areas. Since all of their lands were held in customary tenure at the time the legislation was passed and for many years thereafter, Taihape Māori were effectively disenfranchised under the 1852 Act.[482]

356. Since Māori were to be denied equal standing in the administration of the colony's affairs, section 71 was enacted to allow for the proclamation of 'native districts' within which Māori custom would prevail. O'Malley argues that section 71 was designed to offset the inequity of disenfranchisement,

[479] The tax revenue was largely raised from the consumption by Māori of imported goods—see O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, at 147.
[480] McLintock, A.H., *Crown Colony Government in New Zealand*, Wellington: Government Printer, 1958, at 328.
[481] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 139.
[482] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 142.

but, of course, no 'native districts' were ever proclaimed and so the inequity was never addressed.[483]

357. As discussed above, the first signs of emerging Māori unrest have been traced to the New Zealand Constitution Act 1852. There was contempt for the General Assembly, which was dubbed the "English Committee".[484] Dalton notes that the influence and power of the British government to protect Māori inevitably diminished when it granted responsible powers to settlers.[485] The Kīngitanga grew in response to the exclusivity of the General Assembly and to stop the sale of land. Its intention was to become the dispenser of Māori law. The formation of the Kīngitanga was prescient. It became a movement in the interests of forestalling the otherwise inevitable demise of its people at the hands of a relentless and overwhelming intruder. Te Tiriti ō Waitangi had been used to establish a beach head and once access had been gained, any pretence of adhering to it by the Crown was quickly and utterly cast aside. The incessant displays of duplicitous conduct were in need of being checked and so the Kīngitanga rose as a protector of Māori nationalism. The lawfulness of the Kīngitanga's cause makes its suppression by the Crown an oppressive and undemocratic act.

358. Coming into force on 10 October 1867, the Māori Representation Act 1867 provided that four members of the House of Representatives shall be elected to represent the Māori race. By section 12, the duration of the 1867 Act was 5 years. It was intended as a temporary measure "while Māori adopted land holding similar to Europeans, and as a means to help reassure 'friendly' and neutral Māori and encourage them away from supporting Kīngitanga policies".[486] According to Ward, wrote Cathy Marr, the legislation "was intended to [be] more a matter of public relations and goodwill with Māori, rather than a serious attempt at inclusion of Māori in the settler political system".[487]

359. At the time, Resident Magistrate William Searancke reported a great 'apathy' amongst Waikato Māori with regard to the parliamentary representation that

[483] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 149.
[484] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 142.
[485] Dalton, *War and Politics in New Zealand*, at 279.
[486] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, 294.
[487] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, 294.

had been secured. He was made to understand that the districts were too large and the four members were too few to carry any weight. Resident Magistrate Barstow of Russell reported that Māori in his district were 'utterly indifferent' to the representation offered.[488] Cathy Marr concluded:[489]

> The overall thrust of government policy during this time, however, was to reject recognition of Māori authority within the colonial state even with some of the limited concessions offered.

360. Despite the fleeting treatment given above to the limited extent to which government in New Zealand was representative, there is sufficient evidence to establish nevertheless that through purposeful manipulation of the political process by the Crown, the majoritarian Māori were disenfranchised and oppressed.

Expressions of sovereignty ignored

Rūnanga and komiti Māori

361. With the suppression of the Kīngitanga by the mid-1860s, Taihape Māori looked to other institutions to preserve their mana and way of life such as rūnanga and komiti. These were active from the late 1860s to the 1890s.[490] In June 1867, Mōkai-Pātea iwi met with Ngāti Tūwharetoa at Poutū to discuss boundary issues and dealings in their lands by other tribes. Following the Poutū hui, "the komiti of Mōkai-Pātea" wrote to McLean to set out the boundaries of their central and northern lands in great detail and to warn McLean about fraudulent purchasing.[491] According to David Armstrong, their letters were signed by representatives of the 'Council' of Ngāti Tama and Ngāti Whiti, 'na te Rūnanga katoa'.[492] Te Poihipi Tukairangi had attended at Poutū and made observations. In commenting on its mana, he wrote and told McLean that "[t]his is a very powerful Committee; it was

[488] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, 294-5.
[489] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, 295.
[490] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 28.
[491] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 26.
[492] Armstrong, D., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 43.

excellent, clear to me, and fitting in respect of the lands."[493] Despite Tukairangi's optimism, there was no hope for the komiti:[494]

> Like other committees established by the Mōkai-Pātea tribes, this one would soon discover that its determinations had no impact on land dealings or land titles, but – as set out in a later section – this did not stop them from striving for due recognition for the work of their committees.

362. A boundary issue at Moawhango was for resolution at a hui convened at Tūrangarere on 6 February 1871 involving Mōkai-Pātea iwi, their Ngāti Tūwharetoa kin, Whanganui tribes, Ngāti Kahungunu, Ngāti Rangituhia and Ngāti Rangi. The significance of the hui was recognised in the building of the pātaka Niu Tireni.[495] Although the komiti Māori decision on the boundary issue was in favour of Ngāti Whiti and Ngāti Tama, Ngāti Rangi and others of Whanganui were not bound by it. They subsequently referred the issue to the Native Land Court for hearing. Ngāti Rangi fared "considerably worse" before the court than they had before the komiti Māori but not after "considerable delay" and the incurring of "enormous expense" by all parties.[496] On its face, the komiti Māori gave the landowners leeway to decide land interests in accordance with their tikanga but, as David Armstrong observed, "the existence of the Native Land Court, clothed with the sole legal authority to determine land titles, was a major disincentive to unity and cooperation".[497] According to Stirling, the demise of the Kīngitanga allowed the Crown to ignore komiti Māori in the Mōkai-Pātea:[498]

> And once they had won the wars they said well we don't need all these . . . new institutions. We don't need to placate these Māori anymore because we've beaten them.

Repudiation Movement

363. Māori in the Mōkai-Pātea, Wairarapa, Hawkes Bay and Taupō and other regions were so aggrieved by the operation of the Native Land Court from

[493] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 28.
[494] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 28.
[495] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 28.
[496] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 31.
[497] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 5.
[498] Hearing Week 3 Transcript, Wai 2180, #4.1.10, at 514, lines 30-31, at 515, lines 1-2.

1865 onwards that highly organised, large scale protest action ensued in the form of Ngāti Hokohē or the Repudiation Movement. They lobbied Parliament for changes to the Native land laws, fairer Māori political representation, abstinence from liquor and an appropriate role for rangatira in the administration of Māori matters.[499] At the invitation of Karaitiana Takamoana, Mōkai-Pātea Māori and hundreds of others attended the first large Ngāti Hokohē hui held at Pākōwhai in July 1872.[500] Spurred on no doubt by the large gathering, that same month Retimana Te Rango and Ngāti Tama submitted a petition from Te Riuōpūanga (Moawhango) to the government in which they stated their opposition to the Native Land Court, to road boards and other such developments.[501]

364. The establishment of "district rūnanga" were sought at the inaugural hui as well as a government inquiry into land dealings. Having witnessed the tenor of the speeches, Samuel Locke urged his superiors to take "immediate action in this matter" but no such action was taken.[502] The Repudiation Movement responded to the Crown's inactivity with substantial petitions in 1873 in opposition to the Native Land Court. They complained about the government's failure to address their concerns and the "evil ways of the lawyers and interpreters".[503] Stirling recorded that "[t]he result was nought":[504]

> The government did not particularly welcome these issues being raised, and when Kīngi Herekiekie of Mōkai-Pātea later wrote to the government's bi-lingual mouthpiece, *Te Waka Māori*, to complain about the actions of those that "were killing the land," the government declined to print his missive and rebuked him, saying he should take it up with his "friends" as it did not concern the paper's Māori readership.

The government's prompt dismissal of the complaints manifested an oppressive and undemocratic act. It was a deplorable display of unjustified

[499] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 235-6.
[500] Hearing Week 3 Transcript, Wai 2180, #4.1.10, at 475, lines 20-21, per Bruce Stirling—It may not have been known as or referred to as the Repudiation Movement in 1872.
[501] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 237.
[502] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 237.
[503] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 238.
[504] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 238.

contempt for what were valid complaints by a people who were desperate for justice and solace.

365. Undeterred, the Repudiation Movement held a large pan-tribal hui at Pākōwhai in March 1876 to discuss a number of topics including temperance, "the abolition of the Native Land Court", parliamentary representation for Māori, halting land sales and the taking of land for railways, roads and telegraph lines. Communal ownership was emphasised over the government's individualisation agenda and it was sought that Māori should settle title to the land, not the court. The hui should "demand that another, and differently constituted Native Land Court, be instituted by the Parliament."[505] The new titles by way of Crown grant were objected to as was the creation of mortgages over Māori land. Resolutions to address the issues discussed were passed and it was decided that a petition would be devised to "bring them under the notice of Parliament". So extensive were the grievances that there was only time to point out "some of the more formidable causes of complaint".[506] In prescient and yet accurate fashion, *Te Wananga* considered the prospect of "honest consideration" by the government of the issues at hand to be hopeless. Ignoring Māori issues had become a government policy.

366. A further hui was held by Ngāti Hokohē at Pākōwhai in June 1876, attended by iwi including Ngāti Tama and Ngāi Te Ūpokoiri. The hui agenda is important. It depicts aspirational solutions to the malaise that was being faced, including a Māori Parliament. Unfortunately, they are solutions that would be thwarted or ignored by the Crown at every turn:[507]

> Take tuatahi! Me tu he Paremata mo te tangata Maori, hei whakahaere i tona motu.
> [First subject! A Parliament for Maori people should be held to organise their country.]
> Tuarua. Me kotahi nga iwi i runga i tenei motu, me ana whakahaere.
> [Second. There should be one tribe (people?) over this country and its organisation.]
> Tuatoru. Kua mutu nga tau mo nga Mema Maori ki te Paremata, kahore ki muri atu, me pehea tatou?

[505] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 242.
[506] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 243.
[507] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 245.

