IN THE WAITANGI TRIBUNAL **WAI 2180**

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of the Taihape: Rangitikei ki Rangipō inquiry

CLAIMANT GENERIC CLOSING SUBMISSIONS ON CULTURAL TAONGA

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. These closing submissions are made for and on behalf of the Claimants and the Māori community of the Taihape inquiry district. They concern claim issues raised in relation to the demise of the use and retention of cultural taonga by Taihape Māori.

2. These generic closing submissions address Issue 19 of the Tribunal Statement of Issues, which relates to cultural taonga.[1] These generic closing submissions examine Crown actions and omissions that have impacted the efforts of Taihape Māori to protect their cultural taonga.

3. These closing submissions should be read in conjunction with the generic closing submissions for Issue 20, which relate to wāhi tapu[2], and Issue 21, which relates to te reo Rangatira[3]. The cultural taonga closing submissions address the extent to which Crown policies and practices recognised and protected Taihape Māori tikanga governing traditional social structures and land and resource use including wāhi tapu and te reo.

4. We provide Level 1 answers to the TSOI questions in accordance with the Tribunal's suggested approach to the preparation of these closing submissions.[4] 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.

5. Counsel notes that the filing of these generic closing submissions does not prevent claimants from taking their own positions and presenting their own submissions on this issue.

[1] Waitangi Tribunal, *Tribunal Statement of Issues*, Wai 2180, #1.4.003 at 54
[2] Tamaki Legal, Annette Sykes & Co., *Wāhi Tapu Generic Closing Submissions* dated 5 May 2020, Wai 2180, #3.3.42.
[3] Tamaki Legal, Annette Sykes & Co., *Closing submissions for issue 20: Te Reo Rangatira me ona Tikanga* dated 20 May 2020, Wai 2180 #3.3.43.
[4] *Directions of Judge L R Harvey: Forward Hearing Programme* dated 30 May 2019, #2.6.97, at [26].

6. The generic closing submissions have been prepared by Tamaki Legal of Auckland in tandem with Sykes & Co of Rotorua.

TREATY PRINCIPLES

7. In this section, we discuss the principles of te Tiriti ō Waitangi that are relevant to the Crown's duties in respect of cultural taonga. The principles of te Tiriti ō Waitangi set out below are relied on when addressing the Tribunal Statement of Issues.

Tino Rangatiratanga

8. Article II of te Tiriti ō Waitangi guaranteed to rangatira, hapū and all Māori their "tino rangatiratanga" over their "taonga katoa".[5] "Tino rangatiratanga" has been afforded various meanings by various judicial officers and legal commentators. Cooke P attributed it the meaning of "chieftainship."[6] Sir Edward Taihakurei Durie, former Chief Judge of the Māori Land Court, considered it to mean "full authority."[7] We refer as well to the *Motunui-Waitara* report of the Waitangi Tribunal wherein it was equated with sovereignty:[8]

> 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".

9. 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, 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

[5] Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22) dated 1988 p 173 at 10.2.2
[6] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, per Cooke P, page 664, line 29.
[7] E.T.J Durie "The Treaty in Māori History" in William Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 156, page 157. Reaffirmed at pages 160, 165-166.
[8] Waitangi Tribunal, *Report on the Motonui-Waitara Claim,* (Wai 6, 1983), page 51.

and consistency of our philosophies through the practical expression of our tikanga."[9]

10. The principle of tino rangatiratanga, or mana motuhake, arises from the guarantee to Māori of a pre-existing ability to "govern themselves as they had for centuries, to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants". [10] In the English text of te Tiriti ō Waitangi, Article II explicitly guarantees the "lands and estates, forests, fisheries and other properties that Māori may collectively or individually possess". [11] However, the provision in te Tiriti ō Waitangi of "ō rātou taonga katoa", which roughly translates to mean "those things important to them", emphasises that something more than tangibles were guaranteed.[12] The Tribunal in the *Ko Aotearoa Tēnei* report stated that taonga therefore includes "both tangible things such as land, waters, plants, wildlife, and cultural works; and intangible things such as language, identity, and culture, including mātauranga Māori itself".[13]

11. The Crown is obliged to recognise the Māori interests specified in te Tiriti ō Waitangi.[14] As taonga encompasses "all their (Māori) valued customs and possessions", tikanga Māori as customary law is therefore a taonga to Taihape Māori. [15] Taonga necessarily includes rangatiratanga. [16] Rangatiratanga requires that Māori control their tikanga and taonga, including their social and political institutions and processes, and to the extent practicable and reasonable, create their own policy and manage their own programmes.[17] The relationship between Māori and their taonga "exists beyond mere ownership, use or exclusive possession'.[18] The relationship

[9] Waitangi Tribunal, *Te Urewera: Pre-Publication* (Wai 894, 2012) Part I, chapter 2.3, page 80.
[10] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996) p 5; Waitangi Tribunal, *Turanga Tangata. Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 113
[11] Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22) dated 1988 p 173 at 10.2.2
[12] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) at 10.2.2
[13] Waitangi Tribunal, *Ko Aotearoa Tēnei, A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua, Volume 1* (Wai 262) dated 2011 p 17
[14] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai-8) 1985 at 8.3 page 70.
[15] Waitangi Tribunal, *Report of the Waitangi Tribunal on The Te Reo Claim,* (Wai 11, 1986) at 4.2.3 p 20.
[16] Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p 26 at 1.5.4(6)
[17] Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p xxv at sum.7, 1.5.6 p 31
[18] Waitangi Tribunal, *He Maunga Rongo, Report on Central North Island Claims, Stage One, Volume 1* (Wai 1200) 2008 p 93

concerns personal and tribal identity, Māori authority and control, and the right to continuous access, subject to Māori cultural preferences.

Active protection

12. The Crown has an obligation to not only recognise Māori interests specified in te Tiriti ō Waitangi, but to also protect such interests actively 'to the fullest extent practicable'.[19] The Tribunal further clarified in their *Whaia Te Mana Motuhake* report:[20]

> active protection requires honourable conduct by, and fair processes from, the Crown. Crown conduct that aims or serves to undermine tino rangatiratanga cannot be consistent with the principle of active protection.

13. Failing to actively protect by omission is as much a breach of te Tiriti ō Waitangi as a positive act that removes those rights.[21] As tikanga Māori is a taonga to Taihape Māori, the Crown has a duty of active protection towards the preservation of it. As a taonga tuku iho, the Crown has a duty to ensure tikanga is passed on from generation to generation. Under Article III of te Tiriti ō Waitangi, the Crown's duty of protection applies in respect of "ngā tikanga katoa".[22] This includes the protection of all customs, law, values and institutions, and the right to determine their own decision makers and land entitlements.[23]

14. At the signing of te Tiriti ō Waitangi at Waitangi, assurances were sought regarding the freedom of religious worship. The following provision was presented to those in attendance:[24]

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[19] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai-8) 1985 at page 70. *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (HC, CA) at 665.
[20] Waitangi Tribunal, *Whaia Te Mana Motuhake, In Pursuit of Mana Motuhake, Report on the Māori Community Development Act Claim* (Wai 2417) dated 2014 p 30 at 2.4.4
[21] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai-8) 1985 at page 70.
[22] Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p 26 at 1.5.4(6)
[23] Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims Volume 1,* (Wai 785) 2008 at 4.
Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p 26 at 1.5.4(6)
[24] 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) dated 2014 at 7.6.5 p 372

> E mea ana te Kawana, ko nga whakapono katoa, o Ingarani, o nga Weteriana, o Roma, me te ritenga Māori hoki, e tiakina ngatahitia e ia.
>
> The Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Māori custom, shall be alike protected by him.[25]

Therefore, the Crown has a duty to protect ritenga or traditional Māori spiritual rites,[26] which form an integral aspect of tikanga. It has been stated in oral evidence before this Tribunal that the Crown's duty in respect of tikanga extended to the protection of ritenga, its sustainability, its wairua, and its vitality.[27]

Partnership

15. The *Lands* case affirmed that te Tiriti ō Waitangi signified a partnership between the Crown and Māori.[28] This partnership carries with it the duty to act towards each other "with the utmost good faith which is the characteristic obligation of partnership".[29] The Tribunal in the *Whaia Te Mana Motuhake* report also affirmed that the partnership entails a commitment to co-operate and collaborate.[30] The Tribunal in the *Tau Ihu o Te Waka ā Maui Report* clarified that this partnership is a reciprocal arrangement, involving "fundamental exchanges for mutual advantage and benefit".[31] Māori ceded kāwanatanga (governance) to the Crown in exchange for the recognition and protection of their tino rangatiratanga (full authority) over their own peoples, lands, and taonga, which necessarily includes their tikanga. The Crown's right to govern is not an absolute or exclusive right. The quid pro quo nature

[25] 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) dated 2014 at 7.6.5 p 372 .
[26] Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262) dated 2011 p 212, 254.
[27] Waitangi Tribunal, Joint Hearing Week for Wai 2200 – Porirua ki Manawatu and Wai 2180 – Taihape ki Rangitīkei ki Rangipō, Hearing Week 2, Palmerston North, 30 May – 2 June 2017, Wai 2180, #4.1.9, at 160.
[28] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC, CA) at 664, 702
[29] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC, CA) at 664, 702
[30] Waitangi Tribunal, *Whaia te Mana Motuhake, In Pursuit of Mana Motuhake, Report on the Māori Community Development Act Claim* (Wai 2417) dated 2015 at 2.4.3
[31] Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4

of this provision in the te Tiriti ō Waitangi meant that it could only be exercised in exchange for the protection of Māori rangatiratanga.[32]

16. Furthermore, the Tribunal in the *Te Whanau o Waipareira* report stated that this partnership is a "relationship where one party is not subordinate to the other but where each must respect the other's status and authority in all walks of life".[33] In the *Whaia Te Mana Motuhake* report the Tribunal found that neither te Tiriti partner could claim monopoly rights when it comes to making policy or law where their respective interests overlap.[34] Where there is overlap, a practical balance or collaborative agreement ought to be negotiated in the making of law and policy.[35]

Consultation

17. The Tribunal in the Central North Island Inquiry found that the obligations of partnership included the duty of the Crown to consult Māori on matters of importance to them.[36] This duty requires the Crown to therefore "obtain their [Māori] full, free, prior, and informed consent to anything which altered their possession of the land, resources, and taonga guaranteed to them in article 2".[37] This requires te Tiriti partners to show mutual respect and engage in dialogue to resolve issues where their respective authorities overlap or affect one another.[38]

18. The duty to consult naturally flows on to the right to consider and pursue different options. The *Muriwhenua Fishing Report* first described the principle of options as being the right of Māori to choose a social and cultural path. In other words, Māori must be free to choose between tikanga Māori and other cultural assimilation. Any act of the Crown that limits opportunities

[32] Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake: Report on the Māori Community Development Claim* (Wellington: Legislation Direct) dated 2015, p 25
[33] Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p xxvi
[34] Waitangi Tribunal, *Whaia te Mana Motuhake, In Pursuit of Mana Motuhake, Report on the Māori Community Development Act Claim* (Wai 2417) dated 2015 at 2.4.3
[35] Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake: Report on the Māori Community Development Claim* (Wellington: Legislation Direct) dated 2015, p 25, 42
[36] Waitangi Tribunal, *He Maunga Rongo, Report on Central North Island Claims (Wai 1200), Stage One, Volume 1,* dated 2008 at page 173
[37] Waitangi Tribunal, *He Maunga Rongo, Report on Central North Island Claims (Wai 1200), Stage One, Volume 1,* dated 2008 at page 173
[38] Waitangi Tribunal, *He Maunga Rongo, Report on Central North Island Claims (Wai 1200), Stage One, Volume 1,* dated 2008 at page 173

for Māori to 'walk in two worlds' or choose a social path is a breach of this principle of options.[39]

Right to Development

19. Taihape Māori have a right to develop as a people. This right extends to cultural, social, economic and political development.[40] The Tribunal in the *Te Ika Whenua Rivers Report* stated that Māori have a right to the development of property or taonga.[41] The taonga and resources outlined and reserved in Article II of te Tiriti ō Waitangi should be construed broadly, rather than limited to traditional locations and uses.[42] In the same report, the Tribunal outlined the right to development of property or taonga guaranteed under te Tiriti ō Waitangi,[43] and clarified this right with reference to the *Report on the Motunui-Waitara Claim*: [44]

> The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development.
>
> We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles.

This approach acknowledges the propensity of Māori for development as well as the potential contained in the flexibility and adaptability of tikanga, rather than constraining development to traditional, pre-settlement methods and technology.[45]

THE CROWN POSITION

[39] Waitangi Tribunal, (1988), Muriwhenua Fishing Claim, p 189.
[40] Waitangi Tribunal, *He Maunga Rongo, Report on Central North Island Claims* (2008) p 914.
[41] Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212,1998) p 120 at 10.2.4
[42] Edward Greig, *The Māori Right to Development and New Forms of Property,* dated 2010 at 29
[43] Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212,1998) p 120 at 10.2.4
[44] Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212,1998) p 120 at 10.2.4
Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui-Waitara Claim*, 2nd ed, Wellington, Government Printing Office, 1989, sec 10.3
[45] Edward Greig, *The Māori Right to Development and New Forms of Property,* dated 2010 at 29
Wai 2180 #H7, *Brief of Evidence of Moana Jackson*, dated 21 March 2018 (revised 5 June 2018) at 121

20. The Crown's position on cultural taonga: [46]

> Taihape claims include that the Crown has failed in its duty to actively protect te reo and other taonga, failed to recognise and protect customs, cultural and spiritual heritage; and failed to adequately protect customary rights and interests leading to loss of knowledge and tikanga.

21. The Crown confirm that they have sought to establish a range of institutions in the Taihape inquiry district, as it did in other areas of New Zealand. These include but are not limited to, the Native Land Court, various Crown departments and agencies, Māori Land Boards, Māori Land Councils, and local government structures. The proposed purpose was to assist both Māori and non-Māori with the settlement and development of New Zealand.[47]

22. The Crown also confirm that there was a range of views among Taihape Māori as to the introduction of these institutions and governance entities, and that the Crown acknowledges that it did not always consult specifically with Māori. The Crown goes further to state that Māori attitudes and ideas did influence the Crown's decision-making to some extent through a number of Commissions and the input of Māori politicians and rangatira.[48]

23. The Crown concedes that it did not always consult with Taihape Māori, and we will traverse those topics below. We submit that no consultation took place with Taihape Māori. Therefore the Crown relied solely on input from Commissions and the input of Māori politicians and rangatira to influence its decision-making regarding the introduction of the Native Land Court, various Crown departments and agencies, Māori Land Boards, Māori Land Councils, and local government structures..

LEVEL ONE: RESPONSE TO TRIBUNAL STATEMENT OF ISSUES

[46] Crown Memorandum contributing to the preparation of a draft statement of issues, Wai 2180, #1.3.2 at para 92.
[47] Crown Law, Opening comments and submissions of the Crown dated 2 March 2017, Wai 2180, #3.3.1 at para 387.
[48] Crown Law, Opening comments and submissions of the Crown dated 2 March 2017, Wai 2180, #3.3.1 at para 388.

TAONGA

Issue 19.1: In general, has the Crown introduced its own institutions into the inquiry district contrary to the wishes of Taihape Māori? If Taihape Māori expressed their opposition, how did the Crown respond? Did the Crown breach any Treaty duties by introducing such institutions?

Introduction

24. For at least the two decades after the signing of te Tiriti ō Waitangi, the inquiry district remained predominantly a Māori world operating under tikanga.[49] Though there were occasional Pākehā visitors, until 1865 there were no resident Pākehā within the Mōkai Pātea rohe.[50] During this period, conflicts between the Crown and Māori as well as substantial Crown land purchasing in neighbouring rohe placed increasing pressure upon the land interests of Taihape Māori.[51] Over time, this led to the Crown introducing its own institutions into the inquiry district. The following submissions will focus on the institutions which impacted land ownership and usage in the inquiry district, given these were some of the earliest institutions introduced to the area, yet have had lasting impacts to this day, including on taonga, tikanga and tribal identity.[52] The introduction of such institutions was contrary to the wishes of Taihape Māori, who expressed their opposition, yet received little response from the Crown. By introducing such institutions, the Crown breached its duties under the Treaty, including the duties of partnership, consultation, and active protection.

25. Taihape Māori were eager to access the burgeoning colonial economy but within the broad context of their existing iwi and hapū tribal structures. [53] In the north of the inquiry district they sought to become involved in pastoral farming through the leasing of land to runholders and through the undertaking of their own farming operations. In the south of the inquiry

[49] Tony Walzl, *Tribal Landscape Overview*, dated 5 April 2013 Wai 2180 #A12, at 271
[50] Phillip Cleaver*, Māori and Economic Development in the Taihape Inquiry District, 1860-2013* dated August 2016, Wai 2180 #A48 at 23
[51] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 16
Tony Walzl, *Tribal Landscape Overview*, dated 5 April 2013, Wai 2180 #A12 at page 271
Phillip Cleaver*, Māori and Economic Development in the Taihape Inquiry District, 1860-2013,* Wai 2180 #A48, dated August 2016 at 23
[52] Taonga, tikanga, and tribal identity are discussed at 19.2 – 19.12 of these submissions.
[53] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016, Wai 2180 #A49 at 3

district the first Native Land Court sittings were held. Subsequently the southern blocks became the focus of substantial land alienation.[54] The implementation of the Torrens system of land ownership, Native Land Laws and the associated Native Land Court, and the Crown's consequent land purchasing were largely opposed by Taihape Māori, who sought to maintain their rangatiratanga.

Crown land purchasing scheme

26. The Crown's aggressive land purchase scheme employed two especially egregious methods which further undermined the rangatiratanga of Taihape Māori. The first was its practice of dealing with a primary vendor group without addressing the interests of the various hapū and iwi groups who may share the same land interests within a purchase block. This was further exacerbated when we consider that many Taihape Māori with genuine interests in certain land blocks were excluded from the title provided by the Native Land Courts. Those fortunate enough to receive title interests but were opposed to the purchase were left with little option but to pursue a share of the payment. The second is defining only the exterior boundaries of a purchase block. Internal boundaries between hapū and iwi groups were indefinite.

27. Faced with the threat of land acquisition, Taihape Māori sought to assert their interests and protect their lands. As old methods of dispute resolution involving warfare were on the decline, new forums for addressing issues such as tribal komiti and runanga, began to emerge.[55] Inter-tribal hui were held to discuss and resolve this issue.[56] The following section of these submissions discusses a number of hui that were held where opposition to the Crown's actions in respect of Māori land were expressed.

Opposition expressed by Taihape Māori

28. Inter-tribal hui became increasingly important throughout this period to discuss the protection of the whenua. A number of methods were discussed

[54] Phillip Cleaver, *Māori and Economic Development in the Taihape Inquiry District 1860-2013*, Wai 2180, #A48 at 25.
[55] Tony Walzl, *Tribal Landscape Overview*, dated 5 April 2013, Wai 2180 #A12 at page 378
[56] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43, at 16

during this period to affirm tino rangatiratanga and mana whenua, including setting boundaries within which no further land sales would be tolerated, establishing or extending the Aukati, and the possibility of engaging with the Kingitanga movement. The setting of boundaries would prove to be particularly difficult as traditionally "boundaries were indefinite, overlapping, and shifting," and able to reflect changing hapū and iwi alliances and seasonal or other use rights.[57]

29. The following section outlines a number of significant hui held during this period to address these issues. It is not intended to provide an exhaustive list of each hui which took place, or a comprehensive account of their proceedings, but instead it is intended to illustrate the manner and motives of the discussions, and how Māori responded to the introduction of Crown-driven institutions in the Taihape area.

Pukawa and Kingitanga

30. On 7 May 1854, a hui was hosted by Ngati Ruanui at Manawapou in southern Taranaki. The hui was held in the building ambitiously named Taiporohēnui (the coast where the great wrong will end).[58] The hui involved rangatira and members from Ngāti Ruanui, Taranaki, Ngā Rauru, Whanganui, Ngāti Raukawa and possibly Te Āti Awa tribes.[59] CMS missionary Reverend Richard Taylor, who was also present, recorded that the hui established a boundary within which no further land sales would be tolerated, which extended from New Plymouth via Kai Iwi to the Whanganui River.[60] The meeting also established a Māori committee or 'land league' which expressed tribal unity in resistance to further land sales to Pākehā.[61] A letter was sent to Major Durie, the Resident Magistrate of Whanganui, outlining the decided boundaries and their resolution to protect their lands from further sales. From the hui arose the exclamation:[62]

"Te tangata tō mua, te whenua tō muri."

[57] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 16
[58] Tony Walzl, Tribal Landscape Overview Wai 2180 #A12 at 379
[59] Tony Sole, *Ngāti Ruanui: A History,* at 218
[60] Tony Walzl, *Tribal Landscape Overview*, Wai 2180 #A12 at 379
Richard Taylor,
[61] Tony Sole, *Ngāti Ruanui: A History,* at pages 219-221
[62] Tony Sole, *Ngāti Ruanui: A History,* at page 219

"The man first, the land after."

31. The hui signalled a tribal determination to retain mana whenua and tino rangatiratanga.[63] The resolutions of the hui and the establishment of the land league or committee were observed and widely spoken about.[64] Similar movements would arise in the Waikato and Otaki-Manawatu districts during this period.[65] Also around this time rangatira, such as Tamihana Te Rauparaha and Matene Te Whiwhi, who were present at the Manawapou hui, were canvassing support for a Māori King who would facilitate and consolidate Māori efforts for controlling and holding their lands in the face of colonial land purchasing.[66]

32. In the 1850s Ngāti Tuwharetoa and Ngāti Raukawa to the north of the inquiry district became mainstays of the Kingitanga movement.[67] In 1856 the great Pukawa hui was called by the Ngati Tuwharetoa rangatira Iwikau Te Heuheu, who summoned tribes from throughout the North Island. The object of this hui was to consult and agree on the establishment of: "a King, the holding of the land, and the mana and the symbolic binding of all the tribal mountains to the land, sky, and one another in kotahitanga ".[68] The tribes who were involved with the Kingitanga acted collectively to protect their lands, but also maintained their mana and autonomy over their personal land.[69] This hui established a boundary within which no chiefs could infringe by selling further land.[70] Iwikau Te Heuheu remained an ardent proponent of the movement to establish a Māori king, and supported the installation of Pōtatau Te Wherowhero, the first Māori king. By the late 1850's Kingitanga-based runanga emerged in the Central North Island district, holding formal meetings, enacting laws and administering justice.

[63] Tony Sole, *Ngāti Ruanui: A History,* at page 219
[64] Tony Walzl, *Tribal Landscape Overview*, Wai 2180 #A12 at 378
[65] Tony Walzl, *Tribal Landscape Overview*, Wai 2180 #A12 at 378
[66] Tony Walzl, *Tribal Landscape Overview*, Wai 2180 #A12 at 379
[67] Tony Walzl, *Tribal Landscape Overview*, Wai 2180 #A12 at 379
[68] Tony Walzl, *Tribal Landscape Overview*, Wai 2180 #A12 at 379
Paranapa Rewi Otimi, brief of evidence, 27 April 2005 (doc E16)/12; cited in Waitangi Tribunal, *He Maunga Rongo: Report on the Central North Island Claims,* Wai 1200, Stage 1, Vol.1, Legislation Direct, Wgtn. 2008/224.
[69] Wai 2180 #A12 Tony Walzl, Tribal Landscape Overview, at page 379
Paranapa Rewi Otimi, brief of evidence, 27 April 2005 (doc E16)/12; cited in Waitangi Tribunal, *He Maunga Rongo: Report on the Central North Island Claims,* Wai 1200, Stage 1, Vol.1, Legislation Direct, Wgtn. 2008 p.224.
[70] Tony Walzl, Tribal Landscape Overview, Wai 2180 #A12 at page 379

Hawkes Bay Hui

33. On 13 April 1859, a large hui was held at Pā Whakaairo, a village of the rangatira Te Moananui on the south bank of the Tutaekuri River. The hui was held following a number of significant Crown purchases in the early 1850's in the Hawkes Bay region, and conflict that had been simmering between different groups in relation to land sales. The hui involved people from Poverty Bay to Porangahau as well as a deputation from the Kingitanga movement to discuss whether Ngati Kahungunu would give allegiance to Kingitanga. Certain rangatira accepted the position of the King's Vice-Regent or Kawana in giving allegiance to the King. The remaining group agreed to establish a runanga to provide a collective safeguard to Pākehā incursions.[71] The two groups became known by the Europeans as the monarchists and republicans.[72] Despite being divided in regard to their allegiance to the King, both groups generally agreed that there should be no more land sales to the government.[73] Over the late 1850s and into the 1860s the runanga took an increasingly active role in Hawkes Bay land affairs.[74] The success of the runanga is demonstrated through the fact that very few deeds were signed in the Hawkes Bay between 1859 and 1862.[75] In 1860, a movement also arose desiring to repudiate previous land sales. This repudiation movement is discussed in more detail at 19.7 of these submissions.

Kōkako Hui

34. Perhaps the most significant hui held during this period was convened at Kokako in the Murimotu district in 1860. More than 500 Māori of various tribes attended the hui including hapū and rangatira associated with Ngati Tuwharetoa, Ngati Whitikaupeka, Ngati Tamakopiri, Ngati Kahungunu, Ngai Te Upokoiri, Ngati Apa and Whanganui as well as CMS missionary Reverend Richard Taylor.[76] Attendees therefore came from the wider Mōkai

[71] Tony Walzl, Tribal Landscape Overview, Wai 2180 #A12 at page 380
[72] Tony Walzl, Tribal Landscape Overview, Wai 2180 #A12 at page 380
[73] Tony Walzl, Tribal Landscape Overview, Wai 2180 #A12 at page 380
Renata's Speech and Letter..., Pawhakairo, 7 November 1860.
[74] Tony Walzl, Tribal Landscape Overview, Wai 2180 #A12 at 381.
[75] Tony Walzl, Tribal Landscape Overview, Wai 2180 #A12 at 381
Turton, *Māori Deeds;* cited in Ballara & Scott, 1994/123;
[76] Tony Walzl, Tribal Landscape Overview, Wai 2180 #A12 at 383

Pātea region and from as far as Rangitikei, Manawatu, Ahuriri, Heretaunga, Taupo and Whanganui.[77] Te Oti Pohe informed those gathered that the focus of the meeting was to prevent the further sale of their lands. The prospect of bringing land under the protection of the Kingitanga was also discussed.[78] The Kokako hui was of particular importance to Taihape Māori, given it halted further land purchasing by the Crown from neighbouring tribes.[79] The Crown's early attempts at purchasing in the northern part of Mōkai Pātea had met considerable opposition and, if anything, galvanised the tribes there into co-operating together to prevent further land transactions. This resolve lasted until well into the 1880s, with some continuing to advocate for the retention of their lands for even longer.[80]

Native Land Laws

35. The Crown's aggressive schemes used to purchase Māori land, were further bolstered by the enactment of the Native Land Acts of 1862 and 1865, which included introducing the Native Land Court. The Acts were concerned with facilitating Pākehā purchase of land. By individualising Māori land titles, and replacing customary communal ownership of land, European settlement was encouraged, but gave rise to problems concerning the retention of Māori land.[81] This was to the detriment of Māori, including Māori in the Mōkai Pātea rohe, as it "made sales of Māori land easier and saw the beginning of fragmented ownership interests in Māori land".[82] The following submissions will focus on the Native Land Act 1865, given there was a lack of Pākehā interaction with Taihape Māori until 1865, and the Native Land Court.

Native Land Act 1865

36. The Native Land Acts of 1862 and 1865 abolished the doctrine of Crown pre-emption, which had previously governed the system of Māori land

1 April 1860, Taylor to ? [Gore Browne?], 1 April 1860. GL: NZ, T5A(11). Auckland Public Library; cited in Stirling, 2004/716.Note that the original copy of the manuscript has the pages numbered 5564 and 5565 out of order; cited in Stirling, 2004/716

[77] Tony Walzl, Tribal Landscape Overview, Wai 2180 #A12 at 383
Ballara, Angela, 'Tribal Landscape Overview, c.1800-c.1900 in the Taupo, Rotorua, Kaingaroa and National Park Inquiry Districts', An overview report commissioned by the CFRT, 2004/443.

[78] Philip Cleaver, *Māori and Economic Development in the Taihape Inquiry District 1860-2013*, Wai 2180, #A48 at 24

[79] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 25

[80] Martin Fisher & Bruce Stirling, *Sub-district block study – Northern aspect*, Wai 2180, #A6 at 14

[81] https://oag.parliament.nz/2011/housing-on-maori-land/appendix.htm. Accessed 7 September 2020.

[82] https://oag.parliament.nz/2011/housing-on-maori-land/appendix.htm. Accessed 7 September 2020.

alienation.[83] Therefore, this allowed Māori to sell land to private buyers on the open market, provided the Native Land Court had first investigated the land.[84] The Native Land Act 1865 then replaced the 1862 Act. It "reflected a stronger push toward individualising Māori land title and fragmented ownership", for example, limiting the number of certificates of title that could be issued to no more than 10 owners.[85] The Act also extended to all Māori-owned land the ability to take five percent of Crown-granted Māori land for public works without compensation.[86]

37. In respect of the Native Land Act 1865, Joseph and Meredith stated:[87]

> The real purpose [of the Native Land Act 1865] was to facilitate the purchase of land to settlers which was so successful within 30 years, 4 million hectares had been acquired which increased the pace of displacement of Māori culture and their way of life through the power of the state. By the turn of the century, all of the best land had been alienated and only 2 million hectares remained in Māori ownership. Pākehā had by this time acquired 24.4 million hectares of the total land mass of New Zealand. By 2015, 1.4 million hectares or 5% of the total land mass of New Zealand was still in Māori ownership which loss of mana whenua, we believe, was not contemplated in the minds and hearts of the rangatira when they signed the Treaty of Waitangi in 1840. Such a loss had a devastating impact on the health and wellbeing of Māori throughout the country but including in the Rangitīkei River regions, and it continues to do so.

Native Land Court

[83] Richard Boast, 'Te tango whenua – Māori land alienation - Establishing the Native Land Court', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/te-tango-whenua-maori-land-alienation/page-5 (accessed 7 September 2020). Story by Richard Boast, published 24 Nov 2008, updated 1 Jul 2015.
[84] Richard Boast, 'Te tango whenua – Māori land alienation - Establishing the Native Land Court', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/te-tango-whenua-maori-land-alienation/page-5 (accessed 7 September 2020). Story by Richard Boast, published 24 Nov 2008, updated 1 Jul 2015
[85] https://oag.parliament.nz/2011/housing-on-maori-land/appendix.htm. Accessed 7 September 2020.
[86] https://oag.parliament.nz/2011/housing-on-maori-land/appendix.htm. Accessed 7 September 2020.
[87] Meredith, Joseph, Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspectives Report,* Wai 2180, #A44, pages 214-215.

38. The Native Land Court was established in 1862 to determine disputes over Māori land ownership.[88] Justice Minister Henry Sewell described the aims of the Court as being "…to bring the great bulk of the lands in the Northern Island … within the reach of colonisation" and:[89]

> the detribalisation of the Māori – to destroy, if it were possible, the principle of communism upon which their social system is based and which stands as a barrier in the way of all attempts to amalgamate the Māori race into our social and political system.

