KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL **WAI 2180**

IN THE MATTER OF	**the Treaty of Waitangi Act 1975**
AND	
IN THE MATTER OF	**THE TAIHAPE: RANGITĪKEI KI RANGIPŌ DISTRICT INQUIRY**

CROWN CLOSING SUBMISSIONS IN RELATION TO ISSUE 1: TINO RANGATIRATANGA

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INTRODUCTION

1. These submissions acknowledge the constitutional relationship between Taihape Māori and the Crown. They record the Crown's position on higher level constitutional issues (which has also been traversed with the Tribunal through other inquiries) and further, focus on the evidence relevant to this inquiry district concerning the constitutional relationship between Taihape Māori and the Crown.

2. The Tribunal's statement of issues asks parties to discuss issues of constitutionality and sovereignty in the specific context of Taihape. The Crown agrees this is a useful approach (rather than potentially more abstract or generalised rubric).

3. The first direct engagement between the Crown and Taihape Māori within their rohe (as opposed to events outside of their rohe in which they were involved) did not take place until the 1870s. Given that this is well after 1840, the evidence on political engagement of Taihape Māori gains even greater significance in relation to constitutional issues. Issues 1 and 2 are thus closely related and should be read together.

4. Given the paucity of technical evidence of pre-1870 events in the inquiry district itself, the Crown presents some material from adjoining districts of events in which Taihape Māori were involved (most of which has also been referenced by technical witnesses and claimants as relevant context). This material sheds light on the views and actions of some Taihape Māori pre-1870; including their recognition of the Crown and relationship with it, prior to direct Crown action occurring in the inquiry district itself.

CROWN ACKNOWLEDGEMENTS

5. The Crown acknowledges that Taihape Māori sought to maintain their mana motuhake and to enter a partnership with the Crown, but the Crown did not always honour this partnership and has (at times and in ways set out as concessions in the Crown's closing submissions) denied Taihape Māori their rights under te Tiriti o Waitangi/the Treaty of Waitangi.

6. The commitment to the principles of co-operation and support has characterised the Taihape Māori relationship with the Crown. From the

1870s Taihape Māori generally encouraged and welcomed European settlement in the district, but sought to facilitate this on their own terms. The evidence shows that Taihape Māori have not sought historically to reject the sovereignty of the Crown. Indeed, some Taihape Māori, as an exercise of their mana and in honour of a partnership to which they have been committed, participated in military roles in support of the Crown in the 19th century. The Crown acknowledges it has not always upheld the relationship of reciprocity and mutual respect that comes from such actions.

7. Taihape Māori engaged, in their own timing – with settlers, with settlement, and with the Crown itself – with various intentions, but having a consistent thread of maintaining promoting and developing the rohe established by their tūpuna, and upholding their mana in a time of great change in the district. Taihape Māori sought to exercise tribal control over their lands and over the process of tenurial transformation that marked the entry of the Crown in fact (rather than in law) into their district from the 1870s. They have consistently asserted and operated with their own aspirations for their lands and their peoples and have sought to ensure their relationship with the Crown is one ongoing reciprocity, and is characterised by mutual respect.

8. The Crown acknowledges that te Tiriti/the Treaty resulted in two kinds of authority: the Crown's kāwanatanga and Māori tino rangatiratanga. The Crown accepts that the guarantee of tino rangatiratanga in the Māori text meant more than the English text's guarantee of property rights. The Crown acknowledges that quite how the two forms of authority were to relate to each other was not made clear in te Tiriti/the Treaty. This lack of clarity, as to how far Crown 'kāwanatanga' and Māori 'tino rangatiratanga' were to inter-relate, has been a cause of tension in the Māori-Crown relationship since te Tiriti/the Treaty was signed.

9. Te Tiriti/The Treaty did not dictate with any precision how various issues for the ensuing colony were to be addressed; such matters were to be worked out over time. In doing so, the effect of te Tiriti/the Treaty was to require the Crown and Māori to act towards each other honourably, fairly, reasonably and in good faith.

SUMMARY OF THE CROWN'S POSITION

10. To a considerable extent, these submissions repeat submissions already presented by the Crown in Te Rohe Pōtae inquiry and Te Paparahi o te Raki stage 2 inquiry.

11. Crown sovereignty was established in 1840. In many parts of New Zealand, including the Taihape inquiry district, the Crown did not substantiate that sovereignty with effective control or effective institutions until well after 1840. The Crown says while it did not have an active presence in the Taihape inquiry district before 1870, the absence of substantive Crown authority was not legally inconsistent with the full legal sovereignty obtained in 1840. Rather, this reflected the political and practical realities of colonial government (and the particular demographic and geographic characteristics of the inquiry district).

12. The Crown acknowledges te Tiriti/the Treaty was not signed within the inquiry district, but notes evidence of rangatira signatories who had whakapapa connections to and/or interests in the Taihape inquiry district and concurs with Tribunal jurisprudence that te Tiriti/the Treaty was of national effect (in terms of the obligations the Crown committed to through it).

13. Evidence of the early understandings of Taihape Māori of te Tiriti/the Treaty and how it related to them is limited. Statements of Winiata Te Whaaro and Rēnata Kawepō and others appear to recognise the Queen (and Governor's) authority, while also asserting their own rangatiratanga through such actions as pronouncing on the injustice of Government actions.

14. The Crown says that *de jure* sovereignty was achieved by the Crown through a series of constitutional and jurisdictional steps. *De facto* sovereignty was acquired by the Crown across time, however, the Crown submits it is difficult to pinpoint exactly when and how the Crown substantiated its sovereignty with effective control or effective institutions in the Taihape inquiry district. The absence of this effective control in Taihape until (the Crown says) about 1870 was not legally inconsistent with the full legal sovereignty obtained in 1840.

ISSUES

Issue 1: At what point, and on what terms, did the Crown enter into a relationship with Taihape Māori? Given that the Crown did not have an active presence in the Taihape inquiry district before 1860, to what extent, if at all, did this affect the Crown's approach in exercising its kāwanatanga responsibilities toward Taihape Māori as opposed to other Māori?