> [Third. The time for Maori members of Parliament is over. They are not for the future. What should we do?]
> Tuawha. Kua puta noa atu te kupu o te Motu kia mutu te hoko whenua, kahore e mutu; me aha ra e mutu ai?
> [Fourth. The decision of the country has emerged that land sales should stop.
> They will not stop. How are we to stop them?]
> Tuarima. Kua puta noa atu nga panui ki te Motu kia mutu te Kooti, kahore e mutu; me aha e tatou e mutu ai?
> [Fifth. Notices have gone out to the country that the Court should stop.
> It will not stop. How are we to stop it?]
> Tuaono. Kei te ora ranei tatou i nga mahinga a te Paremata o enei tau kapahure nei, kei te mate ranei.
> [Sixth. Are we surviving or dying through the work of Parliament in the years that have passed?]
> Tuawhitu. E kore ranei tatou e pai kia tono atu kia te Kuini, kia tirohia mai nga mate e peehi nei ia tatou?
> [Seventh. Will we not agree to petition the Queen to look into the troubles that oppress us?]
> Tuawaru. He aha ra nga whakaaro mo nga Pooti? Heoi nga take i ka rangatira ai koutou, ke a koutou hoki etahi take mo a koutou tangata e mau mai. Heoi nga kupu.
> [Eighth. What ideas are there about elections? Hence these subjects for which you are called. It is for you to take up other subjects for your people.]

367. In the interests of self-preservation, an annual Paremata Māori was endorsed as was proportional representation in the House of Representatives. According to Stirling, the request for proportional representation signified that the Repudiation Movement did not wish to challenge Parliament; the movement was prepared to work within the system. There was, according to Stirling, an understanding of "the futility of resistance to the Crown's ultimate authority having been well and truly established during the New Zealand Wars".[508]

368. The 1876 hui led to the presentation of two substantial petitions to Parliament in August and in September of that year that "closely adhered to what had been discussed"[509] at the hui. Stirling described the government's insipid response to them:[510]

[508] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 246.
[509] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 249.
[510] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 248.

> The report of the Public Petitions Select Committee responded blandly that the petitioners "could legally do most of the things that they had petitioned for," and suggested that the changes in Māori representation and in the Native Land Court, "could be brought before parliament by their own members.

369. The Native Affairs Committee considered the petitions as well. The petitioners' request that Queen Victoria "send hither a truthful and upright man to search out and look into the causes of our distress" was ignored in its report. Although the petition was referred to the government for favourable consideration, Stirling wrote:[511]

> It does not appear to have received such consideration and no further records in relation to the petition have been located. Certainly, there were no subsequent policy changes that made any concession to the pleas of the petitioners. If anything, the policies and practices protested to by the petitioners got worse.

370. The hui proper began on 9 March 1877 with more than 200 rangatira present. They sought the end of the purchase of land and the payment of tamana in "unalienated districts" and reiterated that that only when "a tribe of a hapū or the chiefs consent" can land be brought before the Native Land Court. Proportional representation in Parliament was sought again and it was advised that there be "refrain from voting for County Councils" lest Māori land is rated as a result of voting. In terms of the call for equal laws, it was resolved that Māori sit on juries in court cases in which Māori were being tried. There was a resolution seeking more schools for Māori children. The prospect of a Māori Parliament was raised again for the purpose of dispensing law for Māori.[512] 2 well supported petitions emerged from the hui and both were presented to Parliament in July 1877. In its report, the Native Affairs Committee did not make any specific recommendations and "[n]othing further was done".[513]

[511] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 250.
[512] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 254.
[513] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 255.

371. A further Repudiation Movement hui was held at Pākōwhai in March 1878. Another 4 petitions resulted from the hui. They were presented to Parliament in October 1878. The Native Affairs Select Committee made no recommendations on the petitions, it being considered that the Native Lawsuits Bill then before Parliament would offer some remedy for the petitioners. It did not because the Bill was never passed into law. [514]

372. By the end of the 1870s, Ngāti Hokohē had begun to wane as a result of financial pressures and political frustration. It was supplanted by tribal komiti such as the Taupō "Central Committee", which included Taihape Māori including Paurini Karamu.[515] Dubbed the "Parliament", the Central Committee sought to dispense law and administer Māori land. However:

> Such efforts by tribal committees were, unfortunately, largely for naught. The Native Land Court undermined any responsibilities the committee might assume for itself as a body with a meaningful role in the investigation or administration of Māori lands. They were legally powerless and remained so, being marginalised by a government that failed to see the potential good that could be achieved by active engagement with such Māori initiatives. This official neglect was an insurmountable obstacle to the efficacy of any Māori committee, rūnanga or pan-iwi movement that remained features of Māori efforts to manage their lands and lives for the rest of the century.

In circumstances where Taihape Māori were politically marginalised, financially decrepit and without any legal recourse for the curing of their many ills, there was no compulsion on the Crown to provide any remedies. In fact, Taihape Māori were so weakened by this time that the Crown could do what it liked. In these circumstances, a sufficient tactic for suppressing Mōkai-Pātea Māori was simply to ignore them.

Rees-Carroll Commission

373. The Native Land Laws (Rees-Carroll) Commission ("the Commission") was established to inquire into Native land laws ("the Native land laws" or "the

[514] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 257.
[515] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 258.

land laws") to recommend any necessary changes. Criticism of the Native Land Court was near universal amongst Māori, with many Pākeha complaining as well. Stirling listed the key objections to the land laws from the Commission's report to Parliament of May 1891:[516]

a. Delay;
b. Expenses, fees, and duties;
c. Enforced attendance at distant hearings, the resultant poverty, demoralisation, injustice, false claims, perjury, and ruinous loss;
d. Rehearings and applications for prohibition to Supreme Court;
e. Political, government, and other interested influence, which is brought to bear on decisions and proceedings;
f. The itinerant nature and non-local residence of the Judges;
g. Excessive survey costs, especially for subdivisions; and
h. Insecurity of title after adjudication.

374. "The report read like a litany of that disasters that had befallen Māori since the introduction of the Native Land Acts", according to Stirling, with the "resultant breakdown to Māori society condemned".[517] The complexities of dealing with the land under the legislative regime were highlighted. Former Attorney-General Stout was aware that "the cost to the Māoris connected with the ascertainment of title in the court is, to my mind, enormous and disgraceful", and he was aware of cases where Māori were forced to sell one block in order to pay for the costs of gaining title to another". The costs of subdivision were also criticised by Stout.[518] The long-serving Native Department Under-Secretary and head of the Native Land Purchase Department, Thomas Lewis, considered the effect of the Native Land Court on Māori to be:[519]

> injurious in the extreme—their time is wasted, their money squandered, and their health in many cases ruined. Numerous deaths amongst the Māoris, both old and young, are directly

[516] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 352-3.
[517] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 353.
[518] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 355.
[519] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 355.

> traceable to their manner of living while attending protracted sittings of the Native Land Court.

375. In his research, Stirling referred to the excessive number of hearing days that Mōkai-Pātea Māori had to endure—1500 days between 1879 and 1900 or one-fifth of all the days available to them[520]. Difficulties were encountered with attending court sittings far from home and from the strain on resources from delayed and protracted hearings.[521] The court was compromised by conflicts of interest and Pākeha interests.[522]

376. In his evidence to the Rees-Carroll Commission at Waipawa in 1891, Hiraka Te Rango complained that he and his hapū had "suffered greviously" as a result of the Native Land Court, citing, in particular, the hardships endured as a result of attending court hearings in faraway places. He recounted his frustration with how one dissenting party could force everyone back to court. Hiraka confirmed with Carroll his preference for collective control by the tribe over the whenua, for out-of-court arrangements, and for reducing administrative and legal costs. Hiraka's complaint highlighted the emphasis of the Native land laws on fragmentation and alienation as opposed to retention and management.[523] Judge Ward, who heard the Awarua partition case, also gave evidence before the Commission. He too expressed his preference for out-of-court arrangements as the court might take "six or eight months" to get through a contested case that might be resolved in two weeks through a more co-operative and consensual manner. Ward referred to the Awarua partition hearing and how it was unfortunate that those favouring the consensus approach had no authority to insist on a customary resolution of the issues. [524]

377. According to Stirling, the government was very selective in its adoption of the Commission's recommendations. Proposals that would assist the government's planned land-purchase programme drew favour but those that empowered tribal and block committees "lay moribund".[525] Armstrong's synopsis of the Crown's response to the Commission's report was similar.

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[520] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 358.
[521] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 358-9.
[522] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 359-60.
[523] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 361.
[524] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 362-3.
[525] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 367.

Taihape Māori were to be kept weak and powerless so that the Crown could have its way with their property:[526]

> Based on this, and other evidence heard throughout the North Island, the Rees Carroll Commission subsequently, among other things, made detailed proposals which would have provided Māori committees with the legal authority to investigate titles and administer lands once title had been determined. **These proposals were ignored by the Crown**. Instead the Liberal Government embarked on an aggressive land purchase programme based on the acquisition of undivided individual interests. (emphasis added)

Seddon's 'use it or lose it' policy

378. When Premier Seddon met with local rangatira at Moawhango on 2 March 1894, they wished to talk about a township, a school, liquor controls, a police station and a telephone connection. Seddon was there to talk about the 'land question'. He expressed concern with "unproductive" land and how "[t]he government could no longer allow millions of acres of land to remain in a state of nature while thousands of people were wanting land to settle upon and cultivate".[527] According to Stirling, "[t]his is the infamous 'use it or lose it' policy, almost every aspect of which, as Tom Brooking has observed was "coercive and punitive".[528] Seddon then referred to "many Pākeha who suggested that Māori either bring their land into production in a way acceptable to settlers or sell it to the Crown. If they did neither, the land should simply be taken from them by the Crown and its monetary value distributed amongst the owners".[529] Although Seddon "did not consider that this would be a fair thing", it was merely a restatement of the earlier threat.

379. Seddon's rationale for compulsory purchasing lay, somehow, in fair treatment for all:[530]

> If Parliament passed such a law applying to European land, they were not likely to allow the natives to keep millions of acres

[526] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 64-6.
[527] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 444-5.
[528] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 445.
[529] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 447.
[530] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 445.

> locked up and unused. There must be equality on legislation. In the case of European land, its value was fairly assessed, and the price thus ascertained was paid by the Government. The same treatment should be meted out to the Natives.