39. The Native Land Acts also established a process by which Māori could convert their land from customary or native title to Crown-granted or freehold title, making Māori land legally analogous to private land owned by Europeans.[90] The process involved the following three steps:[91]

a. The Native Land Court would conduct an 'investigation of title' to a block of land and determine its owners.

b. The Court would issue a certificate of title to the owners.

c. The owners would then produce their certificate of title to the governor, who would issue a Crown grant on the land. Freehold title allowed the owners to sell the block, lease it, raise money on it, or farm it and live there themselves.

Though it was not compulsory for Māori to bring their land before the Native Land Court, as they could theoretically leave their lands in customary title if

[88] Paul Meredith, 'Take whenua – Māori land tenure', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/take-whenua-maori-land-tenure (accessed 2 September 2020). Story by Paul Meredith, published 24 Nov 2008.
[89] New Zealand Parliamentary Debates, 1870, vol. 9, p. 361, as cited in Rāwiri Taonui, 'Te ture – Māori and legislation - The Native Land Court', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/te-ture-maori-and-legislation/page-3 (accessed 7 September 2020). Story by Rāwiri Taonui, published 20 Jun 2012.
[90] Richard Boast, 'Te tango whenua – Māori land alienation - Establishing the Native Land Court', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/te-tango-whenua-maori-land-alienation/page-5 (accessed 7 September 2020). Story by Richard Boast, published 24 Nov 2008, updated 1 Jul 2015.
[91] Richard Boast, 'Te tango whenua – Māori land alienation - Establishing the Native Land Court', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/te-tango-whenua-maori-land-alienation/page-5 (accessed 7 September 2020). Story by Richard Boast, published 24 Nov 2008, updated 1 Jul 2015

they chose to do so, in practice virtually all land still in Māori ownership in 1865 was brought before the Court and converted to freehold title.[92]

40. Therefore, in practice, the Native Land Laws forced Māori to argue their cases in court, before Pākehā judges who often simplified and misunderstood Māori customs.[93] Whilst any 'interested Māori person' could apply for a Native Land Court hearing, speculators often convinced individuals to sell land before other tribal owners knew of the sale.[94] Hearings were often held some distance from tribal homelands, and Māori had to pay for court costs, survey costs and legal fees.[95] The Māori custom that a group who occupied a block of land held decision-making rights over it was not upheld by the Native Land Court.[96] As explained by Meredith and Joseph:[97]

> Māori lost much of their land and access to waterways through a number of legal machinations but perhaps none was more destructive of Māori worldviews and tikanga, and the rangatiratanga relationship and kaitiaki responsibilities of Māori with the natural resources then the Native (later Māori) Land Court system.

Poutu Hui

41. Another hui was held at Poutu in June 1867, with Mōkai Pātea tribes and Ngati Tuwharetoa attending. The kaupapa of the hui appeared to be focused on the discussion of boundary issues and land dealings by other

[92] Richard Boast, 'Te tango whenua – Māori land alienation - Establishing the Native Land Court', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/te-tango-whenua-maori-land-alienation/page-5 (accessed 7 September 2020). Story by Richard Boast, published 24 Nov 2008, updated 1 Jul 2015.
[93] Paul Meredith, 'Take whenua – Māori land tenure', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/take-whenua-maori-land-tenure (accessed 2 September 2020). Story by Paul Meredith, published 24 Nov 2008.
[94] Rāwiri Taonui, 'Te ture – Māori and legislation - The Native Land Court', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/te-ture-maori-and-legislation/page-3 (accessed 7 September 2020). Story by Rāwiri Taonui, published 20 Jun 2012.
[95] Rāwiri Taonui, 'Te ture – Māori and legislation - The Native Land Court', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/te-ture-maori-and-legislation/page-3 (accessed 7 September 2020). Story by Rāwiri Taonui, published 20 Jun 2012.
[96] Rāwiri Taonui, 'Te ture – Māori and legislation - The Native Land Court', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/te-ture-maori-and-legislation/page-3 (accessed 7 September 2020). Story by Rāwiri Taonui, published 20 Jun 2012.
[97] Meredith, Joseph, Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspectives Report,* Wai 2180, #A44, pages 214.

tribes. A committee, representing the 70 attendees at the hui, issued a letter to McLean (the government's senior adviser on Māori matters as Native Secretary and Native Land Purchase Commissioner) setting out boundaries and stating that if anyone not named in the letter came to him to speak about their lands, "he is a fraud" and should not be paid for their lands, "because your money is only for us", and if he paid others for their land, "you won't be given the land," although he might say "we must take it to court". [98]

Torrens System

42. In 1870 New Zealand adopted the Torrens system of land titles.[99] At the outset it was described as conveyancing by means of a register and a map.[100] This made the state responsible for guaranteeing freehold land titles.[101] The Land Transfer Act 1870 provided that the following land should be subject to the Act:

a. All land which has already in any manner become subject to the provisions of any former Land Transfer Act;

b. All land alienated or contracted to be alienated from the Crown in fee;

c. All land in respect of which an order is made under any Māori Land Act vesting land in any person in freehold tenure;

d. All land vested in any person for an estate in fee simple in possession by virtue of any Act of the General Assembly; and

[98] Bruce Stirling, *Taihape District Nineteenth Century Overview,* Wai 2180 #A43 at 26
[99] Melanie Lovell-Smith, 'Modern mapping and surveying - Government surveying and mapping, 1870–1900', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/modern-mapping-and-surveying/page-1 (accessed 2 September 2020). Story by Melanie Lovell-Smith, published 24 Nov 2008, updated 17 Aug 2018.
[100] 'The Torrens System', from An Encyclopaedia of New Zealand, edited by A. H. McLintock, originally published in 1966. Te Ara - the Encyclopaedia of New Zealand URL: http://www.TeAra.govt.nz/en/1966/property-law-of-real/page-2 (accessed 02 Sep 2020)
[101] Melanie Lovell-Smith, 'Modern mapping and surveying - Government surveying and mapping, 1870–1900', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/modern-mapping-and-surveying/page-1 (accessed 2 September 2020). Story by Melanie Lovell-Smith, published 24 Nov 2008, updated 17 Aug 2018.

e. Land over which the Māori title has been extinguished before 31 August 1874, as soon as a Crown grant or certificate of title in lieu thereof is issued.

43. Such a system was in complete contradiction to the Māori practice of land usage and ownership. Traditionally, land was held by tribal groups, and individuals or their whānau could claim the right to use an area.[102] To prove rights to an area, Māori needed to show continuous occupation – ahi kā.[103] Whilst directly translated it means lit fire, this was in reference to people keeping fires burning for cooking, and if they left the land, the fire was seen as dying out, and therefore those who left could lose their rights to that land.[104] Therefore, Māori concepts of land ownership may be described as akin to guardianship with usage and boundaries having some flexibility, as opposed to the traditional British feudal system of land ownership, which was concerned with exclusive occupation and usage by the individual. The lack of recognition of the Māori conception of land usage and ownership was further exacerbated by the land purchase scheme used by the Crown to ascertain land for its own use in the Taihape district.

Turangarere and Parikino Hui

44. A hui was convened at Turangarere in 1871. Due to the similarity of the issues to those discussed in 1860 at the Kokako hui, the Turangarere hui is often seen as subsequent to the earlier hui.[105] Cleaver observed that the two meetings represent the ongoing efforts of Mōkai Pātea Māori to retain control over their land, in particular by trying to work collectively and establish understandings with neighbouring iwi.[106] Though there are few references to this hui, its legacy resides in its resolution which finally fixed a

[102] Paul Meredith, 'Take whenua – Māori land tenure', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/take-whenua-maori-land-tenure (accessed 2 September 2020). Story by Paul Meredith, published 24 Nov 2008.
[103] Paul Meredith, 'Take whenua – Māori land tenure', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/take-whenua-maori-land-tenure (accessed 2 September 2020). Story by Paul Meredith, published 24 Nov 2008.
[104] Paul Meredith, 'Take whenua – Māori land tenure', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/take-whenua-maori-land-tenure (accessed 2 September 2020). Story by Paul Meredith, published 24 Nov 2008
[105] Bruce Stirling, Nineteenth Century Overview, Wai 2180 #A43 at 32
[106] Phillip Cleaver, *Maori and Economic Development in the Taihape Inquiry District 1860-2013*, Wai 2180 #A48, at 25

boundary between Mōkai Pātea and Whanganui/Ngati Rangi. A similar hui was convened at Parikino (on the Whanganui river) between the Whanganui tribes, Ngati Apa, Ngati Raukawa, and Ngati Whiti in 1871. The hui sought to determine their respective boundaries within a vast territory, from the Whanganui river to the Rangitikei river and extending up to the base of Tongariro.[107]

45. Having observed the impact of the Native Land Court in neighbouring regions, Taihape Māori sought to prevent its introduction into the district. Numerous petitions were sent seeking to exclude the Court from their district, or at the very least see the native land laws amended, the court significantly reformed, and the Crown's land purchasing methods altered. [108] Even when it was apparent land titles would be determined by the Native Land Court, it was anticipated that this process would be overseen by Rangatira and the Court would act as a mere 'rubber stamp' for Taihape Māori determinations of land interests.[109]

Other Hui

46. Though numerous other hui were held during this period, and tribal and pan-tribal forums were established, their kaupapa usually involved the maintenance of rangatiratanga and protection of lands. Such hui represents the collaborative use of tikanga to evolve Māori forums to discuss and resolve land issues in the face of the encroaching colonial system. The Crown's attempts to impose its authority and introduce its institutions into the Inquiry district were met with considerable opposition, and galvanised co-operative efforts to prevent further land transactions. This resolve lasted well into the 1880s, and beyond.[110]

Ngati Hokohē

47. Taihape Māori endorsed the Repudiation Movement, or Ngāti Hokohē, its calls to halt or fundamentally reform the Native Land Court and to repudiate

[107] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 32
[108] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 3, 236
[109] David A Armstrong, Mōkai Pātea Land, People Politics, 2016, Wai 2180 #A49 at 4
[110] Martin Fisher & Bruce Stirling, *Sub-district block study – Northern aspect*, Wai 2180, #A6 at 14.

the dubious transactions associated with it. Ngāti Hokohē sought a greater role for Māori in governance. Resident Magistrate Locke reported in 1872:[111]

> There is a desire springing up among the natives to have local government, or District Runanga, composed of their leading chiefs, elected by themselves, with an officer of the government as their chairman, to discuss their requirements and represent them to the government. This would tend much to encourage the Māori to depend on his own energies, in place of always looking to the government for assistance, and too often receiving it with suspicion.

The aspirations of Ngāti Hokohē accorded well with the proactive pan-tribal hui that were held to address these issues, as well as the considerations that led to the establishment of komiti and rūnanga.

48. One group within Ngāti Hokohē sought a government inquiry into dubious land dealings. When the government failed to fully inquire into the grievances, several petitions were signed. In the end however, their plans to work together with the Crown to develop their lands for the benefit of Māori and the Pākehā alike were utterly ignored by the government.[112]

Kotahitanga

49. Kotahitanga emerged in the 1890s. In 1892, Te Paremata Māori began to meet annually at different Māori centres. Many iwi, including Mōkai-Pātea Māori, sent representatives to Te Paremata to debate and endorse its resolutions. [113] Kotahitanga received enormous support from Māori throughout the country, with 37,000 Māori signing the Kotahitanga petition of the late 1890s calling for greater Māori authority over their lands.[114] The following was sought:

a. the abolition of the Native Land Court;

[111] Locke to Native Minister, 4 July 1872. AJHR, 1872, F-3A, pp.31-33.
[112] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 594.
[113] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 595.
[114] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 595.

b. its replacement by komiti Māori;

c. self-management of Māori lands by block and district committees;

d. local self-government through komiti Māori; and

e. central self-government through a Māori Parliament.

50. Although Kotahitanga compelled concessions from the Liberal Government, and there were promising opportunities for treaty-compliant policies",[115] Stirling considered that the new century brought nothing more than a false dawn.[116] Armstrong states that there is very little evidence that the Crown gave any serious thought to the question of how much land ought to be retained by Taihape Māori to protect and maintain their estates and their way of life.[117] The Crown failed to consider the desire of Taihape Māori to participate in the developing economy of the region and that they required sufficient lands for that purpose.[118] In an attempt to slow or halt the Crown's injurious land acquisition scheme Taihape Māori rangatira sent a number of petitions to Parliament. Little change came from the following Commissions, despite their condemnation of the Native Land Court process.

Rees-Carroll Commission

51. In 1891, William Lee Rees, an Auckland lawyer, together with Member of Parliament for Eastern Māori, James Carroll, and Thomas McKay, a former Land Purchase Officer, were appointed to a government commission of inquiry into Māori land law.[119] Sittings were held in Gisborne, Auckland, Cambridge, Kawakawa, Waimate North, Te Ahuahu, Whangarei, Otorohanga, New Plymouth, Parihaka, Hawera, Wanganui, Palmerston North, Dannevirke, Waipawa , Napier, Greytown, Otaki and Wellington.[120]

[115] Waitangi Tribunal, *He Maunga Rongo*: *Report on Central North Island Claims* at 366 and 374.
[116] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 595.
[117] David A Armstrong, Mōkai Pātea Land, People Politics, 2016, Wai 2180 #A49 at 7.
[118] David A Armstrong, Mōkai Pātea Land, People Politics, 2016, Wai 2180 #A49 at 7.
[119] Mere Whaanga, 'Te Kōti Whenua – Māori Land Court - Surveying and other costs, 1880–1900', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/zoomify/36140/rees-carroll-commission-1891 (accessed 14 September 2020). Story by Mere Whaanga, published 20 Jun 2012.
[120] W L Rees, J Carroll and T Mackay, Report of the Commission appointed to inquire into the subject of the Native Land Laws (1891, Wellington, George Didsbury, Government Printer) at v.

The Commission heavily criticised the Native Land Court for granting Māori land title to individuals rather than to iwi or hapū.[121]

52. The Rees-Carroll report was vitriolic in its condemnation of the Native Land Court system, describing its effects as 'evil'.[122]

> For a quarter of a century, the Native land law and the Native Land Court have drifted from bad to worse. The old public and tribal method of purchase was finally discarded for private and individual dealings. Secrecy, which is ever a badge of fraud, was observed. All the power of natural leaders and the Māori people was undermined.

53. The report goes further citing the '10-owner rule' as being used by the Court to grant titles to small groups of individuals rather than to vest land in hapū or whānau, 'the property of the people other than the grantees was, in all such cases, taken from them under the misinterpretation of the statute, in direct violation of the Treaty of Waitangi' and that:[123]

> ...so soon as title became vested in these individuals, Europeans converged to deal with them by purchases, leases and mortgages. Vast areas of land were thus acquired in many districts and thousands of Native people saw the lands, which in reality belonged to them, passing.... into the hands of complete strangers.

54. We submit that under such circumstances the ability for Taihape Māori to retain any sense of identity with such ruthless actions being undertaken by the Crown's legislative regime would have almost been impossible.

Stout-Ngata Commission

55. In 1907, the Commission on Native Land and Native Land Tenure was created to assess the state of Māori owned lands throughout the North Island. The Commission was headed by the Chief Justice, Sir Robert Stout,

[121] Mere Whaanga, 'Te Kōti Whenua – Māori Land Court - Surveying and other costs, 1880–1900', Te Ara - the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/zoomify/36140/rees-carroll-commission-1891 (accessed 14 September 2020). Story by Mere Whaanga, published 20 Jun 2012.
[122] Dr James S Mitchell, *The Native Land Court and Māori Land Alienation Patterns in the Whanganui District 1865-1900*, Wai 903, #A58 at 20.
[123] Dr James S Mitchell, *The Native Land Court and Māori Land Alienation Patterns in the Whanganui District 1865-1900*, Wai 903, #A58 at 20.

and Apirana Ngata. The Stout-Ngata Commission of 1907-1909 ascertained how much 'surplus' Māori land existed, and the best ways to utilise and settle the land in the interests of both Māori owners and the public good.[124] It did this by interviewing hundreds of Māori land owners, relaying their wishes to the government across 42 reports, and offering the government advice on matters impacting Māori land legislation.[125] Tuuta states: "Māori may have viewed the Commission as a vehicle for their improvement, while Pākehā viewed the Commission as an instrument for opening up Māori land for alienation".[126]

56. The first Stout-Ngata report dealt with Mōkai Pātea lands produced on 12 March 1908. It dealt with Wanganui, Waimarino, Rangitikei and Waitotara counties. The interim report was focussed on identifying land that were already under occupation either by Europeans (through leasing) or by Māori. In a subsequent report dated 19 December 1908, the Commissioners dealt with the remaining lands of Rangitikei County, but this time they were presented alongside information on blocks from Hawkes Bay, Patangata and Waipawa Counties.[127] Walzl states that the Commission's findings in the case of Mōkai Pātea lands was inaccurate. Further, after examination of the minutes, that the Commission did not visit Taihape and that hearings in neighbouring towns such as Wanganui, Napier, Taupo, or Wellington also did not contain reference to blocks within the Inquiry District.[128]

Crown considerations

57. The Crown confirmed that there were a range of views among Taihape Māori regarding the introduction of institutions and governance entities in the district. The Crown note further that it did not always consult specifically with Māori. Further the Crown states that Māori attitudes and ideas did influence its decision-making to some extent through a number of Commissions and the input of Māori politicians and rangatira.

[124] D Tuuta, *Diverging Paths: An Examination of the Stout-Ngata Recommendations and Subsequent Legislation* (1996, Massey University, a thesis completed in fulfilment of the requirements of Master of Arts) at ii.
[125] D Tuuta, *Diverging Paths: An Examination of the Stout-Ngata Recommendations and Subsequent Legislation* (1996, Massey University, a thesis completed in fulfilment of the requirements of Master of Arts) at ii.
[126] D Tuuta, *Diverging Paths: An Examination of the Stout-Ngata Recommendations and Subsequent Legislation* (1996, Massey University, a thesis completed in fulfilment of the requirements of Master of Arts) at 15.
[127] T Walzl, *Twentieth Century Overview*, Wai 2180, #A46, at 60.
[128] T Walzl, *Twentieth Century Report*, Wai 2180 #A46 at 61.

Consultation

58. The Crown did not implement any process to consult with Taihape Māori during the introduction of the Native Lands regime. Rather the Crown ignored any attempts by Taihape Māori to engage in discussion about the protection of their whenua. We submit that the Crown failed to consult with Taihape Māori regarding the protection of their cultural taonga which includes the lands, and the wāhi tapu located on those lands.

Commissions

59. The Rees-Carroll Commission sat in districts surrounding Taihape, but not in Taihape itself. The outcome of the commission was a vitriolic critique of the Crown's Native Land Courts process. The Crown's 10-owner rule was used by the Court to grant titles to small groups as opposed to hapū or whānau. Such small groups were then converged on by Europeans who then purchased said blocks. Vast areas of land were alienated in many districts this way. As the basis for informing the Crown of Taihape Māori cultural taonga, we submit that the Crown could not have obtained input regarding Taihape Māori cultural taonga from this commission.

60. The Stout-Ngata Commission was focused on opening-up Māori land for productive use. As the focus was more about whether the land was being used productively, identification of wāhi tapu sites or investigations into whether specific lands were significant to Taihape Māori was not the focus of the commission. We therefore submit that the Crown could not have received any input regarding the protection of cultural taonga during this commission.

Māori politicians

61. There is no evidence to indicate that the politicians that the Crown sought input from in relation to the protection of cultural taonga in Taihape, were familiar with or understood the tikanga of Taihape Māori.

Rangatira

62. The Crown ignored all attempts by Taihape Māori to engage in dialogue regarding its aspirations with respect to the land in their rohe. In fact, the Crown chose to ignore those attempts at dialogue and implemented its own legislative regime to open-up land for settlers. It is difficult to surmise, that under such circumstances, that the Crown would have received any inputs from the rangatira of Taihape Māori regarding the protection of cultural taonga.

Crown breaches of Treaty duties

63. By introducing institutions into the inquiry district such as the Torrens land system and the Native land laws, the Crown breached its duties to Taihape Māori as encapsulated in the principles of te Tiriti ō Waitangi, including tino rangatiratanga, active protection, partnership, consultation, and development. These principles are discussed in further detail at the beginning of these submissions.

Conclusion

64. Contrary to the wishes of Taihape Māori, the Crown introduced several institutions into the Mōkai-Pātea rohe and failed to consult with or extract Taihape Māori ideas or attitudes with respect to cultural taonga. The above submissions have focused on those institutions that affected land rights and usage, including the Torrens land system, Crown purchasing, and the associated Native land laws and Native Land Court. Despite overt opposition to the introduction of such institutions by Taihape Māori, including numerous hui, involvement in the Kīngitanga movement, and the signing of petitions, the Crown generally failed to consider or properly consider such opposition. This resulted in the Crown breaching many of its duties owed to Taihape Māori, including the duties of tino rangatiratanga, active protection, partnership, consultation, and development.

Issues 19.2: Are the following taonga of Taihape Māori, in terms of the Treaty?

1. Wāhi tapu, urupā and sites of significance; and

2. Rongoā and its application.

Definition of Taonga

65. The term 'taonga' can be defined and interpreted in many ways. Recognised definitions of the term 'taonga' provide some guidance. The Tribunal in *The Petroleum Report* stated:[129]

> Though the term has a number of other more mundane meanings, successive carefully reasoned reports of the Tribunal over many years now have come to treat 'taonga' as used in Te Tiriti, as a tangible or intangible item or matter of special cultural significance.

The *Manukau Harbour Report* concluded that taonga meant more than objects of tangible value and recognised that not only could a river be a taonga as a valuable resource but also its 'mauri' or 'life-force' is another taonga.[130]

66. Āwhina Twomey in her evidence reminded, by reference to the Williams Dictionary, that taonga is often defined as:[131]

> (a) (noun) property, goods, possession, effect, object.
>
> (b) (noun) treasure, anything prized – applied to anything considered to be of value including socially or culturally valuable objects, resources, phenomenon, ideas and techniques.

67. The definition Āwhina Twomey promotes allows for a broad meaning of the word to be applied. In support of this approach is the well-recognised Sir Hugh Kawharu interpretation and English translation of the Māori Text of te Tiriti, who asserts that the meaning of taonga goes beyond physical assets and encompasses "all dimensions of a tribal group's estate, material and non-material."[132]

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[129] Waitangi Tribunal *The Petroleum Report* (Wai 796, 2003) at [5.3].
[130] Waitangi Tribunal *Manukau Report* (Wai 8, 1985) at [8.3.3].
[131] Awhina Twomey, *Brief of Evidence of Awhina Twomey*, dated 4 May 2018 Wai 2180 #K10 at 2.
[132] Sir H Kawharu, *Translation of the Māori Text of the Treaty*, fn 6-8 at www.govt.nz/aboutnz/treaty.php3 and 1 NZLR 641, 662-663; see also Durie 1998 at p 82-83.

68. What is clear is that the term 'taonga' defies any exhaustive definition and particular possessions cannot be itemised in any all-encompassing ways as such an approach unnecessarily constrains the essence of what taonga encapsulates. This is not only relevant for Taihape Māori but all Māori. The Tribunal have also previously noted their reluctance of doing so because, "…taonga in a metaphorical sense covers a variety of possibilities rather than itemised specifics, or simply items of tangible value.[133]

69. The issues to be considered by this Tribunal are focussed to wāhi tapu; urupā and sites of significance. It also asks for a particular consideration of rongoā and its application in the Taihape District.

70. Traditional lands, wāhi tapu and resources are some of the most significant taonga given the force of active protection by dint of Article II of te Tiriti by express terms in the Māori text itself.

71. Work of art or literature, designs or symbols are other examples which have been categorised as taonga by virtue of decisions of this Tribunal with the Wai 262 Report *Ko Aotearoa Tēnei.* The Report confirmed that, increasingly over time these practical expressions of Māori way of life have assumed high value both as tangible expressions of art itself but as means for intergenerational transmission of mātauranga Māori.

72. Similarly, Te Reo Rangatira has been acknowledged as being another treasured taonga being the vehicle that preserves and affirms the core of Māori culture and mana.[134]

73. Māori healing knowledge and practices possessed by tohunga and traditional knowledge keepers and practitioners of rongoā Māori are also pivotal parts of the body of mātauranga Māori that Article II protects.

74. Whether physical or intangible, all of these taonga are no less valuable than the other simply by virtue of the fact that they contribute to the Māori knowledge base upon which the ways of life of whānau, hapū and iwi

[133] Dr R Joseph "*Legal Challenges at the Interface of Māori Custom: Wāhi Tapu*" (2010 & 2011) Vols 13 & 14 YNZJ at p 167.
[134] The connection between language and identity is emphasised by Dr Tamati Reedy in Wai 11 *The Report of The Waitangi Tribunal on The Te Reo Māori Claim,* April 1986, Brookers (Wellington) at p 34.

depend. All these forms of knowledge are directly or indirectly protected by te Tiriti ō Waitangi.

75. Taihape Māori claim that mātauranga, whakairo, rongoā Māori, biodiversity, genetics, wāhi tapu, pā sites, artefacts, weaponry, tīpuna whare and Māori cultural images, designs, symbols and associated indigenous, cultural and customary heritage rights in relation to such taonga (cultural taonga), are and always have been taonga of Taihape Māori, in respect of which ngā hapū of Taihape are kaitiaki and exercise rangatiratanga.

Mōkai Pātea Taonga

76. To illustrate the wide ranging taonga of Mōkai Pātea for Taihape Māori, the *Mōkai Pātea Environmental Impacts Scoping Report* noted a range of portable taonga as described by claimants including…" korowai, patu, and taiaha, fishing traps, guns…hui feathers and even paintings of tupuna".[135]

77. This report was augmented by the tangata whenua evidence of Āwhina Twomey who identified several types of intangible and tangible taonga, including whakairo, whakakai ngā rākau a Tū, waiata mōteatea, and whakapapa, as those customary practices within the dominion of Taihape territories that had been practices in the day to day lives of whānau, hapū and iwi. While Ms Twomey asserted these taonga as living practices of the art, she emphasised in her evidence the potential threat these practices confront daily in an environment that is poorly funded generally with little specific funding available to Taihape Māori.

78. While these are referred to as taonga works in modern parlance, Ms Twomey and other witnesses highlighted the whakapapa of the knowledge from which these practices are linked. Many witnesses identified countless examples of taonga works which are intrinsically linked to mātauranga Māori. These practices included visual art forms, constructions, a story in a name or a performance piece. Witnesses emphasised that many of the modern innovations and products are still unique to the Taihape territories

[135] M. Belgrave and others, *Environmental Impacts, Resource management and Wahi Tapu and Portable Taonga*, December 2012, Wai 2180, #A10, at 191 – 193.

from which they were given force[136] and are an expression of how Taihape Māori connect with and embrace their environment. The creation and distinctive body of knowledge and values held within these taonga works were also fundamental to the body of mātauranga Māori from which Māori culture and ways of life of the peoples of Taihape were connected.[137]

79. Wai 262 identified aspects of taonga works such as intellectual property or mātauranga Māori as a reflection of "the culture and identity of the works traditional owners."[138] We commend such an approach here.

80. The claimants assert that whether the work is fixed or not, contemporary, or more traditional, it will always invoke ancestral connections and contain traditional narratives and stories within its purview. These the claimants assert when viewed from a Te Ao Māori perspective, are "physical and intellectual products of mātauranga Māori made possible through the medium of human industry and creativity". [139] These taonga works undeniably possess mauri and have a living kaitiaki in accordance with tikanga Māori. They require active protection to ensure a living culture is maintained for present and future generations.

81. An example of the risk of the ongoing life of some of these cultural practices was given in the testimony to the Tribunal by Jerome Kavanagh who is a taonga pūoro Artist Practitioner from Mōkai Pātea, and who has dedicated his life to revitalising Māori music, art and culture. Mr Kavanagh stated: [140]

> Taonga pūoro, the rhythmic and wind instruments of our tūpuna, were derived from the sounds and materials of nature. Taonga pūoro reflects the sound of our natural environment from the mountains, rivers, land to the sea.

[136] Waitangi Tribunal *Ko Aotearoa Tēnei, A Report into Claims concerning Law and Policy Affecting Māori Culture and Identity,* Te Taumta Tuarua Volume I (Wai 262, 2011) at p 31.
[137] Waitangi Tribunal *Ko Aotearoa Tēnei, A Report into Claims concerning Law and Policy Affecting Māori Culture and Identity,* Te Taumta Tuarua Volume I (Wai 262, 2011) at p 30.
[138] Waitangi Tribunal *Ko Aotearoa Tēnei, A Report into Claims concerning Law and Policy Affecting Māori Culture and Identity,* Te Taumta Tuarua Volume I (Wai 262, 2011) at p 6.
[139] Waitangi Tribunal *Ko Aotearoa Tēnei, A Report into Claims concerning Law and Policy Affecting Māori Culture and Identity,* Te Taumta Tuarua Volume I (Wai 262, 2011) at p 30.
[140] Jerome Kavanagh, *Brief of Evidence of Jerome Kavanagh*, dated 4 May 2018, Wai 2180 #K11 at 2.

Jerome Kavanagh further emphasised the strong wairua associated with taonga pūoro and its importance "in providing a lifeline connection between the physical and spiritual world".[141] Taonga pūoro are described as living instruments and therefore have mauri.[142]

82. A further example of the relationship between Taihape Māori and their taonga is demonstrated from tangata whenua evidence given by Kathleen Parkinson. In her evidence before this Tribunal, she explains how taonga possess mauri:[143]

> All taonga are taonga tuku iho be they movable or static because like all of us they come from a cosmological genealogy which connects the past to the future, the material to the immaterial, the unconscious state to the state of living.

83. A key aspect to recognising the significance of this relationship is by reference to the conceptualisation of 'mātauranga Māori' itself. The definition of mātau is simply 'to know' and mātauranga is translated as 'knowledge'. However, mātauranga Māori emphasises not only what is known but also how it is known or to be preserved as a knowledge base within a kaupapa Māori framework and epistemology.

84. The concept not only relates to the way mātauranga is held for present and future generations but as part of a dynamic of the way of perceiving and understanding the world within the framework of a Te Ao Māori pedagogy. This approach is underpinned by values and systems of thought and practices that give force to those values. The Waitangi Tribunal in *Ko Aotearoa Tēnei* emphasised that mātauranga Māori is both Māori knowledge and a Māori way of knowing.[144]

85. We commend this approach as a starting point in analysis in this Inquiry. The claimants invite the Tribunal to contrast the body of mātauranga Māori with which the claimants seek to preserve based on the values of

[141] Jerome Kavanagh, *Brief of Evidence of Jerome Kavanagh*, dated 4 May 2018, Wai 2180 #K11 at 2.
[142] Jerome Kavanagh, *Brief of Evidence of Jerome Kavanagh*, dated 4 May 2018, Wai 2180 #K11 at 2.
[143] Kathleen Parkinson, *Brief of Evidence of Kathleen Parkinson,* dated 30 April 2018, Wai 2180 #K01, at 3.
[144] Waitangi Tribunal *Ko Aotearoa Tēnei, A Report into Claims concerning Law and Policy Affecting Māori Culture and Identity,* Te Taumata Tuarua Vol I (Wai 262, 2011) at 16.

intergenerational transmission and collectivism. This is against Pākehā knowledge frameworks that often derive from a western way of thinking; are often built on values of individualism and conformity and for which have underpinned much of the laws, policies, acts and inactions concerned in these submissions. Sadly, for the claimants the Māori knowledge base when confronted with the Pākehā systems of knowledge have been marginalised or invisibilised as other submissions in the generic submissions on Education and Social Policy have emphasised.