15. The Crown submits that when it signed Te Tiriti/the Treaty in 1840, it established a Tiriti/Treaty relationship with all Māori, including Māori from Taihape, regardless of where they lived and whether they had signed te Tiriti/the Treaty (this is discussed further in relation to Issue 2 below).

16. At the assumption of British sovereignty in 1840, all Māori became British subjects, and as such were entitled to the protection of the British Crown. The Crown's aim when it signed te Tiriti o Waitangi/the Treaty of Waitangi was to undertake Tiriti/Treaty obligations towards all Māori, as part of the process of securing a legitimate and moral foundation for British sovereignty. This was a matter of considerable importance for the Crown, as is evident in the concern expressed in Normanby and Russell's instructions. The precise details of how its governing authority was to be exercised, and the institutional structures and relationships that would support it, were matters that remained to be worked out through further debate and discussion. British sovereignty did not preclude all Māori authority or customary law from having legal status in the colony.

17. Tribunal consideration of the application of te Tiriti/the Treaty nationally (from the *Te Urewera Report)* is discussed below under Issue 3.

18. The Crown did not substantiate its sovereignty with effective control and institutions in many other parts of New Zealand, including in the inquiry district, until well after 1840. The absence of substantive Crown authority in the Taihape inquiry district was not legally inconsistent with the full legal sovereignty obtained in 1840. Rather, this reflected the political and practical realities of colonial government and the particular demographic and geographic characteristics of the inquiry district. Taihape district was not coastal. Its climate and topography (along with its remoteness from "established" markets) meant there was no strong development or settlement until the 1870s (from which point there was intense engagement between Taihape Māori, Crown agents and Ministers). The Māori population of

Taihape was relatively small and highly mobile. These matters all affected the pace of change within Taihape district in terms of land development and in terms of direct Crown action within the district.

19. The Crown's late engagement in Taihape also reflected the scale and character of the colonial government in that era. The colonial government in New Zealand was, as the Crown has sought to emphasise in other inquiries, initially quite small and had limited resources. Much of the Crown's early activities were geared towards expanding the resources available to it. Given the relative isolation and limited development opportunities in the inquiry district, the Crown generally focussed its attentions on areas of New Zealand with greater immediate economic potential.

20. While the Crown had a very limited presence in the inquiry district before 1870, the Crown did have relationships with some Taihape Māori in other areas. By 1840, significant portions of the Taihape population had relocated to adjoining regions for strategic and security reasons (including to Manawatū, Heretaunga, and into the Tūwharetoa rohe). Some Taihape Māori with interests in, or whakapapa connections to Taihape signed te Tiriti/the Treaty. Some chose to support the Crown in conflicts in the 1850s and 1860s and formally swore allegiance to the Queen (at Omahu in 1865). Some Taihape rangatira were already making strategic decisions regarding land alienation (and retention) and development before the Crown came to Taihape. In the mid-1860s, for example, the prominent Te Ūpokoiri/Ngāti Hinemanu Rangatira Rēnata Kawepō intervened to prevent the extension of private leasing into the district.[1]

21. The exercise of *de facto* sovereignty is addressed below.

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1 Note, Mr Stirling states **'**The resident owners within the southern part of the district did not instigate the purchases or the title investigations that led to the alienation of their land.' (Wai 2180, #A43, at 2). This forms a theme throughout his report that 'resident owners' were prejudiced by the actions of 'non-resident' owners (and Crown dealings with those non-resident owners). The Crown's view is that that theme is not supported on the evidence. For example in the southern blocks Ūtiku Pōtaka was unquestionably resident; mandated for Ngāti Hauiti as rangatira; and actively involved in each southern block dealing (and in early days, in agreement with Kawepō). Mr Stirling's characterisation of the customary authority Rēnata Kawepō exercised in the Taihape inquiry district in the 1870s is at significant odds with Dr Ballara's repeated statements of the authority he exercised in the district as a leading rangatira not only of his own Ngāti Ūpokoiri and Ngāti Hinemanu but also with whanaunga such as Ngāti Hauiti and with repeated contemporaneous acknowledgements of other Taihape rangatira or tribal groupings as to the authority they placed and recognised in him throughout the 1870s. The Crown defers to Dr Ballara's assessment of his customary authority (whilst also acknowledging that the matter became more complex in the 1880s).

22. Direct engagement between Taihape Māori and the Crown was preceded by engagement with the first European settlers (both inside the inquiry district and outside of it). Taihape Māori had demonstrated an interest in European goods, ideas, and technology, and rangatira from the area sought to advance their people's well-being through engagement with the emerging European economy. As set out in the Crown's submission on Issue 4, informal private leasing first occurred in southern Taihape during the late 1840s, and by the early 1860s those leasees and other private parties were seeking to purchase lands in the area. As this required a Crown-derived title, Taihape Māori had no choice but to operate in accordance with the laws and institutions of the settler state. Around the same time: in the south of the district some Taihape made proposals to sell "Greater Paraekaretu" to the Crown, generating closer engagement; and in the northern tussock lands Taihape Māori were starting to develop their own sheep flocks and farming endeavours. This was in partnership with Europeans through to the late 1870s, where more independent farming operations emerge, and into the 1880s, where Moawhango is increasingly developed by Māori and some of those partners (primarily the Bately's) as a modern settlement.

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

23. No copies of the Te Tiriti/the Treaty were taken to Taihape, and as a result no-one signed within the Mōkai Pātea region. However, te Tiriti/the Treaty was brought to rohe adjoining Taihape in 1840. As mentioned above, significant portions of the Taihape population had relocated to adjoining regions prior to 1840 for strategic and security reasons (including to Manawatū, Heretaunga, and into the Tūwharetoa rohe). Some rangatira with interests in Mōkai Pātea, or with whakapapa to Mōkai Pātea hapū or iwi (addressed below), signed te Tiriti/the Treaty in those other locations.[2]

24. Claimant submissions acknowledge the following rangatira as signatories of te Tiriti/the Treaty – including for Taihape Māori:[3]

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2 This was accepted by claimant counsel in Wai 2180, #3.3.54, Generic constitutional issues closing submissions dated 12 October 2020, at [87]–[91].