380. There was temerity in Seddon's talk about "equality on legislation" in circumstances where there was no independent assessment of land value under Crown pre-emption and nor could the fixed price be independently reviewed. As discussed, access to development finance for Māori was not the same as it was for Pākeha. Pākeha landowners did not have to wade through the gauntlet of Native land laws either before they arrived at a defined title that was theirs.[531]

381. The Premier came with to the hui at Moawhango with ill-considered, self-serving ideas for law reform. He suggested that the rangatira agree on how much land could be disposed of but retain ample reserves for their support. As Stirling pointed out, the Awarua owners had long since advised the Crown of such a scheme for sale and settlement and other more wide-reaching reforms, all of which had been "utterly ignored". Now the Crown "had the nerve to come back with a dumbed-down version . . ." that included the threat of "compulsory purchasing if they didn't move quickly enough" in circumstances where it was Crown land purchasing policy and practice and its Native land laws that had prevented the necessary and desired land development.[532] In reply, Hiraka Te Rango reiterated the need for tribal management.[533]

Te Kotahitanga

382. Te Kotahitanga movement ("Te Kotahitanga" or "the movement" or "Kotahitanga") emerged in the 1890s and in 1892 it formed a Paremata Māori (Māori Parliament). Large, well-attended hui were held annually during the 1890s and into the early 20th century at places such as Waipatu (Hastings), Tokaanu and Pāpāwai. Te Kotahitanga enjoyed a significant support base. The Kotahitanga petition had been signed by 37,000 Māori aged 15 years or older by the late 1890s. Given that the entire Māori

[531] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 445-6.
[532] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 447.
[533] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 448.

population was some 43,112 in 1901,[534] this number of signatories represents an incredible 86% of the entire population. The movement had nationwide appeal. Mōkai-Pātea sent representatives to Te Kotahitanga Paremata as did many other iwi.[535] The notable reforms sought were:

a. The abolition of the Native Land Court;
b. Its replacement by komiti Māori;
c. Self-management of Māori lands by block and district committees;
d. Local self-government through komiti Māori;
e. Central self-government through a Māori Parliament.

383. Although it can be said that Te Kotahitanga led to the enactment of the Māori Lands Administration Act 1900, the Māori Land Settlement Act 1905 and other legislation[536] and their fostering of a modicum of local self-government, a role for some committees in title investigation, the establishment of Māori land boards to administer Māori land and a brief respite from land purchasing, according to Stirling "[t]he new century brought nothing more than a false dawn".[537] Further with regard to Stirling's "false dawn" criticism, we adopt and rely on the *Generic Closing Submissions on Issue C(7): Land Boards and the Native/Māori Trustee* in so far as they relate to the failings of the aforementioned legislation.[538]

384. The first of the Kotahitanga hui was held at Waitangi on 14 April 1892. It was well attended "by 1,342 Māori from throughout the land"[539] and lasted for 6 days. There was an affirmation of the unity of iwi under the mana of the 1835 Declaration of Independence, the Treaty of Waitangi and section 71 of the 1852 Constitution Act. With its distinct national outlook, the movement cast the net of support as wide as possible and the people responded accordingly. The extremely broad support maintained the momentum for a Māori Parliament but what was its strategy? Unfortunately, the government was present at the Waitangi hui in the form of James

[534] New Zealand Censuses per Statistics New Zealand.
[535] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 595.
[536] Maori Land Settlement Amendment Act 1906, Native Land Settlement Act 1907, Native Land Settlement Act 1907, Maori Land Claims Adjustment and Laws Amendment Act 1907 and the Naitve Land Act 1909.
[537] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 595.
[538] *Generic Closing Submissions on Issue C(7): Land Boards and the Native/Māori Trustee*, 21 September 2020, Wai 2180, #3.3.48, at [39] to [233].
[539] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 596.

Carroll. He urged the moderate 'progressives' to establish a representative body to engage with the government on Māori law reform and was dismissive of the 'home rule' advocates.[540] He cautioned that the movement stay "within the limits of practicability".

385. At the inaugural Paremata Māori held at Waipatu later that same year from 14-21 June, Mōkai-Pātea Māori were present in the form of the likes of Hiraka Te Rango and Paora Ngāwaha (or Ngāwaka?). Amongst business of an administrative nature, there was debate on the content of the Paremata's first draft bill regarding Māori issues. It was to be submitted to the New Zealand Parliament.[541] It proposed, for instance, that the Native Land Court be replaced by komiti Māori to investigate titles and to carry out the court's other business. This, of course, had been suggested previously to Parliament by way of petition and other means on numerous occasions but to no avail. Although it may have been deemed to be a draft bill, the act of submitting it to the New Zealand Parliament meant that the document was more petition-like in substance than anything else. With this approach, the Paremata Māori became, as suggested by Carroll, a representative body for engaging with the Crown as opposed to a sovereign dispenser of law. However, once that approach was taken, Kotahitanga was never going to garner the kind of success that the movement's supporters had wished for. Even with total support from all eligible Māori, just 5 to 6% of New Zealand's population were Kotahitanga adherents at this time. Such a population size was irrelevant in New Zealand's wider political context and so no matter how well they were supported by Māori or how justified their cause was, no incumbent administration was going to commit political suicide and sanction the legislation of a Māori Parliament. As we shall see, this is precisely what happened. Thus, the course of the moderate 'progressives' was always doomed to failure since, in effect, they were asking the New Zealand Parliament for their legitimacy. All Parliament had to do was say "no", which it did, and the movement was suppressed.

386. Whilst fraught no doubt with its own set of difficulties, the pathway to becoming a sovereign dispenser of law was the more feasible one for Kotahitanga since, as the Claimants have contended before this Tribunal,

[540] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 596.
[541] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 598.

the law was on their side. Asking the New Zealand for permission was not legally required. The Crown had not properly effected the transfer of sovereignty unto itself in the Mōkai-Pātea region by way of the cession treaty because most of the rangatira were non-signatories, and whilst it may be the case that the legitimacy of the New Zealand Parliament cannot be adduced before the courts because it is a representative body,[542] sovereignty in New Zealand was not assumed by the Crown on the basis of any statute. No effective legislation could be enacted by the British Parliament to effect that despite multiple attempts. Rather, the royal prerogative was relied on to provide jurisdiction somehow and as we have seen, since the time of Coke C.J.,[543] the courts have been prepared to review the exercise of the royal prerogative. Thus, the Crown's assumption of sovereignty can be challenged in New Zealand's courts and this course of action was open to Kotahitanga at the time. Of course, the heavily politicised courts of the day would have struggled to entertain such a pleading and the entire gamut of legal obstacles would have been placed before Kotahitanga to weigh such initiative down. Nevertheless, of the two strategies that were available at the time, the court-related route would have been the better one to take. By dispensing law as a sovereign, Kotahitanga would have prompted litigation between itself and the Crown and from there court rulings would have emanated. Even if, or moreso when, the courts ruled against Kotahitanga, in the very least legal precedent would have been created for later dissection and further challenge in more enlightened times.

387. Mōkai-Pātea Māori showed strong and early support for Te Kotahitanga. Richard Steedman told of how Kaiewe Marae was erected "for the Kotahitanga movement".[544] On 2 August 1893, less than two months after the inaugural Paremata Māori at Waipatu, a hui for the "Western and Eastern Districts" of Te Kotahitanga was hosted by Ngāti Whiti, Ngāti Tama, Ngāti Hauiti and Ngāti Te Rangi Haukaka at Kaiewe Marae in Te Tahi ō Pipiri whare tūpuna.[545] The hui was led by Te Piwa Te Tomo. Te

[542] *Berkett v Tauranga District Court* [1992] NZLR 206 page 213.
[543] *The Case of Proclamations* (1611) 12 Co Rep 74.
[544] Statement of Evidence of Richard Steedman, 21 March 2018 (revised 5 June 2018), Wai 2180, #J15, at [23].
[545] Statement of Evidence of Richard Steedman, 21 March 2018 (revised 5 June 2018), Wai 2180, #J15, at [24].

Kotahitanga was about "tino rangatiratanga and resilience" according to Mr Steedman.[546]

388. The following was one of the 7 agenda items at the hui:[547]

> It is the word of Taitoko at Parikino, Myself, Te Whiti, Te Taura and Tāwhiao will lead the explanations for the Māori Parliament.

Those who would "lead the explanations" represented a broad cross-section of Māori society. "Taitoko" of Parikino, situated near Whanganui, was a reference to Major Te Keepa Te Rangihiwinui. It is significant that the former kūpapa was now a leading proponent of a Māori sovereignty movement. Given the calibre of rangatira referred to as those who "will lead the explanations for the Māori Parliament", it is assumed that Te Whiti was likely a reference to Te Whiti ō Rongomai of Parihaka. Tāwhiao's inclusion means that the Kīngitanga was also in support and so, as discussed above, there was a very broad and wholly united support base for Te Kotahitanga. The movement's law-making intent[548] confirms that the Paremata Māori was a Māori sovereignty movement. Accordingly, it is clear that as late as the end of the 19th century, the vast majority of Māori continued to regard themselves as a sovereign people which means, in turn, that sovereignty had not been ceded by way of te Tiriti ō Waitangi as far as at least 86% of all Māori were concerned.

389. At the second Paremata Māori held at Waipatu in April 1893, the business included "[a]n act to authorise the assembly of the Kotahitanga (the Federated Māori Assembly Empowering Bill)"("the Kotahitanga Bill").[549] The Kotahitanga Bill was forwarded to the New Zealand Parliament. Stirling recorded its inevitable fate:[550]

> Not only was the Bill proposed in the petition not passed, it was not even introduced or debated, and nor did Kotahitanga receive

[546] Statement of Evidence of Richard Steedman, 21 March 2018 (revised 5 June 2018), Wai 2180, #J15, at [26].
[547] Statement of Evidence of Richard Steedman, 21 March 2018 (revised 5 June 2018), Wai 2180, #J15, at [25].
[548] Stirling records the movement's law-making intent as does Dr Te Rito in his evidence—see Brief of Evidence of Dr Te Rito, 3 February 2020, Wai 2180, #P14(b), at 48.
[549] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 601.
[550] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 602.

> either a positive of negative response; it received no response. As they feared in Wellington their collective voice was not more than "the murmuring of the wind".

390. Matters went from bad to worse for the movement the following year even though, as opposed to mailing their bills/petitions to Parliament, Hone Heke Ngāpua would introduce Kotahitanga's Native Rights Bill to the House of Representatives. The 1894 bill "called for a constitution for Māori, providing for a Parliament elected by them which could pass laws which "shall relate to and exclusively deal with the personal rights and with the lands and all other property of the aboriginal inhabitants of New Zealand"".[551] Stirling writes that the 1894 bill "was spurned by the Pākeha Parliament". Most of the Pākeha members "contemptuously" walked out during "the brief debate on the Bill" but not before Carroll replied to Heke "that it would be a "kindness" for the House to free Māori from the "delusion" that Parliament would even grant them such a separate constitution".[552]

391. The fate of the 1894 bill exposed the futility of asking the New Zealand Parliament for some form of independent law-making capacity, especially when any such capacity would have hindered the Crown's access to the coveted Māori lands. We should be clear however that although there was an error of judgment on the part of Kotahitanga with the approach taken, the ultimate failing was on the Crown for its unwillingness to properly engage on the topic as a treaty partner. Close to its entire Māori constituency was expressing great pain, even despair, and the response was to walk out in contempt. The Crown tactic of ignoring the difficult Māori issues was deployed once again and with that, Kotahitanga's principal objective of establishing a law-making Paremata Māori was suppressed.