86. The claimants are also cognisant that there are also different types of mātauranga that have been introduced as a product of interaction between the culture of settlers and the environment of Aotearoa which have been woven into the body of knowledge that Māori seek protection for. This was entirely contemplated by the principles of equality espoused in Article III of te Tiriti.

87. As a matter of this right to develop mātauranga Māori thus incorporates "…traditional technology relating to food cultivation, storage, hunting and gathering…knowledge of the various uses of plants and wildlife for food, medicine, ritual, fibre and building"[145] and other knowledge that has emerged from access to more modern technologies. It necessarily includes all performing arts such as haka, waiata, whaikōrero and various other Māori rituals which give force to the distinct ways of life of Taihape Māori. These aspects of mātauranga must be understood within the values that embrace them. One of the tensions in the present environment is how to preserve the uniqueness of dialect or particular waiata where the internet, data technologies and other features of the modern communications have made access of these taonga to a much broader population base.

88. Rights of indigenous data sovereignty and the need for collective consent are now being recognised in international forums, for example, by the United Nations. The 2019 Report from the Special Rapporteur on the Protection

[145] Waitangi Tribunal *Ko Aotearoa Tēnei, A Report into Claims concerning Law and Policy Affecting Māori Culture and Identity,* Te Taumata Tuarua Vol I (Wai 262, 2011) at 16.

and Use of Health-Related Data, for example, in its definition of Indigenous Data, references collective and individual elements in relation to data: [146]

> "indigenous data" refers to data information or knowledge, in any format or medium, which is about, from or may affect Indigenous Peoples or people of First Nations either collectively or individually and may include the language, culture, environments or resources of Indigenous Peoples. Indigenous data includes health-related data relating to Indigenous Peoples.

While these principles are being increasingly acknowledged, Indigenous Peoples' collective rights to privacy and/or free, prior and informed consent are still being discussed and frameworks developed.

89. The claimants assert that Taihape Māori taonga in particular are distinct products of Mōkai Pātea heritage which have been developed and innovated according to their mātauranga Māori and have a kaitiaki lineage and as a primary obligation, those taonga should not be available to a wider public audience without their express consent and authority.

Wāhi Tapu, Urupā and Sites of Significance

90. The notion of wāhi tapu being included as taonga within the meaning propounded by Article II of Te Tiriti has endured through several Tribunal reports and decisions. The term was affirmed in 1992 in *Te Roroa Report* and further in the 2010 *Hauraki Report*. The Te Roroa Report noted wāhi tapu as an 'umbrella' term and not just applicable to urupā.[147] The latter report adopted a definition as, "those sites of significance which are sacred to the tribe for cultural, spiritual and historical reasons".[148]

91. A place or feature of significance to a particular hapū or iwi will differ to those of another. Therefore, a narrow definition of wāhi tapu simply cannot be imposed. It follows earlier comments relating to the definition of taonga, in that any definition given to wāhi tapu must be broad enough to convey the

[146] Report from the Special Rapporteur on the Protection and Use of Health-Related Data, November 2019 at 6.
[147] Waitangi Tribunal *Te Roroa Report 1992* (Wai 38, 1992) at p 227.
[148] Waitangi Tribunal *The Hauraki Report* Vol III (Wai 686, 2010) at p 933.

importance of the spiritual and cultural connection that Taihape Māori have with their wāhi tapu and sites of significance. This extends to the expression of mana and rangatiratanga over the customary use of a place and the kaitiaki obligation to care for wāhi tapu and associated resources. This is explored in detail in the Wāhi Tapu Generic Closing Submissions dated 5 May 2020.[149]

Rongoā Māori and its Application

92. The issue that arises in the context of the present claim is whether rongoā, and its application of Taihape Māori are also taonga for the purposes of Article II of Te Tiriti. In response to this question, counsel argue that rongoā and its application are also taonga under Article II of Te Tiriti and therefore must also benefit from the guarantee of tino rangatiratanga contained in Article II.

93. Rongoā Māori comprises of a diverse range of practices that emphasise the spiritual dimensions of health. The use of water and of water bodies in rituals has been referred to by many Māori. Water is treated as having powerful spiritual links with respect to removing tapu from and to avert danger to warriors and others. The procedure of cleansing yourself through water is a common procedure of many if not all urupā in Aotearoa as those passed on are tapu. Wai was used for karakia in customary rituals dedicated for the sick, for protection and for healing. Water bodies such as rivers and other waterways had many wāhi tapu on their banks or in the waters. These special sites were used for rongoā or to prepare tūpāpaku for burial and therefore were restricted form being used for other purposes such as drinking, swimming, or gathering kai. These places were regarded as being tapu and those areas safe for other activities were places of noa.[150]

94. As illustrated in *The Napier Hospital and Health Services Report,* 'health' in of itself cannot be regarded as taonga however, various components of customary health knowledge and healing practice can be argued to

[149] Tamaki Legal, Annette Sykes & Co., Wai 2180 #3.3.42 Wāhi Tapu Generic Closing Submissions
[150] Meredith, Joseph and Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspective Report* Wai 2180 #A44 at p 138.

constitute intangible taonga or cultural assets. Such taonga include three types of resource:[151]

- Associations of place, such as wai tapu (protected sources of water);

- Access to materials used for healing, such as rongoā (medicinal flora); and

- Specialist knowledge of healing as possessed by tohunga or traditional healing.

95. For Māori, the spiritual dimension of rongoā intrinsically link to concepts of mauri and wairua. The concept of mauri, expresses the Māori view that everything, whether animate or inanimate, contains a living essence that cannot be easily destroyed'.[152] As illustrated in the *Manukau Report,* the mauri or life essence of a taonga such as a river is also considered a taonga. Conceptually each water stream carries its own mauri and wairua and therefore the same application of Te Tiriti applies.

96. Māori healing practices, rongoā and mātauranga Māori were and are commonly held within hapū or groups of hapū. The evolution of these practices and the extent to which Māori healing knowledge is held does not make it any less of a taonga. Such taonga are still subject to the duty of protection by the Crown.

Issue 19.3: In respect of any of the above that are taonga:

a. What was the Crown's duty, if any, to protect these taonga?

b. Has the Crown met its duty? If not, what specific examples are there of legislation, policy and practices of the Crown that have failed to protect taonga?

[151] Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at p 49.
[152] Waitangi Tribunal *Ko Aotearoa Tēnei, A Report into Claims concerning Law and Policy Affecting Māori Culture and Identity,* Te Taumata Tuarua Vol I (Wai 262, 2011) at p 37.

97. There are common threads throughout these submissions that lend itself to ones understanding of the nature of the interests claimed by Taihape Māori over their taonga including as kaitiaki. This not only includes wāhi tapu, rongoā and its application but also the mātauranga inherently derived from those taonga which informs a Māori way of knowing. The Māori ideology that taonga should be retained by its original owners and protected by those with customary interests is asserted by Taihape Māori. This Māori interest must be valued rather than avoided as has been the experience since the signing of Te Tiriti. What will become evident in this section is that those interests, rights, and obligations are given force to through the overarching principle of tino rangatiratanga and duties of active protection and partnership.

Duty of Active Protection

98. A fundamental principle of Te Tiriti is the protection and preservation of Māori property and taonga.[153] This was found by the Tribunal in the Manukau Harbour Inquiry which stated that, "The Treaty of Waitangi obliges the Crown not only to recognise the Māori interests but actively protect them…"[154] The customary Māori healing resources, rongoā, mātauranga Māori and wāhi tapu are established as taonga and it follows that the principle of active protection would apply to these taonga of Taihape Māori.

99. This duty also includes the recognition and active protection of the right of Taihape Māori to manage, control and exercise kaitiakitanga over their cultural taonga. The kaitiaki relationship between Taihape Māori and their taonga arises from rangatiratanga. Inherent in this relationship is a kaitiaki responsibility which are interwoven with concepts of mana and rangatiratanga which are explored further in submissions. Taihape Māori assert that this relationship should be given appropriate recognition through the duty of active protection.

100. The Crown have not met its duty of active protection by failing to recognise Taihape Māori as kaitiaki over *ngā taonga katoa* including wāhi tapu, urupā, sites of significance, rongoā, mātauranga and many other cultural taonga.

[153] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, PC, 517.
[154] Waitangi Tribunal *Manukau Report* (Wai 8, 1985) at p 70.

Contrary to the principle of active protection, the Crown implemented regimes within the district that set out to alienate Taihape Māori from their taonga such as lands, rivers, resources, wāhi tapu and those abovementioned. In this respect, this overarching principle has not been upheld by the Crown.

Duty of Partnership

101. The prominence and inclusiveness of partnership makes Aotearoa unique among other post-colonial nations such as Canada or Australia. This is because in most cases, the emphasis is directed at powers of state and the relative powerlessness of their indigenous peoples by placing trust obligations at the centre of domestic indigenous rights law.[155] Aotearoa on the other hand, can be contrasted as the partnership arrangements under Te Tiriti are built on a consensus of equals. This means providing for both kāwanatanga and tino rangatiratanga as a partnership. The nature of this partnership is therefore relevant here in considering taonga.

102. The formulation of the principle of partnership inherent in Te Tiriti is the Crown's fiduciary duty of good faith to Māori.[156] This overarching principle means that the Crown should deal with Māori in an honourable way and work together as partners for the prosperity of all. This includes the duty to consult with Taihape Māori as a working Te Tiriti partner. As established in *He Maungarongo Report*, this is required to obtain the free, prior and informed consent to anything which would alter the possession of the land, resources and taonga.[157]

103. In *The Napier Hospital and Health Services Report* the duty of partnership between the Crown and Māori included enabling the Māori voice to be heard, allowing Māori perspectives to influence the type of health services delivered to Māori people and the way in which they are delivered; empowering Māori to design and provide health services for Māori, and presenting a coherent

[155] Waitangi Tribunal *Ko Aotearoa Tēnei, A Report into Claims concerning Law and Policy Affecting Māori Culture and Identity,* Te Taumata Tuarua Vol I (Wai 262, 2011) at p 19.
[156] *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, CA 305-306.
[157] Waitangi Tribunal *He Maungarongo Report on Central North Island Claims* (Wai 1200, 2008) Stage One, Vol I at p 173.

and accountable face in order to sustain a high-quality relationship with its Te Tiriti partner.[158]

104. In this context, the Crown has a duty of partnership with Taihape Māori to ensure that the voices of whānau, iwi and hapū groupings within the district are consulted with and heard when dealing with taonga such as wāhi tapu and rongoā Māori and its application. This also extends to mātauranga Māori possessed and held of those taonga including practices and systems of transmission of those taonga through stories, art forms and those described earlier.

Tino Rangatiratanga

105. The language of Article II of Te Tiriti is compelling:

> …te tino rangatiratanga o o rātou whenua o rātou kainga me o rātou taonga katoa"

106. Taihape Māori claim for recognition and protection of their taonga rests on the obligation to maintain their tino rangatiratanga, their absolute authority over their whenua, kainga and their taonga katoa.

107. Taihape Māori maintain that such absolute authority includes the fill and exclusive rights and responsibilities of:

a. Manaakitanga;

b. Kaitiakitanga;

c. Tapu; and

d. Noa.

108. Taihape Māori assert that the development and protection of those rights and obligations includes:

[158] Wai 692, Waitangi Tribunal *The Napier Hospital and Health Services Report* 2001 at p 60.

i. The right to make decisions over the conservation, control, protection and enhancement and development of natural resources within their rohe;

ii. The needs to exercise a development which permits conservation, control, utilisation, and exercise of rights over indigenous flora and fauna*, me o rātou taonga katoa;*

iii. The protection of the exercise of indigenous, cultural; spiritual; ecological; use rights in accordance with inherited obligations to protect the integrity of mātauranga Māori combined with the ability to make decisions about the future development and use of such knowledge;

iv. The right to determine the environmental wellbeing of whenua, kainga *me o rātou taonga katoa* in keeping with the nurturing and wise application of mātauranga Māori of ngā hapū o Taihape;

v. The right to exercise control, propagation, development; research or sale of taonga; and

vi. The right to withhold consent with respect to the exercise of any of those rights and obligations expressed in (i) to (v).

109. Taihape Māori assert that the Article II guarantee is clear and unambiguous. Their understanding of the guarantee of tino rangatiratanga in Article II has remained unaltered.

110. The exercise of rangatiratanga extends to the authority to make decisions in respect to matters of flora, fauna, mātauranga, embraced within the ambit of taonga and as an extension of that the recognition of such authority by others.

111. Te Tiriti did not contemplate that Māori were to be relegated simply to a position of being consulted with or notified about. Taihape Māori assert that implicit in the exercise of tino rangatiratanga is the notion of shared power and equal authority.

112. Under Article II of Te Tiriti, tino rangatiratanga over their '*taonga katoa'* was guaranteed to rangatira, hapū and all Māori.[159] In this regard, Taihape Māori maintain the right to exercise their own customary law over their taonga.[160] The Crown have denied Taihape Māori the full exercise of tino rangatiratanga over many aspects of life and taonga is no exception.

Crown duties in relation to taonga for Taihape Māori

113. Under the terms and principles of Te Tiriti, the Crown was and is, under an obligation to:

a. Ensure that wāhi tapu, urupā and sites of significance *me ngā taonga katoa* are actively protected;

b. Ensure that Taihape Māori retained their customary health knowledge and healing practices, such as those possessed by tohunga;

c. Ensure the transmission of mātauranga Māori through generations of Taihape Māori;

d. Consult with Taihape Māori on matters relating to their wāhi tapu including how physical features or cultural associations should be dealt with; and

e. Ensure that Taihape Māori can exercise kaitiakitanga over their taonga according to their tikanga and Māori customary law obligations.

114. Te Tiriti relationship envisages foundations of reasonableness, mutual cooperation and trust. In *New Zealand Māori Council v Attorney-General*, it was accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. It was noted that while the

159 Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at p 173 at 10.2.2.
160 Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Premliminary Report on Customary Rights in the Northern South Island* (Wai 785, 2007) at p 4 at 1.2.3.

Crown's obligation is ever lasting, the protective steps that are reasonable for the Crown to take will depend on the situation at any time.

115. As illustrated in generic closing submissions on Te Reo Rangatira me ona Tikanga the Māori language in the Taihape district is in a crisis and nearing extinction. This is detailed by the decline of the language in its use and retention. The dire situation of the loss of the language demands active steps to be taken by the Crown particularly where Crown policies, acts and actions/inactions have contributed to the current state. Given this, it is reasonable for the Crown to take bold and immediate steps that go beyond its usual duty of protection. The prevailing circumstances for Taihape Māori in relation to wāhi tapu and rongoā Māori are not much different.

116. Since the signing of Te Tiriti, numerous efforts have been made by the Crown through mechanisms of governing bodies, policies, and legislation to take advantage of these taonga. This is from the Government's attempt to control the export of Māori artefacts as seen with the Māori Antiquities Act 1901 to the establishment of the Historic Places Trust that was 'overwhelmingly Eurocentric in its approach'. [161] Other devastating examples are the Tohunga Suppression Act 1907 which prevented people from using traditional Māori healing practices and Crown purchases of land from Māori.

117. As a result, many Mōkai Pātea taonga works have been lost to institutions such as museums (including a private museum in Taihape) or through private ownership or have been taken out of the country. This was emphasised in the *Mōkai Pātea Environmental Impacts Scoping Report* which noted that the "loss of portable taonga from this district was considerable…"[162] The entirety of the loss and removal of these taonga from the Taihape district cannot be fully ascertained.

118. Furthermore, wāhi tapu and sites of significance have been desecrated or alienated from the direct control, management, and protection of Taihape Māori. The use of rongoā has also been diminished over time and

[161] D Armstrong, *The Impact of Environmental Change in the Taihape District*, 20 May 2016, Wai 2180 #A49 at 359.
[162] M. Belgrave and others, *Environmental Impacts, Resource management and Wahi Tapu and Portable Taonga*, December 2012, Wai 2180, #A10, at 191 – 193.

mātauranga Māori in healing practices held by tohunga degraded and suppressed. The current situation is undeniable and requires the Crown to take urgent action to ensure that the impacts do not intrench further into succeeding generations.

Mana and Kaitiakitanga

119. For Taihape Māori, just as there are living taonga, there are also living kaitiaki for those taonga and the treatment of such taonga is guided by tikanga Māori. There are those who are responsible for safeguarding taonga, whether they are ancient works or practices, tangible or intangible. This very particular relationship, 'we call this the kaitiaki relationship'.[163] The claimants say that this kaitiaki relationship must be protected and is central to this claim.

120. There are the twin concepts of mana and kaitiakitanga. Mana (or, to use Te Tiriti terminology, *rangatiratanga)* is the authority derived from a combination of kin status and personal attributes but can also involve a communal dimension.[164] The Meredith, Joseph and Gifford report explains how mana and rangatiratanga includes the tribal authority to control a place, people or taonga. [165] It is from this authority that a kaitiaki obligation arises which provides for the care and protection of taonga. The word 'tiaki' means to nurture or care for something or someone and so kaitiakitanga is the responsibility. Those who have mana must exercise the values of kaitiakitanga unselfishly and can be done so collectively. The actions taken by a hapū, iwi or whānau in exercising kaitiakitanga may differ but rely on understandings of tikanga Māori.

121. Iwi and hapū of the Rangitīkei area had mana and tino rangatiratanga over their waterways, lands, resources and taonga from before any Te Tiriti partnership existed and afterwards. This is evident as tangata whenua of Taihape held the mana to exercise their right and responsibility as kaitiaki. Kaitiakitanga in practice can be shown where tangata whenua utilise

[163] Waitangi Tribunal *Ko Aotearoa Tēnei, A Report into Claims concerning Law and Policy Affecting Māori Culture and Identity,* Te Taumata Tuarua Vol I (Wai 262, 2011) at p 31.
[164] Waitangi Tribunal *Ko Aotearoa Tēnei, A Report into Claims concerning Law and Policy Affecting Māori Culture and Identity,* Te Taumata Tuarua Vol I (Wai 262, 2011) at p 37.
[165] Meredith, Joseph and Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspective Report,* Wai 2180 #A44 at p 129.

mechanisms such as rāhui and tapu that enable areas such as wāhi tapu to be restricted and controlled for particular purposes or reasons.

122. The Crown, through the absence of unequivocal legislation or actions/inactions, have prevented Taihape Māori from exercising their mana and tino rangatiratanga over their wāhi tapu, urupā and sites of significance. The lack of recognition of Taihape Māori as legitimate kaitiaki over their wāhi tapu and other taonga has been severe. This is confirmed by the desecration and ultimate destruction of wāhi tapu and culturally significant sites throughout the Taihape district. The extent of these impacts to Taihape Māori have been detailed in the Generic Closing Submissions on Wāhi Tapu.[166]

123. Not only has the Crown fallen short of its partnership obligations to actively protect the cultural taonga of Taihape Māori but also the unique kaitiaki relationship between Taihape Māori and their *taonga katoa.* Further, the Crown have failed to uphold the principle of tino rangatiratanga which was preserved by the terms of Te Tiriti.

Destruction and Desecration of Wāhi Tapu

124. The extent to which the Crown has failed to meet its duties of partnership and active protection in regards to wāhi tapu as taonga, has been largely covered in Generic Closing Submissions on Wāhi Tapu.[167] To avoid duplication, we refer to those submissions here as they relate to the specific examples given of the destruction and desecration of wāhi tapu in the Mōkai Pātea district.

Suppression of Tohunga

125. In Māori society, tohunga were keepers of specialist knowledge and highly regarded for their skills and mātauranga Māori. Tohunga were experts in their respective fields. Tohunga held key roles and responsibilities within hapū and iwi that were delegated, gifted, or succeeded to, to maintain and

[166] Tamaki Legal, Annette Sykes & Co., *Wāhi Tapu Generic Closing Submissions* dated 5 May 2020, Wai 2180, #3.3.42.
[167] Tamaki Legal, Annette Sykes & Co., *Wāhi Tapu Generic Closing Submissions* dated 5 May 2020, Wai 2180, #3.3.42.

protect the survival of their people. Specific examples of tohunga are described in the Joint Brief of Evidence of Āwhina Twomey, Kiriana Winiata, and Jordan Winiata-Haines and described further in the submissions.

126. Crown policies of assimilation and amalgamation derived from a prognosis that though Māori were a 'savage' or 'semi-barbarian' people, they nevertheless had the capacity to adjust to civilisation according to the British Empire. The British would use three vital agents in its 'civilising mission' in New Zealand – civilisation, Christianity, and colonisation.

127. In terms of regulating tohunga, it was envisioned not long after the signing of Te Tiriti that Māori prophet leaders would be a thing of the past. By 1900, this attitude had not transpired as originally thought and so the Māori Councils Act was introduced which aimed at 'regulating the proceedings of tohunga'. Diverse policy threads then came together with the various positions held which set out to restrict and then make legal the suppression of tohunga activities. There were those that promoted modern concepts of health, hygiene and to encourage Māori to seek proper medical attention. There was common law tradition that proscribed witchcraft. There were those promoters of amalgamation who thought it important to eradicate all distinctive features of Māori society in favour of British civilisation. Some were concerned with protecting the monopoly of rights of doctors and pharmacists which was being threatened. A combination of such ideas, even though not necessarily consistent with each other, eventually provided the political stimulus to suppress tohunga by law.

128. The Crown policy at that point driven by racial assimilation indeed made Māori prophetic leaders intolerable rather than honoured for the role of those tohunga who were the whare wananga trained repositories of tikanga Māori, cultural knowledge and wisdom. Jerome Kavanagh explains in his evidence that the Crown continued to enforce the diminishment of tohungatanga through the Tohunga Suppression Act 1907. Even though the Act focussed strongly on replacing traditional Māori healing with modern medicine, it took away the key part of protecting the knowledge and artistry of taonga such as puoro and many other arts like taonga takaro, carving, karakia, rāranga and

much more.[168] This has had devastating impacts on the practices of tohunga and the transmission of mātauranga Māori to those with the ability to attain it who have the responsibility to protect it for the generations that follow them.

129. To further illustrate this point, we need only to refer to colonial regimes that set out to exterminate Māori culture. The narrow-minded colonial imperative imposed that 'saw no value in Māori cultural attitudes to health'[169] is just one example which had the impact of disempowering tohunga and their practices of rongoā Māori. The effects of inaccurately held attitudes and Crown mechanisms of assimilation and amalgamation have been suffered through the generations and are still experienced by Taihape Māori today.

Maurini Haines-Winiata

130. During the presentation of her evidence at Nga Korero Tuku Iho Hearing week 2, Maurini Haines-Winiata ("Ms Haines-Winiata") discussed the impact of the Tohunga Suppression Act:[170]

> Just want to touch upon the impact of the Tohunga Suppression Act, which was intended to stop people using traditional Māori healing practices that included rongoā which had supernatural or spiritual elements, and you know the tohunga would were held to be of a dangerous cult or even practitioners of witchcraft and moko kauae were looked upon as being hideous or wrongly identified as being beauty purposes for wahine.

131. Ms Haines-Winiata goes further:[171]

> There may – there were very few prosecutions and convictions under the Tohunga Suppression Act its main effect was to drive tohunga underground. And it did that. It was very successful in doing.

132. Ms Haines-Winiata described the impact:[172]

[168] Jerome Kavanagh, *Brief of Evidence of Jerome Kavanagh,* dated 4 May 2018, Wai 2180 #K11 at 3.
[169] Waitangi Tribunal *Ko Aotearoa Tēnei, A Report into Claims concerning Law and Policy Affecting Māori Culture and Identity,* Te Taumta Tuarua Volume I (Wai 262, 2011) at p 23.
[170] Wai 2180, #4.1.5, page 300.
[171] Wai 2180, #4.1.5, page 300.
[172] Wai 2180, #4.1.5, page 301.

> The Tohunga Suppression Act was successful to the point that when our people began to leave their cultural practices behind and take up Christianity the tohunga didn't pass on their skill, knowledge and wisdom. They kept it to themselves. So when they passed on, so did a lot of that knowledge and that way of life. It was a way of life.

133. Ms Haines-Winiata gives further evidence of the impact of colonisation on the taonga of moko kauae:[173]

> As colonisation progressed there was a mixture of horror and admiration towards moko kauae especially from the missionaries.
>
> The missionary John Nicholas observed that it was merely absurd preposterous notion of its being a most elegant embellishment, while on the contrary it makes them appear truly hideous. He hoped that this barbarous practice will be abolished in time among New Zealanders, and that the missionaries would exert all the influence they are possessed of to dissuade them from it.

134. Ms Haines-Winiata also cited Samuel Marsden who ridiculed Māori who intended to get a moko kauae and told a person, who intended to get a moko kauae, that they were foolish and that it was a ridiculous custom and to lay aside the barbarous customs of this country.[174]

135. The Crown failed to take any action to protect the culturally significant moko kauae of Taihape Māori from the influence of Christianity and other colonial attitudes.

Neville Lomax

136. At the presentation of his evidence during hearing week 4, Mr Lomax describes the impact of the Tohunga Suppression Act:[175]

> Anyway, I'll leave it at there just by closing and saying that I feel deeply affected by the Crown decision to implement the Tohunga Suppression Act of 1907. This Act took away the traditional methods of transmitting this

[173] Wai 2180, #4.1.5, page 301.
[174] Wai 2180, #4.1.5, page 302.
[175] Wai 2180, #4.1.11, page 641.

> knowledge, one of the taonga which was guaranteed us under Article II of the Treaty of Waitangi by one generation to the next.

Misinterpretation of Taonga

137. The lack of understanding of the physical, cultural, and spiritual connection of Taihape Māori to their taonga has meant they have been estranged from their lands, wāhi tapu and cultural heritage sites in the most devastating ways. The physical presence and markings of those sites also removed or lost. It can be said that in many cases, the destruction or damage of wāhi tapu cannot be undone. The failure to understand the interconnectedness of Māori to tikanga Māori and to taonga has also led to most of the taonga being disregarded, distanced or removed from Taihape Māori.

138. As a result of much misinterpretation, many taonga have left the shores of Aotearoa stretching back to the time of James Cook's arrival in 1769. Thousands of taonga can be said to have "become the 'objects' or 'curiosities' in a foreign system of legal title, and museum - far away from the traditional culture of reciprocity and belonging".[176] Taonga have also been acquired, traded or gifted to overseas institutions and collectors as pieces of interest from foreign lands. Āwhina Twomey adds that Māori kōiwi tīpuna and toi moko were among those traded by collectors and so "it is probable that our tīpuna and possibly their taonga have also been traded or taken overseas too".[177] The mātauranga Māori and traditional knowledge of those tīpuna and cultural taonga have now been lost with them.

Conclusion

139. The consequences of Crown policies of amalgamation and assimilation, inactions/actions have led to the demise of Māori traditional knowledge of cultural sites, rongoā Māori and its associated practices and the mātauranga Māori of these taonga held by tohunga. Not only have the physical features of the land and the presence of many wāhi tapu been lost, but also the history about those sites. Anderson best explains this as the "physical obliteration makes the memory of the past harder to maintain, and reduces

176 Wai 2180 #K10, BOE: Āwhina Twomey, 4 May 2018 at p 2 - 3.
177 Wai 2180 #K10, BOE: Āwhina Twomey, 4 May 2018 at p 3.

the ability to pass on knowledge from one generation to the next".[178] The associations with cultural places for Taihape Māori have been greatly diminished or restricted as well as access to the resources to enable rongoā Māori to be practiced today. In this way, the duty of partnership and to active protection over these taonga has been ignored by the Crown. As a result, Taihape Māori have been prejudiced in many ways.

TIKANGA MĀORI

Issue 19.4: What is the Crown's duty with respect to tikanga Māori under the Treaty? Has tikanga been given effect or otherwise acknowledged by the Crown in Taihape?

Introduction

140. Te Tiriti ō Waitangi imposes a duty on the Crown with respect to tikanga Māori. Such a duty encompasses the principles of the Treaty, including the Crown consulting Māori when considering matters concerning tikanga, and the Crown actively protecting the maintenance and development of tikanga Māori. Despite of this duty, the Crown has failed to give sufficient effect to, or otherwise acknowledge tikanga in the Taihape district area

He Taonga

141. Tikanga Māori is based on a worldview in which all things are descended from the Atua.[179] To elaborate, the Whanganui River Claim Tribunal explained that:[180]

> Based on their conception of the creation, all things in the universe, animate or inanimate, have their own genealogy, genealogies that were popularly remembered in detail. These each go back to Papatuanuku, the mother earth, through her offspring gods. Accordingly, for Māori the works of nature - the animals, plants, rivers, mountains, and lakes – are either kin,

[178] Wai 2180 #A38 D Alexander, *Environmental Issues and Resource Management (Land) in Taihape Inquiry District,* 1970s – 2010, September 2015 at p 151.
[179] Durie, E. T., Joseph, R., Erueti, A., Toki, V., Ruru., J, Jones, C., & Hook, G. R., *The Waters of the Māori: Māori Law and State Law* (Report) dated 2017 p7 at 22
[180] Waitangi Tribunal, *The Whanganui River Report* (Wai 167) dated 1999 at page 38

> ancestors, or primeval parents according to the case, with each requiring the same respect as one would accord a fellow human being.

142. This system of thought created a network of interwoven relationships or whakapapa, which established the relationship of all people and all things.[181] From this whakapapa arose a collection of rights and obligations among all people, their ancestors, and all elements of the environment.[182] Therefore, Māori society was guided by its own system of law and authority, and a series of organising principles or, tikanga Māori.[183] Such relationships, customs, traditions, and rites facilitated the construction and maintenance of a sense of shared cultural values.[184] The principles and values that underpin this worldview are fundamental to understanding tikanga and its application. Without this worldview, the operation of tikanga is disconnected from the mauri that sustains it and that causes it to grow. Legal systems develop over time but that is not possible if their operation is stifled.

143. Tikanga Māori is considered the first law of Aotearoa.[185] The Tribunal, in the *Ko Aotearoa Tēnei* report, described tikanga Māori as "traditional rules for conducting life, custom, method, rule, law".[186] Tikanga cannot be understood merely as a series of customs but rather it should be understood as a system of law.[187] As it was a principles-based legal system, it could be applied flexibly as the circumstances required. This system contained essential elements of law including predictable rules for behaviour and predictable responses to transgression.[188] It also included concepts of

[181] Durie, E. T., Joseph, R., Erueti, A., Toki, V., Ruru., J, Jones, C., & Hook, G. R., *The Waters of the Māori: Māori Law and State Law* (Report) dated 2017 p7 at 22
[182] Waitangi Tribunal, *Te Mana Whatu Ahuru, Report on Te Rohe Pōtae Claims (Pre-Publication Version)* (Wai 898) dated 2018 at page 34
[183] Waitangi Tribunal, *Te Mana Whatu Ahuru, Report on Te Rohe Pōtae Claims (Pre-Publication Version)* (Wai 898) dated 2018 at page 34
[184] Carwyn Jones, *New Treaty, New Tradition, Reconciling New Zealand and Māori Law*, dated 2016, Preface
Linda Tuhiwai Smith, Decolonizing Methodologies: Research and Indigenous Peoples, 1999, Zed Books, London
[185] A Mikaere 'The Treaty of Waitangi and Recognition of Tikanga Māori'
A Mikaere, *Tikanga as the First Law of Aotearoa*, Yearbook of New Zealand Jurisprudence, Vol. 10, 2007: 24-31.
[186] Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262) dated 2011 at 254
[187] Waitangi Tribunal, *Te Mana Whatu Ahuru, Report on Te Rohe Pōtae Claims (Pre-Publication Version)* (Wai 898) dated 2018 at p 39-40
[188] Waitangi Tribunal, *Te Mana Whatu Ahuru, Report on Te Rohe Pōtae Claims (Pre-Publication Version)* (Wai 898) dated 2018 at p 39-40

collective responsibility and the resolution of disputes through compensation.[189]

144. Sir Edward Durie asserted that the traditional law of Māori depended upon whether there were values to which the community generally subscribed. He further clarified that whether those values were regularly upheld is not the point but instead whether they had regular influence. This is because "Māori operated not by finite rules alone…but by reference to principle".[190] In his brief of evidence, Moana Jackson explained that "Māori society necessarily developed ways of ensuring social cohesion and harmony by developing a philosophy or jurisprudence of law and a discrete legal system to give effect to it".[191]

145. Dr Carwyn Jones outlined five values that are foundational to tikanga Māori:[192]

a. Whanaungatanga – the centrality of relationships to Māori life.

b. Manaakitanga – nurturing relationships, looking after people, and being careful as to how others are treated.

c. Mana – the importance of spiritually, sanctioned authority and the limits on Māori leadership.

d. Tapu – respect for the spiritual character of all things.

e. Utu – the principle of balance and reciprocity.