3 Wai 2180, #3.3.54(b), at [87]–[91].

24.1 Te Hāpuku (of Ngāti Te Whatu-i-āpiti, Ngāti Kahungunu and Te Rangi-ko-ia-anake, with whakapapa connections to Ngāti Hinemanu, Ngāti Ūpokoiri, Ngāti Paki);

24.2 Te Ota aka Wi Te Ota (Rangitāne, Ngāti Kahungunu, Ngāi Te Ūpokoiri and Te Paneira) signed at Manawatū;

24.3 Paturoa aka Rāwiri Paturoa (Rangitāne, Ngāti Kahungunu, Ngāti Hauiti, Ngāi te Ūpokoiri, Te Paneiri, Ngāti Hinemanu) signed at Manawatū;

24.4 Te Tohe (Ngāi te Ūpokoiri) signed at Manawatū.

25. Counsel for the Heritage Trust made oral submissions that Ngāti Hinemanu treasure Te Hāpuku in terms of their relationship and that he signed the declaration of independence and te Tiriti "for us at Manawatū".[4] Asked (by Judge Harvey) whether Te Hāpuku ever referred to himself as a Ngāti Hinemanu or Ngāti Paki, counsel for the Heritage Trust said the whakapapa line shows connections for Ngāti Paki – "that it shows an intimate connection there". Counsel said her instructions were that the people at the time would have accepted that Te Hāpuku was signing on their behalf.

26. A prominent signing was that of Ngāti Apa chief, Te Hūnia Hākeke, also known as Kāwana (Governor). Kāwana Te Hūnia Hākeke died in late 1848, but his son took on his name and was involved in negotiations over various southern blocks.[5] Ngāti Apa were found by the Native Land Court to have interests in Taihape (see submissions on Issues 3 and 4 as to Ngāti Apa and Ngāti Hauiti working together on Paraekaretu proposal to the Crown).

27. Te Tiriti/The Treaty was also signed at Hawke's Bay on 24 June 1840 (the Bunbury sheet) by three leading rangatira of Ngāti Te Whatu-i-āpiti and Ngāti Kahungunu, being Te Hāpuku, Waikato and Mahikai.[6] Te Hāpuku's relationship with Mōkai Pātea is discussed above. The other rangatira had no

4 Wai 2180, #4.1.22, from 48.

5 Kāwana Te Hūnia Hākeke | NZHistory, New Zealand history online. See **Appendix 1**.

6 Hawke's Bay, 24 June 1840 | NZHistory, New Zealand history online. See **Appendix 2**.

specific interests in Mōkai Pātea but were also closely related to Rēnata Kawepō, who did exercise and claim interests within Mōkai Pātea.[7]

28. There are further narratives from this period that connect individual rangatira across hapū and iwi lines and to te Tiriti/the Treaty. Rēnata Kawepō was taken captive at the battle of Te Roto-a-Tara – between Ngāti Te Ūpokoiri and Ngāti Te Whatu-i-āpiti – and handed over by the latter to their Ngāpuhi allies, who took Kawepō back to their base at Nukutaurua (at Māhia). In about 1837, he was taken to the Bay of Islands and lived at Waimate North for several years, where he converted to Christianity and was baptised Rēnata (Leonard).[8]

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

29. There is very limited technical evidence in this inquiry about Taihape Māori understandings of te Tiriti/the Treaty at 1840 (particularly the non-signatories) or in fact of their views prior to the political hui of the 1860s discussed further below.

30. As acknowledged above, te Tiriti/the Treaty was not signed within the Mōkai Pātea region, although it was signed by some rangatira with interests in Mōkai Pātea or with whakapapa to Mōkai Pātea hapū or iwi. It was not signed by the majority of Taihape rangatira. Clearly, those Taihape Māori who were not aware of te Tiriti/the Treaty would not have views about how it applied to them.

31. In the absence of contemporaneous evidence, only generalised submissions can be made. The Crown submits that it is likely there were many different intentions and understandings of the te Tiriti/the Treaty among the Māori signatories (and non-signatories), and that those understandings would have been based on the Māori text of te Tiriti/the Treaty.

32. The Crown submits that there is little evidence (if any) of Taihape Māori explicitly rejecting the Crown having assumed sovereignty. However, there is

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7 Kawepō, Rēnata Tama-ki-Hikurangi – Dictionary of New Zealand Biography – Te Ara. See **Appendix 3**.

8 Kawepō, Rēnata Tama-ki-Hikurangi – Dictionary of New Zealand Biography – Te Ara. See **Appendix 3**.

significant evidence of them holding Crown conduct to the standards of te Tiriti/the Treaty, and of them seeking to maintain and exercise their rangatiratanga including through their strategic objectives for the settlement and development of the area (at both collective and individual levels).

Non-signatories

33. Submissions on behalf of claimants correctly state that most of Taihape rangatira were not signatories. They state, therefore, that the majority of Taihape Māori did not consent to the Crown's assumption of sovereignty. Taihape is not the only district in which some rangatira (and for Taihape, most rangatira) did not sign te Tiriti/the Treaty.

34. In the *Te Urewera Report* the Tribunal found that whilst te Tiriti/the Treaty applied nationally, it only did so to the extent it recorded obligations on the Crown, and that reciprocity of obligation depended on Tūhoe recognition of the relationship to them.[9] For Tūhoe that occurred the last three decades of the nineteenth century, and then only incrementally.[10] For Taihape, as set out below, that recognition appears to occur earlier via relationships and events outside of the inquiry district, and within the inquiry district only from the 1860s/1870s.

35. The Tribunal in its recent *Te Rohe Pōtae Report* commented further on the application of te Tiriti/the Treaty to those who did not sign it, concluding:

> … that the Treaty applied to non-signatory hapū as a unilateral set of promises by the Crown to respect and protect their tino rangatiratanga and other rights just as it would for hapū whose leaders had signed. Out of practical necessity, all Māori needed to engage with the Crown on the basis of the Treaty's guarantees, whether they had signed the Treaty or not. At a minimum, however, the Crown was obliged to approach these groups on the basis that a workable relationship had to be put in place based on mutual consent, much as Māori needed to do the same with the Crown.