392. From Stirling's rendition of these events, it does not appear that the New Zealand Parliament was approached again by Kotahitanga with a request for law-making power. For instance, the agenda for the Paremata Māori held at Pāpāwai in 1898 concerned land purchasing, the borrowing of money and recognition of Queen Victoria.[553] Instead, incremental land law

[551] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 603.
[552] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 603-4.
[553] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 609.

reform was sought and eventually achieved with the passing of the Māori Lands Administration Act 1900 and the Māori Land Settlement Act 1905.

Other spheres of oppression

Economy destroyed

393. The Crown took a consummate, all-encompassing approach to its oppression of Mōkai-Pātea Māori. The Kīngitanga was violently attacked, Taihape Māori held no political sway, the Native land laws could not be resisted, complaints and concerns were simply ignored and then their fledgling economy was targeted and wrecked. In the ensuing submissions, we focus in particular on the relative success from sheep farming that was had by Taihape Māori in the last quarter of the 19th century before all of that effort was purposefully undone by the Crown. This and other failings by the Crown to actively protect Taihape Māori and ensure that they retained sufficient land, resources and the capability to effectively participate in the economy are the subject of submissions in the *Generic Claimant Closing Submissions on Economic Development and Capability* ("the Generic Closing Submissions on Economic Development").[554] We rely on and adopt the disclosed Crown acts and omissions that ruined the economic development of Taihape Māori as they are set out in the Generic Closing Submissions on Economic Development

394. Mōkai-Pātea Māori had been involved in sheep farming since the 1860s. Henare Akatarewa was said to have the first to bring sheep to inland Pātea in March 1868. Hiraka Te Rango had sheep at Tūtūpapa by 1873. Pākeha run-holders had de-pastured around 30,000 sheep on leased lands by 1874. Renata Kawepō and G.P. Donnelly stocked a large run at Ōwhāoko. Donnelly's partnerships with Hiraka Te Rango and Paki Paihau had established by 1879 flocks of 4.650 and 6,000 sheep respectively. By December 1881, Hiraka and Donnelly were running 20,000 sheep. Horima Paerau ran 6,000 sheep in 1885 in partnership with settler R.J. Batley. In

[554] *Generic Claimant Closing Submissions on Economic Development and Capability*, 30 September 2020, filed by Rainey Collins, Solicitors, Wellington.

1886, Taihape Māori were running over 67,000 sheep.[555] They were doing remarkably well.

395. When Inspector of Native Schools James Pope visited Moawhango in mid-April 1888, he saw a thriving settlement with income being gathered from sheep run rentals, and wool and flour sales. Pākeha workers were employed and well paid.[556] With good weatherboard houses, it was a wool collection depot and goods distribution area. Good crops grew near the town of wheat, potatoes and oats. The settlement was particularly busy during shearing season.[557] It was evident to Pākeha observers that in light of the great progress being made, Mōkai-Pātea Māori wished to retain their Awarua lands and further develop them.

396. By 1890, Taihape Māori were running 78,000 sheep owned by 21 Māori and providing gainful employment for themselves and Pākeha alike.[558] In 1892, Māori in the region owned flocks ranging from 2,000 to 20,000 sheep, with a total of approximately 105,020 sheep. 400 bales of wool were despatched from Moawhango every season. F Ellis, a Moawhango store keeper, observed that Māori were deriving "a very sure and comfortable income" from their sheep at this time.[559] During 1893, Moawhango was the transhipment centre for 1,000 bales of wool. By this time, 34 Māori sheep farmers in the district ran a total of around 116,000 sheep, approximately 59% of the total flock in the region.

397. From an early date, Mōkai-Pātea Māori sought to exercise collective control over their lands and resources. The Native Committees Act 1883 appeared to provide an opportunity for Taihape Māori to do this. They were to have full authority to inquire into and resolve disputes involving surveys, boundaries, land ownership and alienation. However the Māori Committees were recognised in so far as they might offer advice to the Native Land, and the court could choose to accept the advice or not:[560]

[555] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 38-9.
[556] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 39-40.
[557] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 40-41.
[558] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 40.
[559] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 42.
[560] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 44.

> In most instances the findings of the Native Committees set up under the 1883 Act were simply consigned to the rubbish bin by Native Land Court judges anxious to preserve their own authority. In other words, the 1883 Act was a hollow sham which gave Māori communities no more authority than they aready possessed, and the Native Land Court remained the ultimate arbiter of land titles.

398. Twelve separate districts were created around the country under the 1883 Act. Ūtiku Pōtaka and Winiata Te Wharo complained to Native Minister Ballance at Napier that the inland Pātea region should be a district in its own right. According to Armstrong, no such district was established and there is no evidence that Mōkai-Pātea chiefs participated in the Whanganui or Hawkes Bay Native Committees, the two relevant committees for the region.

399. By the 1880s, Taihape Māori with interests in the Awarua block had clear ideas about how the land would be developed. Some of the block would be sold to the Crown to facilitate construction of the North Island Main Trunk while the remainder, forming the bulk of the best land, would remain in Māori ownership.[561] It was anticipated that this process would be overseen by the rangatira acting together in accordance with tikanga. It was envisaged that land interests would be apportioned in accordance with hapū-based interests and distributed to individual whānau in due course. The lands would then be leased or utilised according to the determinations and ambitions of the owners.[562] Only minor land sales were envisaged as it was anticipated that the construction of the North Island Main Trunk and the Taihape township would allow the owners to access the burgeoning colonial economy. According to Neville Lomax, the rangatira were united in a desire to retain the bulk of their Awarua land as "they made every effort to reach collective agreements in order for the aspirations . . . of the people to be achieve[d]."[563]

400. The partition of the Awarua block by the Native Land Court would be the first step in developing the land in a way that would ultimately lead to

[561] Wai 2180 #A49, David A Armstrong, Mokai Patea Land, People Politics, 2016 p 4
[562] Wai 2180 #A49, David A Armstrong, Mokai Patea Land, People Politics, 2016 p 4
[563] Wai 2180 #A49, David A Armstrong, Mokai Patea Land, People Politics, 2016 p 5

individual whānau farms. In an 1886 hui held amongst Taihape Māori, it was agreed that 5 hapū held rights in various parts of the Awarua block—Ngāti Whiti, Ngāti Hauiti, Ngāti Tama, Ngāi Te Ōhuake and Ngāti Hinemanu. Later that year a title investigation was held at Marton before Judge O'Brien. The court found in favour of the descendants of Ōhuake, Hinemanu, Hauiti, Whitikaupeka and Tamakopiri, and an ownership list of 437 people was agreed. The identification of each hapū's interests would occur later in 1891. In the meantime the owners continued to lease some of their land, run their own sheep and maintain their cultivations. The Crown had, however, succeeded in making its first inroad into Awarua with the fixing of a lien of some £2,291/5/- for a survey plan provided by the Survey Office.[564]

401. On 21 March 1889, the Crown published a *Gazette* notice proclaiming it had entered into negotiations for the Awarua and Motukawa blocks, thought to comprise a total of some 288,300 acres. The effect of the notice was to prohibit sales to third parties so as to provide the Crown with monopoly land purchasing rights. Armstrong found no evidence of any serious negotiations. To justify a proclamation, a token payment need only be made to a person claiming to be an owner.[565]

402. In August 1889, Hiraka Te Rangi, Ihakara Te Raro and other chiefs representing 'The Committee of Ngātiwhiti' ("the Committee of Ngāti Whiti" or "the Committee") set out their proposals for the land and asked the Crown not to commence any purchasing activities. They were prepared to sell land for the railway but they wished to subdivide their land amongst themselves first. In reply, Native Land Purchase Department Under Secretary Sheridan insisted that if an owner wanted to sell, they had every right to do so. The Crown was unwilling to deal with the Committee of Ngāti Whiti.[566]

403. It was decided that the hearing would be held at Marton in the depth of winter, over 100km from Moawhango by way of a poorly formed road. The Committee's request for the hearing to be held at Moawhango was rejected

[564] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 45-6.
[565] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 46.
[566] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 48.

by Sheridan and by Judge O'Brien, despite the enormous cost and hardship that the iwi would incur by attending a hearing elsewhere and despite the preference for the court to view the land if it was to fairly apportion it.[567]

404. In November 1889, the Native Department was informed by Resident Magistrate Preece that five Awarua owners were anxious to sell their interests.

405. In January 1890 Ihakara Te Raro and 12 others wrote to Native Secretary Lewis with a plan to have the hapū boundaries settled outside the court so that the role of the court would be confined to confirming their arrangements. The hearing commenced on July 17, 1890 in Marton before Judge Ward, with a total of 13 claims to the land. In the days leading up to the hearing, Utiku Pōtaka had convened a committee of chiefs in order to come to an out-of-court arrangement about the division of the land. As the case proceeded, Judge Ward agreed to a number of adjournments to permit time for the meetings to take place, however *all* the claimants were required to agree before he could confirm an agreement. Unfortunately, complete unanimity could not be reached. Ngāi Te Ūpokoiri maintained that they were unhappy with their allocation and so the parties were forced to go to hearing. In the end, the protracted hearing lasted for 16 months at a cost to the claimants today of $4,791,499.60.[568] The claimants' requests to the Crown for financial assistance were rejected. Armstrong observed how "[i]t is difficult to escape a conclusion that Māori indebtedness would ultimately work in the Crown's favour" since the Crown had a monopoly on purchasing Māori land in the region.[569]

406. In its award, the court found that the owners were Ngāti Tama, Ngāti Hauiti, Ngāti Whiti, Ngāti Hinemanu, Ngāi Te Ūpokoiri, Ngāti Tama Horako 'and many other hapū'. The land was divided into 9 partitions.[570]

407. The iwi had been keen to pass the Awarua block through the court so that individual whānau could obtain titles to homes, cultivations and pastoral

[567] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 49-50.
[568] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 55-59.
[569] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 59.
[570] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 60.

land, which many hoped to develop. But expenses associated with the hearing had reduced many of the key participants to penury. Furthermore, a determination of individual and whānau interests was still required. Although the Crown began partitioning the interests it had begun acquiring in 1894, there was no further partition of owners' shares until 1896 by which time around three quarters of the block had been acquired by the Crown. Only 19,410 acres of Awarua (7.2%) remains in Māori ownership today.[571] The Crown's aggressive land purchasing programme was materially aided by owner debt and vulnerability, the inappropriate location of customary interests and its failue to recognise any form of tribal control which may have arrested sales. The absence of an immediate further partition of owners' interests resulted in division and quarrelling amongst the owners.[572] The land became over-stocked with sheep as the owners were trying to run too many animals on ever decreasing areas, with the result that the sheep were becoming exhausted and dying. Moreover, a recent dip in wool prices saw all the flocks become heavily mortgaged.