146. These values underpinned an effective, functioning legal system that Taihape Māori applied to their way of life. Specific functions and applications

[189] Judith Binney *"The Native Land Court and the Māori Communities"* in Judith Binney, Judith Bassett and Erik Olssen (eds) *The People and the Land: Te Tangata me te Whenua: An illustrated history of New Zealand 1820_1920* (Allen & Unwin, Wellington, 1990) 17. Cited in Law Commission publication Māori Custom and Values in New Zealand Law: NZLC SP9.
[190] Wai 2180 #H7, *Brief of Evidence of Moana Jackson*, dated 21 March 2018 (revised 5 June 2018) at 119 ET Durie *"Custom Law Address to NZ Law Society for Legal and Social Philosophy"* 24 Victoria University of Wellington Law Review (1994) at 3.
[191] Moana Jackson, *Brief of Evidence of Moana Jackson*, dated 21 March 2018 (revised 5 June 2018) Wai 2180 #H7 at 110
[192] Carwyn Jones, *New Treaty, New Tradition, Reconciling New Zealand and Māori Law*, Victoria University Press (2016), page 115.

of tikanga are then derived from these values. Since tikanga Māori is derived from this primordial whakapapa and the many relationships, customs, traditions, and rites which have arisen as tangata whenua continued to utilise and develop their sacred endowments, it is a taonga to Taihape Māori. As a taonga, the Crown is obligated to protect tikanga Māori and its elements.

147. The ideas and ideals of this law are their unique cultural creations.[193] Prescriptive and proscriptive guidelines outline what is tika, or legal, right and just, and what is not.[194] The behaviour of Taihape Māori reflected these guidelines in their interactions with each other and with te ao Māori.[195] Tikanga is primarily developed and held at the iwi, hapū and whanau level and is based on their unique traditions, whakapapa and mātauranga.[196] Specific values and protocols are applied according to the history and circumstances of individual whānau, hapū and iwi. In his statement of evidence, Richard Steedman of Ngāti Tama-Whiti, hapū of Ngāti Tamakōpiri, stated:[197]

> Our tikanga was to be guided by our whakapapa and our whenua. That is, to follow, within our rohe, the guidance of our tupuna and their learnings as passed down to us as taonga tuku iho.

148. When answering the question: What do you think the Crown's duty is in respect of tikanga, Dr Joseph said:[198]

> "…it's under Article II te tino rangatiratanga possession of their lands, forest, fisheries and other treasures, right, other taonga. Tikanga is a taonga of our people too…But also in the oral accounts or the fourth clause it refers to a ritenga Māori being protected and guaranteed. And so, the protection or

[193] Moana Jackson, *Brief of Evidence of Moana Jackson*, dated 21 March 2018 (revised 5 June 2018) Wai 2180 #H7 at 110.
[194] Moana Jackson, *Brief of Evidence of Moana Jackson*, dated 21 March 2018 (revised 5 June 2018) Wai 2180 #H7 at 121.
Waitangi Tribunal, *Te Mana Whatu Ahuru, Report on Te Rohe Pōtae Claims (Pre-Publication Version)* (Wai 898) dated 2018 at 39.
[195] Wai 2180 #H7, *Brief of Evidence of Moana Jackson*, dated 21 March 2018 (revised 5 June 2018) at 121
[196] Hirini Moko Mead, *Tikanga Māori: Living by Māori Values*
Moana Jackson, *Brief of Evidence of Moana Jackson*, dated 21 March 2018 (revised 5 June 2018) Wai 2180 #H7 at 115.
[197] Richard Steedman, *Statement of Evidence of Richard Steedman*, dated 21 March 2018 (revised 5 June 2018) Wai 2180 #J15 at 40
[198] Wai 2180, #4.1.9, page 160.

> sustainability, making sure that it maintains its wairua, its vitality, everything I believe is what the place of tikanga of what their duties are in terms of te Tiriti, yes.

149. The Crown's duties with respect to tikanga Māori are derived from the principles of Te Tiriti o Waitangi. Such principles include: tino rangatiratanga, active protection, partnership, consultation, and development. The duties that arise from these principles have been outlined in detail at the start of these submissions, and to avoid repetition, that discussion is relied upon here.

Crown acknowledgment and treatment of tikanga

150. From the arrival of Māori until 1840, and for at least two decades after the signing of the Te Tiriti o Waitangi, the inquiry district remained predominantly a Māori world operating under tikanga.[199] Early interactions between Taihape Māori and Pākehā were conducted under the rangatiratanga of Māori and according to their laws. For example, Alexander, having analysed the accounts of early Europeans who made waka journey up the Rangitikei River, concluded that Māori were fully in control of the trips. He explained:[200]

> Māori crew negotiated safe passage (probably thanks to their whakapapa connections) with those Māori holding rangatiratanga over various stretches of the river who were met along the way. Local Māori also appeared to allow both the crew and the Europeans to forage and hunt on the land and on the river. There is no suggestion in the accounts that any Crown authority existed on the stretches of the river that were travelled.

151. The point at which, according to the Crown, it entered a political-legal relationship with Taihape Māori has varied over the years. Such a significant event should be set in stone, but it is not. As outlined in the generic constitutional closing submissions, the shifting sands of Crown opinion is evidence that it does not know the all-important sovereignty transfer date,

[199] Wai 2180 #A14, Tony Walzl, *Tribal Landscape Overview*, dated 5 April 2013 at page 271
[200] Wai 2180, #A40, David Alexander, Rangitikei River and its Tributaries, Historical Report, dated November 2015 p 57

but more than that, it is evidence that the transfer of sovereignty was never effected.

152. Despite the Crown's claims to have assumed sovereignty over the inquiry district by 1840, Taihape Māori continued to live and abide by their own rangatiratanga and tikanga during this period. Incremental assertions of Crown authority through legislation, policy and practices sought to undermine the rangatiratanga of Taihape Māori. Despite this activity, Taihape Māori did not cede sovereignty to the Crown.

Parliamentary Supremacy

153. The Crown, through introducing the British legal system into Aotearoa, has attempted to undermine tikanga Māori through legislation, policies, and practices. This issue is discussed in further detail at 19.5 of these submissions. At the time te Tiriti ō Waitangi was signed, an ideal of partnership was envisaged which involved 'fundamental exchanges for mutual advantage and benefit". [201] Māori ceded kāwanatanga (governance) to the Crown in exchange for the recognition and protection of their tino rangatiratanga (full authority) over their own peoples, lands, and taonga.[202] The Crown's right to govern was to be tempered by rangatiratanga or chiefly authority. [203] Where their respective spheres of authority overlapped, a practical balance or collaborative agreement was to be negotiated in the making of law and policy.[204] This has not been the experience of Taihape Māori

Tikanga Māori and the common law

154. Whilst Parliamentary supremacy has largely resulted in tikanga being insufficiently incorporated into legislation, if at all, the values, customs, and norms which underpin tikanga Māori constitute a legal system. [205] As

[201] Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4
[202] Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358) dated 2019 at 1.5.2
[203] Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake: Report on the Māori Community Development Claim* (Wellington: Legislation Direct) dated 2015, p 25
[204] Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake: Report on the Māori Community Development Claim* (Wellington: Legislation Direct) dated 2015, p 25, 42
[205] Dr R Joseph, *Re-Creating Legal Space for the First Law of New Zealand*, Waikato Law Review Volume 17 2009 p 82

previously stated, that particular issue is addressed at 19.5 of these submissions. This legal system contained essential elements of law, including predictable rules for behaviour and predictable responses to transgression.[206] Sir Edward Durie stated: "Māori customary law does not have a tradition of strict legal precedent as it is the underlying values that are important, not necessarily the consistency of application."[207]

155. While tikanga Māori is based on values and principles to which the community generally subscribes, the colonial law system is rules-based.[208] Tikanga is flexible and adaptable as the whakapapa upon which it is based is in and of itself "a series of never-ending beginnings".[209] It should not be seen as fixed, frozen in a pre-Treaty context, but as based on a continuing review of fundamental principles in a dialogue between the past and the present.[210] Sir Edward Durie further stated:[211]

> …adherence to principles, not rules, enabled change while maintaining cultural integrity, without the need for a superordinate authority to enact amendments. Custom does not, therefore, appear to have been lacking for vitality and flexibility. Inconvenient precedent could simply be treated as irrelevant, or unrelated to current needs, but precedent nonetheless was regularly drawn upon to determine appropriate action. Accordingly, while custom has usually been posited as finite law that has always existed, in reality customary policy was dynamic and receptive to change, but change was effected with adherence to those fundamental principles and beliefs that Māori considered appropriate to govern the relationships between persons, peoples and the environment.

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[206] Waitangi Tribunal, *Te Mana Whatu Ahuru, Report on Te Rohe Pōtae Claims (Pre-Publication Version)* (Wai 898) dated 2018 at p 39-40

[207] Durie, E T "Justice, Biculturalism and the Politics of Law" in Margaret Wilson and Anna Yeatman (eds), *Justice and Identity: Antipodean Practices* (Bridget Williams Books, 1995) 33, 35, 36.

[208] Dr R Joseph, *Re-Creating Legal Space for the First Law of New Zealand*, Waikato Law Review Volume 17 2009 p 82; E Durie, 'Māori Custom Law' (Unpublished Paper, Wellington, 1994), 3.

[209] Wai 2180, #H7, Brief of Evidence of Moana Jackson, dated 27 November 2017 at [121]

[210] Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 51.
Law Commission, Te Aka Matua o te Ture, Māori Custom and Values in New Zealand Law, Wellington, NZ March 2001 p3 at 10

[211] ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 331.

156. The incompatible origins and natures of colonial law and tikanga Māori has made the incorporation of tikanga into New Zealand's legal system unwieldy and unsatisfactory. Coates explained that the insertion of tikanga into the law changes its nature, as it largely divorces the custom from its context which consists of the whakapapa from which it is derived,[212] including its underlying principles and values,[213] and its own rules of adjudication and recognition.[214] Justice Joe Williams has stated that "the nature of tikanga is such that to codify it is to kill it".[215] When considering the Te Ture Whenua Māori Bill, the Māori Affairs Select Committee considered that "codifying tikanga would be an overly prescriptive interpretation of values and principles when applied to Māori land. We believe these are best left for whānau, hapū, and iwi to determine".[216] While it has been argued that the extensive codification of Māori customary law may provide a sense of certainty, as it both clarifies the law and makes it more easily publicly ascertainable, it may have certain undesirable effects, such as freezing tikanga Māori in an undesirable form,[217] or making the enactment or amendment of tikanga Māori subject to parliamentary process. This derides the principle of partnership envisioned by Te Tiriti ō Waitangi and outlined in its principles.

157. Furthermore, when Māori customary law is incorporated into legislation it becomes subject to enforcement, interpretation, and application by non-Māori decision-makers who have insufficient understanding or background in tikanga Māori. This leaves the tikanga prone to the possibility of being misunderstood, or for its meaning to be lost in translation.[218] For example, the Native Land Court's attempts to codify tikanga Māori merely resulted in the reduction of extraordinarily complicated tikanga related to whenua into four sources of title – take raupatu, take tupuna, take taunaha, and take tuku, which vastly over-simplified the concepts and provided unsatisfactory means

[212] Moana Jackson, *Brief of Evidence of Moana Jackson*, dated 21 March 2018 (revised 5 June 2018) Wai 2180 #H7 at [121].
[213] [213]
[214] Coates, *Me Mau Ngā Ringa Māori I Ngā Rākau a te Pākeha? Should Māori Customary Law be Incorporated into Legislation?* (2009) at 25
[215] Williams, J *The Māori Land Court: A Separate Legal System?* (New Zealand Centre for Public Law, 2001) at 8
[216] Te Ture Whenua Māori Bill (Report of the Māori Affairs Select Committee November 2016) at 126-2
[217] Coates, *Me Mau Ngā Ringa Māori I Ngā Rākau a te Pākeha? Should Māori Customary Law be Incorporated into Legislation?* (2009) at 26
[218] Coates, *Me Mau Ngā Ringa Māori I Ngā Rākau a te Pākeha? Should Māori Customary Law be Incorporated into Legislation?* (2009) at 24

for excluding groups of claimants in favour of others.[219] The inappropriate application of tikanga Māori by the Native Land Court was further exemplified with regard to succession issues. Chief Judge Robert Stout acknowledged the Court's problematic application of customary law, when he stated in 1905:[220]

> What his Honour presumed the Native Land Court had to do, was to incorporate English law and Māori custom together, and from this conglomerated law find succession, and call it according to Māori custom. It seemed to his Honour that the time had come when there should be some authoritative definition of what Māori custom or usage was. It should not be left to the Native Land Court Judges to declare what they think Native custom is.

The modification of tikanga Māori by mixing its concepts with those of the introduced colonial law undermines the traditional values and whakapapa from which it is derived.

Adjusting the English common law

158. 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 Māori land made after 14 January 1840 would be valid until they had been investigated and a Crown title issued ("the Gipps proclamations").[221] The effect of the Gipps proclamations was described by the Te Paparahi o Te Raki Tribunal in its Stage 1 report: [222]

> The date of the proclamations in New South Wales, 14 January, held a particular significance. From it, for example, the establishment of a British system of land tenure in New Zealand

[219] Law Commission, Te Aka Matua o te Ture, Māori Custom and Values in New Zealand Law, Wellington, NZ March 2001 at 25
Williams, J *The Māori Land Court: A Separate Legal System?* (New Zealand Centre for Public Law, 2001) at 8
[220] 'On Māori Customs Being Codified' in *New Zealand Times* (30 August 1905), 6.
[221] Donald Loveridge, *Brief of Evidence of Donald Loveridge*, Wai 1040, #A18 at 188.
[222] 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.

> 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".[223] Since the Gipps proclamations were derived from or were a form of the royal prerogative and since the royal prerogative is a creature of the common law,[224] it is contended that the common law of England was supplanted here as early as January 1840. The immediate application of the English common law in Aotearoa is consistent with New Zealand being a settled (and not a ceded) colony.[225]

159. Implementation of the common law of England in Aotearoa was then statutorily enshrined through the enactment of the English Laws Act 1858, which stated that the laws of England applied "so far as applicable to the circumstances of the said Colony of New Zealand".[226] Despite the repeal of the 1858 Act, the English common law remains subject to being modified by 'the circumstances of the ... colony', with the meaning of 'circumstances' including tikanga Māori.[227]

160. The adjustment of the English common law to 'the circumstances of the ... colony' is most aptly illustrated in *Attorney General v Ngati Apa*, where the iwi of Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa, Rangitane and Te Atiawa applied to the Māori Land Court for a determination that certain land below the high-water mark in the Marlborough Sounds was Māori customary property. Judge Hingston of the Māori Land Court found in favour of iwi. The decision overturned *Re Ninety Mile Beach,* [228] clarifying that there were no words in the Territorial Sea,

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[223] 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.
[224] In the *Case of Proclamations* (1611) 12 Co Rep 74, at 76 where Coke CJ stated to King James I that "the King hath no prerogative, but that which the law of the land allows him". With that decision, King James I was denied the use of a prerogative he had sought to use. The "law of the land" referred to by Coke CJ was the judge-made common law.
[225] 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."[225] 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 including McLintock, Robson and Scott, Malloy and Williams. Dr Foden, Crown solicitor and legal and constitutional historian, should also be included in that list.
[226] The English Laws Act 1858, s 1; and English Laws Act 1908, s 2; the effect of these provisions is now preserved by s 5 of the Imperial Laws Application Act 1988.
[227] *Attorney General v Ngati Apa* [2003] 3 NZLR 643 at [134] per Keith and Anderson JJ.
[228] *Re the Ninety-Mile Beach* [1963] NZLR 461 (CA).

Contiguous Zone, and Exclusive Economic Zone Act 1977, or any other legislation, that met the 'high test' required to 'explicitly' extinguish Māori customary ownership in the foreshore and seabed. This decision was appealed to the High Court where Ellis J found that land below the low water mark was owned by the Crown, pursuant to the 1977 Act.

161. The Court of Appeal held that the Māori Land Court had the jurisdiction to determine the ownership status of the foreshore and seabed, as customary rights cannot be extinguished by anything less than explicit words. Elias CJ overruled the High Court for starting with "the English common law, unmodified by New Zealand conditions (including Māori customary proprietary interests). They are interests preserved by the common law until extinguished in accordance with the law."[229] Elias CJ further stated:

> In British territories with native populations, the introduced common law adapted to reflect local custom, including property rights. That approach was applied in New Zealand in 1840. The laws of England were applied in New Zealand only "so far as applicable to the circumstances thereof". The English Laws Act 1858 later recited and explicitly authorised this approach. But from the beginning the common law of New Zealand as applied in the Courts differed from the common law of England because it reflected local circumstances.

162. The now settled approach to any application of the English common law '[i]n British territories with native populations' must include an examination of 'the circumstances' prevailing there, whereby 'the circumstances' include the 'native population's' customary rights and practices. That having been said, it must be noted how Elias CJ takes matters much further than mere modification of the English common law:[230]

> The applicable common law principle in the circumstances of New Zealand is that rights of property are respected on assumption of sovereignty. They can be extinguished only by consent or in accordance with statutory authority. They continue to exist until extinguishment in accordance with law is established. Any presumption of the common law inconsistent with recognition of customary property is displaced by the circumstances of New Zealand.

[229] *Attorney General v Ngati Apa* [2003] 3 NZLR 643, at [13].
[230] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 at [85] and [86].

> The common law as received in New Zealand was modified by recognised Māori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.

New Zealand's common law is necessarily distinct from the English common law, as opposed to a mere modification of it. Therefore, where the application of the English common law is opposed to 'local circumstances', such as the prior existence of tikanga Māori, it is not applicable or binding.

163. In *Takamore v Clarke,* issues around the rights to burial were raised, with the dispute being between the deceased's widow and executor ("Ms Clarke") and his wider Tūhoe and Whakatohea whanau group ("whānau"). The deceased had lived most of his adult life in Christchurch with Ms Clarke and their children, dying in 2007. Without the consent of Ms Clarke, the deceased's body was taken by members of his whānau and buried in their traditional rohe, in accordance with the tikanga observed by their hapū. Ms Clarke sought to have the body exhumed and reburied in Christchurch.

164. The Courts and parties recognised that the entitlement to bury someone who dies is not prescribed by any enactment, and therefore the matter would be determined in accordance with the common law of New Zealand. In the Supreme Court the deceased's whānau argued that New Zealand law does not recognise an exclusive right of an executor to determine disposition of the body when the deceased is Tūhoe. However, the majority of the Court found that Ms Clarke's application to bury the deceased in Christchurch was appropriate.

165. A minority of the Court concluded that the executor rule applied was not part of New Zealand common law. The common law right of an executor is subject to the supervisory jurisdiction of the Courts. The fiduciary responsibilities arising from this role are only properly discharged by considering the views of those closely connected with the deceased. In New Zealand these interests include those who have interests by reason of whakapapa and tikanga.[231] The recognition and consideration of these

[231] *Takamore v Clarke* [2012] NZSC 116 at [94]

interests and customs are necessary in the New Zealand legal system where the laws of England applied only "so far as applicable to the circumstances of the … colony".[232] Elias CJ concluded as follows:[233]

> Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. That accords with the basis on which the common law was introduced into New Zealand only "so far as applicable to the circumstances of the … colony".

166. The minority stated the law cannot give effect to custom or values which are contrary to statute or to fundamental legal principles and policies. However, Māori custom according to tikanga is part of the values of the New Zealand common law.[234] Nevertheless, in the circumstances of the case, it was held that Ms Clarke should be entitled to choose where the deceased should be buried.

Criminal law

167. In *R v Mason*, Heath J concluded that a Māori customary system for addressing wrongs had been extinguished "by necessary implication", through ss 5 and 9 of the Crimes Act 1961.[235] Heath J qualified the extinguishment by clarifying that the custom may still play a meaningful role in criminal proceedings provided it can be accommodated within the existing statutory system.[236]

168. On appeal, the Court of Appeal held that the Crimes Act 1961 provides a code for criminal offences within New Zealand, and concurred with Heath J's finding that any application of tikanga in the present context had been extinguished by ss 5 and 9 of the Act.[237] The Court did not consider that express words stating that the Act is to operate as a code were necessary

[232] The English Laws Act 1858, s 1; and English Laws Act 1908, s 2; the effect of these provisions is now preserved by s 5 of the Imperial Laws Application Act 1988.
[233] *Takamore v Clarke* [2012] NZSC 116 at [94]
[234] *Takamore v Clarke* [2012] NZSC 116 at [94]
[235] *R v Mason* [2012] NZHC 1361.
[236] *R v Mason* [2012] NZHC 1361.
[237] *Mason v R* [2013] NZCA 310 at [20].

for it to have that effect.[238] The Court considered it's approach to be consistent with legislative history, in particular the predecessors to the 1961 Act – s 6 of the Criminal Code Act 1883 and s 5 of the Crimes Act 1908.[239] However, the Court acknowledged ss 10 and 27 of the Sentencing Act 2002, which require the Court to take into account the response of the offender's whānau, any measures the offender or whānau propose to make good the harm, and the cultural background of the offender, and suggested such provisions could be invoked by Mr. Mason at sentencing. Referring to the evidence given by Moana Jackson before Heath J, the Court of Appeal held that "tikanga is not presently a viable legal process for serious crime even if continuity of custom could be demonstrated".[240] The appeal was dismissed, and the convictions stood.

169. The *Mason* case illustrates that whilst there is judicial acceptance of tikanga Māori custom in the criminal law context, this is limited to the sentencing process, rather than the pre-trial or trial process. A tikanga Māori approach has been rejected as a complete punishment, despite the principles of the Treaty such as the Crown's duty to protect and maintain tikanga.

Conclusion

170. The Crown's acts and omissions, in respect of the recognition and implementation of tikanga within New Zealand's legal system have been turbulent and insufficient. While tokenistic provisions for tikanga Māori have been considered and incorporated to a degree, tikanga Māori is a subordinate consideration in New Zealand's jurisprudence.

171. The partnership outlined in te Tiriti ō Waitangi, which involved 'fundamental exchanges for mutual advantage and benefit", has never realised the potential of a hybrid system of law and values of tikanga Māori and the English common law. The actions of the Crown indicate that no such hybrid system or sharing of power was ever intended.

172. Tikanga Māori has been suppressed and bridled by the presumptive colonial law through the doctrine of parliamentary supremacy, and the improper

[238] *Mason v R* [2013] NZCA 310 at [26].
[239] *Mason v R* [2013] NZCA 310 at [37]-[28].
[240] *Mason v R* [2013] NZCA 310 at [41].

application of the doctrines implementing the common law of England into Aotearoa. This has undermined the tino rangatiratanga and tikanga of Taihape Māori.

19.5: To what extent, if any, did legislation enacted by the Crown interfere with the retention and development of tikanga for Taihape Māori?

Introduction

173. During the early half of the 1840s, a debate emerged regarding the application of the British law towards Māori. This pervaded colonial discourse, and in many ways informed the application of the law throughout the 1840s and beyond. Ward has explained this debate as between "those who favoured 'exceptionalist' systems, which modified the application of English law to temper it's impacts on Indigenous peoples, and those who favoured the 'strict application' of English law".[241] Despite their differences, both positions maintained that eventual assimilation of Māori within a British legal framework was the ultimate goal, but the antithesis to what obligations and duties guaranteed by Te Tiriti. This resulted in legislation being enacted by the Crown that interfered with the retention and development of tikanga for Taihape Māori. Such legislation includes the Native Exemption Ordinance 1844, and the New Zealand Constitution Act 1852.

Legislation

Native Exemption Ordinance 1844

174. One such example is the Native Exemption Ordinance 1844. Although it ostensibly recognised separate law for Māori, the preamble provisions sought that the native population "be brought to yield a ready obedience to the laws and customs of England" and the weakening of "the force of ancient usages".[242] 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 sought to supplant customary tikanga and chiefly authority. Therefore, Māori were able to practice some of

[241] Damen Ward, A Means of Measure and Civilisation: Colonial Authorities and Indigenous Law in Australasia" (2003) History Compass at 1.
[242] Native Exemption Ordinance 1844, Preamble; Johnson, *The Northern War 1844-1846*, Wai 1040, #A5, page 138.

their customary laws pursuant to the 1844 Ordinance but only because the Crown allowed it. The tino rangatiratanga of Taihape Māori is heavily abrogated if not wholly undermined if it is practiced or expressed at the behest of the Crown.

Resident Magistrate Courts Ordinance 1846

175. The Native Exemption Ordinance was replaced in 1846 by the Resident Magistrates Ordinance. Although Governor Grey heavily criticised his predecessor's Ordinance, he drew heavily upon it to develop his own legislative regime. According to Dorset, the new Ordinance was "the main vehicle through which Grey intended to 'induce' Māori to take up British law and to 'train' them for eventual participation in the broader legal system".[243] The new law established Resident Magistrate Courts throughout the country, in which Magistrates held both summary criminal and civil jurisdiction, in disputes between Māori and Pākehā.

176. In respect of civil matters, the Court would constitute itself as a Court of Arbitration, where the Resident Magistrate would sit with two Māori "native assessors".[244] No decision could be given unless all three members agreed. The criminal provisions made no distinction between offences committed against Māori, and offences committed against Pākehā. However, Māori who confessed to larceny or receiving stolen goods, the Magistrate had discretion to sentence the offender for any period not exceeding two years' imprisonment.[245] Yet, the Ordinance continued to allow Māori convicted (presumably without confessing) of theft or receiving stolen goods to avoid imprisonment through payment to the Court of four times the property's value.[246] Arrest warrants, or committals to prison, for Māori offenders were no longer required to go through local chiefs, and instead Resident Magistrates would make those orders.[247] Whereas the provisions on utu in the Native Exemption Ordinance applied to the Supreme Court, analogous

[243] S Dorsett, "How do things get started? Legal Transplants and Domestification: An Example from Colonial New Zealand (2014) 12 NZJPIL 103.
[244] Resident Magistrates Courts Ordinance 1846, clause 19.
[245] Resident Magistrates Courts Ordinance 1846, clause 9.
[246] Resident Magistrates Courts Ordinance 1846, clauses 10 – 11.
[247] Resident Magistrates Courts Ordinance 1846, clause 7.

provision in the Resident Magistrates Court Ordinance were confined to the Resident Magistrate's Court.

177. For its short time, the Resident Magistrates system involving Māori assessors was perceived as a successful initiative. The critical factor which contributed towards its success was the direct involvement of Māori leadership, adequate consultation with the local people about what laws applied, and what role the chiefs should play in their enforcement role of Māori Assessors. In discussing this role, Dr Robert Joseph wrote that:[248]

> Māori assessors were critical to the success of the system. Their working with the Resident Magistrate helped identify [the Magistrate] as part of the local community, particularly where [Magistrates] involved themselves sympathetically with the people and treated the assessors as responsible lieutenants. This measure reinforced group cohesion by not appearing to the Māori as an appeal outside. Moreover, Māori assessors also frequently heard cases on their own… The critical factors contributing to the success of the Resident Magistrates system were adequate consultation with the people of a district about what laws would apply and what part the chiefs should play in their enforcement.

New Zealand Constitution Act 1852

178. Another important yet overlooked constitutional provision that looked to acknowledge Māori customary laws and institutions was s 71 of the New Zealand Constitution Act 1852. It stated:

> And whereas it may be expedient that the laws, customs, and usages of the Aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart

[248] R A Joseph Colonial Biculturalism? The Recognition & Denial of Māori Custom in the Colonial and Post-Colonial Legal System of Aotearoa/New Zealand (paper prepared for Te Mātāhauariki Research Institute, University of Waikato FRST Project, 1998) at p. 10.

> within which such laws, customs, or usages should be so observed:
>
> It shall be lawful for her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from time to time to make provision for the purposes aforesaid, any repugnancy of any such native laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.

179. Section 71 provided for the establishment of native districts where tikanga Māori would prevail. However, the provision was neglected and under-utilised until it was repealed in 1986.[249] When considering the potential of early colonial law, Joseph summarised as follows:

> The Treaty of Waitangi 1840, Official Charters, Royal Instructions, the Resident Magistrates Courts Ordinance 1846, and section 71 of the New Zealand Constitution Act 1852 all envisaged a polyphyletic system of hybrid laws for the new Colony whereby the settlers would govern settlers and Māori would govern themselves according to their customary laws and institutions. The explicit establishment of geo-political and bi-jural space was envisaged within the new legal system of Aotearoa-New Zealand regulated according to Māori customary laws for Māori.[250]

180. While these provisions ostensibly provided a context amenable to a dual legal system consisting of colonial law and tikanga Māori, the doctrine of parliamentary supremacy torpedoed a bi-jural system. It is evident no such system or sharing of sovereignty was ever intended by the Crown, despite the assurances guaranteed in Te Tiriti. During the Wai 1040 Inquiry, Hearing

[249] Dr R Joseph, *Re-Creating Legal Space for the First Law of New Zealand*, Waikato Law Review Volume 17 2009 at page 78

[250] Dr R Joseph, *Re-Creating Legal Space for the First Law of New Zealand*, Waikato Law Review Volume 17 2009 at pages 78-79
New Zealand Constitution Act 1986, Long Title and s 26(1)(a). It has been a challenge for the researcher to locate historic de jure examples where s 71 was applied successfully. There were plenty of de facto examples by Māori. For an analysis of the development and demise of s 71 of the Constitution Act 1852, see R Joseph, *The Government of Themselves: Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852,* (2002).

Week 4, counsel for the claimants, Mr Doogan (now Judge Doogan), questioned Professor McHugh in the following way:[251]

MD *In your Aboriginal Societies book, and I do not need to take you to the passage, but you say that this was an empire, the British Empire saw itself as founded upon law, and I think the words you use, in the pyramidic structure of empire, did I get that right?*

PM *Yes.*

MD *Pyramidic structure of empire, motions of authority flowed downwards.*

PM *Yes.*

MD *Flowed downwards from superior to subordinate.*

PM *Yes.*

MD *And at the top of the pyramid there is a sovereign, right?*

PM *Yes.*

MD *And it is in the very nature of a sovereignty that there can only be one, is that right?*

PM *Within a particular domestic legal system, yes.*

MD *So - - -*

*JC** *Sorry, Dr McHugh, can you just speak a bit louder? We did not quite hear that.*

PM *Sorry, I will repeat my answer. Within a particular sovereign legal system, yes, there can only be one sovereign.*

181. The Resident Magistrates system enabled some recognition of Māori custom, norms, and institutions, however in 1893 the Magistrates Court Act repealed the Resident Magistrates Act 1867, abolishing the office of Resident Magistrate and the associated role of Native Assessors. Whilst both the Native Exemption Ordinance and the Resident Magistrate Ordinance incorporated elements of utu into legal system, both constituted a means of gradually acculturating Māori to a system of justice modelled on British laws. For Māori, punishing the criminal was "a vindictive and largely pointless proceeding".[252] They felt that there should be compensation for victims, and his or her kin, in the form of utu. Therefore, the enactment of such legislation adversely affected the retention and development of

* Judge Coxhead

[251] *Hearing Week 4 Transcript,* Wai 1040, #4.1.4, page 534, lines 39-44 and page 535, lines 1-13.

