IN THE WAITANGI TRIBUNAL

Wai 2180, Wai 1705, Wai 647, Wai 588, Wai 385, Wai 581, Wai 1888

IN THE MATTER OF the Treaty of Waitangi Act 1975 and the Taihape: Rangitikei ki Rangipo Inquiry (Wai 2180)

IN THE MATTER OF a claim by Isaac Hunter, Utiku Potaka, Maria Taiuru, Hari Benevides, Moira Raukawa-Haskell, Te Rangianganoa Hawira, Kelly Thompson, Barbara Ball and Richard Steedman on behalf of themselves, the Iwi organisations who have authorised them to make this claim and the Mōkai Pātea Waitangi Claims Trust (**Wai 1705**)

AND a claim by Maria Taiuru and others for and on behalf of Wai 647 Claimants (**Wai 647**)

AND a claim by Isaac Hunter and Maria Taiuru and others for and on behalf of the Wai 588 Claimants (**Wai 588**)

AND a claim by Neville Franze Te Ngahoa Lomax and others for and behalf of the Potaka Whanau Trust and Nga Hapu o Ngati Hauiti (**Wai 385**)

AND a claim by Neville Franze Te Ngahoa Lomax and others for and behalf of Te Runanga o Ngati Hauiti (**Wai 581**)

AND a claim by Iria Te Rangi Halbert and others for and behalf of the Wai 1888 Claimants (**Wai 1888**)

Closing Submissions in Reply for Mōkai Pātea claimants
27 September 2021

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E te Roopu Whakamana i te Tiriti o Waitangi, tēnā rawa atu koutou

He mihi poroporoaki tēnei ki a koe, e te ruahine o te Rōpū Whakamana i te Tiriti o Waitangi, haere atu rā. He pukenga tuhinga koe, he mātanga rangahau koe. Moe mai, moe mai. Tātou te hunga ora, i kawea tonutia ā Angela mahi ki te ao mārama, tēnā tātou katoa.

1. These closing submissions in reply are filed on behalf of the Mōkai Pātea claimants.

2. Counsel acknowledges the submissions on behalf of other claimant groups on the specific issues raised in this inquiry.

3. These submissions capture replies to issues focused on in the Mōkai Pātea closing submissions, which were of a generic nature (October 2020) and with a specific focus on the Native Land Court (December 2020).

Tino Rangatiratanga - Constitutional relationships

4. In the Crown's opening comments (dated 2 March 2017), Crown counsel advised that the Crown would await the closing submissions in the *Paparahi ki te Raki* inquiry before making further submissions on constitutional matters (para 16). For the Mōkai Pātea claimants, it has been viewed as critical throughout this inquiry that the Crown engage fully on the issue of the basis for its alleged constitutional authority, as stated in the Mōkai Pātea opening submissions:

    4.1 Under what authority did the Crown assume it had the right to create and impose its native land tenure system?

    4.2 How does the Crown justify the imposition of a land tenure system on Māori which was so contrary to their customary tenure?

5. With respect to Crown counsel, who can only work within instructions from Ministers and their officials, the Crown has not

engaged on that central question. The assumption of constitutional authority remains, without actually providing a justification for it.

6. The Crown submissions on Issue 1 (Tino Rangatiratanga) commences with the theme that "Crown sovereignty was established in 1840" (para 11), and says at paragraph 14 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."

7. The *de jure* sovereignty is then justified at paragraph 58, based on the Crown position in the *Paparahi ki te Raki* Stage 1 inquiry, and relying on Richardson J in the 1987 *Lands* case and the Waitangi Tribunal in the Whanganui Land Report (2015), which applied that Court of Appeal decision. As all roads appear to lead back to Richardson J's pronouncement, it is useful to revisit that obiter dicta:[1]

> "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." (emphasis added)

8. Jurists of Māori and indigenous law have long regarded that statement as circular, given that "colonial law" depended for its legitimacy on a recognition of sovereignty, so it was unsurprising that "colonial law" would accept Crown sovereignty. Furthermore, with respect to Sir Ivor Richardson, international law has developed considerably, and cannot be said to have accepted that principle either. The interpretation of the Treaty of Waitangi must favour an interpretation most favourable to the indigenous peoples. The preferred text must be that in the language of the indigenous peoples. And the Declaration on the Rights of Indigenous Peoples, now a

[1] *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 at 671.

definitive statement of international law, (to which New Zealand is a signatory), does not support the assumption of colonial authority.

9. Crown counsel (both in the Taihape closing submissions and in quoting the Crown's position in *Paparahi ki te Raki*) rely on the Whanganui Lands Report.[2] However, the quotation relied on must be placed in the full context of that Panel's report at section 4.2.6(2) "Māori and Crown sovereignty". It is clear that that Tribunal is acknowledging that Māori did not agree to nor accept the assumption of sovereignty, *but that it happened anyway*. Indeed, the Whanganui Tribunal cites the *Paparahi* Tribunal that Māori did not cede sovereignty, and does not dispute that finding. But (the Tribunal concludes) Māori lacked the power in the decades that followed to insist on the regime that they believed in. That is very different to "*de jure* sovereignty". Thus, when the Whanganui Tribunal states that "on any objective assessment of how power came to be exercised in New Zealand after 1840, sovereignty did pass to the Crown", it is a statement of reality as to the shift in power, it is hardly an endorsement of the legality of that shift in power. There are numerous examples in the Taihape inquiry of objections to the Crown assertion of power. As the Whanganui Tribunal laments, when Māori did resist the Governor's authority, "that resistance was typically quelled by force."