408. The Crown's economic destruction of Mōkai-Pātea Māori was crippling. In 1895, there were 43 Māori flock owners in the wider inland Pātea region, owning a total of almost 140,000 sheep. In 1896, Māori owned sheep had increased to 152,448. After 1896, the point at which the Crown had secured ownership of the bulk of the Awarua block, average flock sizes in Māori ownership decreased dramatically. By 1905, the total sheep number had declined to as few as 12,502 owned by 15 Māori.

409. To add insult to injury, the associated survey costs with the Awarua hearing were astronomical.[573] As discussed, the cost of the original Awarua survey was charged as a lien over the block. An additional survey was carried to correct errors with how the Rangitikei, Moawhango and Hautapu Rivers had been mapped. An additional £930/11/3 was added with the placing of a further lien on the land. Armstrong calculatd that the cost of surveys up until 1892 and the cost of the partition hearing adds up to the sum of $5,414,570 in today's money. This sum does not include costs associated with the 1886

[571] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 80.
[572] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 61-2.
[573] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 68-70.

court, the 1892 rehearing and the 1896 subdivision hearing, subsequent surveys and host of other transactional costs:[574]

> Under these circumstances it is hard to see how the owners might have resisted pressure to sell their interests, let alone find the means to stock their lands with sheep or carry out development work.

Through abuse of its right of pre-emption and the monopoly on land purchasing that this created, the Crown destroyed Moawhango's economic development and wrested most of the Awarua block from its customary owners.[575]

410. In a letter dated 9 September 1892, Ūtiku Pōtaka and other Awarua block owners offered 100,000 acres to the Crown for sale, whilst keeping 150,000 acres of the best lands for themselves in relation to which there would be restrictions on alienation and whānau-hapū subdivisions. There were to be no further surveys unless requested. However, "[n]o partition of owners' interests was to take place until 1896—when the bulk of the block had passed from iwi ownership—and control of the surveys was taken from Māori hands." The owners also sought legal authority for a 'Committee or Committees of Management' to manage the lands. The Crown's response was typical:[576]

> But no Crown support was forthcoming. Sheridan merely minuted that the Crown would soon begin purchasing the undivided shares of those willing to sell.

411. The Crown intended to purchase Awarua lands until purchasing came 'to a standstill'. Armstrong rightly observes how purchasing in this manner meant that the Crown had no regard for the point at which Crown purchasing might irretrievably damage future Mōkai-Pātea Māori economic prospects.[577] Neither did the Crown care about the number of uneconomic land interests that its purchasing programme engendered. For example, of the 45 partitions carried out of Awarua 2C in 1896, 24 were for less than 100 acres

[574] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 70.
[575] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 63-4.
[576] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 70-2.
[577] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 72-3.

and of these 24 partitions ten were less than 5 acres. Hiraka Te Rango complained to the Crown in 1895 about 'unworkable' land interests but as far as Armstrong could ascertain, there was no response to Te Rango's concern.[578]

412. The Crown fostered the financial ruin of Taihape Māori in other ways. They faced "manifold difficulties" with the development of their lands, with access to finance being the most challenging of these to overcome:[579]

> Developing land, stocking it with sheep and providing the necessary buildings and equipment required a significant amount of capital, especially if the land was bush covered. This was beyond the capacity of most Mōkai-Pātea Māori. Pākeha settlers had a major advantage. The Crown Waste Lands Board cut up land acquired from Māori into economic farm units, which were surveyed and fenced, and the necessary access roads were constructed, Māori landowners, on the other hand, were left very much to their own.

413. In his research report, Armstrong provides evidence of the high cost of establishing and running sheep farms in the late 19th and early 20th centuries.[580] In 1892, Mōkai-Pātea chiefs wrote to Native Minister Cadman requesting that they be allowed to borrow money for land development. The government ignored their request and continued purchasing Awarua and other Mōkai-Pātea lands.[581]

414. Whilst Māori received little assistance from the Crown, Pākeha farmers could access low interest mortgage interest rates through the Advances to Settlers Act 1894 and other measures. Said to be a critical factor in ensuring the success of New Zealand farming, the 1894 Act was not a "critical factor" for Māori farming in the Mōkai-Pātea.[582] Although they were not expressly excluded, the Crown had machined the 1894 legislation to ensure that Māori were ineligible for assistance, by, for example, requiring that the land to be developed was solely owned; an unlikely ownership state of affairs for

[578] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 74.
[579] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 82.
[580] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 82-3.
[581] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 83.
[582] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 83-4.

most Māori landowners. A Māori applicant under the 1894 Act needed to own other lands, also in severalty, and those lands needed to be leased to Pākeha. Although loans were available from the District Māori Land Boards from 1922, their criteria was the same as the 1894 Act.[583]

415. From 1894, Māori land incorporations could raise finance from the Public Trustee but Armstrong found no evidence of the existence of land incorporations in the Taihape district. This was likely because undefined Crown interests prevented their establishment, an incorporation's powers of alienation were a concern for owners and much of the land "consisted of marginal often land-locked area unsuitable for farming."[584]

416. Mortgages could be raised from private parties but the interest rates were likely to be higher. For there to be a loan, the Native Land Court had to lift restrictions on alienation, land needed to be possessed elsewhere by the applicant, the Land Board had to approve the loan and this approval seems to have been based on the applicant's business and farming skills. Māori "who had adopted wholly Pākeha lifestyles" were favoured. Armstrong lists just 33 successful loan applications from 1898 to 1930 by Māori in the Taihape district, mostly for debt repayment purposes.[585]

Maladministration of education services

417. In addition to violent suppression, to threats of compulsory purchasing and of being ignored in general or financially ruined by the Crown, Taihape Māori were oppressed by the Crown in other ways. There was also oppression as a result of the maladministration by the Crown of its education services in the Mōkai-Pātea region. In support of this submission, we rely on and adopt:

a. The *Generic Claimant Closing Submissions Regarding Education, Health and Other Social Services*,[586] in so far as those submissions relate to the Crown's oppressive use of the education

[583] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 84.
[584] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 84-5.
[585] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 85-91.
[586] *Generic Claimant Closing Submissions Regarding Education, Health and Other Social Services*, 21 September 2020, Wai 2180, #3.3.46.

system in the Mōkai-Pātea region. We refer in particular to the submissions in response to Issue 18(1) in so far as they pertain to education and to the submissions in response to Issues 18(4) to 18(9);

b. The *Te Reo Rangatira Me Ona Tikanga Generic Closing Submissions*[587] in so far as they relate to the use by the Crown of its education system to create a monolingual, homogenous society at the expense of the culture, identity and te reo rangatira of Taihape Māori.

The aforementioned generic closing submissions are supplemented with the following submissions on education.

418. In his evidence, Stirling established that Taihape Māori expressed an interest in education as early as the 1840s.[588] Unfortunately, their interest in education would go unmet for many years to their significant detriment.

419. The Native Schools Act 1867 was enacted to establish schools for Māori. However, there were substantial bars to founding a school. The 1867 Act required Māori communities to gift land for a school *and* contribute substantially to the costs of buildings and teacher salaries. When it became evident that the contributions sought were too onerous, an 1871 amendment to the Act allowed Māori communities to grant land only. Whilst a significant step was taken with the establishment of formal, Crown-sponsored learning amongst Māori, Stirling rightly observes that "Pākeha communities seeking an education for their children were not required to make such contributions." He added that "they also had a greater say in the management of their schools than did Māori communities in the management of Native schools."[589]

420. The double-standards at play worked against Taihape Māori in particular. Moawhango School became Moawhango Native School on 4 September

[587] *Te Reo Rangatira Me Ona Tikanga Generic Closing Submissions*, 19 May 2020, Wai 2180, #3.3.43.
[588] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 448.
[589] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 449.

1944.[590] It was established nearly 60 years after Māori at Moawhango first requested a native school.[591] The land provision requirement plagued the native school request for many years and in the end it almost fell away altogether.[592] In the meantime, a clearly preferred mode of learning was not available to Mōkai-Pātea Māori for an unreasonably long time. Significant learning opportunities were lost due largely to the gifted land criteria. In these circumstances, the setting of the gifted land criteria was oppressive.

421. Since there was no Native school until 1944, Māori children in the Taihape region were expected to attend the local public school. However, they faced the difficulty of racial discrimination from Pākeha parents and pupils which served to discourage interest in the learning process.[593] Māori children also faced the difficulty of learning in what was a foreign environment to them. According to Dr Christoffel:[594]

> In the main the general school system really tended to ignore Māori and in that sense it was assimilationist in that it ignored Māori language and culture. It treated Māori as if they were simply students like any other and didn't take into account the different backgrounds that Māori came from, except to the extent that this was often seen as a disadvantage rather than Māori culture as something to be preserved.

Furthermore, the first schools established in the region "catered almost exclusively for the children of Pākehā settlers."[595]

Local government

422. Since the 19th century and enactments such as the Municipal Corporations Act 1876, the Crown's local government legislative regime has failed to ensure or facilitate the full and active participation of Mōkai-Pātea Māori in local body proceedings. The iwi "have therefore lacked any voice or

[590] Christoffel, *Education, Health and Housing in the Taihape Inquiry District, 1880-2013*, Wai 2180, #A41, at 80.
[591] Christoffel, *Education, Health and Housing in the Taihape Inquiry District, 1880-2013*, Wai 2180, #A41, at 54.
[592] Christoffel, *Education, Health and Housing in the Taihape Inquiry District, 1880-2013*, Wai 2180, #A41, at 62-3. Christoffel discusses the drawn-out establishment of a school at Moawhango school in his report.
[593] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 449.
[594] Hearing week 7 transcript, Wai 2180, #4.1.15, at 425, per Dr Christoffel.
[595] Christoffel, *Education, Health and Housing in the Taihape Inquiry District, 1880-2013*, Wai 2180, #A41, at 19.

management role in this critical area", especially given the absence of functioning iwi representative organisations for much of the region's history.[596] The insufficiencies of the Crown's local government legislative regime have oppressed the rights and interests of Taihape Māori in the affairs of local government. We refer to and adopt the *Claimant Closing Generic Submissions Local Government and Rating: Part 1, Local Government* ("the Local Government generic closings")[597] in so far as they disclose the manner in which Taihape Māori have been politically marginalised at the local government level.