*Judge Coxhead

[252] Alan Ward A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand (Auckland University Press, Auckland, 1995) at 62.

surrounding the tikanga of utu not only by Taihape Māori, but Māori across Aotearoa.

182. The principle that 'there can only be one sovereign' was emphatically embraced by the Crown in imposing the doctrine of parliamentary sovereignty, affecting the wholesale subjugation of tikanga Māori with an onslaught of legislation. The affirmation of tino rangatiratanga in Article 2 of te Tiriti o Waitangi was never upheld.[253] Taihape Māori were significantly prejudiced as a result.

183. The incorporation of tikanga in contemporary legislation should have enhanced its use and development. However, the decontextualisation of tikanga from its roots in traditional Māori society limits its effectiveness. Its apportionment into a series of discreet values, applied in a tokenistic manner throughout contemporary legislation, undermines its role as a wholly functional legal system in the management of the affairs of Māori and their interests.[254] As the Tribunal found in the *He Maunga Rongo* report: "the balancing of Māori interests must be done in a manner consistent with the Treaty, and Māori rights cannot be balanced out of existence".[255]

184. It has been observed that there still appears to be a potential for the values of the dominant society to be "regularly applied in the assessment of proposals without a thought as to their origin".[256] The very concept of a 'dominant culture' belies the principles of Te Tiriti which gives Māori values an equal place with British values, and a priority when the Māori interest in their taonga is adversely affected.[257] However, the overarching authority of the Crown imposed through the doctrine of parliamentary supremacy makes the misapprehension and diminishment of these values inevitable.

[253] It is submitted that Article 2 of te Tiriti o Waitangi culminates in an affirmation of Māori 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 Māori sovereignty. We elaborate on the meaning of "tino rangatiratanga" below.
[254] For example, see the Resource Management Act 1991, and its definition of tikanga, discussed in detail at 19.8 of these submissions.
[255] Waitangi Tribunal, *He Maunga Rongo, the report on Central North Island claims, stage 1*, Part V, page 1673, Wai 1200, 2008.
[256] Waitangi Tribunal, *The Manukau Report (Wai 8)* 1985 at 57
[257] Waitangi Tribunal, *The Manukau Report (Wai 8)* 1985 at 57

Tohunga Suppression Act 1907

185. The Tohunga Suppression Act 1907 made being a tohunga an offence punishable by fine or imprisonment. The Preamble stated:[258]

> Whereas designing persons, commonly known as tohungas [sic], practise on the superstition and credulity of the Māori people by pretending to possess supernatural powers in the treatment and cure of disease, the foretelling of future events, and otherwise, and thereby induce the Māoris to neglect their proper occupations and gather into meetings where their substance is consumed and their minds are unsettled, to the injury of themselves and to the evil example of the Māori people generally.

186. The offence was described in section 2:[259]

> Every person who gathers Māoris around him by practising on their superstition or credulity or who misleads any Māori by professing or pretending to possess supernatural powers in the treatment or cure of any disease, or in the foretelling of future events, or otherwise, is liable on summary conviction before a Magistrate to a fine not exceeding twenty-five pounds or to imprisonment for a period not exceeding six months in the case of a first offence, or to imprisonment for a period not exceeding twelve months in the case of a second or any subsequent offence against this Act.[260]

187. Though the Act was aimed at charlatans profiting from the ills and fears of Māori, it also stigmatised all tohunga, both symbolically and ideologically, making it impossible for them to "honour the traditions of tohunga and their whare wānanga of the past without running the risk of prosecution".[261] The Tohunga Suppression Act undermined the social and ethical standing of tohunga.

Impact of the Tohunga Suppression Act

188. There were nine convictions under the Tohunga Suppression Act between 1910 and 1919.[262] The Act created suspicion and fear in Māori communities, undermining community structures and the transmission of ancient

[258] Tohunga Suppression Act 1907, Preamble.
[259] Tohunga Suppression Act 1907, s2(1).
[260] Tohunga Suppression Act 1907, s2(1).
[261] Waitangi Tribunal*, Ko Aotearoa Tenei Volume 2,* (Wai 262) at 619.
[262] Waitangi Tribunal*, Ko Aotearoa Tenei Volume 2,* (Wai 262) at 615.

knowledge.[263] Yet, some people continued to go to them due to the lack of access to conventional medical assistance,[264] and because they wanted to maintain their traditional practices. The Act created suspicion and fear in Māori communities, undermining community structures and the transmission of ancient knowledge.[265]

189. We submit that the conviction of tohunga under the Tohunga Suppression Act would have had an immediate impact on the retention of mātauranga Māori. The creation of suspicion and fear in Māori communities would have resulted in tohunga concealing their knowledge and not passing their knowledge to future holders of such knowledge for fear that they would also suffer repercussions. This would have had a concomitant impact on the transmission and retention of that knowledge.

190. The Joint Brief of Evidence of Āwhina Twomey, Kiriana Winiata, and Jordan Winiata-Haines described the blessing of having experts in tohungatanga who lived together as whānau and in many cases as hapū on their papakāinga throughout the rohe.[266] These experts held key roles and responsibilities were delegated, gifted or succeeded to, in order to maintain and protect the survival of their people. Their many and varied fields of expertise included:

a. Tohunga ahurewa: highest class of priest;

b. Tohunga matakite: foretellers of the future;

c. Tohunga whakairo: expert carvers;

d. Tohunga tātai arorangi; experts at reading the stars;

e. Tohunga kōkōrangi expert in the study of celestial bodies (astronomer);

[263] Waitangi Tribunal, *Ko Aotearoa Tenei Volume 2*, (Wai 262), at 619.
[264] Waitangi Tribunal, *Ko Aotearoa Tenei Volume 2*, (Wai 262) at 622.
[265] Waitangi Tribunal, *Ko Aotearoa Tenei Volume 2*, (Wai 262), at 619.
[266] Joint Brief of Evidence of Āwhina Twomey, Kiriana Winiata, and Jordan Winiata-Haines dated 4 May 2018, Wai 2180 #K9 at [10]

f. Tohunga tārai waka: expert canoe builders;

g. Tohunga wetereo: expert in language (linguist);

h. Tohunga tā moko: expert in tattoo;

i. Tohunga mahi toie: expert artists;

j. Tohunga tikanga tangata: expert in the study of humans (anthropologist);

k. Tohunga o Tūmatauenga: expert in weapons or war party chaplain:

l. Tohunga kiato: lower class of priest;

m. Tohunga pūoro: expert in instruments which are a medium of communicating with the Gods.

191. The Tohunga Suppression Act achieved its ambit and sundry, resulting in the widespread suppression of tohunga and therefore the suppression of tikanga of Taihape Māori at iwi, hapū, whānau and even at an individual level. As summarised by Isaac Hunter:[267]

> For my ancestors, the Tohunga Suppression Act and other laws like it were an important signal that the tide had turned and Māori traditional laws was not respected or valued by the laws of the land.

192. We refer to our discussion on the suppression of tohunga under 19.2 above. The Act focussed strongly on replacing traditional Māori healing with modern medicine, it took away the key part of protecting the knowledge and artistry of taonga such as puoro and many other arts like taonga takaro, carving,

[267] Wai 2180, #4.1.14, page 29.

karakia, rāranga and much more.[268] This has had devastating impacts on the practices of tohunga and the transmission of mātauranga Māori.

Conclusion

193. Since the signing of Te Tiriti, the Crown has enacted legislation that has adversely affected the development and retention of tikanga, including the tikanga of Taihape Māori. By the enactment of legislation such as the early Ordinances, the Constitution Act of 1852, and the Tohunga Suppression Act, the development and retention of tikanga concerning matters such as crime and punishment, governance and traditional medicine has been prohibited or stunted.

Issue 19.6: To what extent and in what ways, if any, have Crown legislation, policy and practice affected the tikanga of traditional Taihape Māori leadership structures?

194. Since the signing of te Tiriti ō Waitangi, the tikanga of Taihape leadership has not been sufficiently recognised and protected by the Crown. In fact, the Crown actively sought to undermine the rangatiratanga of Taihape Māori. In these submissions, we attempt to describe the source of chiefly authority and how it was wielded. We then set out how the Crown undermined the traditional leadership structures. The phrase "rangatiratanga" is used to encapsulate the different forms of tribal leadership that existed.

Substance of Rangatiratanga

195. Māori settlement of Aotearoa occurred around 1350 AD. A loose cluster of related tribal groups, led by their respective rangatira, migrated by waka from East Polynesia.[269] Leadership was entrusted to waka captains, as well as tohunga, based on the belief in the sanctity of traditional waka authority and the legitimacy of those persons exercising it.[270] Waka captains exhibited transactional leadership, having the authority to issue commands.[271]

[268] Jerome Kavanagh, *Brief of Evidence of Jerome Kavanagh* dated 4 May 2018, Wai 2180 #K11 at p 3.
[269] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 11-12.
[270] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 12.
[271] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 12.

However, as the population grew in Aotearoa, waka groupings were naturally replaced by other social divisions, namely whānau, hapū and iwi.[272]

196. Rangatiratanga was based on mana and whakapapa.[273] Leaders also had certain personal qualities.[274] Te Rangikaheke stated:[275]

> [l]eadership in Māori terms requires both status proven by descent and a strong display of certain personal attributes. Most significantly it is for the people to recognise those qualities and so identify the rangatira in the course of time.

197. Other qualities such as aroha, wairua and manaaki were also displayed and so were skills such as hunting, fishing, other resource gathering and fighting. Traditionally, Māori society supported a fourfold hierarchy of leadership:

a. Rangatira;

b. Ariki;

c. Tohunga; and

d. Kaumatua.[276]

Rangatira

198. Selwyn Katene wrote:[277]

> The term 'rangatira' sheds light on the nature of Māori leadership. The word, meaning 'chief', is gender neutral.[278] The 'ranga' of 'rangatira' is an abbreviation of 'raranga' (weaving), and 'tira' signifies a group. One of the key characteristics of a rangatira is to weave the group into one; to provide a sense of unity.

[272] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 12.
[273] Selwyn Katene The Spirit of Māori Leadership (Huia Publishers, Wellington, 2013) at 12.
[274] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 12.
[275] Waitangi Tribunal, *Report on the Orakei claim*, p 133.
[276] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 13.
[277] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 13.
[278] Williams HW, (1971), A Dictionary of the Māori Language, Government Printer, Wellington at p. 323.

> 'Rangatira' provides a definition of leadership that encapsulates the interdependent and collectivist nature of Māori society.[279]

199. The ability of a rangatira to lead was a birth right[280] but to maintain authority displays of mana were required.[281] Mana reflected one's influence[282] and it could be enhanced:[283]

> … mana was to a large extent inherited and, if those who possessed it led socially responsible lives or accomplished memorable deeds, it was enlarged. The qualities of mana and tapu (personal 'sacredness' or 'untouchability') were regarded as manifest more intensely in those rangatira who possessed the status of ariki or paramount aristocrats. Such leaders, bound by all their spiritual complications that surrounded intensified tapu, most often 'presided' as focal points for community identity and loyalty rather than actively leading their people in war or peace. Their words would be influential in determining tribal strategies, however, for they were seen as potential intermediaries between deities and humankind and between ancestors and descendants. These categories too were flexible rather than immutable.

Others could rise to positions of leadership through the possession of personal characteristics, the accomplishment of deeds and with displays of skill, such as those exhibited in combat.[284]

200. Marsden defined tapu as "the sacred state or condition in which a person place or thing is set aside by dedication to the gods and thereby removed from profane use".[285] Two kinds of tapu operated: the private (relating to individuals) and the public (relating to communities).[286] The laws of tapu were created in order to preserve mana.[287] Tapu, as well as mana, was transmitted from one to chief to another and they were held in high regard

[279] Kennedy JC, (2000), 'Leadership and culture in New Zealand', Discussion paper No. 88, Commerce Division, Lincoln University, Canterbury.
[280] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 19.
[281] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 2.
[282] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 14.
[283] Michael King *The Penguin History of New Zealand* (Penguin Books, Auckland, 2003) at 3.
[284] Buddy Mikaere *Māori in Aotearoa New Zealand: Understanding the culture, protocols and customs* (New Holland Publishers (NZ) Ltd, Auckland, 2013) at 12.
[285] MH Durie *Te Mana, Te Kāwanatanga: The Politics of Māori Self-determination* (Oxford University Press, Auckland, 1998) at 118-119.
[286] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 14.
[287] Samuel Robinson Tohunga: The Revival Ancient Knowledge for the Modern Era (Reed Books, Auckland, 2005) at 100.

because of their tapu.[288] Any violation of a rangatira's tapu was done so on pain of death.[289]

201. Sir Hirini Moko Mead outlined six key responsibilities of a rangatira:[290]

a. Te Mauriora (survival).

b. Tikanga (customs) and kawa (procedure).

c. Moenga rangatira (the chiefly marriage bed).

d. Pā harakeke (continuity).

e. Tangohanga (acquisition of wealth).

f. Tohatoha (fair distribution).

202. Traditional Māori society embraced a worldview that was dominated by whakapapa.[291] The descent from bilateral senior lines that conferred status upon a person was 'not confined to males'.[292] Both sexes could inherit rangatira status, and mana and tapu, from male and female ancestors.[293] Women of pre-eminent rank "personified mana over land and people in their communities and descent groups". Such women were tapu. They held chiefly rank and power and possessed and exercised mana.[294] There are multiple examples of wāhine Māori as eponymous ancestors or sources of mana as significant landholders and/or the inheritors of mana whenua in the Taihape district.[295]

[288] Selwyn Katene The Spirit of Māori Leadership (Huia Publishers, Wellington, 2013) at 14.
[289] Selwyn Katene The Spirit of Māori Leadership (Huia Publishers, Wellington, 2013) at 14.
[290] HM Mead *Landmarks, Bridges and Visions: Aspects of Māori Culture* (Victoria University Press, Wellington, 1997) at 201.
[291] Ballara, A, *Wahine Rangatira: Māori Women of Rank and Their Role in the Women's Kotahitanga Movement of the 1890s*, NZJH, 27, 2 (1993) at 130.
[292] Ballara, A, *Wahine Rangatira: Māori Women of Rank and Their Role in the Women's Kotahitanga Movement of the 1890s*, NZJH, 27, 2 (1993) at 130.
[293] Michael King *The Penguin History of New Zealand* (Penguin Books (NZ) Ltd, Auckland, 2003) at 87.
[294] Ballara, A, *Wahine Rangatira: Māori Women of Rank and Their Role in the Women's Kotahitanga Movement of the 1890s*, NZJH, 27, 2 (1993) at 131
[295] Wai 2180 #A12 Tony Walzl, *Tribal Landscape Overview*, at page 397- 402

203. The role of a rangatira was to lead the people, in both community and national affairs, and to unite hapū and whānau.[296] Chiefs were leaders as opposed to rulers, with authority belonging to the people.[297] A rangatira relied on ongoing support from the people – which was given when tasks such as food-gathering, warfare, and erecting whare were successfully carried out.[298] A chief was a trustee for his people, and therefore his authority was exercised with their advice and support.[299] Most effective Māori leaders arose from a foundation of strong whānau, hapū and iwi support.[300]

Ariki, tohunga and kaumātua

204. Whilst rangatira were the pre-eminent leaders of Māori society, the ariki, tohunga and kaumatua also held leadership roles.

205. Māori viewed all power and authority as originating from the atua, with man as an agent of god, "or an instrument through which godly power was expressed."[301] Supreme control rested with the gods, followed by the ariki class.[302] The most senior-ranking member amongst the Māori aristocracy, who were the first-born of the most senior whānau, is the ariki.[303] Mana and tapu were greater in those rangatira who has the status of ariki.[304] However, in some traditions ariki status was so tapu that the incumbent would not participate in political affairs, whilst in other circumstances, the ariki was an active and involved leader.[305] The most powerful and high-ranking chiefs were sometimes referred to as the paramount chief.[306]

[296] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 19.
[297] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 15.
[298] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 15.
[299] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 18.
[300] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 2.
[301] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 23.
[302] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 23.
[303] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 23.
[304] Michael King *The Penguin History of New Zealand* (Penguin Books (NZ) Ltd, Auckland, 2003) at 79.
[305] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 23.
[306] Rāwiri Taonui, 'Tribal organisation - Social rank', Te Ara - the Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/tribal-organisation/page-5 (accessed 31 August 2020). Story by Rāwiri Taonui, published 8 Feb 2005

206. Tohunga are priests or experts in a particular field.[307] Māori scholar Te Rangi Hīroa suggested that the title is derived from the word "tohu", which means "to guide or direct", whereas Ngāpuhi elder Māori Marsden suggested that "tohu" means "sign or manifestation", so tohunga means chosen or appointed one.[308] The meaning assigned by Māori Marsden reflects how tohunga were identified at a young age, based on high birth and elevated intelligence.[309] Traditionally, tohunga were feared by many people and they lived very different lives to others, given they were tapu.[310] Tohunga would also act as mediums, allowing atua and spirts to communicate through them.[311] Therefore, tohunga held an important position in Māori society, with key roles and responsibilities in relation to the distribution and maintenance of mātauranga, wairuatanga and tikanga. As experts, tohunga held a prominent leadership role in Māori society and often worked in concert with rangatira.[312] The suppression of tohunga has been discussed in greater detail in the preceding submissions.

207. Kaumātua are male and female elders in Māori society and they have a variety of roles in their whanau, hapū and iwi, including:[313]

a. Storehouse of tribal knowledge, genealogy, and traditions;

b. Guardians of tikanga;

[307] Basil Keane, 'Traditional Māori religion – ngā karakia a te Māori - Tohunga', Te Ara - the Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/traditional-maori-religion-nga-karakia-a-te-maori/page-2 (accessed 25 August 2020). Story by Basil Keane, published 5 May 2011
[308] Basil Keane, 'Traditional Māori religion – ngā karakia a te Māori - Tohunga', Te Ara - the Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/traditional-maori-religion-nga-karakia-a-te-maori/page-2 (accessed 25 August 2020). Story by Basil Keane, published 5 May 2011. Basil Keane, 'Traditional Māori religion – ngā karakia a te Māori - Tohunga', Te Ara - the Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/traditional-maori-religion-nga-karakia-a-te-maori/page-2 (accessed 25 August 2020). Story by Basil Keane, published 5 May 2011
[309] Samuel Robinson *Tohunga: The Revival Ancient Knowledge for the Modern Era* (Reed Books, Auckland, 2005) at 85.
[310] Samuel Robinson Tohunga: The Revival Ancient Knowledge for the Modern Era (Reed Books, Auckland, 2005) at 92.
[311] Basil Keane, 'Traditional Māori religion – ngā karakia a te Māori - Tohunga', Te Ara - the Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/traditional-maori-religion-nga-karakia-a-te-maori/page-2 (accessed 25 August 2020). Story by Basil Keane, published 5 May 2011
[312] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 23.
[313] Rawinia Higgins and Paul Meredith, 'Kaumātua – Māori elders', Te Ara - the Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/kaumatua-maori-elders (accessed 25 August 2020). Story by Rawinia Higgins and Paul Meredith, published 5 May 2011

c. Nurturing children – traditionally kaumatua looked after children while their parents worked or went away to fight, and often brought up the first grand-child;

d. Providing leadership; and

e. Helping resolve disputes.

Whilst the leadership of a whānau was generally the responsibility of a kaumatua, it was not unusual for the real leadership and influence to be exercised by kuia.[314] Kaumātua and kuia were recognised by extended whānau and hapū as their immediate leaders.[315]

Undermining the tikanga of rangatiratanga

208. The tikanga of Taihape Māori leadership has been undermined by the Crown's legislation, policies, and actions. The Crown usurped the mana of rangatira and progressively undermined their authority.[316] Traditional leadership "was subjected to strong, often conflicting, external influences (trade, new technology, capitalism, Christianity) once European colonisation took hold".[317]

209. As discussed in 19.4 of these submissions, the English common law was operational in New Zealand as early as 14 January 1840. It was proclaimed on this day by Governor Gipps that no purchase of Māori land made after 14 January 1840 would be valid until any such purchase had been investigated by the Crown and a Crown title issued. The inclusion of New Zealand in the territorial boundary of New South Wales on 14 January 1840 by proclamation usurped the mana and authority of all the rangatira of Aotearoa, including those of the Mōkai-Pātea region. It was just a matter of time before the change that had been effected in 1840 by the Crown would impact on Taihape Māori. With the full force of the Crown in support, Crown land purchasing agent Donald McLean threatened to purchase the land of

[314] M Winiata, (1956), 'Leadership in pre-European Society, Journal of Polynesian Society, vol. 65, no. 2, p.212.
[315] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 27.
[316] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 2.
[317] Selwyn Katene *The Spirit of Māori Leadership* (Huia Publishers, Wellington, 2013) at 2 – 3.

Mōkai-Pātea Māori from other parties in 1849 in direct contravention of the wishes of Mōkai-Pātea rangatira.

210. Representative government in the form of the General Assembly was established with the enactment of the New Zealand Constitution Act 1852 ("the 1852 Act"). It was "representative" in name only since most Māori were denied the right to vote for or be represented in the new settler assemblies established as a result of the 1852 Act.[318] The General Assembly established pursuant to the 1852 Act was at the helm of the country's affairs and Taihape rangatira were not a part of the decision-making process. In this way as well, their mana and authority was undermined and eroded away.

211. As illustrated in the evidence of Lewis Winiata, the sexism that was entrenched in the English legal system diminished the status of wāhine rangatira.[319] At the time, the women leaders were not a part of the settler political system. The Crown and its agents could only conceive of dealing with men: "Māori men were the ones with whom the colonisers negotiated, traded and treatied".[320] While the New Zealand Constitution Act 1852 enfranchised men who met the property criteria, it was not until 1893 that women were given the right to vote in parliamentary elections. Wāhine would have to wait until 1919 for the right to stand for Parliament.[321] The disenfranchisement of wāhine from the political sphere was antithetical to the rangatiratanga that wāhine Māori were used to wielding. The marginalisation of wāhine Māori undermined their mana and so the advice and counsel they usually provided became less and less a part of the decision-making processes, ultimately to the detriment of Taihape Māori in general.

[318] O'Malley, *Te Rohe Potae Political Engagement Report 1840-1863*, Wai 898 #A23, page 139.
[319] Lewis Winiata, *Brief of Evidence of Lewis Winiata (Wai 662, 7835, 1868)* dated 19 September 2017, Wai 2180, #G14 at [101], [115]
[320] A. Mikaere, *Māori Women: Caught in the contradictions of a Colonised Reality*, 2 Waikato L. Rev. 125 (1994), at 132.
[321] Electoral Act 1893
Women's Parliamentary Rights Act 1919

212. The ostracism of wāhine rangatira by the Crown was inconsistent with Māori perceptions of traditional leadership. Ani Mikaere observed:[322]

> The roles of men and women in traditional Māori society can be understood only in the context of the Māori world view, which acknowledged the natural order of the universe, the interrelationship or whanaungatanga of all living things to one another and to the environment, and the over-arching principle of balance. Both men and women were essential parts in the collective whole, both formed part of the whakapapa that linked Māori people back to the beginning of the world, and women in particular played a key role in linking the past with the present and the future. The very survival of the whole was absolutely dependent upon everyone who made it up, and therefore each and every person within the group had his or her own intrinsic value. They were all a part of the collective; it was therefore a collective responsibility to see that their respective roles were valued and protected.

213. These were the developments at the time despite the leadership roles wāhine Māori had previously held in the Taihape rohe:[323]

> Māori women within the iwi and hapū of the Rangitīkei River catchment area has a central leading role. Colonisation has to some extent pushed women into the background of tribal leadership. But Māori women of the Rangitīkei River catchments areas played central leading roles in taking claims to the Native Land Court and have continued to provide strong role models and to have important influence in the communities including the tribal decision making.

214. The Municipal Corporations Act 1876 gave both men and women ratepayers the right to vote and stand for local government office. However, in general, Māori did not participate. non-participation of Māori in local government appears to have been the norm, excluding Māori from political influence at

[322] Ani Mikaere: *Māori Women: Caught in the Contradictions of a Colonised Reality* (Waikato Law Review, 1994).
[323] D A Armstrong, *The impact of environmental change in the Taihape district 1840*-C1970, Wai 2180, #A45 at 261.

this level.[324] The effects of the early exclusion of rangatira in local government bodies and decision-making appears to have continued through to the present, where there continues to be an observable lack of Māori representation at the local government level.

Māori land legislation

215. The Native Land Acts of 1862 and 1865 initiated a process whereby title to Māori land was investigated for the purpose of placing Māori land interests in the hands of individual owners. The individualisation of title was done for ease of identification and sale to willing Crown purchasing agents offering cash to a people who were always in difficult financial circumstances, and so they would sell. In traditional times, the alienation of land by way of a gift or tuku whenua was the domain of the rangatira in counsel with his or her advisors; whereas in colonial times the role of the rangatira in land transactions was reduced to that of a by-stander. There was no chiefly power of veto over a land sale if the landowner decided to offload their interests to the Crown or to a private purchaser. The Native land legislation significantly undermined the mana of the rangatira.

Māori forums

216. In the face of large-scale land alienation in their rohe, Taihape Māori sought to assert their interests and protect their whenua. As old methods of dispute resolution involving warfare declined, representative tribal bodies such as komiti and rūnanga were formed to address land and boundary issues and to engage with the government.[325] However, the continued role of the Native Land Court in the affairs of the komiti and rūnanga wholly undermined their authority and effectiveness. In section 19.7 of these closing submissions, we highlight the court's pivotal role in a failed attempt by rangatira to administer a partitioning of the Awarua land block in the mid-1890s. On its face, the komiti and rūnanga promised independence and control for the chiefs but the legislative requirement for court oversight took such pretence away.

[324] Meredith, Joseph and Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspective Report,* Wai 2180 #A44 at 280.
[325] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 26.

217. Support for the Kīngitanga was also canvassed in the inquiry district by rangatira such as Tamihana Te Rauparaha, Matene Te Whiwhi and by Iwikau Te Heuheu Tūkino. The Kīngitanga was viewed favourably by many Taihape rangatira. [326] By the late 1850s, Kīngitanga-based rūnanga emerged in the Central North Island district, holding formal meetings, enacting laws, and administering justice.[327] Similar rūnanga also appeared in neighbouring regions to the inquiry district.[328] As discussed more fully in the Generic Closing Submissions on Constitutional Issues, the Kīngitanga was supported in the Mōkai-Pātea region but armed suppression by the Crown in 1863 and 1864 put paid to the Kīngitanga as a vehicle for the maintenance of chiefly mana and authority.

A homogenous New Zealand society

218. The Crown's objective of social control in New Zealand through a politically and culturally homogenous society involved the marginalisation of Taihape rangatira. Homogeneity and a monolingual society entailed the subjugation of the Māori race according to Dr Judith Simon:[329]

> The Education Ordinance of 1847 first provided for Government funding of mission schools. The support of mission schools continued via the Native Schools Act 1858. Dr Simon believed that the Government was using the schooling of Māori as a means of social control and assimilation, and for the establishment of British law. She provided as evidence a report by school inspector Hugh Carleton, who said in 1862 that schools were 'aiming at a double objective, the civilisation of the race and the quietening of the country' . . ..

The "quietening of the country" could not be achieved if rangatira maintained their mana and authority. "Quietening" the Kīngitanga was precisely the reason why the Crown invaded the Waikato in 1863.

219. Whilst military invasion and armed suppression comprised one approach to effecting the Crown's social control agenda, assimilation through the

[326] Tony Walzl, *Tribal Landscape Overview*, Wai 2180 #A12 at 384.
[327] Tony Walzl, *Tribal Landscape Overview*, Wai 2180 #A12 at 380.
[328] Tony Walzl, *Tribal Landscape Overview*, Wai 2180 #A12 at 380.
[329] Waitangi Tribunal, *Waananga Capital Establishment Report*, 1999, at 5.

education process was identified by Hugh Carleton (and others) as a less violent and less expensive approach to achieving the same outcome:[330]

> . . . 'things had now come to pass that it was necessary to either exterminate the Natives or to civilise them', as well as Major Heaphy, who stated that 'Any expenditure in this direction would be true economy, as the more Natives were educated the less would be the future expenditure in police and gaols.

Other educationalists have acknowledged the social control purpose of the assimilation agenda.[331] According to Professor Ranginui Walker, Māori were invaded by the assimilationists:[332]

> Beginning with the missionaries, the founding fathers of the new nations state were therefore committed to the policy of assimilation. To this end, the missionaries, and later the state, used education as an instrument of cultural invasion.

220. In New Zealand, Māori were educated by the Crown in the interests of producing a homogenous society for ease of control. One of casualties of the assimilation onslaught was the mana and authority of the rangatira.

Conclusion

221. The tikanga of rangatiratanga was a highly developed process by the time of the signing of te Tiriti ō Waitangi. A hierarchy of leadership had evolved as a counterbalance to errant, arbitrary decision-making. Although whakapapa played a central role in identifying future leaders, other leadership attributes were necessary such as the ability to bring people together, displays of mana and the exhibition of skills such as resource gathering and defence. Furthermore, the rangatira's responsibilities had been identified to include ensuring the group's survival, laying down the law and acquiring wealth. Unfortunately, Crown legislation, policy and practice was engaged to nullify the role of the rangatira in the Mōkai-Pātea region. The English common law was imposed without Māori consent,

[330] Waitangi Tribunal, *Waananga Capital Establishment Report*, 1999, at 6.
[331] Openshaw, Lee and Lee, *Challenging the Myths: Rethinking New Zealand's Educational History*, The Dunmore Press: Palmerston North 1993, at 40.
[332] Walker, Ranginui. *Ka Whawhai Tonu Matou: Struggle Without End*, 1990, at 145.

representative government was largely exclusive of rangatira, wāhine rangatira were given no place in New Zealand's sexist society, land title was individualised so a chief could not veto land sales, the Kīngitanga's Rohe Tapu was invaded to suppress rangatiratanga, land administration by rangatira-led komiti and rūnanga was undermined by the Native Land Court and the education system diminished the mana and authority of the chief. At a time when Taihape Māori especially needed the leadership of their rangatira, the Crown strived to ensure that the people became leaderless, powerless, and dependent.

Issue 19.7: What was the impact of land alienation on the tikanga of Taihape Māori? Did the Crown consider the effect of the impact of land alienation on the tikanga of Taihape Māori, and if so, what conclusions did it draw?

Introduction

222. The tangata whenua of Taihape have a reciprocal relationship with the world around them, and with all life existing within it. All things are derived and descended from the ātua.[333] A celestially drawn whakapapa connects the people to other people, to the land, to bodies of water, to the flora and fauna and to other elements of the natural world.[334] Based on whakapapa that stems from ancient times, land entitlements, personal identity and executive functions were defined.[335] A co-dependent relationship exists with the land, making it vital and sacred.[336] Land alienation in the inquiry district adversely impacted the tikanga of Taihape Māori, which the Crown failed to consider prior to implementing such policy and practice.