10. In that sense, the Crown's basis for its assumption of sovereignty is (1) its own colonial law; (2) an outdated interpretation of international law and (3) the ability to enforce its sovereignty by use of violence and force.

11. Paragraph 16 refers to British sovereignty as an "assumption" as at 1840. It is telling that the Crown refers to the English text of Article I and uses "sovereignty" as the basis for its assumption of control, in absolute terms; but on the contrary refers to the te reo Māori text of Article I and uses "kawanatanga" when referring to its Treaty

[2] Whanganui Lands Report (2015), Vol 1, page 145.

partnership and obligations of acting honourably and in good faith (paras 8 and 9), with the relationship to be worked out over time. The effect of this difference in language is the imposition of a baseline "sovereignty" which is non-negotiable and within that a "Treaty relationship" to be negotiated over time. That immediately locates the fundamental power within the Crown. That is not what Te Tiriti required. The task of reconciling a "Kawana" sphere of influence and a "Rangatira" sphere of influence was (and is) the cornerstone of the Treaty relationship, not an assumption of one being sovereign over the other.

12. Mōkai Pātea claimants acknowledge the concessions in the Crown submissions that the Crown did not meet the standards of an honourable Treaty partner in its dealings with tangata whenua. The culpability of the Crown in this inquiry is heightened by the fact that by the time its tenure system was applied to the Mōkai Pātea region, the same tenure system had failed Māori around the country and resulted in significant loss of land, prejudice and social and economic deprivation. The Crown did not adjust its system to reflect those deficiencies and failed to protect Mōkai Pātea from the losses which flowed.

13. Then to make matters worse, even trying to work within the new system, the Crown was put "on notice" from leading Mōkai Pātea rangatira as to their preferences for how the administration and utilisation of their land and resources should be conducted, through a series of carefully constructed proposals in 1892 and 1895. The pleas of the Rangatira "fell on deaf ears" within the government.

14. The Crown submits at paragraph 30 that as Te Tiriti was not signed by the majority of Taihape Rangatira,[3] "clearly those Taihape Māori

[3] Mōkai Pātea claimants do take issue with references to Te Hāpuku as being somehow representative of Mōkai Pātea views (paragraphs 24.1 and 25), or "Taihape-related" (see para 40 of Crown closings on political engagement #3.3.90). This was addressed by counsel for Mōkai Pātea in the oral presentation of submissions at Winiata Marae. There is simply no evidence that Te Hāpuku gave evidence, either at Omahu or otherwise, that he was of Ngāti

who were not aware of te Tiriti/the Treaty would not have views about how it applied to them." But at paragraph 32, the Crown relies on a submission that "there is little evidence (if any) of Taihape Māori explicitly rejecting the Crown having assumed sovereignty." Mōkai Pātea claimants say in response:

14.1 What applies to one situation must apply to the other – presumably Taihape Māori who were not aware of the Crown's assumption of sovereignty would not have had views about how that applied to them. That would be the more likely explanation for the apparent lack of evidence of Māori explicitly rejecting that assumption of sovereignty;

14.2 Moreover, when Taihape Māori did come into contact with Crown institutions, be that land agents, or church missionaries, or the Native Land Court, there is ample evidence of the assertion of tino rangatiratanga in direct contrast to the assumption of absolute sovereignty, including the Mōkai Pātea alliances with the Kīngitanga, and with the various Repudiation initiatives. For example, Crown counsel records (accurately) the position of Renata Kawepo that there were two kinds of authority that could, and should, accommodate each other (para 40).[4]

Hinemanu or Ngāti Paki descent, or had land interests on that basis. Te Hāpuku married Heipora who was descended from Te Upokoiri. (See Steedman Whakapapa document bank, Tab E.) This can be contrasted with Renata Kawepo who did claim affiliation to both Te Upokoiri and Ngāti Hinemanu. But even then, reliance on Renata's views as to the Treaty and the relationship with the Crown as being representative of Mōkai Pātea views is drawing a long bow. He was not resident in the rohe in the 1840s and 1850s. The views expressed by Renata and other Rangatira have to be carefully assessed in accordance with the timing of those views – given the extraordinary shifts in power, institutions, land alienation, and dismantling of tribal authority that occured between the 1860s to the 1890s. Renata's connection from Ngāi Te Upokoiri to Mōkai Pātea is through Ngāti Whitikaupeka. As a point of correction to the Crown's footnote 14 about Renata, Murimotu is not in "southern Mōkai Pātea, around Hunterville area", but is in fact past Waiouru in the north of the rohe.

[4] At para 47 Crown counsel includes a translation of a letter dated 3 April 1861 from Kawepo and other "Napier" Rangatira to the Governor and Queen Victoria. The letter is not representative of Mōkai Pātea views. But in anycase, the reference to "sovereignty" in the letter is actually "rangatiratanga" in the original Māori text, supporting the fact that Renata

15. During the hearing of claimant closing submissions at Winiata Marae, the Presiding Officer asked whether the claimants were challenging the legitimacy of the government. As was answered then, the short answer is "yes" – where the government does not operate in a manner consistent with the Treaty promises, then this raises a question of legitimacy. The Treaty of Waitangi Act 1975 creates this Tribunal as a forum which under section 5 has the "exclusive authority to determine the meaning and effect of the Treaty". As such, the Tribunal is the appropriate forum in which to allow a constructive critique of our constitutional underpinnings. Through this inquiry process, the evidence has demonstrated that the kawanatanga power (judicial power, land tenure systems, educational and health systems) was imposed based on assumptions which were not consistent with the Treaty guarantees and which actively undermined tribal decision-making authority. As such, throughout this inquiry, the plea of the Mōkai Pātea claimants is for this Tribunal to be transformational in its findings and recommendations.