Conclusion

423. The Crown fails the Mitchell legality test, clearly. Its conduct in its relentless grab for land across the last half of the 19th century was shocking. A myopic interest in itself, the fate of ngā hapū me ngā iwi ō Mōkai-Pātea was of little to no concern. The Crown manipulated its way into power on false pretences and then having proclaimed itself the new rangatira, the people it was supposed to be leading were promptly forsaken. It doesn't even matter if there was no Kīngitanga-related suppression in the Mōkai-Pātea region, although it's difficult to see how that war did not impact those who committed themselves to the 'Rohe Tapu' at Pūkawa and Kōkako, the record is replete with a litany of oppressive Crown acts and omissions that range from the unauthorised supplanting of the English common law, to the coagulation of early Crown power in the Governor, to the Māori exclusive General Assembly of the 1850s and so on. Conscious of its vulnerability to majoritarian Māori rule during from the 1840s, 50s and 60s, the Crown nullified the threat with policies of segregation, exclusion and by simply ignoring the complaints. When the tables were turned later in the century and Māori became the distinct minority, a stifling form of tyrannical majoritarian rule became the policy and that's how it's been for the people of the Mōkai-Pātea region ever since.

[596] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 31.
[597] *Claimant Closing Generic Submissions Local Government and Rating: Part 1, Local Government*, 6 October 2020, Bennion Law, Wellington.

424. It's not as if the hapū and iwi of Taihape lay down and rolled over. In fact, on their side of the ledger the record is replete with plans, tactics, strategies and other efforts to throw off the yoke of oppression from around their necks in regular assertions of their tino rangatiratanga.[598] They placed their lands in a large, no-sale zone but to no avail. They sided with the Kīngitanga to protect their mana and their land but that initiative was violently overthrown by the Crown. They formed rūnanga and komiti Māori to manage the whenua but the Crown manipulated the workings of the Native Land Court so that those initiatives failed. Mōkai-Pātea Māori petitioned Parliament about the Native Land Court on numerous occasions during the 1870s along with Ngāti Hokohē but their complaints were ignored. About the 2 petitions to Parliament of July 1877, Stirling records that "[n]othing further was done".[599] There was staunch opposition to liquor licensing but this was undermined by the ready availability of liquor.[600]

425. Although the Rees-Carroll Commission gave due consideration to their land woes in 1891 and despite a raft of recommendations that sought appropriate law reform in favour of Taihape and other Māori, the Crown simply ignored the recommendations that empowered Māori landowners and selected those that aided its planned for monopsony on land purchasing. Quickly shaking off that adverse result, Mōkai-Pātea Māori threw themselves into supporting the Kotahitanga movement for the rest of the 1890s and its calls for the abolition of the Native Land Court, for self-managing komiti Māori and for a Paremata Māori. Although there was some legislative change in response to Kotahitanga, it was piece-meal and nothing really changed—"a false dawn". With regard to a Māori Parliament, the Crown thwarted their calls for power sharing by simply ignoring it.

426. Not only was there political and legal oppression, but there was economic oppression as well. The history of the Crown-manipulated economic decline of Taihape Māori is a truly sad story. The record clearly shows economic success for many years up until the mid-1890s. At that point in time, there were over 150,000 sheep on Māori owned farms. Moawhango was a thriving settlement, with weatherboard homes, extensive cropping and

[598] Hearing Week 3 Transcript, Wai 2180, #4.1.10, at 514, lines 30-31, at 524, line 28, per Bruce Stirling.
[599] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 255.
[600] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 463 and 470.

plenty of well-paid work. There was pragmatic and responsible leadership. Less than 10 years later however, a little over 12,000 sheep were in Māori ownership. Any hope at co-operative farming had dissipated. There was crippling debt as a result of the costly Awarua partition hearing and the associated survey costs. Notably, the Crown gave low interest financial assistance to Pākeha farmers at this time. The financial assistance was also available to Māori landowners if their land was solely owned an if they had other land leased to Pākeha. In effect then, the financial assistance was unavailable.

427. In addition to the political, legal and economic oppression they faced, the culture, traditions, language and identity of Taihape Māori were purposefully attacked and undone by the Crown through its education system.

428. The needless pain and suffering caused unto ngā hapū me ngā iwi ō Taihape by the Crown's in its relentless drive to oppress them means there should be no hesitation on the Tribunal's part with agreeing with the Claimants' claim that the Crown has failed the *Mitchell* legality test abysmally. Through its own well-recorded acts and omissions, the Crown cannot reasonably claim to be a legal revolutionary government and so it is without *de jure* sovereignty.

LEVEL TWO

429. We now provide an overview of particular themes in the inquiry.

Confusion reigned

430. The obscure and muddled thinking that characterises the Crown's assumption of sovereignty in New Zealand contradicts the Crown's claim to outright power in the Taihape inquiry district. Legal academic Moana Jackson has developed a coping strategy for dealing with the patent incongruities:[601]

[601] *Hearing Week 4 Transcript,* Wai 1040, #4.1.4, page 166, lines 16-21, per Moana Jackson.

> There is a certain suspension of logic in the entire jurisprudence of colonising law and the discourses used in the erection of an imperium. They require an equally illogical suspension of disbelief if one is to accept their legitimacy but, perhaps like Roland Barthes' conceptualisation of myths, they have been well learned and have established an ability to 'turn reality inside out'.

431. Historian Ruth Ross complained about the whole sovereignty muddle in her own blistering way:[602]

> However good intentions may have been, a close study of events shows that the Treaty of Waitangi was hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution. To persist in postulating that this was a 'sacred compact' is sheer hypocrisy.

Of all the many tasks involved with the transfer of sovereignty, Crown officials "saw the judicial provisions as posing the most difficulty".603 The perceived "difficulty" with the relevant law fortifies the complaints of Jackson, Ross and numerous others about mis-steps, mistakes and misconceptions by the Crown. The passing of the Foreign Jurisdiction Act in 1843 also fortifies their complaints. The 1843 Act was an attempt to provide certainty with regard to extending British jurisdiction over foreign territory. Its passing begs the question as to why the royal prerogative was not used, as it had been with the annexation of New Zealand to the New South Wales legislature in 1839. Perhaps it was because, as we have pointed out, the royal prerogative could not be used in the manner that it was.604

432. We have gone to some lengths to expose the manner in which the Crown's thinking with regard to acquiring sovereignty changed regularly in the 2-3 year period leading up to the consent gathering process of 1840, thus denoting a difficulty with resolving how exactly sovereignty would be acquired. Three separate legislative attempts had been made by 1828 and a fourth and perhaps a fifth were contemplated, the factories approach was a contender for a period of time, there was a Charter of Incorporation idea

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602 Ross, Ruth, *Te Tiriti o Waitangi: Texts and Translations*, New Zealand Journal of History, 6:2, at 154.
603 Brief of Evidence of Donald Loveridge, Wai 1040, #A18, at 146.
604 Pennell, C.R., *The origins of the Foreign Jurisdiction Act and the extension of British sovereignty*, University of Melbourne, 2009. Pennell contends that, in effect and despite its purport, the 1843 Act extended British jurisdiction over disorderly individuals, not over territory.

but that was dispensed with, then the royal prerogative and finally the treaty cession process. Even the treaty cession process waxed and waned in its execution. At first, Māori sovereignty was reposed *by the Crown* in the Wakaminenga for transfer at Waitangi, then Hobson followed the southward plan for a period of time but this was discontinued with when the North Island proclamation was issued. On another level of inconsistency, it is clear from Colonial Office records that the Crown was intent on acquiring sovereignty and yet when Crown officials met with northern rangatira, this most important of discussion points was dropped from the agenda. Adding to the morass of variables are the divergent views on how sovereignty was assumed—whether by cession treaty or by settlement.

433. The ultimate point here is that confusion reigned, procedural and legal mistakes were made by the Crown and they are legion.

Going behind Parliament

434. An important feature of the Crown's approach to the assumption of sovereignty, and it is related to and perhaps prompted by the error-laden course that was taken, is the edict that the process not be traduced before the courts. As opposed to Parliament's representative nature however, Dr McHugh cited use of the royal prerogative as the reason for not 'going behind Parliament'.[605] As we have seen, the courts have been prepared to examine use of the royal prerogative since at least the time of Lord Coke in the *Case of Proclamations* (1611) and increasingly so since the war compensation claims of the 20th century. Furthermore, the royal prerogative is not a creature of Parliament. In more modern times it has been applied by the executive branch of government, and not by the Queen of England, and certainly not by the House of Representatives. The placement of the royal prerogative in the way of an examination of Parliament's legality doesn't add up in these circumstances. It should not matter. In any event, given the disparate bargaining strengths of the parties to the cession treaty, it is imperative that the process for the assumption of sovereignty is placed under a legal lens.

[605] Brief of Evidence of Dr P G McHugh, Wai 1040, #A21, paragraph 132.

435. The Crown claims that its sovereignty over New Zealand is incontrovertible.[606] The claim of incontrovertibility is made on the basis that Hobson discharged his duties in relation to the acquisition of sovereignty on the Crown's behalf. We have complained already that incontrovertibility is a treaty breach. Its unilateralism violates Te Tiriti o Waitangi principles since it depends on when Hobson alone considered, for instance, that 'universal adherence' of the chiefs to te Tiriti o Waitangi had been achieved.[607] Incontrovertibility left no place for a partnership-based approach to such important determinations. Furthermore, we have contended that universal adherence was not achieved. Professor David Williams described Hobson's claim in this regard as 'patently untrue'.[608] He added that 'this lack of universal adherence was to become an acute embarrassment later on when members of some of the largest and most militarily significant tribes asserted that they were not, and never had been, British subjects'.[609] But this is the problem with incontrovertibility. The facts do not seem to matter.