36. The Crown recognises that it is bound by Tiriti/Treaty obligations to Taihape Māori – notwithstanding that most Taihape rangatira did not sign te Tiriti/the Treaty.

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9 Waitangi Tribunal, *Te Urewera Report,* at 133, 134.

10 Waitangi Tribunal, *Te Urewera Report,* at 133, 134.

Evidence from Taihape Māori as to their views on te Tiriti/the Treaty

37. Given the limited contemporaneous evidence, the Crown draws on evidence of the understandings of those connected to, or with interests in, Taihape; along with a limited number of statements made by Taihape Māori some decades after 1840. Other Crown submissions are also relevant to the subsequent expectations of Taihape Māori (including Issues 3, 4, and 6 – native land laws, Crown purchasing, Pokopoko) with respect to exercising rangatiratanga.

Te Hāpuku

38. The Crown submits a source which may shed light on the understandings of signatories with connections to Taihape is the account of a Tiriti/Treaty signing at Hawke's Bay by Major Bunbury. Bunbury recorded that he told Te Hāpuku that his assent to te Tiriti/the Treaty 'could only tend to increase his consequence' among his own people and that good government would apply 'equally' to Māori and Pākehā, including mediation in inter-tribal wars (a statement that reflected Normanby's instructions to Hobson).[11] The Crown acknowledges this evidence is of limited effect. It is being presented here as there is so little contemporaneous information available to assist the Tribunal on this specific question. The Crown recognises that it remains uncertain from this evidence what Te Hāpuku himself thought (never mind the degree to which that was reflective of wider Taihape Māori thought). It is also recognised that it is highly unlikely that Te Hāpuku and Bunbury were of the same mind.[12]

Rēnata Kawepō

39. Rēnata Kawepō's role as rangatira of Ngāi te Ūpokoiri and Ngāti Hinemanu (and at times acknowledged as a leader/ally with Ngāti Hauiti and others) has been traversed in discussions between Dr Ballara and various witnesses throughout the inquiry. The Crown understands him to have gained and exercised considerable authority as a leading rangatira of Mōkai Pātea (and

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11 Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams, 1987), at 81–82. We note that the Heretaunga Tamatea historical account includes a section that describes the view of Heretaunga claimants that Te Hapūku was effectively coerced into signing te Tiriti/the Treaty.

12 Orange records that Hāpuku is reported to have "refused to sign at first, alleging that Ngāpuhi were now slaves through the Treaty." (at 84). According to Orange, Bunbury "warned Te Hāpuku that, whether he signed or not, British authority was a fait accompli" before "threatening to demonstrate [the point] with the *Herald's* guns unless local Māori returned a whaleboat stolen from a Pākehā" (at 83).

Heretaunga) between the 1840s and his death in 1888. He made a number of statements and took various stances towards Crown action that reflected understandings of te Tiriti/the Treaty, including understandings of Crown authority/kāwanatanga and its role.

40. Renata's actions demonstrate that while he actively supported the Crown on a number of fronts (for example, participating in military actions, opposing the Kīngitanga etc) he was also willing to critique the Crown's actions when he thought they were impinging upon his rangatiratanga or that of his people. This suggests that Rēnata did not view the Crown's sovereignty and his own rangatiratanga as mutually exclusive, but rather as two kinds of authority that could, and should, accommodate each other.

41. Further, given the paucity of other evidence, the Crown references in detail:[13]

41.1 when Donald McLean arrived in Hawke's Bay in 1850 to acquire land for the Crown, Kawepō was initially welcoming. Later in the decade, however, he opposed the attempts by Te Hāpuku to sell land over which other rangatira, including himself, exercised authority – this led to the Pakiaka war of 1857, for which a peace was brokered in 1858;[14]

41.2 in the late 1850s, Kawepō supported the rūnanga system of local self-government (which is discussed further below), and did not agree with the support that other rangatira such as Kurupō Te Moananui gave to the Kīngitanga movement;

41.3 in 1861, Kawepō wrote and published a critique of the Crown's actions in acquiring Te Atiawa land at Waitara and provoking the first Taranaki war (this is examined further below);

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13 This summary is based on Angela Ballara and Patrick Parsons, "Kawepō, Rēnata Tama-ki-Hikurangi", *Dictionary of New Zealand Biography*, first published in 1990. Te Ara - the Encyclopedia of New Zealand. See **Appendix 3**.

14 A Ballara and P Parson's biography of Kawepō on Te Ara states: "Kawepō's stand [opposing land sale] resulted in his being regarded as the protector of Hawke's Bay lands from Maraekākaho to the ranges, and across to the borders of Murimotu, in the centre of the North Island." The location of Murimotu is southern Mōkai Pātea, around Hunterville area.

41.4 Kawepō opposed Pai Mārire in Hawke's Bay and in 1866, at Ōmarunui, he joined Karaitiana Takamoana and Crown forces led by Lt-Col G S Whitmore to drive them out of the region;

41.5 in 1868-70, Kawepō campaigned with other Hawke's Bay chiefs against Te Kooti at Tūranga (Poverty Bay) and the interior, including at Tokaanu. On the Tokaanu expedition he suffered an injury when he was clubbed from behind and his right eye was gouged out by a woman he later married. For his injury and war service the Crown awarded him a £100 pension, however, the campaign with his own native contingent was a financial burden, which he relieved in part by selling land (as discussed in submissions on Issues 3 and 6);

41.6 Kawepō was disappointed with the outcome of the 1873 Government commission into Hawke's Bay land purchases, and he advocated for a new commission with greater powers;

41.7 he sometimes supported and sometimes opposed the Repudiation Movement, which repudiated Crown purchases in the region;

41.8 Kawepō was a leader of economic development in the Hawke's Bay and Mōkai Pātea regions, including promoting sheep farming amongst his people;

41.9 Kawepō promoted educational endeavours (addressed further in Crown closing submissions on Issue 3 and Issue 18) including: proposing the Ōwhāoko education endowment reserve; establishing Ōmahu school in 1867; Te Aute school and the trust lands; and in the late 1870s he promoted education for Māori children in English to put them on an equal footing with Pākehā in the future.