Issue 2 – Political Engagement

16. As noted above, Mōkai Pātea claimants do not accept the proposition from the Crown that "Taihape Māori generally recognised the authority of the Queen" (for example, para 3), even with the qualifications that follow that such recognition was not absolute, unconditional or fixed for all time. But it is accepted that it is difficult to record positions of Taihape Māori generally, and that the analysis has to have in mind the time period, and the competing stresses and impacts that the colonial power was exerting on their communities.

17. The primary vehicle for political engagement and the expression of tribal tino rangatiratanga was through the Mōkai Pātea rūnanga. A manifestation of collective control, based on tikanga, whereby

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and the others regarded the relationship as on an equal footing, not based on an assumption of overriding constitutional supremacy/sovereignty in the Crown.

leadership depended on robust wananga/debate and informed decision making. Premier Fox was well aware of the potency of the Rūnanga system. He informed the members of the settler government that:

> "We look to runanga, or Native council, as the point d'appui to which to attach the machinery of [Māori] self-government and by which to connect them with our own institutions… We have no choice but to use it, it exists as a fact, it is part of the very existence of the Māori – we can no more put it down than we can stay… and, if we do not use it for good purposes, it will assuredly be used against us for bad' [New Zealand Parliamentary Debates (1861-1863), p. 422]

18. Chief Judge Fenton himself regarded incorporating the rūnanga structure into the system as an opportunity to enforce "indirect rule, [with] overall direction of the movement remaining with the Government". Fenton said Māori recognised:[5]

> "that the Government of the country [was] more anxious to obtain possession of their lands for the augmentation of the intruding body, than to elevate the present possessors, and admit them amongst themselves as a competent part of our people."

19. The Crown's submissions traverse the broad range of activities, protests, and initiatives of the Rangatira to seek to engage in, and influence decision-making. Yet the Crown concludes at paragraph 75 that "none of these actions amounted to an attempt to create a self-governing district." Mōkai Pātea claimants completely disagree. But perhaps it is simply a cultural lens that interprets the same evidence from a Crown and then a Māori perspective, that leads to different conclusions. For Mōkai Pātea claimants, the actions of their Rangatira were based in tikanga, using Rūnanga and reacting to the enormous and unprecedented challenges of colonisation to their way of life and their institutions, all with the consistent aspiration to exercise their authority and tino rangatiratanga over their lives, their people, their whenua and their resources.

20. The letters from the Rūnanga of Ngāti Tamakōpiri and Ngāti Whitikaupeka in the 1860s, particularly raising concerns at the

[5] Ward, A. (1995), *A Show of Justice,* page 104

activities of McLean and Ormond, and also asserting their tino rangatiratanga to their lands, are a telling example.

Issue 3 - Native Land Court and Issue 4 – Crown Purchasing

21. Mōkai Pātea claimants acknowledge the concessions that have been forthcoming from the Crown.

22. At paragraph 11 of Crown closings on the Native Land Court,[6] (and the more detailed analysis at paragraphs 102-104) there is an important acknowledgement that the ability to incorporate land from 1894 could not be utilised by Taihape Māori until after Crown purchasing of Awarua and Motukawa had been completed. By that time, the area which might have been incorporated by way of some sort of collective title had been significantly reduced and the vision that Mōkai Pātea Rangatira had for their lands (as set out in their 1892 and 1895 letters) had not been supported by the Crown.

23. The end of Paragraph 11 seeks to draw a direct connection between the Rangatira proposals to sell 100,000 acres of land, by acknowledging that the Crown acquires approximately twice that amount (200,000 acres) than it indicated that it needed for the railway and associated settlements. There is a theme in these submissions and in the submissions on Crown purchasing, that the Crown engaged with the chiefs about their consolidation and development proposals.

24. It depends on what is meant by "engaged". Certainly the Crown did not implement the proposals (apart from acquiring twice as much as had been proposed). And any consideration of the proposals was firmly in the context of what was in the Crown and settler interests, not the interests of Māori. An example is the North Island Main Trunk Railway Select Committee, which made recommendations to the government in 1892 concerning the route, and timing of construction after the purchase of sufficient lands that would benefit

[6] #3.3.104

from the railway as to warrant the investment. The following extract demonstrates the unilateral focus of the Crown on its settler requirements, and the devious approach to the construction of the railway (by stopping the construction before the block boundary), so as to not enhance the value of Māori land in Awarua until it was purchased first: [7]