436. Further in relation to the topic of incontrovertibility is the Whanganui Tribunal finding that it had 'no jurisdiction to question the Crown's sovereignty over New Zealand'.[610] In reply, we refer to the Urewera Tribunal finding that it was statutorily authorised to examine such matters:[611]

> The next question is whether the legal validity of the Crown's proclamations of sovereignty precludes the Waitangi Tribunal from recognising the fact that the claimants' tipuna did not sign the Treaty and so did not actually cede anything to the Crown. In our view, if we were to ignore the reality behind the May 1840 proclamations, we would be unable to exercise responsibly our statutory jurisdiction. The Treaty of Waitangi Act makes plain that our task is to apply Treaty principles, not legal principles. It is well established that the Tribunal can find lawful Crown

[606] Crown Law, *Closing Submissions of the Crown on Issue 1: Tino Rangatiratanga, Kāwanatanga and Autonomy* dated 20 September 2017, Wai 1040, #3.3.402, at [1].
[607] In explaining the premature issuance of the May 1840 proclamations to Lord Russell, Hobson attested that he had availed himself 'of the universal adherence of the native chiefs to the Treaty of Waitangi, as testified by their signatures to the original document in my presence . . . '—Hobson to Russell. 25 May 1840, CO 209/6: 146 at 150, cited in the *Brief of Evidence of Paul McHugh*, Wai 1040, #A21, at [128].
[608] Professor David V Williams, *The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi?*, Australian Journal of Law & Society, Vol. 2, No. 2, 1984, at 44.
[609] Professor David V Williams, *The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi?*, Australian Journal of Law & Society, Vol. 2, No. 2, 1984, at 44.
[610] Crown Law, *Closing Submissions of the Crown on Issue 1: Tino Rangatiratanga, Kāwanatanga and Autonomy* dated 20 September 2017, Wai 1040, #3.3.402, at [2].
[611] Waitangi Tribunal, *Te Urewera*, Volume 1, (Wai 894, 2017), at 137.

> conduct to be inconsistent with Treaty principle. That outcome would not be possible if the Tribunal was unable to examine Crown acts or omissions simply because they were lawful.

We discern that a similar approach to its jurisdiction to 'examine the relationship entered into under the treaty' was taken by Te Paparahi o Te Raki Tribunal in Stage 1.[612]

437. It is clear too from recent case law that incontrovertibility does not exempt the Crown's acquisition of sovereignty from examination by our civil law courts. Brookfield writes that a new view[613]

> has found favour with the courts of a number of countries and has the powerful support of the majority judgment of the Privy Council in *Madzimbamuto v Lardner-Burke.* This view is that courts, including those created by a written constitution, are authorised and required to decide when and if a revolutionary regime has become lawful.

438. In delivering the opinion of the majority judgment in *Madzimbamuto*, Lord Reid referred to[614]

> the position . . . where a court sitting in a particular territory has to determine the status of a new regime which has usurped power and acquired control of that territory. It must decide. . . . It is an historical fact that in many countries—and indeed in many countries which are or have been under British sovereignty—there are now regimes which are universally recognised as lawful but which derive their origins from revolutions or coups d'etat. The law must take account of that fact. So there may be a question how or at what stage the new regime became lawful.

439. We examine a number of cases where the courts have 'gone behind Parliament' to examine the legality of revolutionary governments including *Mokotso v HM King Moshoeshoe II,*[615] *Mitchell v Director of Public*

[612] Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 432-3.
[613] Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, 2006), at 25.
[614] *Madzimbamuto v Lardner-Burke* [1968] 3 All ER 561, per Lord Reid.
[615] *Mokotso v HM King Moshoeshoe II* [1989] LRC (Const) 24 (Les HC) pages 132-133.

Prosecutions,[616] *Jilani v Government of the Punjab,*[617] *Bhutto v Chief of Army Staff,*[618] *Vallabhaji v Controller of Taxes*[619] *and Republic of Fiji v Prasad*.[620] There are many other cases where the courts have exercised their supra-constitutional jurisdiction. When called upon to exercise this jurisdiction, it is incumbent upon the courts to do so. It is noteworthy too that most of the relevant cases concern countries 'which are or have been under British sovereignty'.

440. Brookfield complains that supra-constitutionalism is 'a mistake'[621] because a judge 'may function only within the legal order founded on a basic norm and cannot step outside that order to determine whether by a revolution a new legal order has replaced it.'[622] Whether or not this complaint is valid, it does not appear to be applicable to New Zealand's circumstances. Our present courts were not part of the earlier, Māori legal order at any stage. They have always derived their respective jurisdictions from contemporaneous constitutional arrangements and statute. Brookfield offers no other criticism.

441. Professor Honore bases supra-constitutionalism 'on some principle of law independent of any particular system [which] authorises a judge simply by virtue of his [or her] office, and irrespective of the source of . . . jurisdiction, to recognise the revolutionary regime'.[623] This is the approach taken by the court in *Prasad*.[624] If the judges have an inherent constitutional role by virtue of their office, we submit that the source of such a role is the separation of powers doctrine. Inherent in this doctrine is the checks and balances role played by the courts in relation to the political power exhibited by the legislature and executive, which are, notably, often comprised of the same personnel. Supra-constitutionalism can usefully offset the coagulation of political power.

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[616] *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada).
[617] *Jilani v Government of the Punjab* [1972] PLD 139 (SC Pakistan) (unreported).
[618] *Bhutto v Chief of Army Staff* [1977] PLD 657 (SC Pakistan).
[619] *Vallabhaji v Controller of Taxes* (1981) 7 CLB 1249 (CA Seychelles).
[620] *Republic of Fiji v Prasad* [2001] 2 LRC 743 (CA Fiji).
[621] Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, 2006), at 25.
[622] Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, 2006), at 25.
[623] Honore, 'Reflections on Revolutions' (1967) *2 Irish Jurist* (NS) 268, pp. 275-276, cited in Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, 2006), at 25.
[624] *Republic of Fiji v Prasad* [2001] 2 LRC 743 (CA Fiji) at 759.

The consent theme

442. The Crown cannot be sovereign because there was no consent by Maori to the cession treaty in 1840 and there was no consent to New Zealand being a settled colony. The criteria laid down by the courts recently for the legality of a revolutionary government cannot be met by the Crown in Right of New Zealand because of the violence and oppression used against Taihape Māori. We acknowledge that the legality or not of the Crown in Right of New Zealand is not within the purview of the Waitangi Tribunal's jurisdiction. We are not asking for the Waitangi Tribunal to determine the law of the matter. That will be the task of another court. Rather, we ask the Tribunal to consider the alleged illegality in terms of its own jurisprudence. When considered in that light, the Crown's obviation of the law as it can be said to stand is inconsistent with the treaty principles of active protection and partnership, in the least.

443. The law of New South Wales was operative in New Zealand from 14 January 1840 when the Gipps proclamations were issued. These proclamations are discussed above at paragraphs 261 to 271. From the date of the Gipps proclamations, no private purchases were recognised by the Crown. On 30 January 1840, Hobson issued a proclamation of his own that extended the "boundaries of the government of New South Wales" and by which he was appointed Lieutenant-governor of New Zealand.[625] The ban on private land purchasing and the extra-territorial jurisdiction establish that the law of New South Wales was in effect before 21 May 1840. This appears to have been the Reverend A.N. Brown's take on Hobson's land proclamation when he saw it a short time later, commenting that it had 'a tone … which sounds very much like the sovereign rights of New Zealand being vested in Queen Victoria'.[626] In a related vein, Professor Rutherford expressed concern with Hobson's premature elevation to the office of Lieutenant-Governor, indicating that it should have occurred upon cession and not any earlier.[627]

[625] *Brief of Evidence of Donald Loveridge,* Wai 1040, #A18, at 188.
[626] *Brief of Evidence of Donald Loveridge,* Wai 1040, #A18, at 189.
[627] Rutherford, *The Treaty of Waitangi*, at 19, cited in the *Brief of Evidence of Donald Loveridge*, Wai 1040, #A18, at 189.

444. There is heavy compulsion on the Crown to disavow the settlement process because it would be as if New Zealand was acquired by discovery and that this was an empty land, such as Australia and the South Island for that matter. Despite its position in this respect, we argue that the Crown endeavoured to apply the law of New South Wales in New Zealand by invoking royal prerogative powers and issuing letters patent to this effect on 15 June 1839.

445. As at the date of 15 June 1839, the territory of the colony of New South Wales was expanded to include New Zealand. By way of evidence in support, we refer to the proclamation issued by Gipps on 14 January 1840 that expanded the boundaries of New South Wales to include New Zealand.[628] The mechanism relied on for the expansion thereof was the 15 June 1839 letters patent. Similarly, Hobson also draws on the letters patent to issue the proclamation whereby he declared himself Lieutenant-Governor of New Zealand on 29 January 1840.[629] Reliance by Gipps and Hobson on the letters patent for the requisite jurisdiction to carry out their respective constitutional duties establishes that the letters patent were in effect from their date of enactment. Whilst there was a supervening period of some months before Gipps and Hobson actually relied on the letters patent, the delay in that regard does nothing to undermine the submissions made here. We note in particular that when utilised by Gipps and Hobson, nothing else was relied on for the requisite authority other than the letters patent.

446. By declaration in the English Laws Application Act 1858, the laws of England were deemed to have been in force from 14 January 1840 ("the January date").[630] Clearly the laws of England were deemed to be in effect from the date of the Gipps proclamations. We aver that Gipps' proclamations drew their legality, in theory, from the letters patent. If indeed the letters patent are the fount of the Crown's sovereignty, then the appropriate date for the 1858 legislation should have been 15 June 1839, the date the letters patent were enacted, and not 14 January 1840. We note that the Crown's preference for

[628] Document Bank to the *Brief of Evidence of Donald Loveridge*, Wai 1040, #A18(e), at 683.
[629] Document Bank to the *Brief of Evidence of Donald Loveridge*, Wai 1040, #A18(e), at 683.
[630] Crown Law, *Closing Submissions of the Crown on Issue 1: Tino Rangatiratanga, Kāwanatanga and Autonomy* dated 20 September 2017, Wai 1040, #3.3.402, at [6.4].

the January date in the 1858 legislation deflects attention away from the legal effect of the letters patent.

447. These submissions should not be taken to mean that the Crown had no purpose for the cession treaty process. It is considered that the gathering of signatures was carried out by the Crown in a genuine manner, although it cannot be said that 'universal adherence' was achieved and it is a treaty breach that the sufficiency of signatures was a matter for Hobson alone to determine. Nevertheless, the attempt at acquiring Maori consent to the transfer of sovereignty was a necessary political act; done in order to curry favour with the rangatira and to make it appear to the international community that the acquisition of sovereignty by the Crown was being done in accordance with international law. And in the event that sufficient consent was acquired, the Crown could then emphasise the cession treaty process as the primary means for the acquisition of sovereignty, which is in fact what has transpired. But when the onion layers are peeled away and when the relevant events are looked at in terms of their (purported) legal effect, the treaty cession process falls away.