42. Kawepō, speaking of the emerging conflict in Taranaki, acknowledged the sovereignty of the Queen, which he said, had been accepted long ago:

> Though it be said that this war is for sovereignty, the fault of the Governor can never be concealed by that. Who is the Maori that is such a fool as to be mistaken about the sovereignty or supremacy of the Queen of England? Or who will throw himself away in fighting for such a cause? No, it is for the land; for land has been the prime cause

> of war amongst the Maoris from time immemorial down to the arrival of Pakehas in this Island of ours.

43. His recognition of the Crown's sovereignty was neither absolute, nor unilateral. It was instead conditional on the Crown's behaviour. An 1860 speech by Kawepō made several points concerning the relationship between Māori, the Queen and Governor, including:[15]

> Ko tenei kua mutu taku pai atu ki tena Matua oku, engari ki te titiro mai ia ki te he o nga mahi a tenei Kawana whangai pu whangai paura whangai mata ka whakahoki atu, ka ho mai ai i te Kawana whangai i au ki te kai ngawari, ki te Runanga, ki te Whakawa, ki te Aroha, ki nga tikanga pai.
>
> Now, my duty to that mother of mine [the Queen] is ended, unless she will look upon the fault of this Governor who feeds us with guns, powder, and ball, and recall him, and give me a Governor who will feed me with digestible food, with Councils, with Courts of Justice, with love, and with good deeds.

44. He informed the gathering that his "duty to that mother of mine [the Queen] [would be] ended" unless she recalled the Governor, and that Māori "will obey the law; if it be properly administered he will always obey".[16]

45. Kawepō continued to upbraid the Governor:

> It was said that that Treaty was to protect the Maoris from foreign invasion. But those bad natives never came to attack us; the blow fell from amongst you, the nation who made that same treaty. Sir, it is you alone who have broken your numerous promises.

46. Kawepō fought for the Crown after making the above statements. The statements have elements of the approach under tikanga of leadership being an exercise in reciprocity (with mandate for leadership enduring only for so long as the people consented to that leadership). They also shed light on how Kawepō understood the relationship between himself and the Queen, and with the colonial government (and the Governor). It is one that is relationally based, is of significant complexity and ongoing accountability. It is one of mutual respect.

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15 *Renata's Speech and Letter to the Superintendent of Hawke's Bay*, at 6S.

16 Renata Tama-ki-Hikurangi Kawepo, *Renata's Speech and Letter to the Superintendent of Hawke's Bay on the Taranaki War Question; in the Original Maori with an English Translation* (Wellington: Spectator Office, 1861); copy at Renata's Speech and Letter to the Superintendent of Hawke's Bay on the Taranaki War Question; in the original Māori, with an English translation. | NZETC (victoria.ac.nz). See **Appendix 4**.

Collective 1861 correspondence to the Queen from Taihape rangatira and others

47. On 3 April 1861, Kawepō and other leading rangatira addressed letters to both the Governor and Queen Victoria. Taihape tūpuna signatories include Noa Huke and Hira Te Ota. The translation of the letter to the Queen is set out here in full given it is from multiple people including Taihape rangatira, and it sets out some evidence as to their views of arrangements between 1840 and 1860 (which is otherwise missing from the record):[17]

> Salutations to you. This is our word to you respecting the errors (troubles) of our land, which are going on here where your people, the Europeans, are fighting with us, the Maori people. The good which used to be associated with the mention of your name in our land, and which caused the Maoris of this Island to regard you only as our mother, has been lost. While the proceedings of the first Governors were good, your name was then sweet to the hearts of your Maori people, Then matters went well, and both races, the Europeans and the Maoris, were satisfied. All proceedings were then dealt with by a Runanga (Council); what was seen to be right was agreed to, and what was seen to be wrong was negatived by your people of both races. Things were thus done at that time. The first Governors returned (to you) approved (with a good name). But when this Governor of yours was sent, the manner of proceeding then for the first time became strange. Your name also became strange to (ignored by) this people. Now for the first time have we been hunted with evil. As also it is a new thing for you to hear that this island is evil. You heard before that the Maoris were improving, but now the news reaches you that the work of this island is fighting.
>
> O Mother, do not listen to fabrications which are probably being written to you, to the effect that the Maoris are fighting against your Sovereignty (Chieftainship). It is a fabrication. Understand that it is really a quarrel about land. The years are many in which we have been talking quietly, and nothing has come of it. We then perceived that this is a real evil (grievance.) On this account we thought that you should send a person to investigate this war that it may be made to cease.
>
> This is all our word to you. Salutations.
>
> From Tareha, Te Moananui, Renata Kawepo, Karaitiana Takamoana, Noa Huke, Paora Torotoro, Te Matenga te Hokimate, Te Harawira Tatere, Morena, Paraone Hakihaki, Rota Porehua, Te Harawira Takaao, Wiremu Te Rewarewa, Te Wirihana Ponomai, Henare Te Apatari, Noa Kuhupuku, Te Waaka Hiao, Te Hira Te Ota, Tohutohu, Te Teira Te Paea, Paora Rerepu, Te Haka, Porukoru Mapu. From us all, 170 of the men, Maori Chiefs of this place, Napier.

48. The letter to the Governor delivered the same essential message (although some harsher and more circumspect words were used).

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17 170 of the 'Rangatira Māori' of Napier signed this letter.

49. These exchanges show some Taihape Māori appealing directly to the monarch for redress of grievances, thus recognising in some material way the Queen's authority. The letters denied that Māori were fighting against the 'rangatiratanga' (translated 'sovereignty' and 'chieftainship') of the Queen. The language used here is strong – denouncing such talk as 'tito' and 'parau' – a falsehood or deception.

50. At the same time, Taihape Māori were asserting their own rangatiratanga to pronounce on the injustice of Government actions and the conditionality of their ongoing recognition of that authority being premised on Crown conduct.

51. This exchange occurs in 1861. Throughout the remainder of that decade, Kawepō, along with several Taihape Māori (including Winiata Te Whaaro and Irimana), participated in military actions aligned with the Crown.