> 15. Mr. Rhodes.] Would you advise all construction of railway to be stopped until after the whole of the Native land was purchased?—I would advise the line being formed to the south boundary of the Awarua Block.
> 16. The Chairman.] That is about twenty-five miles from Hunterville?—Six or seven miles beyond the proposed viaduct….That land was purchased for about £2 an acre. It was afterwards sold for an average of £140 an acre.
> 17. During the present year? —Yes.
> 18. Is there any other information you would like to furnish to the Committee?— Yes. The railway would enormously enhance the value of the Crown lands.
> 19. In what blocks ?—Otamakapua, Waimarino, Maungakaretu, and Mangoira - Ruahine Blocks. …. At the present time the Natives have 107,700 sheep and 700 head of stock running there. By extending the line on to Taumaranui it would tap a magnificent totara forest, estimated to comprise 30,000, acres, and valued at £25 an acre.
> 20. The Awarua Block has not yet been acquired from the Natives ?—The Natives have just made an offer to sell 100,000 acres, or about one-third of the whole of it to the Government.
> 21. The block, as shown on the map, is about 205,000 acres ?—
> Yes. 22. And 100,000 acres of which they offer for sale to the Government?— Yes; the land which they offer to the Government comprises the southern portion of the block. The price has yet to be arranged.
> 23. As the price is not yet fixed it would hardly be wise to extend the railway until after the price has been agreed to ?—Only to the boundary of that block.
> 24. If you extend the railway even to the boundary of the block it must greatly enhance the price ultimately to be paid ?—As a matter of fact, the line at the present time is under construction.
> 25. Not to the boundary ? —Yes ; under the co-operative system. The line itself is being constructed at the present time.
> 26. The earthworks are being formed ?—
> Yes.
> 27. Under the co-operative system ?—Yes. The line under construction at the present time extends to the south boundary of the Awarua Block. I think the distance is about thirty-two miles from Marton.
> 28. In the interests of the colony do you not think the further extension of that railway should be stopped until the purchase is completed ? —I think it would be a good business investment to erect a viaduct and have a station at the Ohingaiti, and to build a bridge at Otara to induce traffic.

[7] AJHR I-09, (6 October 1892) at pages 2, 16-17

> 29. Until the purchase is negotiated and completed with the Natives, every mile you advance the railway must enhance the price that they will require to be paid ?—They see the earthwork there now, and they know the line will go on sooner or later. …."

25. With respect, this puts a different slant on the Crown approach than given by Crown counsel in the "Crown purchasing" submissions at paragraphs 125-126 who categorised this as a "legitimate rationale" and "fiscal prudence".

26. The Rangatira proposals which "expressed a collective willingness to sell"[8] 100,000 acres of land can only be interpreted as one part of a much wider overall scheme of consolidation and development put forward to the Crown. It might be regarded as an expression of partnership and good faith from the Māori Treaty partner, but only if the other aspects of Crown support that were requested in the letters were realised. Mōkai Pātea claimants maintain their submission that the Rangatira proposals were ignored. That was the reality.

27. The impact was significant: as the Crown acknowledges at paragraphs 136-138 of the Crown purchasing submissions, the proposals came at a time when Mōkai Pātea had been effectively frozen out of development opportunities for their whenua, for ten years: while their lands were under monopoly powers restricting land transactions (including mortgaging and leasing), they could not raise capital or maximise income streams, and could only transact with the Crown. But the Crown imposed these restrictions in 1884, it did not actively purchase lands for another decade (and refused to advance funds prior to purchase). The Crown would not purchase without lands being titled and subdivided, (which Mōkai Pātea had to fund themselves).

28. Paragraphs 15-18 of the Crown closings on the Native Land Court suggests that the evidence is complex as to whether Taihape Māori were totally opposed to the Native Land Court or not. Examples are

[8] Crown closings #3.3.104, para 11

given where the Crown has interpreted actions or statements of Rangatira as being supportive of the new tenure system.

29. In response:

29.1 The generic submissions cited by the Crown at footnote 7 do qualify the notion of "total opposition" in their paragraph 71;

29.2 However, it is difficult to categorise the nature of the Mōkai Pātea view as anything other than oppositional. The technical evidence provides numerous examples of Taihape Māori being opposed to the Court.[9] Hosting the major kōtahitanga hui at Kaiewe Marae is a further example. And the Mōkai Pātea Rūnanga had written to McLean telling him not to send any of his people into their rohe (for example, Pikirangi and Ihakara in 1867.

29.3 The Crown suggests at paragraph 14 that the Court only became active "where people made applications to it". But people 'made applications' because land agents were operating in the rohe, contrary to the principles of active protection and contrary to the express protestations of the rangatira.

30. This is a theme in the Crown submissions – that somehow involvement or participation in a system denoted acceptance or endorsement. A further example is at paragraph 93, where at multiple hui, the Crown states that Taihape Māori "discussed their aspirations, concerns and strategies for their engagement with the new economy (which there is no doubt by the 1870s they wanted to be part of)…." (emphasis added). Mōkai Pātea claimants reject the inference that by wanting to be part of the economy, Taihape Māori endorsed the new tenure system, or that this mitigates the Crown's Treaty breaches.

[9] Eg #A43, page 235 for accurate summary.

31. Richard Steedman in his evidence at #L10 said:

> In the 1890s, the Mōkai Pātea rangatira wanted to retain their rohe potae lands, and saw a tactical alienation of some lands as facilitating their economic development in the new environment. Their original intentions and aspirations were thwarted. The Native Land Court processes of individualisation of title, dismantling of tribal decision-making authority, lack of consolidation and financial pressures led to debt, leading to a second wave of partition applications to the Court. Individuals could trigger an application as well, and other owners had to react to those applications in order to protect their position. The system itself was divisive, costly and stressful. Tribal systems for cooperation and collectivism were undermined.

32. As such, the tenure system was imposed in contravention of tikanga; the fact that it was then <u>used</u> illustrates the success of the imposed system in meeting its colonial objectives, rather than the endorsement of it by Māori. By the time of the Rangatira letters in 1892 and 1895, the system was so embedded, and the loss of land and loss of decision-making authority (rangatiratanga) was on such a scale, that the Mōkai Pātea response had shifted to working within the system to bring about a re-imagining of collective authority and consolidation as best could be achieved.