Tikanga and whenua

[333] Durie, E. T., Joseph, R., Erueti, A., Toki, V., Ruru, J., Jones, C., & Hook, G. R, *The Waters of the Māori: Māori Law and State Law* (Report) dated 2017 p 8 at [25]
Korero by Te Rangikaheke on Āwhina, among other topics, as cited in Grey, G, *Polynesian Mythology* (Whitcombe & Tombs, Wellington, 1956) at 15.
[334] Waitangi Tribunal, *Te Mana Whatu Ahuru, Report on Te Rohe Pōtae Claims (Pre-Publication Version)* (Wai 898) dated 2018 at p 41
Mead, *Tikanga Māori*, pp 285–289 ; Durie, *Custom Law*, pp 61–63.
[335] Waitangi Tribunal, *The Whanganui River Report* (Wai 167) dated 1999 at page 38
[336] Manuka Arnold Henare, The Changing Images of Nineteenth Century Māori Society – From Tribes to Nation, dated 2003 p 26

223. A unique tikanga is derived from the relationship that Taihape Māori have with their whenua.[337] Richard Steedman's evidence was that tikanga is guided by whakapapa and whenua.[338] Land is central to the Māori identity; it provides a place to stand and sustenance is drawn from it.[339] As Moana Jackson observed in his evidence:[340]

> In every case too tikanga as law was related to the land, either in the poetic metaphors of creation or in the whakapapa of different Iwi and Hapū to a certain whenua or rohe. Sometimes of course the tikanga was particularised in relation to named markers in the land or sites of significance in the history of the people. In these instances, the story of the land becomes the grundnorm from which tikanga as law takes its meaning and purpose.

224. Whakapapa and tikanga guide the people in their use and development of the environment and its many resources. The intensity of this relationship evinces application of the principle of whanaungatanga to the surrounding world, including the land. This familial aspect to the innumerable relationships generates the duties of kaitiakitanga and manaakitanga which culminate, in turn, in the responsibility to nurture and care.[341] Whakapapa and whanaungatanga defined certain land use rights. These rights were derived from certain methods of acquisition or *take*, and include take tupuna which refers to rights derived from ancestry, take raupatu which refers to rights derived from conquest, and take whenua tuku or rights derived from gifts or grants.[342] Such land rights were further entrenched through ahi kā or occupation and continuous use.[343] It is these principles and duties that underpin the tikanga that Taihape Māori apply to the land.

225. In accordance with tikanga, land was not owned by individuals; it was owned communally instead. As opposed to land ownership, there was guardianship

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[337] Wai 2180 #H7, *Brief of Evidence of Moana Jackson*, dated 21 March 2018 (revised 5 June 2018) at 110
[338] Wai 2180 #J15, *Statement of Evidence of Richard Steedman*, dated 21 March 2018 (revised 5 June 2018) at 40
[339] Waitangi Tribunal, *Te Mana Whatu Ahuru, Report on Te Rohe Pōtae Claims (Pre-Publication Version)* (Wai 898) dated 2018 at p 41
Mead, *Tikanga Māori*, pp 285–289; Durie, *Custom Law*, pp 61–63.
[340] Wai 2180 #H7, *Brief of Evidence of Moana Jackson*, dated 21 March 2018 (revised 5 June 2018) at 125
[341] Waitangi Tribunal, *Ko Aotearoa Tēnei, A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262) dated 2011 at page 5
[342] Waitangi Tribunal, *Te Mana Whatu Ahuru, Report on Te Rohe Pōtae Claims (Pre-Publication Version)* (Wai 898) dated 2018 at page 1185
[343] Waitangi Tribunal, *The Hauraki Report*, (Wai 686) dated 2006 at 44

over the land. Joint occupation and resource use between hapū and iwi were not uncommon.[344] Walzl described traditional land tenure as follows:

> Although there is no evidence of specific boundaries being declared between groups, over time zones of influence exercised by hapū became apparent. Often these are shared with other closely related hapū, sometimes they are comparatively exclusive. The nature of this exclusivity, however, is ever-changing as the intermingling through marriage continues and the membership of any given group widens. Nevertheless, by the time of the Land Court, individuals could record their specific links to occupation points across the land and could recite the rights they exercised.

226. Under Article II of te Tiriti ō Waitangi, the Crown guaranteed to Māori their lands and estates, forests, fisheries, and also their language, identity, and culture, including mātauranga Māori.[345] This guarantee under te Tiriti ō Waitangi extends to the tikanga of Taihape Māori as it pertains to their whenua. The Crown has an obligation to recognise and actively protect all of the interests that Taihape Māori have in relation to their lands, [346] including their customs, laws, values, and institutions.[347] The Tribunal in its *Te Kahui Maunga* report found that there was an onus on the Crown to ensure that Māori fully understood the implications of land transactions. [348] The principle of partnership entails a duty on the Crown to consult with Māori on matters of importance to them. [349] This duty requires the Crown to obtain the full, free, prior, and informed consent of Māori regarding any matter which may alter their relationship with the whenua. [350]

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[344] Tony Walzl, *Tribal Landscape Overview*, Wai 2180 #A12 at 26.
[345] Waitangi Tribunal, *Ko Aotearoa Tēnei, A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua, Volume **1*** (Wai 262) dated 2011 p 17
[346] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai-8) 1985 at page 70.
New Zealand Māori Council v Attorney General [1987] 1 NZLR 641 (HC, CA) at 665.
[347] Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims Volume 1,* (Wai 785) 2008 at 4.
Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p 26 at 1.5.4(6)
[348] Waitangi Tribunal, *Te Kāhui Maunga, The National Park District Inquiry Report, Volume 3* (Wai 1130) dated 2013 p 1011 at 13.5.3
[349] Waitangi Tribunal, *He Maunga Rongo, Report on Central North Island Claims (Wai 1200), Stage One, Volume 1,* dated 2008 at 173.
[350] Waitangi Tribunal, *He Maunga Rongo, Report on Central North Island Claims (Wai 1200), Stage One, Volume 1,* dated 2008 at 173.

227. Although several Pākehā visited the area after 1840, there were no resident Pākehā in the Mōkai-Pātea until 1865. For some decades after the signing of te Tiriti ō Waitangi, the inquiry district remained a Māori world operating in accordance with tikanga.[351] From the 1860's onwards, Taihape Māori confronted the developing colonial political and economic order. They were eager to engage with it but within the context of their existing tribal structures and legal order. Armstrong noted that Taihape Māori sought to engage with the Pākehā world of trade and commerce in a collective manner and in accordance with traditional practices.[352] This was not to be however, as the Crown did little to ameliorate the impact of land alienation on the tikanga of Taihape Māori.

Land alienation by the Crown

228. A plethora of legislative enactments were used by the Crown to wrest their traditional lands from Taihape Māori. The legislation was not designed to preserve tikanga Māori as it pertains to the land. In fact, the objective was to undermine tikanga Māori and make it obsolete.

229. Most if not all the land in the region eventually passed through the Native Land Court.[353] As a result, the tikanga that once applied to Māori land administration was substantially undermined or lost altogether. In his research, Armstrong identified "the erosion and subversion of tribal structures and rangatiratanga, principally through the process of land title individualisation and large-scale land alienation which inevitably followed".[354] Land alienation permeated every aspect of the lives of Taihape Māori and resulted in significant and enduring prejudice to the operation of their legal order.[355]

230. A particular issue for Taihape Māori involved land court claims by outsiders to lands that Taihape Māori held mana whenua over.[356] The Crown did nothing to offset this particularly egregious form of land alienation. In fact, it

[351] Tony Walzl, *Tribal Landscape Overview*, dated 5 April 2013 at 271.
[352] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016, Wai 2180 #A49 at 3-4.
[353] Crown Law, S Eccles / R Ennor / C Tattersall (Crown), Memorandum of Counsel for the Crown contributing to the preparation of a draft statement of issues dated 2 Sep 16, Wai 2180, #1.3.2.
[354] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016, Wai 2180 #A49 at 3.
[355] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016, Wai 2180 #A49 at 3.
[356] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 3, 236.

was facilitated by the Crown's legislative regime. The early instigation of Native Land Court proceedings in the inquiry district was not by Taihape Māori. Instead, they found themselves obliged to participate in court hearings after claimants living outside the district committed their lands to title investigations. Not only were Taihape Māori forced into court, they often found themselves having to share title to their lands with non-resident claimants, and if lands were sold against their wishes by non-resident claimants, there was little they could do other than secure a share of the purchase proceeds.[357]

231. For example, as outlined in the Amended Joint Brief of Evidence of Maata Merle Ormsby, Daniel Ormsby and Ti Aho Pillot:[358]

> The Native Land Court system was open to manipulation and because of that our hapū lost a lot of land. The Crown should pay for that. What happened to us was a real crime. One of the aspects of the Native Land Court in our area was the way that it let Renata Kawepo acquire lands that he had no right to. Kawepo was well known in the Mōkai Pātea region. He made his name as a kupapa, having fought for the Crown in battles such as the one against Te Kooti at Te Porere. During that battle, his eye was scratched out by the woman who would eventually become his wife. Kawepo developed strong relationships with Pākehā landowners and Crown agents in Mōkai Pātea. He became heavily involved in land management and with the Native Land Court in the area. His military service for the Crown and the positive relationships he had with the Crown and Pākehā landowners meant that he got favourable treatment from the Native Land Court, to the detriment of hapū such as Ngati Tamakopiri. That said, we also hold the view that he was a tool of the colonial government of the time – a mere pawn in the Crown's grab for Māori land. This is because the Crown knew that Renata's ties to the land he received from the Court were weak and so he was more likely to sell.

[357] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 2.
[358] Amended Joint Brief of Evidence of Maata Merle Ormsby, Daniel Ormsby and Ti Aho Pillot dated 29 September 2017, Wai 2180 #G18 at [38].

232. Patently aware of how prejudicial the native land legislative regime would be to their maintaining their lands interests, Taihape Māori petitioned Parliament in 1872, the same year of the court's first title investigation in the region. They joined other tribes in seeking to exclude the court from their district so that they could maintain their hapū-based land tenure system. Unfortunately, the Parliamentary petitions and support for pan-iwi organisations such as the Repudiation Movement proved to be in vain as the Crown largely ignored their concerns and failed to apply any favourable reforms. Even when the Crown considered the damaging effect of the land laws on Māori society and tikanga, any law reform that resulted was piece-meal and ineffective. Legislative reform remained directed at facilitating land alienation.[359]

Law reform and the application of tikanga Māori

233. Even when the Crown facilitated the application of tikanga Māori in law reforms made in response to complaints by Māori about the Native Land Court process, the results were the same. In accordance with the Native Land Act 1873, Taihape Māori could administer their lands through fora such as komiti and rūnanga. Land interests could be decided by these Māori-led bodies instead of the Native Land Court.

234. Failed efforts to utilise such fora are perhaps best exemplified in relation to the Awarua block. By the 1880s, Taihape Māori with interests in the 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.[360] 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.[361] Only minor land sales were envisaged as it was anticipated that the construction of the North Island Main Trunk and the

[359] Waitangi Tribunal*, The Hauraki Report*, (Wai 686) dated 2006 at 777.
[360] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 4.
[361] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 4.

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]."[362] An efficient and inexpensive land administration process would be developed where the Native Land Court would 'rubber stamp' rūnanga or komiti decisions. Such a process would manifest the partnership principle of te Tiriti ō Waitangi.[363] 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 individual whānau farms. The komiti Māori, consisting of key rangatira, reached agreement on customary interests and hapū boundaries in accordance with tikanga.[364] Control of the adjudication process was maintained for fairer results (and to avoid the crippling costs of expensive litigation).

235. The komiti Māori finalised its decisions and apportioned land to various groups. Unfortunately, two of the groups did not agree with the partition decisions. As the Native Land Court could only give effect to a voluntary agreement if there was unanimity amongst the groups and since the komiti Māori had no legal authority to enforce or impose its decisions, the matter was bound to go before the court. The case was heard at Marton despite repeated requests that the court sit in the owners' rohe at Moawhango.[365] The Native Land Court put the komiti's partition decisions aside and subjected the block to the protracted and expensive litigation process the komiti Māori had sought to avoid.[366] 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".[367]

236. The Native Land Court's intervention demonstrated the subordination of tikanga Māori to the native land legislation. Armstrong noted with sad irony

[362] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 5.
[363] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 4.
[364] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 5.
[365] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 5.
[366] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 5.
[367] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 5.

how the Native Land Court's decision largely reflected the komiti's earlier determinations.[368] Lomax observed how the Native Land Court's decision undermined cohesion and unity as it set whānau and hapū against each other.[369] It was also noted how the individualised land titles undermined the mana of the rangatira. Individual owners sold their land to Crown agents and private purchasers without recourse to the traditional leadership.[370] This feature of the land court process accelerated land loss and it undermined the rangatira.

Succession

237. To facilitate land alienation, tikanga Māori as it applied to succession was changed by the Crown. In traditional times, land interests were kept whole for the benefit of the whānau-hapū. Management and land retention issues were exacerbated by the Native Land Court's approach to succession. Section 30 of the Native Lands Act 1865 provided that when the Court considered the succession of intestate Māori, it should do so "according to law as nearly as can be reconciled with Native custom". The legislation was worded in a way that gave the court a discretionary approach to succession. The phrase ""as nearly as can be reconciled with Native custom" allowed to court to approximate custom and not necessarily apply it. Accordingly, Chief Judge Fenton held in the *Papakura* case in 1867 that all the children of intestate Māori would inherit equally.[371] If tikanga Māori had been applied, the eldest child of the deceased who died intestate would have inherited the land interests. This tikanga-based approach to intestacy would have significantly reduced the number of owners in each block of land. Although the tikanga Māori approach to intestacy meant that the other siblings did not inherit any land interests, it was available for the court to have applied tikanga Māori and awarded the land interests to the eldest sibling upon trust for their siblings and others.

238. The succession rule applied in *Papakura* and all courts since that time has led to extreme fragmentation of title so that now there can be hundreds of

[368] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 5.
[369] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 5.
[370] Statement of Evidence of Neville Franze Te Ngahoa Lomax, dated 12 February 2018, Wai 2180 #I5 at [7].
[371] Important Judgments Delivered in the Compensation Court and the Native Land Court, 1866-1879. Auckland: Native Land Court.

owners in the smallest of land blocks. Amongst other issues, there are now widespread problems with owner apathy, owner notification issues, logistical issues of an administrative nature, management problems and difficulties with raising finance. The development of multiply owned Māori land has become so problem laden that land alienation by way of sale or lease was and remains an appealing option for owners. These outcomes for Māori owners suited the Crown's land purchasing programme. The Crown's failure to preserve tikanga Māori upon intestacy culminated in a breach of the principles of te Tiriti ō Waitangi. This developed into a particularly significant issue as many Māori died intestate during the 19th and 20th centuries.

Crown Purchasing

239. The Native land laws subverted collective control, rational economic use of the land and the ability of Māori to retain ownership of the land. For instance, as soon as the Awarua title investigation had concluded, the Crown began to acquire individual land interests from those rendered vulnerable to sale by their personal, financial circumstances, despite the urgings of rangatira to hold the land and manage it in a cohesive manner. This pattern of predatory land acquisition by the Crown was not confined to the Awarua block. It was repeated throughout the inquiry district in relation to diverse land blocks, particularly those containing the most valuable land. The land the Crown did not seek was often inaccessible and even land locked, and therefore not viable for economic development.[372]

240. Armstrong thought there was little evidence that the Crown gave any serious thought to how much land ought to be retained by Taihape Māori for the protection and maintenance of their estates and way of life. The Crown failed to consider the desire of Taihape Māori to participate in the developing economy of the region and that they required sufficient lands to do so.[373]

[372] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 7.
[373] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 7.

241. By 1896, the Crown had acquired 72.5% of the 250,000-acre Awarua block.[374] Today only 19,410 acres of the Awarua parent block remains in Māori ownership.[375]

Land Law Commissions

242. Taihape rangatira attempted to slow or halt the Crown's injurious land acquisition programme with petitions to Parliament and participation in several land commissions. For example, the unsatisfactory subdivisions of the Ōwhāoko and Ōruamatua-Kaimanawa blocks saw Parliament petitioned and a Select Committee convened to further investigate the matter. A memorandum was provided by Attorney-General Robert Stout condemning the court's processes as a "gross travesty of justice", befitting the feelings of mistrust displayed toward it by Māori.[376] Chief Judge Fenton retorted in reply:[377]

> it is not part of our duty to stop eminently good processes because certain bad and unpreventable results may collaterally flow from them; nor can it be averred that it is the duty of the Legislature to make people careful of their property by Act of Parliament, so long as their profligacy injures no one but themselves.

243. Stirling opined that the results while certainly bad were scarcely 'unpreventable' as they flowed directly from legislation that Chief Judge Fenton had drafted and implemented.[378] When Parliament sought to ameliorate the worst of the effects of the early land legislation by, for example, recognising the interests of more than 10 owners in the Native Lands Act 1867, Fenton CJ obstructed and resisted its implementation. Though he had stated at the Ōwhāoko re-hearing in 1880 that the whole

[374] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 7.
[375] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 and Oral Evidence of Neville Lomax, dated 2016 at p 11
[376] Bruce Stirling, *Nineteenth Century Overview*, Wai 2180 #A43 at 287-288.
AJHR, 1886, G-9, p.23.
[377] Bruce Stirling, *Nineteenth Century Overview*, May 2016 Wai 2180 #A43 at 288.
AJHR, 1867, A-10a, p.4.
[378] Bruce Stirling, *Nineteenth Century Overview*, May 2016 Wai 2180 #A43 at 289.

point of the Native Lands Acts was to put an end to communal ownership, he stated the opposite before the Rees-Carroll Commission:[379]

> That has been most disastrous, I think. Being to a certain extent a philo-Māori, if I had seen in 1865 what the result of our Acts would have been, I do not think I should have assisted in their introduction. I should have said, 'Let colonisation go to the wall'. ...It has destroyed the race.

Fenton CJ later affirmed that, "in the destruction of the communal system of holding lands is involved the downfall of communal principles of the tribe".[380] As discussed, communalism was and is a key component of tikanga Māori as it relates to the whenua. It is clear from Chief Judge Fenton's statements that a key tenet of tikanga Māori was targeted to facilitate the Crown's land acquisition programme. It is also clear from Fenton's statements that the Crown was aware of the adverse impact of land alienation on the tikanga of Taihape Māori. In fact, an adverse effect on the tikanga of Taihape Māori was precisely what the Crown sought.

244. Mōkai-Pātea rangatira Hiraka Te Rango also attempted to ameliorate the adverse effects of the native land laws when he gave evidence to the Rees-Carroll Commission at Waipawa in 1891. He described the background to the Awarua adjudication, and the many difficulties faced by the rangatira. Te Rango agreed with Commissioner James Carroll that a rūnanga or komiti Māori should be permitted to exercise more control over the title adjudication process, but should also, after title had been settled, be empowered to set aside wāhi tapu and cultivation areas, superintend the allocation of land for leasing or farming purposes, and collect and distribute rents or sale proceeds. Carroll's recommendations essentially reflected the form of collective control and management envisaged by Te Rango.[381] The Rees-Carroll Commission subsequently made detailed proposals which would have provided komiti Māori with the authority to not only investigate titles, but also administer the land once ownership had been determined. Although these and other similar proposals were submitted to Native Minister

[379] Bruce Stirling, *Nineteenth Century Overview*, May 2016 Wai 2180 #A43 at 288. AJHR, 1886, I-8, p.63.
[380] Wai 2180 #A43, Bruce Stirling, *Nineteenth Century Overview,* May 2016 at 289
[381] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 7.

Cadman, they were largely ignored by the Crown in the interests of maintaining its aggressive land purchasing programme.[382]

245. The only recommendation made by Rees and Carroll which was accepted by the Government was the reintroduction of Crown pre-emption, which essentially eliminated competition from private purchasers and further advanced the Crown's land acquisition objectives.

Lack of recognition of wāhi tapu

246. The maintenance of the traditional tribal estates of Taihape Māori necessarily includes their wāhi tapu. As outlined above, the Rees-Carroll Commission recommended that committees, elected by the owners, should, among other things, be charged with setting aside wāhi tapu before land was alienated. This suggestion was regularly ignored by the Crown.[383]

247. The Crown's refusal to recognise wāhi tapu eroded the ability of whānau, hapū and iwi to manage and protect their sacred sites. When lands that contained wāhi tapu were sold, there was no obligation on the purchaser to ensure that access to the wāhi tapu was maintained for interested whānau and hapū members. Many wāhi tapu have been landlocked and made inaccessible as a result. They have been desecrated as a result and/or lost from living memory, to the detriment of the wairua and mātauranga of family members.

248. Claim issues regarding the loss, desecration, or inaccessibility of wāhi tapu have been addressed in detail in the Wāhi Tapu Generic Closing Submissions.[384]

Continued alienation and economic hardship

249. At a hui at Moawhango in March 1894, Premier Seddon told Taihape rangatira that if they did not use their land in an acceptably 'productive'

[382] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 8.
[383] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 19.
[384] Tamaki Legal, Annette Sykes &Co, Wai 2180 #3.3.42 Wāhi Tapu Generic Closing Submissions 5 May 2020.

manner they would inevitably lose it.[385] Seddon's statement came amidst a period of large scale land alienation by the Crown and so it must have been especially disconcerting for his Māori audience to hear. Furthermore, the Premier ignored the many issues that Taihape Māori faced with developing their lands including individualised land tenure, fragmented title, a high proportion of landlocked land and a lack of development finance and government support. Seddon shifted the blame for the poor outcomes on to Taihape Māori at a time when the government should have been actively protecting them. None of the legislative measures that were taken sufficiently addressed the issues that needed resolving. Armstrong opined that the primary aim of the legislative measures was to assimilate and not to strengthen the collective Māori identity.[386]

250. Lomax described how the loss of access to natural resources and mahinga kai areas undermined the ability of Taihape Māori to sustain themselves:[387]

> With the land taken away it also took away our rivers, and the waterways that had been providing food and spiritual nourishment for generations [of] our people, and without these elements the opportunity to exercise full rangatiratanga and kaitiakitanga over these waterways, streams, and land, the identity of the people... was negatively impacted

251. As a result of the loss of their traditional lands and therefore the ability of whānau and hapū to subsist in the region, many Taihape Māori were forced to move away from the region to look for work. The migration out of the region affected the maintenance of tikanga because there was a loss of leadership and associated kawa and mātauranga Māori.[388] Many of those who left the region still owned land interests in numerous blocks and their absence made it difficult in later years to manage the land.[389]

[385] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 at 8.
[386] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 and Oral Evidence of Neville Lomax, dated 2016 at 13.
[387] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49 and Oral Evidence of Neville Lomax, dated 2016 at p 11
[388] Hari Benevides, *Statement of Evidence of Hari Benevides,* dated 19 March 2018 Wai 2180 #J3 at [36].
[389] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49, Oral Evidence of Neville Lomax, dated 2016 at p 11

252. Numerous hapū and tribal-based organisations have been formed down through the years in attempts to address the ongoing issues. Often these organisations operate at the iwi level with a collective tikanga-based approach.[390] Unfortunately, there is often a lack of human and financial resources and difficulties with dealing with legislation such as the Resource Management Act 1991 and the Local Government Act 2002. When dealing with Crown agencies there is often an imbalance of knowledge or expertise which hinders effective engagement and participation. As Armstrong concluded, the developmental ambitions of Taihape Māori were thwarted in virtually every key respect by the Crown through various legislation, policies and practices.[391] Their plans of developing their land and other resources to partake in the colonial economy, whilst maintaining their tino rangatiratanga, have never been realised.

Impact of land alienation on tikanga Māori—Claimant Evidence

253. Claimant evidence is utilised in these submissions to illustrate the detrimental impact that the alienation of land by the Crown has had on the tikanga of Taihape Māori.

254. In their statement of evidence, Raihania Pōtaka explained that the land is a source of identity to Ngāi Te Ngarūrū and that alienation from their whenua has disempowered their people and negatively impacted on their social, physical, mental, and spiritual wellbeing.[392]

255. Rodney Graham explained that the Crown's actions have destabilised Ngāti Kauwhata. Their community well-being has been eroded and they have been deprived of their ability to exercise their rangatiratanga. [393]

256. Ropata William Miritana stated that the Crown actions in relation to their land were contrary to tikanga. This resulted in a significant disconnection for his people from their customary rights and interests in the whenua. This has

[390] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49, Oral Evidence of Neville Lomax, dated 2016 at p 13
[391] David A Armstrong, *Mōkai Pātea Land, People Politics*, 2016 Wai 2180 #A49, Oral Evidence of Neville Lomax, dated 2016 at p 10
[392] Wai 2180 #H12 Statement of Evidence of Raihania Potaka dated 29 November 2017 at [7]
[393] Wai 2180, #L4, Amended Brief of Evidence of Rodney Graham, dated 25 September 2018 at [71]

resulted in a loss of mātauranga Māori, of their whakapapa as well as a disconnection from their whanaunga and taonga tuku iho.[394]

257. Donald Koroheke Tait considered that colonisation changed the way in which tikanga Māori operated. Once close allies and whanaunga lost the ability to work together and the Crown took advantage of the relational discord. Tribal and hapū boundaries were changed to accommodate the government's purposes.[395]

258. According to Rodney Graham, the determinations of the Native Land Court were divisive for Māori as it left them arguing among themselves over title to land.[396]

259. Neville Lomax's evidence was that the Crown was unwilling to engage with collectives of landowners. This undermined traditional leadership and the ability of owners to develop their lands and to take advantage of economic opportunities.[397]

260. The Native Land Court title investigations were highly prejudicial as the entire process was expensive and time consuming. It involved the application of a Pākehā concept of ownership to a Māori world where it did not belong.[398] The operation of the Native Land Court severed generations of mana whenua. Wayne Ormsby explained further:[399]

> A severance of this kind has meant that whakapapa, ahi kaa, mātauranga, wairua and kaitiaki links to the whenua have diminished and in some cases lost forever. This has manifested in generations of economic and cultural deprivation.

[394] Wai 2180, #L5, Brief of Evidence of Ropata William Miritana (Wai 1482) dated 24 August 2018 at [28],[36],[44]
[395] Wai 2180, #L6, Brief of Evidence of Donald Koroheke Tait, dated 27 August 2018 page 4 at [14]
[396] Wai 2180, #L4, Amended Brief of Evidence of Rodney Graham, dated 25 September 2018 at [71]
[397] Wai 2180, #I5, Statement of Evidence of Neville Franze Te Ngahoa Lomax, dated 12 February 2018
[398] Wai 2180, #G11, Brief of Evidence for Wayne Ormsby (Wai 401) dated 20 September 2017 at [42]
[399] Wai 2180, #G11, Brief of Evidence for Wayne Ormsby (Wai 401) dated 20 September 2017 at [45]

261. Lewis Winiata described how the Native Land Court undermined the whakapapa and tikanga of Taihape Māori by failing to recognise the many lines of descent through which an applicant could lay claim:[400]

> The role of the Native Land Court was not to recognise the sacredness or tapu of whakapapa but was to individualise title for settlers to lease and purchase. If this meant destroying someone's whakapapa then that's what they did.

The loss of their land has resulted in the loss of their mana as well as their culture and identity.[401]

262. Whakatere Whakatihi detailed how the Crown's policies and practices caused their whenua to pass out from their whānau and hapū to those who had no traditional ties to the whenua. Their tīpuna refused to attend the Native Land Court, saying that discussions about the whenua should happen on the whenua. When their tīpuna died, their Māori land interests were dealt with as General Land rather than being distributed in accordance with whakapapa and tikanga.[402] These events reflect how tikanga Māori is subservient to the colonial law.

263. The removal of Ngāti Hinemanu me Ngāti Paki from their traditional kainga dispersed the people. The once close-knit hapū no longer lived as one. With the loss of their land came the loss of their traditional ways of living. They had to adopt foreign customs and traditions, and this led to the demise of their unique language, tikanga and mātauranga Māori.[403]

264. Tikanga Māori is derived from and entwined with the whenua. The loss of the land affected the use and retention of te reo Māori, as explained in the Joint Brief of Evidence of Āwhina Twomey, Kiriana Winiata and Jordan Winiata-Haines:[404]

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[400] Wai 2180, #G14, Brief of Evidence of Lewis Winiata (Wai 662, 7835, 1868) dated 19 September 2017 at [7]
[401] Wai 2180, #G14, Brief of Evidence of Lewis Winiata (Wai 662, 7835, 1868) dated 19 September 2017 at [101], [115], [121]
[402] Wai 2180, #J11, Signed Brief of Evidence of Whakatere (Terrence) Whakatihi, dated 26 March at [89]-[97]
[403] Wai 2180 # K9, Joint Brief of Evidence of Āwhina Twomey, Kiriana Winiata and Jordan Winiata-Haines, dated 4 May 2018 at [9]-[10]
[404] Wai 2180 # K9, Joint Brief of Evidence of Āwhina Twomey, Kiriana Winiata and Jordan Winiata-Haines, dated 4 May 2018 at [9]-[10]

> It reflected the rohe in which we resided, and was the repository of our own language, mita, tikanga, kawa and mātauranga; maintaining the reo of the mana whenua…
>
> Te reo me ōna tikanga o Ngāti Hinemanu me Ngāti Paki reflected our environment and carried all aspects of life and survival of all things within our Te Ao Māori. It was the medium to efficiently and effectively portray our unique worldview and give proper effect to our tikanga through the use of our own unique reo.

The failure to retain te reo Māori contributed to the loss of whakapapa and identity.

265. Heather Hyland Gifford explained that as the land base and tribal structure of Ngāti Hauiti was eroded, many hapū members left the district to look for work. The availability of housing finance incentivised the migration away and in a negative way, so did the restrictions on building on multiply-owned Māori land.[405] When the people left the district, the tikanga of Ngāti Hauiti was affected because there was a loss of leadership and of mātauranga Māori. The state of the marae declined as did the use and retention of te reo Māori.[406]

266. Hari Benevides recounted their marae being abandoned and becoming derelict because of urban migration.[407] This meant the opportunity to learn the traditional roles, tikanga, kawa and mātauranga Māori was impaired or halted altogether. [408]

267. The loss of tikanga Māori led to a diminished role for the Claimants as kaitiaki of the land, waterways, fisheries, the ngāhere, maunga and other important places and resources. In her evidence, Tiaho Pillot described how her Koro Patena would ride for several days across the land to attend to the sacred puna and other wāhi tapu.[409] Some of the wāhi tapu were on army land. In the end, Koro Patena was prevented from entering those lands to fulfil his

[405] Wai 2180, #I10, Statement of Evidence of Heather Hyland Gifford, dated 12 February 2018, at [16.8]
[406] Wai 2180, #I10, Statement of Evidence of Heather Hyland Gifford, dated 12 February 2018, at [16.8]
[407] Wai 2180 #J3, Statement of Evidence of Hari Benevides, dated 19 March 2018 at [36]
[408] Wai 2180 #J3, Statement of Evidence of Hari Benevides, dated 19 March 2018 at [36]
[409] Wai 2180, #G18, Amended Joint Brief of Evidence of Maata Merle Ormsby (Wai 1196) dated 29 September 2017 at [25]

kaitiaki role.[410] During cross examination, Major Hibbs conceded that army operations inhibited kaitiakitanga and the maintenance of ahi kaa.[411] Although the lands taken for defence purposes are within the traditional rohe of Ngāti Tamakōpiri and Ngāti Whitikaupeka, the hapū have been displaced altogether as kaitiaki.[412]

268. The individualisation of Māori land title wholly undermined tribal leadership and contributed significantly to land alienation. Once title to land had been individualised, owners could be identified. Crown land purchasing agents and private purchasers would then approach the identified owners and offer to buy their land interests.[413] Neville Lomax observed that the Crown's refusal of a request by the rangatira of Mōkai Pātea to set-up tribal collectives within their land blocks undermined their traditional leadership, the ability of tribal owners to develop their lands and to take advantage of the agricultural economy.[414]

269. The Crown's suppression of Māori economic development in the inquiry district included a refusal by the Crown to allow Ūtiku Pōtaka and his whānau to retain their settlement at Pōtaka (now Ūtiku Township), despite a viable offer of an alternative site. Neville Lomax explained the impact this had on Ngāti Hauiti;[415]

> It seems that every attempt by our people to determine their own pathways, within the new economy, was being frustrated by Crown agencies who were just as determined that Māori should not succeed.
>
> From that point onwards, Ngāti Hauiti leadership and structures began to breakdown as rangatira realised that the tribes rangatiratanga of their lands and estates were now completely at the whim of the Crown and its agencies.