Winiata Te Whaaro

52. A further example of this relational and conditional recognition of the authority of the Queen is the 1897 statement of Winiata Te Whaaro.[18]

> I gave you my bible and my money. That is the bible of the Queen. The Queen gave the bible between us all to finish all evil deeds so that we may all live in love. This was done in the year [18]40. This indeed is the reason I gave you the money. Now as regard the gun and this indeed is the thing that will make the blood flow according to the command of the Queen. This indeed is the reason that I laid down the gun and the notes to finish the discussion between us both. You say I must go I say I will stay until my blood is shed on this block.

53. Winiata Te Whaaro fought with Rēnata Kawepō for the Crown in the 1860s and formally declared his allegiance to the Queen in a ceremony at Ōmahu in 1865. Te Whaaro's 1897 statement, made in the context of his eviction from his Pokopoko farm, provides insights into his views about both the potential benefits of British sovereignty, and his subsequent experience of colonial laws and institutions.

54. Further evidence of Taihape Māori views regarding sovereignty, te Tiriti/the Treaty, and political arrangements generally are addressed in the following (Issue 2: Political Engagement) submissions.

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18 Wai 2180, #A56, at 68.

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

55. As above, the Crown's understanding was that the *de jure* sovereignty discussed below applied nationally, including in Taihape. How the Crown attained *de facto* sovereignty is also discussed below.

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

56. The Crown says that *de jure* sovereignty was achieved through a series of constitutional and jurisdictional steps. The Tribunal is aware that constitutional issues have been advanced through the Tribunal's Te Paparahi o te Raki inquiry stage 1 report, due to the events at Waitangi occurring within that district.

57. The Crown has made substantive submissions in response to the Tribunal's stage 1 report addressing both general constitutional matters (legal, Tiriti/Treaty, and evidential) and matters specific to Te Paparahi o te Raki district.[19] Whilst the circumstances of Taihape differ from those in Northland, there is not a sufficient evidential basis in this inquiry for the Crown to posit a substantially different position from that advanced in Te Paparahi on the overarching constitutional issues.[20] Nor would it be efficient to do so given the Tribunal is still actively considering the Crown's views (along with the evidence and the submissions of claimants). The Tribunal – in its Te Paparahi o te Raki stage 2 report – will presumably address the matter it reserved in its stage 1 report, assessing how the Crown came to exercise the sovereignty it exercises today (and the Tiriti/Treaty consistency of that process).

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19 Wai 1040, #3.3.402.

20 Evidence from Dr Paul McHugh, Dr Alex Frame, and Mr Moana Jackson are all being considered within that inquiry. In Taihape there is no specific technical or expert report on constitutional matters or on political engagement. Mr Walzl's tribal landscape report (Wai 2180, #A12) does not address matters at 1840 due to the lack of documentary evidence available from the district in that era. Mr Stirling's Nineteenth Century Overview report (Wai 2180, #A43) addresses various historical events of a political nature but does not engage in the kind of expert analysis of constitutional matters that Drs McHugh and Frame have in Wai 1040. Mr Jackson's evidence has identified the possibility of different discourses and starting assumptions by participants. Such evidence places before the Tribunal a sociological frame of reference in which it might choose to examine and construe other evidence detailing the actions and recorded views of the relevant 19th century participants. His evidence (Wai 2180, #H07) critiques Crown views on Taihape land issues (specifically Mangaohane issues) given the different constitutional premises between his views and those of the Crown, and the different consequences flowing from ideological premises within tikanga and te ao Māori and property and land law.

Crown position on de jure sovereignty

58. The Crown's position can thus be summarised as follows:[21]

> The Crown's sovereignty over New Zealand is incontrovertible. As was stated by Richardson J in New Zealand Māori Council v Attorney General (the Lands case): [22]
>
> > It now seems widely accepted as a matter of colonial law and international law that those proclamations approved by the Crown and the gazetting of the acquisition of New Zealand by the Crown in the London Gazette on 2 October 1840 authoritatively established Crown sovereignty over New Zealand.
>
> The Tribunal has recently said: [23]
>
> > On any objective assessment of how power came to be exercised in New Zealand after 1840, sovereignty did pass to the Crown. Such an assessment is not simply based on the international law perspective that the transfer of sovereignty was legally effective from when the proclamations of May 1840 were gazetted in October 1840. After 1840, iwi Māori also came to accept the reality of the Queen's authority in New Zealand; many, if not most, accepted the acts of the Governor, her representative.
> >
> > [...] we have no jurisdiction to question the Crown's sovereignty over New Zealand – the Court of Appeal has held that it was 'authoritatively established' (in the words of Justice Richardson) through the gazetting of Hobson's proclamations.

Tribunal findings on de jure sovereignty (and the scope of those findings)

59. The Waitangi Tribunal held, *inter alia,* that Northland Māori did not cede sovereignty to the Crown, nor the authority to make and enforce law, over themselves or their territories.[24] This part of the Te Paparahi o te Raki stage 1 findings is relied on heavily by claimants in this district inquiry as being authority that the Crown does not exercise authority today. With respect, the Crown submits that this interpretation relies on a selective rendering of the Tribunal's findings which, for the sake of completeness, are set out in full.[25]

> Our essential conclusion, therefore, is that the rangatira did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories. Rather, they agreed to share power and authority with the Governor. They and Hobson were to be equal, although of course they had different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis. But the rangatira did not surrender to the British the sole right to make and enforce law over Māori. It was up to the British, as the party drafting and explaining the treaty,

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21 Per Wai 1040, #3.3.402, at [1]–[3].

22 [1987] 1 NZLR 641 (CA) at 671.

23 *He Whiritaunoka: The Whanganui Land Report* (Wai 903, 2015) at 145 and 154; footnote omitted.

24 *He Whakaputanga me te Tiriti – The Declaration and the Treaty* (Wai 1040, 2014), at 526–527.

25 *He Whakaputanga me te Tiriti – The Declaration and the Treaty* (Wai 1040, 2014) at 526–527.

> to make absolutely clear that this was their intention. Hobson's silence on this crucial matter means that the Crown's own self-imposed condition of obtaining full and free Māori consent was not met.