33. As the Tribunal in volume 2 of the *Hauraki* report concluded at page 779:

> "It was thus very difficult for Maori not to be drawn into the court, especially in respect of blocks in which some of the owners had accepted payment charged against the land. The fact that Maori went to the court (even when they did so entirely voluntarily) does not mean they were content with the process or the forms of title that emanated from it."

34. Mōkai Pātea claimants acknowledge the concession from the Crown at paragraph 28 that there was little Crown support given to attempts by Rangatira to assert a collective control or strategy over the titling or partitioning processes, and that this directly undermined tribal structures. The Crown accepts that it breached Te Tiriti o Waitangi by not providing an effective collective land mechanism at the time it was needed.

35. Paragraphs 38-46 of the Crown submissions consider Crown purposes for establishing the Court. Mōkai Pātea reject the inference in those paragraphs that the Crown objectives included positive outcomes for Māori. Paragraph 40 is an example where concessions as to Treaty breaches are muted: that "a key purpose" of the Native Land Court was to enable tenure conversion to open up Māori land to settlers is described as "but one aspect of the Crown's policy in promoting the Native Land Court system". The submission states that the focus was also on the Crown seeking to "encourage and facilitate assimilation by enabling Māori to deal as they saw fit with their land and resources", an apparent example of Article III being applied (para. 41). With respect, there is just not the evidence to support that supposition; on the contrary the primary objective of the Court was to facilitate settler acquisition and use of land. But even if that were the case, the Crown intentions were entirely inappropriate in Treaty terms. "Assimilation" equates to suffocation of cultural practices into the culture of the dominant. Reliance on Article III belies the disregard and active dismantling of chiefly authority guaranteed under Article II.

36. Crown submissions at paragraphs 52-61 appear to distance the Crown from initial title investigations in Taraketī, Ohaumoko and Ōtūmore blocks and from purchases in the northern blocks (eg para. 59). There is an inference theme that where title investigations or negotiations for sale are "initiated" by Taihape Māori, the Crown is not culpable.[10]

37. The Mōkai Pātea claimants accept that there was agency involved on the part of their Rangatira, but say that those actions were as a consequence of the legal and factual situation which had been created over the top of, (and in disregard of the cultural authority of)

[10] A feature of the Crown submissions on Crown purchasing and engagement has been to highlight the purchase of Paraekāretu in the 1870s (eg, paras 32-34 of #3.3.78). Aperahama Tipae was of Ngāti Apa and Utiku Potaka would have been involved through those affiliations. The Paraekāretu example can be regarded as a unique set of facts, involving Ngāti Apa factions, and is certainly not indicative of Mōkai Pātea views.

those Rangatira. This is not a "chicken and egg" conundrum. The Crown created, imposed, enforced and supported the Court and other processes of alienation for its own ends. Rangatira had to react, always in fundamental opposition, but also had to participate, oftentimes out of pragmatism, and with strategic intent to better their people. Furthermore, the Crown submissions at paragraph 61 gloss over the fact that Crown actors were actively involved in land acquisition ostensibly wearing private hats. The conflicts of interest were demonstrable, as outlined in the technical evidence reports, and represented a particularly invidious form of Treaty breach of good faith. There is no middle ground here. In the first hearing week, R Steedman analysed the correspondence between Ormond and McLean in the late 1860s and concluded:

> On the one hand they were actively competing with each other, and then acting together against others, to secure lands for their private developments in Mōkai Pātea by attempting to be the first to do deals with our Tupuna. On the other hand they were Officers of the provincial government. They can rightly be regarded as part of the very Crown that was tasked to actively protect Mōkai Pātea Tupuna and their taonga. As was presented in the many letters between them, they discussed schemes to head off private developers and worst of all planned scare tactics by referring to other Iwi and parties coming to take their lands to induce our Tupuna to 'take up with them'. This a fundamental breach of the promises and guarantees in the Treaty of Waitangi, at the time of the very first encounters of the Crown with the Iwi of Mōkai Pātea. This was a mere twenty years after the first Pakeha entered the rohe.

Consequences and impacts

38. The consequences of all of this were such that Chief Judge Fenton was moved to concede in 1886 about Māori, that the Native Land Court "has destroyed the race".[11] While Mōkai Pātea claimants are testament to their ongoing survival and that they were not "destroyed", nevertheless this indictment of the Court by the Chief Judge is telling as to the undermining of tribal authority and tribal structures. As Crown counsel states at her paragraph 20.4:

[11] AJHR 1886 Vol I-08 at page 63.

> "Under all of the legislation that applied in the inquiry district, the Native Land Court's process to determine ownership ultimately involved the conversion of customary, collective based tenure to individual title."

39. The success of the transfer of land out of the control of Taihape Māori is noted by the Crown submissions at paragraphs 66-67. One additional comment however – where the Crown states that today, less than 15 percent of the district remains in Māori ownership, it is important to recall that the 15 percent consists predominantly of high country and not pastoral lands, and consists significantly of landlocked land.

40. It is sometimes easy to become locked in an analysis of the Crown processes and systems, and lose sight of the essentiality of the larger constitutional picture.