448. It is time now for the appropriate judicial examination to be made of the claim that New Zealand is a settled colony because of the legal effect of such a claim. The topic is a suitable one for this Tribunal because it concerns the place of the Treaty of Waitangi in New Zealand's constitutional firmament. This Tribunal is well placed to consider settlement because of the historical and evidential investigations already made during the Stage 1 hearing and, in particular, because of the Tribunal's knowledge of the consent process that was employed by the Crown viz a viz the alleged transfer of sovereignty. As we have stated already, the issue of consent is also crucial to the process of settlement and to the claim that New Zealand is a settled colony.

449. It has been claimed that '[t]he Colonial Office treated New Zealand as both a settled and ceded colony'.[631] We reply by stating that a colony cannot be treated, for legal purposes, as both a settled and ceded colony. It is either one or the other. Once a colony is deemed to be a settled colony, the acquisition of sovereignty by way of a cession treaty is mere posturing. Legal

[631] Crown Law, *Closing Submissions of the Crown on Issue 1: Tino Rangatiratanga, Kāwanatanga and Autonomy* dated 20 September 2017, Wai 1040, #3.3.402, at [19].

commentators such as Williams and Foden make this very important point. Once there is consent to settlement, the legal requirements for the transfer of sovereignty are fulfilled. But perhaps the lack of Māori consent to settlement is the reason why the Colonial Office treated New Zealand as both a settled and ceded colony? In this way it could 'hedge it's bets', so to speak. However, we don't think it is that straightforward for the Crown. If a settled colony could not be achieved because of a lack of consent thereto, the Crown cannot fall back on the treaty of cession for the acquisition of sovereignty. As soon as the Colonial Office discards settlement in favour of the cession treaty, Gipps' proclamations and those of Hobson in January 1840 are without authority. As a result, for instance, Hobson could not be appointed to the office of Lieutenant-Governor with any validity and all acts committed by him as Lieutenant-Governor become *void ab initio*. Neither is it imagined that some sort of hybrid can be achieved.

PREJUDICE

450. In breach of the Treaty principles of good faith, partnership and active protection and despite the affirmation of Maori sovereignty contained in Article 2 of te Tiriti ō Waitangi, the Crown has abrogated and continues to abrogate the sovereign rights of Taihape Māori in circumstances where the Crown's assumption of sovereignty is illegal, without the consent of Taihape Māori, incomplete as a process as at the date of acclaimed assumption and without legal precedent.

451. The Crown's assumption of sovereignty caused Taihape Māori significant and devastating prejudice, such as the loss or diminution of their:

a. Tino rangatiratanga and mana;

b. Right to self-determine;

c. Autonomy and independence;

d. Legal order, tikanga Māori and kawa;

e. Leadership structures;

f. Political influence;

g. Health and well-being;

h. Lands, mountains, minerals, forests, waterways, fisheries, birdlife;

i. Economic independence and prosperity;

j. Culture, te reo Māori me ōna tikanga, identity; and

k. Social cohesion and norms.

RELIEF

Findings

452. The Claimants ask the Waitangi Tribunal for the following findings:

a. That the phrase 'tino rangatiratanga' as it is used in te Tiriti ō Waitangi be accorded the meaning of 'sovereignty';

b. That to be sovereign is to have the power to make and enforce law;

c. The Waitangi Tribunal gives special weight to the Māori text in establishing the treaty's meaning and effect;[632]

d. Other than the signing of te Tiriti ō Waitangi by Te Hāpuku, Wi Te Ota, Rāwiri Paturoa and Te Tohe on 26 May 1840, no other Mōkai-Pātea rangatira signed te Tiriti ō Waitangi;

e. Since the majority of Mōkai-Pātea rangatira were non-signatories to te Tiriti ō Waitangi, the majority of Mōkai-Pātea Māori did not consent to the Crown's assumption of sovereignty;

[632] In accordance with the approach taken by the Tribunal in previous reports such as Waitangi Tribunal, *He Whakaputanga me te Tiriti—The Declaration and the Treaty: The Report on Stage 1 of Te Paparahi o Te Raki Inquiry* (Wai 1040, 2011), at 522; *Report on the Motunui-Waitara Claim*, at 49; Waitangi Tribunal, *The Orakei Claim,* 1987, Wai 9, at 180.

f. That the Crown assumed ‘full Sovereignty’ over Aotearoa when Hobson’s proclamations of 21 May 1840 were published in the London *Gazette* on 2 October 1840;

g. For the Crown to properly acquire the ‘full Sovereignty’ referred to in Hobson’s North Island proclamation, it was necessary for the Crown to have acquired both *de jure* and *de facto* sovereignty;

h. By 1840s end, the Crown had not acquired *de facto* sovereignty in the Taihape district;

i. Since Lieutenant-Governor Hobson assumed ‘full Sovereignty’ over Taihape Māori on 21 May 1840 in the North Island proclamation, the Crown is estopped from making any later claim to the acquisition of *de facto* sovereignty;

j. Taihape Māori did not cede their tino rangatiratanga, whether at 1840 or any time thereafter;

k. Following 1840, Māori of the Mōkai-Pātea expressed their tino rangatiratanga through their opposition to land sales and through their support for the Kīngitanga, rūnanga, komiti Māori, Ngāti Hokohē and Te Kotahitanga;

l. The Crown always intended to acquire sovereignty over the whole of New Zealand and not just over those parts of New Zealand where rangatira consented to British dominion;

m. In terms of the level of consent required, the Crown intended to acquire the ‘universal adherence’ of Māori, including Taihape Maori;

n. The ‘universal adherence’ of Māori was not acquired;

o. The Crown considered that the sovereignty of all Māori, including Taihape Māori, was reposed in the rangatira of Te Wakaminenga when they signed he Whakaputanga;

p. Consequently, according to the Crown, the rangatira of Te Wakaminenga transferred the sovereignty of all Māori to the Crown when they signed te Tiriti ō Waitangi;

q. The rangatira of Te Wakaminenga did not transfer the sovereignty of all Māori to the Crown when they signed te Tiriti ō Waitangi;

r. The Crown did not acquire sovereignty over Aotearoa by way of settlement;

s. Taihape Māori did not consent to being a settled British colony;

t. There was no legal precedent for use of the royal prerogative by the Crown for the purpose of annexing Aotearoa;

u. Since the Crown did not acquire sovereignty over New Zealand in 1840, the New Zealand government is a revolutionary government;

v. As a revolutionary government, the legality of the New Zealand government is subject to judicial review;

w. The New Zealand government is established;

x. There is conformity by Taihape Māori to the New Zealand government;

y. The manner in which the New Zealand government was established and how Taihape Māori were made to conform with it is amenable to review by the Waitangi Tribunal in accordance with the principles of te Tiriti ō Waitangi;

z. The Kīngitanga created the ‘Rohe Tapu’, an area in which there would be no land sales and in which tikanga Māori would be dispensed;

aa. The Mōkai-Pātea region was included in the ‘Rohe Tapu’ at Pūkawa in 1856 and at Kōkako in 1860;

bb. The Crown violently suppressed the Kīngitanga in the 1860s;

cc. As a result of the Kīngitanga’s violent suppression, the Mōkai-Pātea region was no longer protected from land sales by inclusion in the ‘Rohe Tapu’;

dd. The tacit submission of Taihape Māori to the Crown following the violent suppression of the Kīngitanga was a result of coercion and a fear of force;

ee. The Crown manipulated representative government in New Zealand to ensure the political ostracism of Taihape Māori;

ff. Although there was tacit submission to the Crown and political ostracism, in the interests of self-determination, Mōkai-Pātea Māori owned and managed their lands through rūnanga and komiti Māori;

gg. The Crown nullified the rūnanga and komiti Māori by making their decisions subject to the Native Land Court;

hh. Mōkai-Pātea Māori sought to preserve their lands and their tino rangatiratanga through participation in the Repudiation Movement;

ii. Despite substantial Māori support and numerous petitions to Parliament, the interests of the Repudiation Movement were largely ignored by the Crown;

jj. The Crown adopted those recommendations of the Rees-Carroll Commission that favoured its interests over the land interests of Mōkai-Pātea Māori;

kk. Premier Seddon’s ‘use it or lose it’ policy of the mid-1890s coerced Taihape Māori into conforming with the New Zealand government;

ll. Mōkai-Pātea Māori sought to preserve their lands and their tino rangatiratanga through participation in Te Kotahitanga and formation of the Paremata Māori;

mm. The New Zealand House of Representatives refused to consider let alone enact legislation for the formation of the Paremata Māori;

nn. Although Te Kotahitanga sought enabling legislation for the Paremata Māori from the New Zealand House of Representatives, in strict legal terms the broad Māori support for the formation of the Paremata Māori legitimated its formation;

oo. During the late 19th and early 20th centuries, the Crown decimated the once-healthy economy of Mōkai-Pātea Māori and it never recovered;

pp. The Crown undermined the social cohesion, identity and culture of Taihape Māori through its emphasis on assimilation and a homogenous society;

qq. The militarism, political ostracism and oppressive conduct by which the Crown assumed sovereignty over New Zealand means that the New Zealand government is illegal and dispensing law in a manner that is inconsistent with the principles of te Tiriti ō Waitangi.

Recommendations

453. The Waitangi Tribunal is asked to recommend that the Crown:

a. formally and publicly apologise for its oppressive and undemocratic conduct in the suppression of Taihape Māori;

b. formally acknowledge the sovereign status of Taihape Māori;

c. formally acknowledge the limited form of government, or kāwanatanga, that was ceded to the Crown by way of te Tiriti ō Waitangi;

d. facilitate the formation of a Māori Parliament to dispense tikanga Māori, administer health, education, housing and criminal justice portfolios and to ensure that legislation enacted by the New Zealand Parliament is consistent with the principles of te Tiriti ō Waitangi;

e. implement constitutional change at all levels of government to accommodate and ensure that the sovereign status of Taihape Māori is protected;

f. in consultation with Taihape Māori, prepare a written constitution that incorporates te Tiriti ō Waitangi into the municipal law of the land and that affords te Tiriti ō Waitangi its rightful place in New Zealand's constitution;

g. make payment of a commensurate amount of compensation to Taihape Māori for the prejudice, significant as it is, that has arisen from the Crown's illegal assumption of sovereignty;

h. appoint the Office of the Maori Ombudsman;

i. appoint the Office of the Maori Attorney-General;

j. Any other relief that the Tribunal considers appropriate.

DATED at Auckland this 12th Day of October 2020

Darrell Naden
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