60. The te Paparahi o te Raki Tribunal stressed its conclusions were not radical as a number of scholars – Māori and Pākehā – have expressed similar views for a generation. In that sense, the Tribunal stated that its conclusion represents continuity rather than change.

61. The report also stated that the Tribunal made no conclusions about the sovereignty the Crown exercises today,[26] nor how and when the Crown acquired the sovereignty that it exercises today.[27]

Applicability of national constitutional de jure events to Taihape

62. The relevance and applicability of events in 1840 to Taihape has been questioned given the Crown did not physically undertake any activities in Taihape until some decades later, and as few Taihape rangatira signed te Tiriti/the Treaty. The Crown's view is that the high-level issues are of national effect and apply to Taihape and Taihape Māori. The Crown considers this view is supported by Tribunal jurisprudence. Taihape Māori are in a similar position to other iwi:

62.1 who signed te Tiriti/the Treaty, but did not intend to cede sovereignty (such as Whanganui Māori); or

62.2 who did not sign te Tiriti/the Treaty, and therefore could never have intended to cede sovereignty (such as Moriori and ngā iwi o Te Urewera).

63. After the stage 1 Northland report, the Tribunal issued *He Whiritaunoka: The Whanganui Land Report*, in which it confirmed its earlier findings that te Tiriti/the Treaty is of national effect – including those areas where Māori did not sign te Tiriti/the Treaty, and/or did not intend to cede sovereignty through it. *He Whiritaunoka* stated:[28]

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26 *He Whakaputanga me te Tiriti – The Declaration and the Treaty* (Wai 1040, 2014) at xxiii.

27 *He Whakaputanga me te Tiriti – The Declaration and the Treaty* (Wai 1040, 2014) at 527.

28 *He Whiritaunoka: The Whanganui Land Report* (Wai 903, 2015) at 143.

63.1 The Waitangi Tribunal has rejected the suggestion that te Tiriti/the Treaty should apply differently in different places, depending on how te Tiriti/the Treaty was received there, or even whether te Tiriti/the Treaty was indeed received.

63.2 Tiriti/Treaty duties applied even where Māori were not offered and did not sign te Tiriti/the Treaty, such as with Moriori and Te Urewera.

63.3 There was no meeting of minds about what te Tiriti/the Treaty meant or what its effect would be. But rangatira had insufficient access to power in succeeding decades to enable them to insist that the regime that te Tiriti/the Treaty ushered in was what they believed they had agreed to.

63.4 As some Māori did not agree to the Crown's assumption of sovereignty, but the Crown assumed it anyway, the Tiriti/Treaty's effect is to bind the Crown to use that appropriated power well as regards Māori. What that means in practice has come to be conceived of in terms of 'principles' of te Tiriti/the Treaty.

63.5 The set of principles that are core to the Tribunal's jurisprudence are: partnership, good faith, reciprocity, active protection, and autonomy. Inherent in these principles are the elements of responsibility and mutuality.

64. The Tribunal also stated in *He Whiritaunoka*:[29]

> On any objective assessment of how power came to be exercised in New Zealand after 1840, sovereignty did pass to the Crown. Such an assessment is not simply based on the international law perspective that the transfer of sovereignty was legally effective from when the proclamations of May 1840 were gazetted in October 1840. After 1840, iwi Māori also came to accept the reality of the Queen's authority in New Zealand; many, if not most, accepted the acts of the Governor, her representative. Iwi were often not directly affected – or did not feel themselves to be directly affected – by the authority and acts of either the Queen or the Governor.

29 *He Whiritaunoka: The Whanganui Land Report* (Wai 903, 2015) at 145.

65. The Crown agrees, and says the evidence, such as it is for Taihape pre-1870, is consistent with that conclusion.

66. In Te Rohe Pōtae report (*Te Mana Whata Ahuru*) the Tribunal summarised previous Tribunal jurisprudence about te Tiriti/the Treaty meaning and effect, and its application in differing circumstances in the following terms:[30]

> Other Tribunals have explained how, through the Treaty, the Crown acquired a right to govern, and in return acquired an obligation to actively protect Māori rights and interests. Māori retained tino rangatiratanga, while also acquiring the rights of British subjects. Those Tribunals, as well as the courts, have found that the Treaty created a partnership between Māori and the Crown, reflecting its original promise as a foundation for mutually beneficial co-existence between Māori and the Crown. Tribunals have also found that the Crown owed Treaty duties to hapū and iwi even if they were not given the opportunity to sign.

The nature of de jure sovereignty

67. Te Tiriti/The Treaty and proclamations of Crown sovereignty resulted in two forms of authority in New Zealand: the Crown's authority in the form of an overarching kāwanatanga or civil government for the whole of the country, and Māori authority or tino rangatiratanga exercised at the local tribal level of hapū over lands, settlements and other taonga. These two forms of authority overlapped and exactly how they were to relate to each other was not made clear in te Tiriti/the Treaty.

68. The guarantee of tino rangatiratanga in the Māori text (of Article II) meant more than the English's texts guarantee of property rights, including when read (as it must be) in the context of Articles I and III. The involvement of rangatira in the imperial/colonial legal system in the 1840s, and later as assessors in the Native Land Court and within the rūnanga system and in other roles, recognised in some way the authority of rangatira within the kāwanatanga system.[31] As is well traversed, there is ambiguity in both texts, and that ambiguity is further increased as the two texts are to be read together.

69. Tiriti/Treaty principles do not, and should not, change because of the Tribunal's stage 1 report in Te Paparahi o te Raki. Tiriti/Treaty principles by

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30 Waitangi Tribunal Te Mana Whata Ahuru Parts I and II at 110 [3.2.1].

31 For which, see submissions below and, generally, Crown Te Raki submissions, stage 2, Wai 1040, #3.3.402, at 74–158.

and large stem from the Court of Appeal's decision in the *Lands* case ([1987] 1 NZLR 641). In the *Lands* case, the Court of Appeal generally acknowledged the issues that were addressed in the Tribunal's stage 1 report, including the differences in meaning as between the two texts of te Tiriti/the Treaty and the understanding that rangatira may have had in signing it. The Tribunal in *He Whiritaunoka* concurred with this approach.