41. A feature of the tribal landscape evidence has been that Mōkai Pātea iwi and hapū exercised their customs and practices in a manner which demonstrated a cohesive system of customary tenure. That tenure was characterised by the application of highly regulated principles such as:

    41.1 Whakapapa

    41.2 Ahi Kaa Roa - Occupation and use rights

    41.3 Utu - reciprocity and dispute resolution

42. Such regulations established rights and obligations of mana whenua to specific areas and resources, well-known and understood by the parties involved, who were intimately familiar with their geography, their boundaries, and their relationships with each other. Through the rights and obligations of mana whenua, the leaders of the whānau and hapū exercised tino rangatiratanga, being the expression of their decision-making authority in accordance with their cultural preferences and structures.

43. It is this very expression of tino rangatiratanga that is guaranteed by Article II in Te Tiriti o Waitangi, and it is submitted, at the heart of this Tribunal's inquiry into Crown acts and omissions.

Deaths at the time of Native Land Court hearings

44. Counsel will defer to more specific claimant submissions in reply concerning the Native Land Court processes, costs and venues. However, Mōkai Pātea claimants do respond to the supplementary submissions filed by the Crown on the issue of deaths arising at the time of Native Land Court sittings.[12] As Crown counsel respectfully notes, the issue raised by the 1890 telegram is compelling evidence.

45. Firstly, although the Crown only noticed the 1890 telegram from Erueti Arani and Winiata Te Whaaro about the deaths and other impacts from the Marton Court sittings when it was drawn to their attention in Mr Hockly's submissions, the telegram has been on the Record of Inquiry since 1996, being filed as an appendix to the statement of claim for Wai 588 (Maria Taiuru and Isaac Hunter and others). It was then specifically referred to in the Mōkai Pātea amended statement of claim (August 2016) in Wai 1705. It was referred to in Richard Steedman's evidence dated 11 September 2018, and in Mōkai Pātea closing submissions in October 2020 and December 2020.

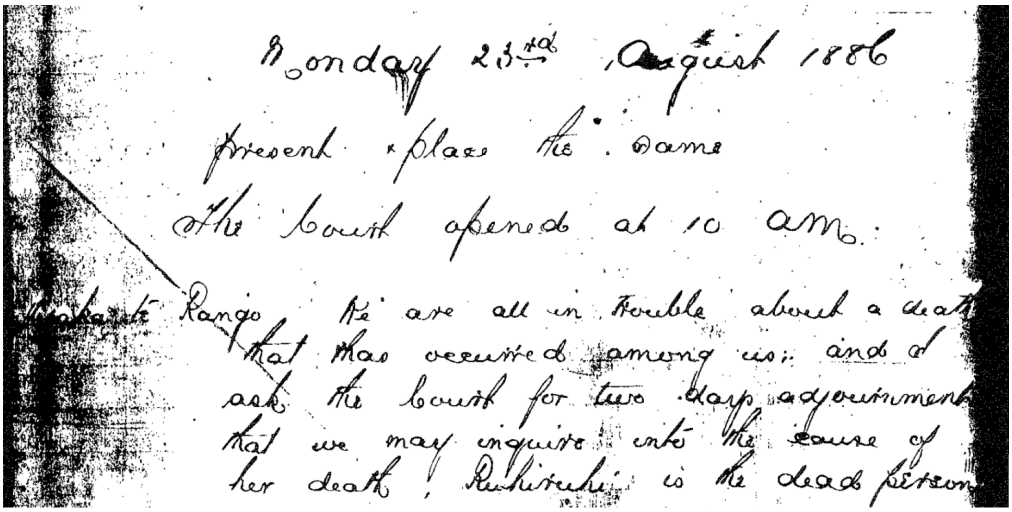
46. Secondly, the Crown supplementary submissions at paragraph 4.1 state that a search of newspaper accounts of the 1886 Awarua title title determination in Whanganui has not located any contemporaneous accounts of deaths. The following references are examples of contemporaneous accounts of the death of Ruhiruhi Taitumu on 23 August 1886 in Whanganui:

[12] Wai 2180, #3.3.104(a), dated 3 August 2021

46.1 The Wanganui Herald, 23 August 1886, page 2 "Sudden death of a Maori at Putiki";[13]

46.2 The Wanganui Chronicle, 24 August 1886, page 2 "The Deceased Maori Ruhiruhi"; [14]

46.3 The Awarua title investigation, evidence of Hiraka Te Rango on 23 August 1886,[15] an extract from which is reproduced here:


Monday 23rd August 1886
present as before the same
The Court opened at 10 am.
Hirahaka Rango We are all in trouble about a death
that has occurred among us: and I
ask the Court for two days adjournment
that we may inquire into the cause of
her death! Ruhiruhi is the dead person

47. Thirdly, as to the warning from Arani and Te Whaaro of "future deaths", an example is the death of Rangatira Paramena Te Naonao on 20 July 1891 at Utiku Potaka's house in Marton from lung disease (consumption), a condition particularly susceptible to winter weather.[16]

48. Fourthly, Crown counsel relies on evidence at footnote 13 of the Crown supplementary submissions that "the timing of the 1890 hearing appears to have been advocated for by some Taihape Rangatira as a means of avoiding conflicts with cultivation and harvesting." But that evidence is a request to hold the hearing in

[13] Wanganui Herald, Volume XX, Issue 5984, page 2 (23 August 1886)
[14] Wanganui Chronicle, Volume XXIX, Issue 11274, page 2 (24 August 1886)
[15] 11 WH MB 145. See also the Blake papers, record of Hiraka's evidence at Vol 2, p253.
[16] Awarua Subdivision case, evidence of Wi Wheko, 20 WH MB 197 (20 July 1891). See also Feilding Star, Vol XIII Issue 9, 21 July 1891, page 2 and the New Zealand Mail, Issue 1013, 31 July 1891, page 13.