[410] Wai 2180, #G18, Amended Joint Brief of Evidence of Maata Merle Ormsby (Wai 1196) dated 29 September 2017 at [28]
[411] Wai 2180, #4.1.18, Transcript, Hearing Week 9 at Rongomaraeroa o Ngā Hau e Whā Marae, Waiōuru Held on 18 to 21 March 2019, Nephi Pukepuke to Major Patrick Hibbs at 113
[412] Wai 2180, #G13, Statement of Evidence of Richard Steedman, dated 20 September 2017 at [10]-[11]
[413] Wai 2180 #I5, Statement of Evidence of Neville Franze Te Ngahoa Lomax, dated 12 February 2018 page 3 at [7]
[414] Wai 2180, #I5, Statement of Evidence of Neville Franze Te Ngahoa Lomax, dated 12 February 2018
[415] Wai 2180 #I5, Statement of Evidence of Neville Franze Te Ngahoa Lomax, dated 12 February 2018 page 3 at [5]-[6]

Issue 19.8 Is the knowledge held by Taihape Māori of traditional methods of sustainable harvesting and utilisation of flora and fauna a form of tikanga? If so, what duty does the Crown have to ensure that such aspects of the tikanga of Taihape Māori are maintained by providing for the continuation of these practices?

Introduction

270. The knowledge of traditional methods of sustainable harvesting and utilisation of flora and fauna held by Taihape Māori is a form of tikanga.

271. Tikanga Māori is based on a worldview in which all things, including Māori themselves, are descended from the atua (gods). Tikanga administers and regulates the relationship between all people and all things. It is a system of law. A legal system. Māori extended their deep sense of spirituality to the whole of creation, constantly acknowledging the gods and other deities that had bequeathed all of nature's resources to them.[416] There was a system of tapu—rules to protect the resources from improper exploitation.[417] To disregard the rules of tapu was to court calamity and disaster.[418]

272. The Tribunal in the *Ko Aotearoa Tēnei* report thought the environment, as a whole, was not a taonga—at least not in the same sense as the term is used in te Tiriti ō Waitangi—because accepting that everything is a taonga would make the concept meaningless as a source of rights and obligations.[419] Therefore, taonga are, for example, the particular iconic mountains or rivers, or specific species of flora or fauna that have significance in mātauranga Māori.[420] Taonga species, which are most relevant to the present context, are those defined by the Tribunal as "the species of flora and fauna for which an iwi, hapū, or whānau says it has kaitiaki responsibilities for".[421]

[416] Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22, 1998) p 179 at 10.3.2.
[417] Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22, 1998) p 179 at 10.3.2.
[418] Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22, 1998) p 179 at 10.3.2.
[419] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua Volume 1* (Wai 262, 2011) p 269 at 3.5.1.
[420] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua Volume 1* (Wai 262, 2011) p 269 at 3.5.1.
[421] Waitangi Tribunal, Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity (Wai 262, 2011) p 65 at 2.2.2.

273. The Tribunal has previously acknowledged that current relationships with taonga such as land, water, flora, and fauna have been adversely affected by wholesale land alienation and environmental degradation.[422] And yet the interests of Taihape Māori in their taonga are so significant that they are integral to their very identity.[423] Few would argue that the relationships of Taihape Māori with their various taonga should not be affirmed in and/or protected by law in some way.[424] It follows that the language of Te Tiriti ō Waitangi requires that kaitiaki have sufficient authority and control to enable them to protect their mauri.425

274. The Crown has a duty to ensure that the tikanga of Taihape Māori is maintained by providing for both the continuation and development of these practices. This duty is encapsulated in the principles of te Tiriti ō Waitangi as they are described below.

Treaty principles and tikanga

275. In this section, we discuss the principles of te Tiriti ō Waitangi that are relevant to the Crown's duties in respect of tikanga. The principles of te Tiriti ō Waitangi set out below are relied on when addressing the Tribunal Statement of Issues.

Tino Rangatiratanga

276. Article 2 of te Tiriti ō Waitangi guarantees to Taihape Māori the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess. Māori were guaranteed tino rangatiratanga over their 'taonga katoa'.[426] Taihape Māori maintain the right to retain their customary law and

[422] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua Volume 1* (Wai 262, 2011) p 10 at IN.4.1.
[423] Waitangi Tribunal, *Ko Aotearoa Tēnei*, A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua Volume 1 (Wai 262, 2011) p 97 at 1.8.
[424] Waitangi Tribunal, *Ko Aotearoa Tēnei*, A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua Volume 1 (Wai 262, 2011) p 97 at 1.8.
[425] Waitangi Tribunal, Ko Aotearoa Tēnei, A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua Volume 1 (Wai 262, 2011) p 82 at 1.6.2(2).
[426] Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22, 1998) p 173 at 10.2.2.

institutions, the right to determine who their decision-makers are and the right to determine land entitlements.[427]

277. Kaitiakitanga is an aspect of tino rangatiratanga in the sense that as kaitiaki, Taihape Māori have a reciprocal duty to nurture and care for the mauri of their taonga.[428] For example, kaitiaki could impose rāhui to protect their environment.[429]

278. We note that kaitiakitanga is defined in the Resource Management Act 1990 in terms of guardianship. However, the Tribunal has previously stated that such a definition "overlooks the deeper spiritual dimension of kaitiakitanga that derives from the whanaungatanga as its source".[430] It is about using the environmental resources in a manner that enhances rather than damages kin relationships.[431] It would be appropriate for the Crown to amend the RMA definition of kaitiakitanga so that it approximates more closely the traditional and actual meaning of the practice.

Partnership

279. In the *Lands* case the Court of Appeal affirmed that te Tiriti ō Waitangi signified a partnership between the Crown and Māori.[432] This partnership requires the Crown and Māori to act towards one another with the utmost good faith.[433] The Tribunal in the *Te Whanau ō Waipareira* report stated that this partnership is a "relationship where one party is not subordinate to the other, but where each must respect the other's status and authority in all walks of life."[434] In the *Whaia Te Mana Motuhake* report the Tribunal found that neither treaty partner could monopolise policy or law making where their respective interests overlap.[435] The Tribunal in the *Tau Ihu ō Te Waka ā*

[427] Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims Volume 1,* (Wai 785, 2008) at 4.
[428] Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262) dated 2011 p 253
[429] Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262) dated 2011 p 253
[430] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua Volume 1* (Wai 262, 2011) p 269 at 3.5.1.
[431] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* Te Taumata Tuarua Volume 1 (Wai 262, 2011) p 269 at 3.5.1.
[432] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC, CA) 664 at 702.
[433] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC, CA) 664 at 702.
[434] Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998) p xxvi.
[435] Waitangi Tribunal, *Whaia te Mana Motuhake, In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 2.4.3.

Māui report clarified that the partnership is a reciprocal arrangement, involving "fundamental exchanges for mutual advantage and benefit."[436]

280. The Tribunal in the *He Maunga Rongo* report stated that, in their view, the obligations of partnership required the Crown to: [437]

> … consult Māori on matters of importance to obtain their full, free, prior, and informed consent to anything which altered their possession of the land, resources, and taonga guaranteed to them in article 2.

The Tribunal also considered the treaty partners must show mutual respect and engage in dialogue to resolve issues where their respective authorities overlap or affect one another. [438] The claimants submit sustainable harvesting and utilisation of flora and fauna is one such issue where the Crown and Taihape Māori should engage in dialogue.

281. However, the Crown has not always done so. Belgrave *et al* note that for most of the period from 1840 to 1880, "the Crown's *laissez-faire* policy with regard to environment issues did not consider any responsibility to consult with Māori over environmental management".[439] For example, in the 20th century there was a lack of consultation with Māori when the Crown chose to drain swamps in the Taihape area.[440] This was in violation of the principle of partnership and the responsibility of the Crown to consult with Taihape Māori about issues affecting their taonga and tikanga. The Crown's responsibility to make informed decisions, where there may be treaty implications, requires consultation with Māori.

Right to Development

[436] Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims Volume 1* (Wellington: Legislation Direct, 2008) p 4.
[437] Waitangi Tribunal, *He Maunga Rongo, Report on Central North Island Claims (Wai 1200), Stage One, Volume 1,* dated 2008 at page 173
[438] Waitangi Tribunal, *He Maunga Rongo, Report on Central North Island Claims (Wai 1200), Stage One, Volume 1,* dated 2008 at p 40.
[439] M Belgrave et al *Environmental Impacts, Resource Management and Wāhi Tapu and Portable Taonga* (December 2012) Wai 2180, #A10 at 9, [6].
[440] M Belgrave et al *Environmental Impacts, Resource Management and Wāhi Tapu and Portable Taonga* (December 2012) Wai 2180, #A10 [240].

282. Māori have a right to develop as a people. This right extends to cultural, social, economic, and political development.[441] Māori have a right to the development of their property or taonga.[442] This necessarily includes their tikanga, which in the present context is the knowledge of Taihape Māori in respect of traditional methods of sustainable harvesting and utilisation of flora and fauna. Pursuant to Article 3 of te Tiriti ō Waitangi, the Crown's duty of protection applies in respect of "ngā tikanga katoa".

Legislation

283. The following legislation discussed shows the Crown's continued ad hoc approach to incorporating the above principles into legislation, and to its duty to ensure that the tikanga of Taihape Māori relating to the sustainable harvesting and utilisation of flora and fauna are maintained by providing for the continuation of these practices.

Resource Management Act 1990

284. Certain aspects of tikanga Māori have been incorporated into environmental legislation such as the Resource Management Act 1991 ("the RMA").[443] However, in practice, seldom is it that tikanga Māori is properly considered let alone upheld by the Crown in the delegation of its authority under the RMA to local government entities.

285. Section 2 of the RMA defines tikanga Māori as Māori customary values and practices. The definition is insufficient because tikanga Māori is not recognised as a body of customary law which regulated Māori society. As "values" rather than "laws", the purpose and effect of tikanga Māori under the RMA are wholly diminished. Tikanga Māori has been watered down. Those who exercise power under the RMA are to 'have particular regard to' kaitiakitanga.[444] However, the definition of kaitiakitanga in the RMA is insufficient as it confers a mere advisory role whereas the concept means so much more.[445] For the purposes of the Act, kaitiakitanga is defined as

[441] Waitangi Tribunal, *He Maunga Rongo, Report on Central North Island Claims (Wai 1200), Stage One, Volume 1,* dated 2008 at p 914.
[442] Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212,1998) p 120 at 10.2.4
[443] M Belgrave et al *Environmental Impacts, Resource Management and Wāhi Tapu and Portable Taonga* (December 2012) at p 185, [433].
[444] Resource Management Act 1991 s7(a)
[445] D Alexander, *Rangitikei River and Its Tributaries Historical Report* (November 2015), Wai 2180 #A40 at 666.

"the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship".[446] The Tribunal has recognised that such a definition is flawed, given that the "connections between kaitiaki and taonga species are holistic and complex".[447] It is insufficient, as it confers a mere advisory role whereas the concept means so much more.[448] Joseph and Meredith describe competing Māori-Pākeha ideologies in the context of waterways and in doing so they exposed deficiencies with the definition of kaitiakitanga in the RMA:

> Indeed, the ancestral, customary and traditional relationships and usage of the waterways prior to the arrival of Europeans was one of taonga that existed beyond mere ownership, use, or collective possession to one of personal and tribal identity, authority and control, and the right to access subject to tribal tikanga. In summary, the relationship was one of collective kaitiaki or stewardship. In contrast, when one contemplates European notions of ownership rights and property title of resources such as lands, forests, fisheries and other properties including waterways, the associated rights that accrue to property title of any resource includes an inverse relationship to the world of individualistic (but not always) quality of title (particularly indefeasibility of real property), exclusivity (others keep out), durability, transferability (one can sell it) and the right (if not the duty) to exploit the resource for commercial gain or even to neglect or outright pollute, abuse or overuse it.

286. Although Part 2 of the RMA creates a hierarchy of matters for decision makers to consider, all too regularly Māori interests have been outweighed or balanced out altogether.[449]

287. In the *Ko Aotearoa Tēnei* report, the Tribunal rejected the Crown's argument that its Treaty obligation to protect the kaitiaki relationship with the environment is absolved when, pursuant to statute, it devolves its

[446] Resource Management Act 1991, s 2.
[447] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua Volume 1* (Wai 262, 2011) p 117 at 2.1.1.
[448] D Alexander, *Rangitikei River and Its Tributaries Historical Report* (November 2015), Wai 2180 #A40 at 666.
[449] Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358) dated 2019 at xx

environmental and management powers and functions to local government. As previously stated by the Tribunal in the *Ngāwha* report:[450]

> The Treaty was between the Māori and the Crown. The Crown obligation under article 2 to protect Māori rangatiratanga is a continuing one. It cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local or regional authorities. If the Crown chooses to so delegate, it must do so in terms which ensure its Treaty duty of protection is fulfilled.

288. The *Ngāwha* Report was published in 1993. Despite its aging and often-repeated message to the Crown, local councils continue to limit resource management opportunities for hapū and iwi.[451] The Crown has failed to align the conduct and practices of local councils in these respects with the principles of te Tiriti ō Waitangi. Consequently, for example, the management and use by various stakeholders of the Rangitikei River catchment has adversely affected water quality and quantity, which, in turn, has diminished the catchment's flora and fauna and customary usage thereof.[452] With implicit approval by the Crown, local councils have failed to recognise that "[r]angatiratanga and mana much include tribal authority to and control which includes such actions as the kaitiaki obligation to care for the resources and the people".[453]

289. Alexander refers to the almost complete absence of Crown consideration for the customary fishing rights of Rangitīkei River Māori, despite the obligation in Te Tiriti ō Waitangi to actively protect customary fisheries.[454] This is because, in practice, "kaitiakitanga is not given its full tikanga meaning…narrowed down to an advisory role to be exercised when tangata whenua are consulted about a proposal requiring RMA approval".[455]

[450] Waitangi Tribunal, *The Ngawha Geothermal Report 1993*, (Wai 304, 1993) pp 153-154 at 8.4.5.
[451] R Joseph & P Meredith *Ko Rangitīkei Te Awa: The Rangitīkei Rover and Its Tributaries Cultural Perspectives Report* (May 2016) Wai 2180, #A44 at 282.
[452] R Joseph & P Meredith *Ko Rangitīkei Te Awa: The Rangitīkei Rover and Its Tributaries Cultural Perspectives Report* (May 2016) Wai 2180, #A44 at 282.
[453] R Joseph & P Meredith *Ko Rangitīkei Te Awa: The Rangitīkei Rover and Its Tributaries Cultural Perspectives Report* (May 2016) Wai 2180, #A44 129 at 4.10.
[454] D Alexander, *Rangitikei River and Its Tributaries Historical Report* (November 2015), Wai 2180 #A40 at 666.
[455] D Alexander, *Rangitikei River and Its Tributaries Historical Report* (November 2015), Wai 2180 #A40 at 666.

290. The Tribunal in the *Ko Aotearoa Report* found that a treaty-compliant environmental management regime is one that provides for the tino rangatiratanga guaranteed to Māori, as well as incorporating the principles of partnership by means of a process that balances the kaitiaki interest alongside other legitimate interests. The following recommendations were made:[456]

- *control* by Māori of environmental management in respect of taonga, where it is found that the kaitiaki interest should be accorded priority;
- *partnership* models for environmental management in respect of taonga, where it is found that kaitiaki should have a say in decision-making, but other voices should also be heard; and
- *effective influence and appropriate priority* to the kaitiaki interests in all areas of environmental management when the decisions are made by others.

It was observed that while Māori values have in some ways 're-entered' the legal system, the system may not yet have the tools, or have developed a sufficiently informed approach to dealing appropriately with those values.[457] The potential to achieve the recommendations through provisions in the RMA, such as sections 33, 36B, and 188, have rarely been used without the intervention of a treaty settlement.[458] The Freshwater Tribunal found that the RMA creates barriers to their use but has no incentives or compulsion for councils to pursue co-management arrangements.[459] These provisions have been shown to be inadequate and therefore tokenistic. [460]

Protection of Certain Animals Act 1861

291. The Protection of Certain Animals Act 1861 was enacted to protect certain animals and birds imported into New Zealand. Section 5 of the 1861 Act

[456] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua Volume 1* (Wai 262, 2011) p 269 at 3.9
[457] Robert Joseph, Tom Bennion, *Māori Values and Tikanga Consultation under the RMA 1991 and the Local Government Bill – Possible Ways Forward,* Inaugural Māori Legal Forum Conference Te Papa Tongarewa, Wellington, 9 – 10 October 2002, p21
[458] Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358) dated 2019 at xxi
[459] Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358) dated 2019 at xxi
[460] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua Volume 1* (Wai 262, 2011) p 269 at 3.5.1.

prohibited the use of traps and snares for hunting protected species. However, Māori preferred to use snares when hunting and concern was expressed about the potential for Māori to be prevented Māori from using their traditional food gathering techniques.[461]

Wild Birds Protection Act 1864

292. The Wild Birds Protection Act 1864 encouraged the importation and protection of birds into New Zealand. The 19th century saw the decimation of many indigenous bird species because of predation by imported animals and loss of habitat caused by deforestation.[462]

Salmon and Trout Act 1867

293. The Salmon and Trout Act 1867 sought to protect salmon and trout that had been introduced into New Zealand waters. The 1867 Act made no reference to Māori fishing rights and no legislation was enacted to protect indigenous fauna predated on by the introduced fish species.[463] Belgrave *et al* note that in river systems, "eel weirs, or pa tuna, were of particular importance" to Māori.[464] However, acclimatisation societies considered eels to be vermin as they were believed to be a danger to introduced trout fisheries. People were encouraged people to destroy them.[465]

294. The legislation discussed establishes that introduced fauna was protected by the Crown ahead of indigenous fauna.

Native Plants Protection Act 1934

295. The Act made it an offence to take any indigenous plant growing on Crown lands, forests, and public spaces, or from private land without the consent of

[461] E Aramakutu "Colonists and Colonials; Animals' Protection Legislation in New Zealand, 1861-1910" A thesis submitted in partial fulfilment of the requirements for the Degree of Master of Arts in History (Massey University, 1997) at p.109.
[462] E Aramakutu "Colonists and Colonials; Animals' Protection Legislation in New Zealand, 1861-1910" A thesis submitted in partial fulfilment of the requirements for the Degree of Master of Arts in History (Massey University, 1997) at p.66.
[463] Belgrave et al, Te Rohe Potae Harbours and Coast, Inland Waterways, Indigenous Flora and Fauna, sites of significance and Environmental Management and Environmental Impacts Scoping Report, Wai 898, #A64, page 28.
[464] M Belgrave et al Environmental Impacts, *Resource Management and Wāhi Tapu and Portable Taonga* (December 2012) Wai 2180, #A10 at 121, [293].
[465] M Belgrave et al Environmental Impacts, *Resource Management and Wāhi Tapu and Portable Taonga* (December 2012) Wai 2180, #A10 at 126-127, [305].

the owner. An exception permitted the taking of plants for medical purposes provided it did not exhaust the species in any given habitat. Therefore, Māori were prohibited from taking any edible plants.

Plant Variety Rights Act 1987 (PVR)

296. The PVR is a more modern piece of environmental legislation that encompasses the Crown's duty to ensure that the tikanga of Taihape Māori is maintained. Currently, the 1987 Act does not specifically consider the interests of kaitiaki, as breeders of flora are not required to consult with kaitiaki.

297. The Tribunal has previously recommended a "simple" requirement, that in general, the Crown should notify or consult with kaitiaki.[466] This recommendation was considered by the Ministry of Business, Innovation & Employment's Options Paper, which reviewed the PVR in July 2019. The Options Paper concluded that the 1987 Act be reformed to comply with the Treaty of Waitangi, recommending that a grant of a plant variety right could be refused if kaitiaki interests would be negatively affected and the impacts could not be mitigated.[467]

Town and Country Planning Acts

298. The predecessors to the RMA were the various Town and Country Planning Acts. The Town Planning Act 1926 was described as having "nothing for Māori" in it.[468] The Town and Country Planning Act 1953 prevented the building on land that remained in Māori title.[469] Section 3(1)(g) of the Town and Country Planning Act 1977 declared that "the relationship of the Māori people and their culture and traditions with their ancestral land" was a matter of national importance to be "recognised and provided for". However,

[466] Waitangi Tribunal, Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity (Wai 262, 2011) p 19.
[467] Ministry of Business, Innovation & Employment, Options Paper: Review of the Plant Variety Rights Act 1987 (July 2019) at 47.
[468] Nathan Kennedy *Viewing the World through a Wider Lens: Māori and Council Planning Documents PUCM Māori Report 6* (The International Global Change Institute, Hamilton) July 2008 at 7.
[469] Nathan Kennedy *Viewing the World through a Wider Lens: Māori and Council Planning Documents PUCM Māori Report 6* (The International Global Change Institute, Hamilton) July 2008 at 7.

Planning Tribunal and High Court decisions on the application of the section provided mixed results for Māori.[470]

Issue 19.9: What is the Crown's role with respect to the tikanga of Taihape Māori today?

299. Te Tiriti ō Waitangi is declarative of the Crown's role with respect to the tikanga of Taihape Māori today. It does not add "anything new and unsettled" in terms of Māori customary rights,[471] meaning the cession treaty is merely declarative and not constitutive thereof. A similar view was expressed by Cooke P in *Te Runanga o Muriwhenua Inc v Attorney-General*, where it was considered that rights under Article 2 of Te Tiriti and customary rights at common law are the same, with Article 2 intended to preserve Māori customary title.[472] In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, Cooke P maintained that "[t]he Treaty of Waitangi 1840 guaranteed to Māori, subject to British kāwanatanga or government, their tino rangatiratanga and their taonga.[473]

300. Section 1 of the English Laws Act 1858 provided that English laws were deemed to have been in force in New Zealand from 1840 "so far as applicable in the circumstances of the … colony". It is submitted that, despite the repeal of the 1858 Act, the English common law remains subject to being modified by "the circumstances of the … colony" where the meaning of 'circumstances' is said to include customary rights.[474] This approach has been applied in subsequent case law.

301. In *Baldick v Jackson*, Jackson and his crew killed and secured a whale.[475] It later sank and was carried out by the tide into the Cook Strait. Baldick found the whale carcass, towed it to land, and claimed it. The Court had to determine who the whale belonged to. Chief Justice Stout had to decide whether an English statute enacted during the reign of King Edward II (late 13th century to early 14th century) applied in New Zealand. His Honour held

[470] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua Volume 1* (Wai 262, 2011)) p 249 at 3.2.5(1).
[471] *R v Symonds* (1847) NZPCC 357 at 388.
[472] *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 655.
[473] *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at 7.
[474] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 at [134], per Keith and Anderson JJ.
[475] *Baldick v Jackson* (1910) 30 NZLR 343.

that the old English statute was not applicable to the circumstances of the colony, relying on the prevailing 'custom'. Whaling had been practiced before, during, and after the signing of the Treaty of Waitangi, and the government had never tried to assert the English statute. It was therefore held that the English statute was not applicable as it would be claimed against Māori, and would therefore interfere with their whaling rights and interests:

> I am of the opinion that this statute has no applicability to New Zealand, and that through the right to whales is expressly claimed in the statute of 17 Ed II, c 2, as part of the Royal prerogative, it is one not only that has never been claimed, but one that it would have been impossible to claim without claiming it against the Māoris, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not be to interfered with – they were to be left in undisturbed possession of their lands, estates, forests, fisheries, etc.

302. In the more recent decision of Attorney-General v Ngati Apa, a key element of Elias CJ's judgment was adopted from a text by Sir Kenneth Roberts-Wray:

> [It is a] vital rule that, when English law is in force in a Colony, either because it is imported by settlers or because it is introduced by legislation, it is to be applied subject to local circumstances; and, in consequence, English laws which are to be explained merely by English social or political conditions have no operation in a Colony.

303. Such an approach reflects that tikanga is a legal system in and of itself, not merely custom as it has been considered by the Crown to be. As summarised by Dr Joseph at Hearing Week 2:[476]

> And just in terms of – excuse me – tikanga Māori the traditional customary legal system of Māori was based around tikanga which was based around these values in contrast to a written legal system. A values-based oral system was tikanga Māori which was an effective, an effective legal system and authentic

[476] Waitangi Tribunal, *Hearing week 2 transcript,* Wai 2180, #4.1.9, pages 79-80.

> legal system. Given that it was values-based it means that it was intrinsic and in effect no need for a police force; the people governed themselves. So the rangatiratanga rights and responsibilities noted earlier, were guaranteed in the Treaty of Waitangi in Article II.

304. In conclusion, it is submitted the Crown's role with respect to the tikanga of Taihape Māori today is best summarised by Meredith and Joseph:[477]

> …it's to allow the space for Māori to develop, you know, their tikanga and to exercise their tikanga as they see fit…given our history and given how we are recovering from the colonial process in terms of our reo as well as our tikanga, much like the reo, a Crown duty is actively protect it, strengthen it, promote it, encourage it.

TRIBAL IDENTITY

Issue 19.10: What is the Crown's duty to preserve the tribal identity of Taihape Māori whānau, hapū and iwi?

305. The Crown's duty to preserve the tribal identity of Taihape Māori whanau, hapū and iwi arises from Te Tiriti o Waitangi. Article 2 guaranteed to rangatira, hapū and all Māori tino rangatiratanga over their 'taonga katoa'.[478] The guarantee of tino rangatiratanga or mana motuhake meant Taihape Māori retained the right to govern themselves and to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants.[479] These are all factors that compromise the tribal identity of Taihape Māori. In the ensuing submission, we set out the Crown's duty to reserve the tribal identity of Taihape Māori.

Active protection

[477] Waitangi Tribunal, *Judicial Conference transcript*, Wai 2180, #4.1.9, pages 159-160.
[478] Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22) dated 1988 p 173 at 10.2.2
[479] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996) p 5 ; Waitangi Tribunal, *Turanga Tangata. Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 113

306. The identity of Taihape Māori is a taonga.[480] This necessarily includes tribal identity and its associated tikanga, including language, culture and mātauranga Māori. As a taonga, the identity of Taihape Māori attracts a duty of active protection. The Crown has an obligation to not only recognise Māori interests specified in Te Tiriti, but to also actively protect them 'to the fullest extent practicable'.[481] The duty of active protection allows for the scrutiny of not only actions but also omissions.[482] Any Crown act or omission that explicitly or implicitly impedes or suppresses the Claimants' identity culminates in a breach of Te Tiriti. The Crown must therefore take active steps to protect the tribal identity of Taihape Māori.

307. It is submitted that in the present context, steps to be taken by the Crown not only need to be active, but also vigorous in their nature. In the Broadcasting Assets case, when discussing the language of Te Reo Māori, which is a taonga of all Māori, the Privy Council noted:[483]

> Again, if as is the case with the Māori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.

308. As will be discussed in further detail below at 19.11 and 19.12, it is submitted the tribal identity of Taihape Māori is in a vulnerable state, and at least some of that vulnerability can be attributed to past breaches by the Crown of its duties and obligations under Te Tiriti. Because of this, the claimants submit that for the Crown to fulfil its duty of active protection, as encompassed by

[480] Waitangi Tribunal, *Ko Aotearoa Tēnei, A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua, Volume **1*** (Wai 262) dated 2011 p 17
[481] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai-8) 1985 at page 70. *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (HC, CA) at 665.
[482] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai-8) 1985 at page 70.
[483] *New Zealand Māori Council v Attorney-General* [1194] 1 NZLR 513.

Article 2, it needs to take vigorous action to protect the tribal identity of Taihape Māori.

Partnership

309. Te Tiriti signified a partnership between the Crown and Māori.[484] This partnership carries with it the duty to act towards each other "with the utmost good faith which is the characteristic obligation of partnership".[485] This duty requires the Treaty partners to show mutual respect and to enter into dialogue to resolve issues where their respective authorities overlap or affect each other.[486] This requires the Crown to recognise and work together with Taihape Māori self-determined tribal structures of whānau, hapū and iwi. From this duty of partnership arises a duty to consult with Taihape Māori, and to obtain their free, prior, and informed consent to anything which altered their possession of land, resources, and taonga.[487]

310. The High Court has held that "there is no doubt Treaty principles impose a positive obligation on the Crown, within constraints of the reasonable, to protect the position of Māori under the Treaty".[488]

Issue 19.11: To what extent, if any, did the acts and omissions, legislation, policies and practices of the Crown, interfere with, undermine, redefine or even replace the tribal identities of Taihape Māori?

Loss of identity through the education system

311. The tribal identities of Taihape Māori were wholly undermined by the 'English only' education system that was administered by the Crown in the Mōkai-Pātea region. An extensive examination of the Crown's oppressive conduct in this regard is set out in the Te Reo Rangatira Me Ona Tikanga Generic

[484] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC, CA) at 664, 702
[485] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC, CA) at 664, 702
[486] Waitangi Tribunal, *He Maunga Rongo, Report on Central North Island Claims (Wai 1200), Stage One, Volume 1,* dated 2008 at page 173
[487] Waitangi Tribunal, *He Maunga Rongo, Report on Central North Island Claims (Wai 1200), Stage One, Volume 1,* dated 2008 at page 173
[488] *Taiaroa v Minister of Justice* unreported, 29 August 1994, McGechan J, HC Wellington cp 99/94, p. 69, cited in, Janine Hayward, 'Principles of the Treaty of Waitangi – ngā mātāpono o te tiriti - Treaty principles developed by courts', Te Ara - the Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/principles-of-the-treaty-of-waitangi-nga-matapono-o-te-tiriti/page-2 (accessed 31 August 2020). Story by Janine Hayward, published 20 Jun 2012.