Findings on sovereignty in Te Rohe Pōtae report

70. The Rohe Pōtae Tribunal's findings on te Tiriti/the Treaty and sovereignty appear to differ in emphasis from the Te Paparahi o te Raki stage 1 report. For example, the Rohe Pōtae Tribunal stated:[32]

> … our conclusion is that through the Treaty the Crown acquired a right to govern and make laws, and thereby to control settlers and settlement, and to manage international relationships with foreign European states. With respect to Māori communities, the power of kāwanatanga provided for the possibility of the Crown governing and making laws, so long as those powers were used in a manner that was consistent with their tino rangatiratanga, and which offered them protection from any harmful effects of settlement or foreign intervention.

71. The Tribunal's finding confirms that te Tiriti/the Treaty provided for the Crown to govern and have law-making authority with respect to Māori (conditional on that being undertaken consistently with tino rangatiratanga).

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

72. Similar to many other parts of New Zealand, the Crown did not substantiate the *de jure* sovereignty in the inquiry district with effective control or effective institutions until well after 1840. *De facto* sovereignty occurred incrementally over time.

73. It is difficult to pinpoint at exactly what point, or through what means, the Crown acquired *de facto* sovereignty in Taihape. Over time, the Crown substantiated its sovereignty through a range of means resulting in effective control in the Taihape inquiry district. These included:

    73.1 some discussion and negotiations with Māori;

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32 Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on the Te Rohe Pōtae Claims* (Wai 898, 2018), at 180.

73.2 the actions of Taihape Māori, eg in making applications to the Native Land Court for title determination to enable private land dealings in the 1860s (prior to Crown purchase activity commencing in the district); and

73.3 primarily through Crown actions (some driven by the Crown, some in dialogue, some at the request of Taihape Māori).

74. The Crown has maintained an active presence in the Taihape inquiry district since 1870 and established a constitutional relationship recognised by Taihape Māori through events outside the district itself, prior to that time. The various Crown actions that established more active kāwanatanga in the district over time are considered in more detail in other submissions. In broad terms, key examples include:

74.1 the promotion and establishment of settlement in the district, including supporting township development;

74.2 development of significant infrastructure (primarily railway) and the commerce that enabled; and

74.3 introduction of education, health and other services such as police (on request of Taihape Māori and at scale and timing proportionate to the nineteenth century state and the demographics of the region).

75. Setting the broader legislative, policy and regulatory parameters to enable the confirmation and protection of personal security and property rights; increased commerce and economic development; and capitalisation on technological advancements and global trade, were also Crown actions that had real and direct effect in the Taihape district. Of course, the benefits and costs of each of these matters for Taihape Māori is not without complexity, nor are the realistic alternatives available. Some of those matters are addressed in detail in other submissions.

CONCLUSION

76. Mr Jackson stated in this inquiry:[33]

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33 Wai 2180, #H07, at [52].

> it is also timely that the Treaty relationship be mediated through the interrelationship between the different "spheres of influence" as that Report [Te Paparahi stage 1] detailed rather than through an ongoing presumption of the Crown's absolute and overarching sovereignty based on its own forlorn presumptions. The relationship between Iwi and Hapū and the Crown, and indeed the well-being of the country as a whole, requires a more honest accounting with history than the presumptions have hitherto allowed.

77. Whilst the Crown may differ on some matters of emphasis within Mr Jackson's statement, the Crown agrees with the central premise that the Crown, Māori and the intersection of them, constitute spheres of influence and that the relationships between those 'spheres' requires ongoing consideration and relational development. That consideration is currently occurring not only through the Te Paparahi o Te Raki inquiry (and all other work of the Tribunal including this inquiry). It is also being actively developed through Māori leadership in political and other public offices (including the judiciary); through active partnerships and work programmes of tremendous variety; and through various reforms (eg in health, education, justice and social service sectors) that seek to embody the partnership approach more fully and promote the active involvement of Māori in governance, decision making, service design and delivery.

78. It is also being actively developed through the courts. In this regard, the Crown acknowledges the recent judgment of Churchman J in *Re Edwards (Te Whakatōhea No. 2)* which explained the development of Māori and English law and their intersection in New Zealand:[34]

> It is important to briefly note that at the point in 1840 when the Treaty was signed, there was an intersection between what Williams J and others have termed as two separate legal systems in Aotearoa New Zealand. According to Williams J and a number of academic commentators, tikanga Māori was brought across the Pacific Ocean and developed by Māori over the past millennium, forming the first law, sometimes referred to as "Kupe's Law", in Aotearoa New Zealand. The second law of New Zealand, brought over by the British hundreds of years later, was the common law, sometimes referred to as "Cook's Law". As noted by Williams J, the signing of the Treaty of Waitangi acted as the "point of contact" between the first and second laws; the "mechanism through which these two systems of law would be formally brought together in some sort of single accommodation". The Courts have accepted this fact, and have started to engage in an analysis of the relationship between the first and second laws of Aotearoa New Zealand and their impact on the current legal system.

34 [2021] NZHC 1025 at [69], footnotes omitted.

79. The constitutional dialogue is best progressed through these multiple means. Non-government processes such as Matiki Mai are also critical. The planned Tribunal's planned kaupapa inquiry into the constitution, self-government and the electoral system will be able to bring focussed attention to these issues (with an inclusive approach) beyond that capable within any district inquiry.

80. In summary, the Crown's position on:

80.1 constitutional matters generally: remains as advanced in its Northland/Te Paparahi o te Te Raki stage 2 closing submissions – *de jure* sovereignty was achieved in 1840 for the whole country. The Crown awaits the stage 2 report accordingly; and

80.2 its relationships with Taihape Maori prior to 1870: relationships of constitutional import were developed between some Taihape Māori and the Crown through events that occurred outside the inquiry district; and

80.3 with regards to Taihape specifically: *de facto* sovereignty was established following 1870 through the increasing interaction and relationship between the Crown and Taihape Māori, in the context of the development and settlement of the district. How intentions in this regard played out are addressed further in other Crown closing submissions.

21 May 2021

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AND TO: Claimant Counsel