April. That is manifestly different to hearings continued through the winter which is when the deaths of Te Naonao (July) and Ruhiruhi (August) occurred. In anycase, a petition in June 1890 specifically requested an adjournment of the Marton hearing (scheduled to commence on 2 July 1890) and instead take place in summer in Moawhango.[17]

49. In anycase, as Crown counsel acknowledges at paragraph 17 of the supplementary submissions, the Native Affairs Committee considered, but did not act on the telegram or the petition. The hearing continued.

50. As Te Rina Warren has calculated, some 1,535 days were spent by Mōkai Pātea in the Courts over 37 years, including hearings in Whanganui, Taupō, Gisborne, Palmerston North, Napier, Hastings, Marton and Bulls. The whare Whitikaupeka was constructed specifically as an accommodation base for hearings to be held within the Mōkai Pātea rohe. However, only one hearing was held there. Using Googlemaps as a rough guide, and even on today's formed roads, it would take approximately 27 hours to walk from Moawhango to Napier, or over 18 hours from Moawhango to Marton.

51. As with all of the issues relating to the Native Land Court, and as with all of the fundamental issues in this inquiry, it comes down to where the decision-making authority was located. Rangatira were not decision makers in the Court. They were applicants, or supplicants, or petitioners. The possibility of tribal committees actually being decision makers over their own lands was raised by Hiraka Te Rango and others. Regrettably, the Crown submissions does not engage on this at all:[18]

> "Hiraka Te Rango had also identified this risk to the Commission. [Judge Ward] and he both ventured views on possible improvement:

[17] Winiata Te Whaaro and others, petition 27/1890 (#A16 doc bank p12118 ff)
[18] #3.3.104, para 226

> committees being empowered as decision makers, and using costs orders as a disincentive to "recalcitrants". It is unsure how this later suggestion would have been viewed in terms of access to justice. The Whanganui Hot Tub ventured a number of alternatives to the Native Land Court that might have been reasonably available at the time – the Crown does not wish to relitigate that further other than noting that any assertions that are premised on speculation as to what might have been should be transparently caveated as that."

52. The suggestion of committees being empowered as decision makers is not addressed. But why not? That Ministers and/or officials have instructed Crown counsel that it does not wish to litigate that issue is (with respect) not relevant – the jurisdiction of the Tribunal is to inquire into these very issues. In another example, Crown submissions state that a "modified form of customary tenure might well have become quite capable" of providing secure titles in the new economy, but according to the Crown, "that cannot be assessed directly given that it is not what happened." (para 229). Why was that option not fully explored at the time and why, given that it was the plea of Rangatira in their 1890s letters, was the decision making authority to implement such a title system not granted? It is simply not good enough that Ministers and officials can deflect analysis by claiming "speculation" and thereby avoid the glaring fact that the systemic racism of the colonial power structures was the root cause of oppressing the opportunity of Rangatira to exercise their decision making authority – their tino rangatiratanga.

The debacle of Mangaohane

53. The Crown submissions comprehensively set out the wheeling and dealing that occurred in the Mangaohane proceedings, and counsel acknowledges other claimant submissions that address this in more detail. But the Mōkai Pātea claimants take issue with the following themes which arise from the Crown's analysis:

    53.1 The continued insistence that the Native Land Court, and its judges, were independent of the Crown is rejected. Counsel invites the Tribunal to imagine a scenario where an

amended Environment Court was constituted in 2021 with the sole purpose of granting consents in favour of land developers. The Court could run its own processes, could decide where and when it held hearings, but each application before it, or any objection to the application, was determined in accordance with the Court's primary objective of favouring one group in society, the land developer. That is how the Native Land Court was constituted, as slanted towards the outcome of acquisition of land for settler development, but with "pro forma" independence. With respect, claims of the Native Land Court's "independence" from the Crown do not withstand scrutiny.

53.2 It is not accepted that the repeated reference to the cases and title investigations in Mangaohane being "highly complex" is a reasonable rationale for inordinate delays, drawn out proceedings, and a web of conflicts of interest between the non-Māori protagonists.[19]

53.3 It is submitted that the Crown today in 2021 needs to be bold and call it as it is – this case example demonstrates the inherent colonialism and power imbalance that resulted in significant and ongoing suffering for Mōkai Pātea. Jane Luiten's report (#A56) is replete with examples where the technicalities, or legal interpretations, or subtleties of process, or inferences of wrongdoing or lying, went in favour of the controlling elite, and not tangata whenua.

54. Crown counsel has included in her submissions at paragraph 366 the letter from Chief Judge Fenton to Studholme, which is worth

[19] A correction to the Crown map at para 13 of Submissions on Pokopoko (#3.3.103) which shows in the insert Pokopoko to the south of the Stream. Pokopoko is next to the Stream, on the north side of the stream. A comment on the Crown's footnote 10 of the Pokopoko submissions, concerning Hiraka Te Rango. In terms of his relationship with Mangaohane, he was of Ngāti Hau of Ngāi Te Ohuake.

repeating. Fenton sums it up in his own words, no doubt never contemplating that they would be quoted in a commission of inquiry such as this Waitangi Tribunal, but nonetheless disclosing the patently obvious bias of the Court and of Buller, and the corruption that infected the whole case, when he writes to Studholme:

> "I am doing the best I can for all of us, and you or he might take a line which would destroy everything, and be extremely disastrous. You know Buller's impetuosity, and how he might be writing something which would put all the fat in the fire. Pray see him at once, and tell him to write nothing. I can see what is best, much better than you or he can, away from the place, so pray take some trouble in insisting that nothing shall be said or written by either of you. Conflict would be destruction. I think there is a disposition to protect the European interests. Stout, however, is made on the subject of the natives. You will understand, I hope, the importance of silence at present on the part of yourself and Buller." (emphasis added)

Issue 15 – Defence (Public Works)

55. Mōkai Pātea notes the specific submissions from other counsel on this issue, and provides the following comments on the Crown submissions at #3.3.84 on Public Works (Defence), as follows.