Closing Submissions dated 19 May 2020 and they are adopted in full for the purpose of addressing Issue 19.11.[489]

Loss of identity through land alienation

312. The acts and omissions of the Crown that alienated Taihape Māori from their lands also diminished their tribal identity. The original tīpuna of Taihape Māori were explorers who made their way into the inquiry district at various times throughout history. Several claimant iwi trace their descent from the Takitimu waka through Tamatea Pokai Whenua.[490] As each tribal group settled in the area, they formed new relationships.[491] The operation of whakapapa meant that any external threat from invading or warring groups could be met in a combined manner by the wider group and warded off. Through whakapapa, wider land use rights were enabled, and this often meant that different kinship groups could utilise the same resource without issue. These aspects of whanaungatanga help to explain the overlapping and fluid nature of traditional group boundaries in the inquiry district, as hapū and iwi alliances changed.[492]

313. To wrest their lands from them, the Crown enacted legislation that defined tribal and hapū boundaries. The Native land legislative regime was contrary to tikanga Māori in many ways but, in particular, ownership was individualised and the centralising institution of the rangatira was largely undermined.[493] The individualisation of title also de-emphasised the institutions of hapū and iwi and this, in turn, reduced reliance on or the practices of whakapapa and whanaungatanga. Māori kinship institutions were marginalised and with that, tribal identity was diminished.

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[489] Tamaki Legal, Annette Sykes & Co, *Te Reo Rangatira Me Ona Tikanga Generic Closing Submissions* 19 May 2020, Wai 2180 #3.3.43.
[490] Maori Tradition, Whanganui region, Te Ara Encyclopaedia, http://www.teara.govt.nz/en/whanganui-region/4 cited on p 47 of #A12.
[491] Tony Walzl, Tribal Landscape Overview, dated 5 April 2013 Wai 2180 #A12 at 392.
[492] Tony Walzl, Tribal Landscape Overview, dated 5 April 2013 Wai 2180 #A12 at 392.
Wai 2180 #A43, Bruce Stirling, Taihape District Nineteenth Century Overview, dated May 2016 p 16
[493] Law Commission, Te Aka Matua o te Ture, Māori Custom and Values in New Zealand Law, Wellington, NZ March 2001 at 25
Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 41.

314. Utiku Pōtaka explained how large-scale land loss affected tribal identity in other ways:[494]

> However, through the loss of most the tribal lands in the late 1800s, coupled with the Government's assimilation policies, the tribal structures of Mōkai Pātea disintegrated and alliances with more influential neighbouring iwi such as Ngāti Tūwharetoa, such as Ngāti Kahungunu, such as Ngāti Apa were developed. The result of this process was the in-advertent assimilation of our tikanga and kawa by our neighbouring relatives throughout most of the 20th Century.

315. The accepted fundamental unit of operation in traditional Māori society for the purposes of socio-economic and political organisation was the hapū. Rangatiratanga and the operation of tikanga Māori were most effectively practiced at the hapū level.[495] For various purposes, and predominantly for that of war, hapū combined to form iwi, and in more modern times, komiti or rūnanga .[496] The Crown's preference that it deal with larger groups such as iwi undermined the primacy of hapū and this development also frayed the fabric of Māori society and identity.

316. Native Land Court title investigations emphasised history, tikanga Māori, whakapapa and evidence of occupation. However, interpretative errors were often made by the Native Land Court judges when they applied a colonial lens to information of this nature; a lens that was more interested in facilitating land acquisition than it was in accurately determining korero tuku iho. The mis-calls, errors of fact and vested interests of the Native Land Court distorted and/or completely changed the recorded history of Mōkai-Pātea Māori and this also undermined their tribal identity.

317. Tribal identity was wholly undermined when certain groups with traditional interests in lands over which title was being determined were never given the opportunity to participate in a hearing, either because they were not aware of the proceeding or because they were incapacitated in some way

[494] Waitangi Tribunal, *Hearing week 1 transcript,* Wai 2180, #4.1.8, page 26.
[495] Waitangi Tribunal, *The Declaration and the Treaty, The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040, at 30.
[496] P Hohepa, *Hokianga from Te Korekore to 1840*, dated January 2011, Wai 1040, #E36, at 269. See also R Johnson, *The Northern War1844-146*, dated July 2006, Wai 1040, #A005, at 176.

from attending. As the evidence provided to the Native Land Court was limited to that of the witnesses' present, distortions in hapū or tribal histories arose.[497]

318. The competitive nature of the Native Land Court process and its susceptibility to being manipulated by parties to the proceedings incentivised the distortion and even the fabrication of information presented to it.[498] History and whakapapa could become one-sided and with that tribal identity was undone.

319. The Native Land Court developed its own jurisprudence and views on traditional Māori land tenure and so decisions regarding title to land could be made in a culturally insufficient manner. Judges developed their own approaches to applying Māori custom and law for instance.[499] *Take* raupatu or land rights obtained or held through might or force were prioritised over *take* tupuna, or inherited rights, or over ahi kaa or occupation rights.[500] The emphasis of *take* raupatu at the wrong time could lead to an error of fact on the court's part and parties receiving land entitlements that they were not due.

320. The Native Land Court came to emphasise evidence of occupation over whakapapa evidence. The court developed a prejudice against the oral delivery of whakapapa evidence[501] even though it was possible for whakapapa to be verified.

321. The bias against women that is inherent in English law undermined the status of wāhine Māori. This undermined and changed their role in Māori society and thus affected their identity.[502]

[497] Tony Walzl, Tribal Landscape Overview, dated 5 April 2013 Wai 2180 #A12 at 30.
[498] Tony Walzl, Tribal Landscape Overview, dated 5 April 2013 Wai 2180 #A12 at 30.
[499] Tony Walzl, Tribal Landscape Overview, dated 5 April 2013 Wai 2180 #A12 at 30.
[500] Waitangi Tribunal, *Te Mana Whatu Ahuru, Report on Te Rohe Pōtae Claims (Pre-Publication Version)* (Wai 898) dated 2018 at page 1185
[501] Law Commission, Te Aka Matua o te Ture, Māori Custom and Values in New Zealand Law, Wellington, NZ March 2001 at 25
[502] Wai 2180, #G14, Brief of Evidence of Lewis Winiata (Wai 662, 7835, 1868) dated 19 September 2017 at [101], [115]

Issue 19.12 What is the impact on the respective Taihape Māori whānau, hapū and iwi of the loss of their tribal identity since 1840?

322. Despite the Crown's duty to actively protect tribal identity pursuant to Article 2 of te Tiriti ō Waitangi, the cultural identity of Taihape Māori has been steadily eroded since 1840. According to Reid, the loss of tribal identity is especially debilitating:[503]

> The evidence from our individual and whanau narratives suggest that a strong cultural identity translates to pride-in-self and the resulting positive self-concept is a powerful defence against the shaming and stigmatising efforts of the colonial narratives. It also offers individuals and whānau with improved coping abilities in the face of stressors.

323. Through various acts and omissions, the Crown has systematically undermined the culture, language, traditional leadership, knowledgebase, customs, and practices of Taihape Māori. A process of assimilation was utilised by the Crown to undermine and weaken the unique culture, language, and identity of Taihape Māori. The system of land tenure used by Taihape Māori, their language, leadership structures, modes of behaviour and value systems were all Europeanised. Taihape Māori were robbed of their turangawaewae. Whakapapa ties to the kinship groups around them were lost or diminished as were their connections to their cultural taonga.

324. Claimant evidence is set out in the submissions below to illustrate the detrimental impact of Crown acts and omissions on tribal identity.

325. Ropata William Miritana explained that Crown activity in the Taihape and surrounding inquiry districts such as Te Rohe Pōtae and the Waikato caused significant detriment to Ngāti Wehi Wehi's relationship and knowledge to Patea and other land blocks in this inquiry district. This has resulted in a loss of tribal knowledge, customary interests and resources relating to Ngāti Wehi Wehi lands within this inquiry.[504]

[503] Reid *et al*, The *Colonising Environment: An aetiology of the trauma of settler colonisation and land alienation of Ngai Tahu whanau*, May 10, 2017, University of Canterbury Ngai Tahu Research Centre, at 142.
[504] Wai 2180, #L5, Brief of Evidence of Ropata William Miritana (Wai 1482) dated 24 August 2018 at [28],[36],[44]

326. Ngaire Kauika-Stevens tied language loss to the erosion of cultural identity and knowledge:[505]

> We had a generation of no Te Reo, which was a huge loss that transcended the loss of fluency in our language, and actually eroded our sense of identity. This was due to the government and the education system and, still today, it has not changed. We are still being denied a basic right to learn our language in our own rohe, on our own land.
>
> The impact is that we have been unable to successfully maintain tikanga a hapū, tikanga a Marae, tikanga a whanau.
>
> The Crown must accept responsibility for their arrogance, their mana-diminishing attitude, the oppression of our people, and the intergenerational suffering, all due to the loss of our Reo.

327. In their Joint Brief of Evidence of Āwhina Twomey, Kiriana Winiata and Jordan Winiata-Haines explain that the loss of their land also brought about the loss of their traditional ways of living. They had to adapt to the foreign customs and traditions which soon led to the demise of their unique reo, tikanga and mātauranga Māori.[506] The witnesses stressed the following:[507]

> We currently have only a handful of fluent speaking hapū members and less than five who actively perform on our marae. We are missing a huge part of our cultural identity and, much of it is now lost forever. We hold strong to the view that the fault of the state of our reo does not lie at the feet of Ngāti Hinemanu me Ngāti Paki, but rather it is at the feet of the Crown.

328. Lewis Winiata described how the loss of their land has also resulted in the loss of their mana and rangatiratanga as well as their culture and identity.[508]

329. Raihania Pōtaka explained that the land is a source of identity for tangata whenua, who act as its kaitiaki. Alienation from the whenua results in

[505] Statement of Evidence of Ngaire Anne Te Hirata Kauika-Stevens, Wai 2180, #J5, at [39]-[41].
[506] Wai 2180 # K9, Joint Brief of Evidence of Āwhina Twomey, Kiriana Winiata and Jordan Winiata-Haines, dated 4 May 2018 at [9]-[10]
[507] Wai 2180, #K9 at [13].
[508] Wai 2180, #G14, Brief of Evidence of Lewis Winiata (Wai 662, 7835, 1868) dated 19 September 2017 at [101], [115], [121]

disempowerment and without the kaitiaki role any longer, there is also a loss of identity.[509]

330. Wayne Ormsby described how the Native Land Court process severed generations of mana whenua and this resulted in the loss or diminution of mātauranga Māori, knowledge of whakapapa, kaitiakitanga in relation to the land and the wairua of Taihape Māori as well. The harm that has been suffered is manifested in generations of economic, social, and cultural deprivation.[510]

331. Heather Hyland Gifford explained that as the land base and tribal structure of Ngāti Hauiti was eroded, many of its members migrated from their tīpuna whenua, resulting in further undermining of their leadership structures, te reo Māori and marae.[511]

332. Rodney Graham described how the Crown's actions have destabilised the tribal structures of Taihape Māori and a result they have been deprived of their ability to exercise their rangatiratanga. [512]

333. Neville Lomax is adamant that extensive land loss and the associated loss of access to natural resources and mahinga kai areas harmed the mauri of Mōkai-Pātea iwi and their identity as a people.[513] He further explained:[514]

> This is why it is difficult to populate our iwi database because our people don't know who they are, and they don't know that they belong to us.

334. Urgent action is required by the Crown to resuscitate and reconfirm the identity of Taihape Māori; to restore their mātauranga, tikanga Māori, mana motuhake, whakapapa and Mōkai-Pātea identity.

[509] Wai 2180 #H12 Statement of Evidence of Raihania Potaka dated 29 November 2017 at [7]
[510] Wai 2180, #G11, Brief of Evidence for Wayne Ormsby (Wai 401) dated 20 September 2017 at [45]
[511] Wai 2180, #I10, Statement of Evidence of Heather Hyland Gifford, dated 12 February 2018, at [16.8]
[512] Wai 2180, #L4, Amended Brief of Evidence of Rodney Graham, dated 25 September 2018 at [71]
[513] Wai 2180, #A49 David A. Armstrong, Mokai Patea Land, People and Politics dated January 2016 p 11 Neville Lomax, Oral Evidence
[514] Wai 2180, #A49 David A. Armstrong, Mokai Patea Land, People and Politics dated January 2016 p 11 Neville Lomax, Oral Evidence

CONCLUSION

335. The Crown has historically failed to protect the cultural taonga of Taihape Māori resulting in several breaches of its duties of active protection, partnership, consultation, and the right to development. More particularly, the Crown have already conceded that it may not have consulted with Taihape Māori when introducing these new institutions to the district, and that it had used Māori attitudes and ideas to influence its decision-making process. Taihape Māori opposed land alienations in their rohe, attending hui and filing petitions with the Crown opposing such. The Crown ignored the hui attempts by Taihape Māori to combat land alienations, and petitions they filed, setting about trying to open the land up for settlers. It would be difficult for any analysis to show that the Crown considered any feedback from Māori regarding cultural taonga given the large number of hui and petitions that the Crown ignored to implement its land alienations regime and Torren's lands system. The Crown breached article II of the Treaty guaranteeing to Taihape Māori tino rangatiratanga over its lands by implementing a land alienation regime contradicting Taihape Māori wishes.

336. Cultural taonga can be tangible and/or intangible. Taonga includes wāhi tapu, urupā, sites of significance, rongoā and its application, moko kauae, mauri or life-force. It can also mean the mātauranga associated with certain practices, for example tohunga knowledge in relation to rongoā, tohunga knowledge in relation to preparation of rongoā for medicinal purposes. Taonga defies an exhaustive definition and particular possessions cannot be itemised in any all-encompassing ways, as such an approach unnecessarily constrains the essence of what taonga encapsulates.

337. The Crown has duties under Article II of te Tiriti to guarantee to Taihape Māori tino rangatiratanga over their taonga katoa. Under this guarantee, the Crown must ensure that wāhi tapu, urupā and sites of significance are actively protected; that customary health knowledge and healing practices are retained; that mātauranga Māori transmission continues; that consultation is meaningful; and ensure that Taihape Māori can exercise their kaitiakitanga functions over their taonga. The Crown's failure to uphold these duties have resulted in the demise of Māori traditional knowledge of cultural sites, rongoā Māori and its associated practices and the mātauranga Māori

of these taonga held by tohunga. Not only have the physical features of the land and the presence of many wāhi tapu been lost, but also the history about those sites. The associations with cultural places for Taihape Māori have been greatly diminished or restricted.

338. Tikanga Māori has been suppressed by colonial law through the doctrine of parliamentary supremacy. This has undermined the tino rangatiratanga of Taihape Māori. The partnership principle under the Treaty of Waitangi has never been utilised by the Crown to implement a hybrid system of law and values of tikanga Māori and the English common law. The lack of Crown action indicates that no such hybrid system or sharing of power was ever intended.

339. The Crown's legislative regime has adversely affected the development and retention of tikanga for Taihape Māori. Legislative instruments such as the early Ordinances, the Constitution Act of 1852 and the Tohunga Suppression Act of 1907 have prohibited or stunted the development and retention of tikanga concerning matters such as crime and punishment, governance, and traditional medicine.

340. Crown legislation, policy and practice was engaged to nullify the role of the rangatira in the Taihape region. The English common law was imposed without Māori consent, representative government was largely exclusive of rangatira, land administration was undermined by the Native Land Court and the education system diminished the mana and authority of the chief. Crown actions ultimately led to Taihape Māori becoming leaderless, powerless, and dependent.

341. Land alienation had significant impacts for Taihape Māori in relation to loss of access to wāhi tapu sites, urupā, and sites of significance. These losses had concomitant loss of mana, loss of mātauranga and loss of identity. The Crown told Taihape rangatira that they had to use their land in an acceptably productive manner or that they would inevitably lose it. The Crown then ignored the many issues that Taihape Māori faced with developing their lands including individualised land tenure, fragmented title, a high proportion of landlocked land and a lack of development finance and government support. Once lands were lost, access to natural resources and mahinga kai

was lost. Taihape Māori therefore lost the ability to subsist in the region and many Taihape Māori were forced to move away. The migration out of the region affected the maintenance of tikanga through the loss of leadership and associated kawa and mātauranga Māori.

342. The Crown did little to assist Māori after lands were alienated. Lands were converted to general land and became private property, moving the land out of the tino rangatiratanga of Taihape Māori. We refer to the generic closing submissions for wāhi tapu[515] and te reo rangatira[516] for a discussion on Crown attempts to address wāhi tapu desecration through land alienations, and Crown attempts to protect te reo and its tikanga in Taihape, respectively.

343. The Crown has a duty to ensure that the tikanga of Taihape Māori is maintained by providing for both the continuation and development of these practices. The Crown has enacted a number of laws to ensure that the tikanga of Taihape Māori relating to the sustainable harvesting and utilisation of flora and fauna continue. While Māori values have in some ways re-entered the legal system, the system may not yet have the tools, or have developed a sufficiently informed approach to dealing appropriately with those values.[517]

344. The Crown's role with respect to the tikanga of Taihape Māori is to allow the space for Māori to develop their tikanga and to exercise their tikanga as they see fit. That duty is to actively protect it, strengthen it, promote it, and encourage it.

345. The identity of Taihape Māori is a taonga. This identity includes tribal identity and its associated tikanga, including language culture and mātauranga Māori. As a taonga, the identity of Taihape Māori attracts a duty of active protection which requires that the Crown take active steps. When a taonga is in a vulnerable state, as it is for the identify of Taihape Māori, the Crown in deciding the action it should take to fulfil its obligations, take especially vigorous action for its protection. Te Tiriti signified a partnership between the

[515] Wai 2180 #3.3.42 Wāhi Tapu Generic Closing Submissions 5 May 2020.
[516] Tamaki Legal, Annette Sykes & Co., *Closing submissions for issue 20: Te Reo Rangatira me ona Tikanga* dated 20 May 2020, Wai 2180 #3.3.43.
[517] See paragraphs 283 to 298 for a discussion on the legislation enactments that fail to address the tikanga of Māori.

Crown and Māori. Partnership carries with it the duty to act towards each other with the utmost good faith which is the characteristic obligation of partnership.

346. Taihape Māori identity was wholly undermined by the 'English only' education system that was administered by the Crown in Taihape. We adopt in full the Te Reo Rangatira Me Ona Tikanga Generic Closing submissions in relation to the loss of Taihape Māori identity through the education system.

347. The Native land legislative regime was contrary to tikanga Māori in many ways, in particular, ownership was individualised and the centralising institution of the rangatira was largely undermined. The individualisation of title de-emphasised the institutions of hapū and iwi and this in turn, reduced reliance on or the practices of whakapapa and whanaungatanga. The tribal structures of Mōkai Patea disintegrated and alliances with more influential neighbouring iwi such as Ngāti Tuwharetoa, Ngāti Kahungunu and Ngāti Apa were developed. This resulted in the in-advertent assimilation of Taihape Māori tikanga by their neighbouring relatives throughout most of the 20th Century. The Native Land Court title investigations was plagued with interpretative errors that were often made by the Native Land Court judges when they applied a colonial lens to information of this nature. A lens that was more interested in facilitating land acquisition than it was in accurately determining korero tuku iho. We adopt the generic closing submissions for issue 3: Native Land Court for discussions around:

a. Impact on decision making structure(s), mana whenua and tino rangatiratanga;

b. the social and cultural impacts felt by Taihape Māori regarding the partition, fragmentation, and alienation of land; and

c. impact of Native Land Court title determinations on Taihape Māori customary interests.

348. The Claimants have given evidence of the impacts that the loss of tribal identity has had since 1840. These include:

a. a loss of tribal knowledge, customary interests, and resources;

b. an erosion of cultural identity;

c. loss of traditional ways of living which led to the demise of their unique reo, tikanga and mātauranga Māori;

d. loss of mana and rangatiratanga;

e. disempowerment of their kaitiaki role which leads to a loss of identity;

f. loss or diminution of mātauranga Māori, knowledge of whakapapa, kaitiakitanga;

g. undermining of leadership structures, te reo Māori and marae;

h. destabilisation of tribal structures resulting in deprivation of their ability to exercise their rangatiratanga;

i. loss of access to natural resources and mahinga kai; and

j. diminution in the mauri of Mōkai Patea iwi and their identity as a people.

LEVEL TWO: PARTICULAR THEMES / ISSUES IN THIS INQUIRY

Introduction

349. Five key themes arise in relation to cultural taonga for Taihape Māori:

a. That there was a lack of consultation with Taihape Māori in relation to the protection of cultural taonga;

b. The Crown's failure to protect cultural tāonga, both tangible and intangible;

c. The Crown's legislative regime continues to ignore tikanga;

d. Land alienation has had a significant impact on the tikanga of Taihape Māori; and

e. The failure of the Crown to implement measures to stem the loss of cultural taonga within the Taihape inquiry district.

Theme one—lack of adequate consultation

350. The Crown failed to adequately consult with Taihape Māori in relation to its implementation of the Native land laws. There was inadequate consultation with regard to the establishment and operation of, inter alia, the Native Land Purchase Department, the office of the Resident Magistrate, the Native Department, the Education Department, the New Zealand court system, the Aotea Māori Land Board, the Māori Land Council and local government. The Crown conceded that in establishing the institutions and governance entities, it did not "always consult specifically with Māori".[518] Therefore, these institutions were imposed on Taihape Māori in breach of the principles of Te Tiriti ō Waitangi ō Waitangi. They adversely affected the land interests of Taihape Māori in particular and consequently their cultural taonga as well.

351. The Crown claimed that Māori attitudes and ideas influenced the Crown's decision-making with respect to the protection of cultural taonga, pointing to "a number of Commissions and the input of Māori politicians and rangatira".[519] The Crown's claim in this regard is not accepted. The opposition of Taihape Māori to large-scale land alienation was significant and on-going:

a. The rejection of early Crown purchasing attempts by Donald McLean;

b. Attendance at and support for inter-tribal hui held at Pūkawa, Kōkako, Murimotu, Poutū, Turangarere and Parikino;

[518] Crown Law, Opening Comments and Submissions of the Crown, 2 March 2017, Wai 2180, #3.3.1, at 388.
[519] Crown Law, Opening Comments and Submissions of the Crown, 2 March 2017, Wai 2180, #3.3.1, at 388.

c. Support for the Kīngitanga;

d. Petitions to Parliament;

e. Support for the Repudiation Movement;

f. Complaint to the Rees-Carroll Commission; and

g. Support for Te Kotahitanga.

352. In his evidence, Bruce Stirling recorded how often the Crown simply ignored Taihape Māori in response to their initiatives, petitions, letters and complaints. In June 1867, Mōkai-Pātea iwi met with Ngāti Tūwharetoa at Poutū to discuss boundary issues and dealings in their lands by other tribes. The "komiti of Mōkai-Pātea" wrote to McLean setting out the boundaries.[520] Their efforts would be in vain:[521]

> 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, . . .

353. Two substantial petitions to Parliament emanated from the Ngati Hokohē hui held at Pākōwhai in June 1876. The government's reply was underwhelming. Stirling wrote: [522]

> 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.

354. Likewise, the Crown's response to the Rees-Carroll Commission recommendations was selectively self-serving:[523]

[520] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 26.
[521] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 28.
[522] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 250.
[523] Armstrong, D.A., *Mokai Patea Land, People and Politics*, Wai 2180, #A49, at 64-6.

> 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)

355. On the education front as well, the Crown disregarded the needs and aspirations of Taihape Māori:[524]

> 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.

356. The Crown snubbed many of the important concerns that were raised by Taihape Māori. The Crown cannot reasonably maintain that it was influenced by Taihape Māori and others about their cultural taonga.

Theme two—Crown failure to protect cultural taonga

357. A consistent theme across the many years of colonisation is the Crown's failure to protect cultural taonga. In fact, some taonga such as te reo rangatira were purposefully destroyed by the Crown.[525] Wāhi tapu and urupā have been desecrated and/or destroyed on a consistent basis.

358. The term "taonga" defies an exhaustive definition. "Taonga" as it is used in te Tiriti ō Waitangi can refer to both tangible possessions and items of property and intangible items or matters of special cultural significance. [526] Cultural taonga therefore includes wāhi tapu, sites of significance such as

[524] Hearing week 7 transcript, Wai 2180, #4.1.15, at 425, per Dr Christoffel.
[525] This is the central thesis of the *Te Reo Rangatira Me Ona Tikanga Generic Closing Submissions*, 19 May 2020, Wai 2180, #3.3.41.
[526] Waitangi Tribunal *The Petroleum Report* (Wai 796, 2003) at [5.3].

tūāhu, urupā, mātauranga Māori, te reo Rangatira, healing knowledge, knowledge of rongoa, the practices of tohunga and korero tuku iho.

359. The Crown is failing and continues to fail to protect the cultural taonga of Taihape Māori including:

a. Te reo Rangatira, which is in crisis and nearing extinction;

b. the desecration of wāhi tapu;

c. the trading of portable taonga;

d. the loss of mātauranga Māori in relation to cultural sites;

e. the loss of mātauranga Māori of taonga held by tohunga;

f. the loss of mātauranga Māori in relation to traditional healing practices; and

g. the loss of mātauranga Māori with respect to the use and knowledge of rongoā Māori.

Theme three—Crown's legislative regime continues to undermine tikanga Māori.

360. The Crown's acts and omissions, in respect to the recognition and implementation of tikanga within New Zealand's legal system have been tokenistic and tikanga Māori is a subordinate consideration in New Zealand's jurisprudence.

361. Tikanga Māori has been suppressed and bridled by the colonial law through the doctrine of parliamentary supremacy, and the improper application of the doctrines implementing the common law of England into New Zealand.

362. By the enactment of legislation such as the early Ordinances, the Constitution Act of 1852 and the Tohunga Suppression Act 1907, the development and retention of tikanga concerning matters such as crime and

punishment, governance and traditional medicine has been prohibited or stunted.

363. The tikanga of rangatiratanga has been nullified by Crown legislation, policy and practice by engaging a representative government that was largely exclusive of rangatira, wāhine rangatira were no place in New Zealand's sexist society, land title was individualised so a chief could not veto land sales, the Kīngitanga's rohe tapu was invaded to suppress rangatiratanga, land administration of rangatira-led komiti and rūnanga was undermined by the Native Land Court and the education system diminished the mana and authority of the chief.

Theme four—Land alienation has had a significant impact on the tikanga of Taihape Māori.

364. Taihape Māori have a reciprocal relationship with the world around them, and with all life existing within it. A co-dependent relationship exists with the land, making it vital and sacred.

365. Whakapapa and tikanga guide the people in their use and development of the environment and its many resources. The intensity of this relationship incorporates the principle of whanaungatanga. This familial relationship generates the duties of kaitiakitanga and manaakitanga, which in turn results in the responsibility to nurture and care.

366. Land alienations have a concomitant impact on the wāhi tapu located therein. The Rees-Carroll Commission recommended that committees, elected by the owners, should among other things, be charged with setting aside wāhi tapu before land was alienated. This suggestion was regularly ignored by the Crown. A loss of wāhi tapu results in a concomitant loss in mātauranga including the tikanga associated with that wāhi tapu.

367. There is a plethora of impacts on land alienation on tikanga Māori given by the Claimants that including:

a. disempowering their people and negatively impacting on their social, physical, mental, and spiritual wellbeing;

b. deprivation of their ability to exercise their rangatiratanga;

c. loss of mātauranga Māori, of their whakapapa as well as a disconnection from their whanaunga and taonga tuku iho;

d. loss of whanaungatanga and an ability to work together;

e. intra-tribal arguments; and

f. undermining traditional leadership and the ability to take advantage of economic opportunities.

Theme five—No Crown measures to stem the loss of cultural taonga

368. The Crown's role is to allow space for Māori to develop their tikanga and to exercise their tikanga as they see fit. It is actively to protect it, strengthen it, promote it, and encourage it.

369. This role includes the protection of tribal identity and its associated tikanga, including language, culture and mātauranga Māori.

370. The Claimants have given evidence of the continued impacts that they are facing that the Crown has either yet to address, or are failing to implement appropriate measures to stem those losses:

a. Ngāti Wehi Wehi's relationship and knowledge of Patea and other land blocks in this inquiry district remains a mystery to Ngāti Wehi Wehi;

b. Language loss has had concomitant impacts on the loss of cultural identity and knowledge;

c. Loss of traditional ways of living;

d. Loss of mana and rangatiratanga;

e. Disempowerment with respect to kaitiakitanga;

f. Loss or diminution of mātauranga Māori, knowledge of whakapapa, kaitiakitanga in relation to the land and the wairua of Taihape Māori; and

g. Loss of access to natural resources and mahinga kai areas harming the mauri of Mōkai Pātea iwi and their identity.

PREJUDICE

371. The Claimants further state that the ordinances, Acts, regulations, orders, proclamations, notices, other statutory instruments, policies, practices and any actions taken, omitted or adopted by or on behalf of the Crown that led to, caused or otherwise effected the demise of the use and retention of tikanga by Taihape Māori and which are the subject of submission above were, are and/or remain, inconsistent with the terms and/or the principles of Te Tiriti o Waitangi including, in particular, the guarantee set out in article 2 of Te Tiriti o Waitangi and the principle of active protection. Specifically, the Claimants have been prejudicially affected by:

a. the diminution and suppression of the tikanga of Taihape Māori;

b. the diminution and suppression of the tikanga o nga iwi o Aotearoa;

c. a concomitant loss or diminution of, inter alia, their:

i. Tino rangatiratanga;

ii. Culture;

iii. Te reo;

iv. Identity;

v. Wairua;

vi. Mana;

vii. Self-worth; and

viii. Mātauranga Māori

RELIEF

372. The Claimants seek the following relief from the Waitangi Tribunal as a result of the prejudice the Claimants have suffered from the Crown's breaches of the terms and principles of Te Tiriti o Waitangi viz a viz the demise of the Claimants' use and retention of their cultural tāonga.

Taonga

373. A finding that the Claimants' claims concerning the demise of their tāonga are well founded.

374. A finding that the Crown:

a. has a duty to actively protect and preserve the taonga of Taihape Māori;

b. has failed to adequately protect and preserve the taonga of Taihape Māori;

c. has failed to consult with Taihape Māori regarding legislation, policies, and practices relating to the protection of taonga; and

d. has failed to provide access for Taihape Māori to express concerns regarding legislation, policies and practices of the Crown, relation to the protection of taonga.

375. A recommendation that the Crown provide Taihape Māori with meaningful opportunities to consult and provide input into processes that will restore and/or revitalise their taonga.

Tikanga Māori

376. Counsel seek the following relief from the Tribunal:

a. A finding that the Claimants' claims concerning the demise of their tikanga are well founded;

b. A finding that the Crown has failed to recognise the tikanga of Taihape Māori as a tāonga;

c. A finding that the Crown has failed to actively protect the tikanga of Taihape Māori as a tāonga;

d. A finding that the definition of 'kaitiakitanga' as it is set out in the RMA does not accord with the Claimants' understanding of the concept;

e. A recommendation that the Crown work closely with Taihape Māori to restore and revitalise their tikanga; and

f. A recommendation that the Crown amend the RMA definition of kaitiakitanga so that it approximates more closely with the traditional and actual meaning of the practice.

Tribal Identity

377. A finding that the Claimants' claims concerning the demise of their tribal identity are well founded.

378. A finding that the:

a. tribal identity of Taihape Māori is in a vulnerable state and that vigorous action should be taken by the Crown to protect it;

b. imposition of the Native land laws destroyed the ability of Taihape Māori to maintain their traditional tribal structures;

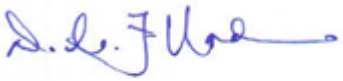
c. education system contributed to the loss of identity that Taihape Māori have suffered;

d. large-scale land alienation has contributed to the loss of identity that Taihape Māori have suffered;

e. Crown has failed to actively protect the identity of Taihape Māori as a taonga.

379. A recommendation that Crown work closely with Taihape Māori for the purpose of recognising and restoring their tribal identity.

DATED at Auckland this 12th day of October 2020



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