56. Paragraph 8, concerning the takings in the Rangipō Waiū and Rangipō North blocks, Mōkai Pātea claimants note that these lands are lands in which Ngāti Tamakōpiri and Ngāti Whitikaupeka have strong interests, as recognised and affirmed by Ngāti Rangi and Tūwharetoa.

57. Paragraphs 9 – 17 focuses on the necessity of the defence force, and its activities. Mōkai Pātea claimants have not challenged the defence force as to its operations or activities, and indeed have a long history of support for the defence force. The point of the inquiry is whether the extent of the land taking was reasonable (including but not limited to OK4 block), and whether the acquisition of fee simple title from Māori was reasonable rather than other more Treaty consistent options such as long-term leasing.

58. The Crown calculates the taking of land as between Māori owners and non-Māori owners. Mōkai Pātea claimants place the issue of compulsory acquisition of land for defence purposes in the wider picture of the significant land loss that had already occurred in the northern blocks. Furthermore, in relation to the Crown table at paragraph 26, the claimants submit that the Koreneff land of 16,277 acres should be treated as Māori land, given that he should never have been able to acquire that land and hold it as European title in the first place.

59. The justifications for acquiring the land come down to "convenience" and pragmatics – see paragraphs 31-33. That is not a Treaty standard in the context of active protection of taonga.

60. A submission about context – and the need to place events into the wider context of the Crown-Māori relationship. For example, Paragraph 36 refers to "only one Māori landowner" formally objecting. This was Riini Williams (Riini Henare Akatarewa), who was farming at the time. Mōkai Pātea claimants submit that the issue of who objected or who did not must sit within a careful analysis of what had occurred to Mōkai Pātea landowners who were scattered, fragmented, urbanised, economically deprived and not operating under a cohesive tribal authority which had been dismantled by Crown acts and omissions.

61. Another example is at Paragraph 37 which illustrates the connection between various Crown breaches in the context of the valuation of land taken for defence purposes. While the Māori Land Court is cited as finding the valuations as "fair", this is in the context of landlocked land, land which did not have capital funding to make improvements, land which was topographically challenging because settler avarice had acquired the most productive tribal lands.

62. Paragraph 69 of the Crown submissions concerns the compensation assessment for the takings of OK 2C3 and 2C4, and the lack of

settlement for the OK4 block (not paid until 1982). This does not address the underlying deviousness which had been traversed in detail by claimant evidence that the compensation to Koroneff was held back deliberately to prevent land values rising which might impact on compensation payable to the OK 4 Māori landowners.

63. Mōkai Pātea claimants acknowledge the improvements in relationships between NZDF and tangata whenua and the genuine efforts being made by officials to grapple with the NZDF past.

64. Mōkai Pātea claimants rely on earlier claimant submissions as to the remedies sought through this process:

64.1 The amendment of provisions of the Public Works Act as they relate to the taking of Māori land:

(a) Compulsory acquisition of Māori land should be an action where there are no other reasonable alternatives;

(b) The taking of Māori land for public purposes should recognise and provide for tikanga, cultural connection and customary relationships. At present, compensation is based on strict market (economic) values;

(c) Offer back provisions are contrary to tikanga, split whanau, and focus on western notions of "successors in title".

64.2 A partnership approach between NZDF and Māori to decisions concerning the future of defence lands:

(a) The cessation of private party use of defence lands without comparable and primary recognition to mana whenua gaining benefits from use of the lands;

(b) The comprehensive review by NZDF of all defence lands as to whether the lands remain necessary for the public purpose;

(c) AND if so required, then assessing each area as to whether the lands can be reasonably offered back and leased;

(d) Where lands are not necessary for defence purposes, that the lands should be transferred back to mana whenua;

(e) Adequate resourcing to deal with the environmental impacts of the unexploded ordinances;

(f) A continuing relationship of shared decision making authority in relation to the lands themselves.

Concluding comments

65. Mōkai Pātea claimants reiterate the mihi and acknowledgements contained in counsel's main closing submissions. They look forward to the Tribunal's report and the pathways towards reconciliation, growth and tino rangatiratanga that such a report will facilitate.

66. To conclude on a note of hope, as encapsulated in the pao that has been composed by Te Rina Warren to celebrate the renaissance of Mōkai Pātea confederation and all of the whānau, hapū and iwi of Ngāti Hauiti, Ngāi Te Ohuake, Ngāti Tamakōpiri and Ngāti Whitikaupeka:

Hau mai i Waitapu
Ō mai i te taumata o Ruahine
Piri mai i Hautapu
Whiti mai i Ngaruroro
Kia **Mōkai Pātea** e

DATED this 27th day of September 2021

Leo H Watson
Counsel for Mōkai Pātea Claimants