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BEFORE THE WAITANGI TRIBUNAL **WAI 2522**

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the Trans-Pacific Partnership Agreement Inquiry

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BRIEF OF EVIDENCE OF MOANA JACKSON

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MAY IT PLEASE THE TRIBUNAL

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

2. I graduated from Victoria University with an LLB and undertook postgraduate research with the Justice Department of the Navajo Nation in Arizona. Whilst there, I had the privilege of working with and was exposed to the writings of many indigenous elders and scholars on the rights and authority of their nations, including what might be called the grundnorm or basic right to ensure peace, and where deemed necessary, to declare war.

3. I was struck particularly by the consistent affirmation that their ancestors never gave away the sovereignty or independence of their nations. I was also struck by the similarities and parallels that exist with the efforts of our people to advocate our rangatiratanga. I have spent many years studying those parallels which has necessarily included questions to do with the injustice that we and other Indigenous Peoples have had to endure through the process of colonisation and the particular place of He Whakaputanga and Te Tiriti o Waitangi in the history of Iwi and Hapū.

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

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

6. In 1993 I was appointed as a judge to the independent International Peoples Tribunal in Hawaii, and in 1995 I was appointed to a similar tribunal in Canada. The Tribunals were established following the Russell Tribunal which heard claims of Indigenous Peoples in North and South America in 1972. They consisted of international jurists and were not bound by the so-called domestic law of the colonisers but rather by international and indigenous law.

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

8. More recently I have been asked to give evidence before the Tribunal on the history of that colonising law and the baselines it has provided for the Crown's assumption of authority in this country and the ways in which they are contrary to both Te Tiriti o Waitangi and the history, tikanga and perceptions of tātou te Iwi Māori.

9. One of those Tribunal hearings was the Paparahi o Te Raki hearing. As members of this Tribunal will be aware the Tribunal in that case undertook a careful and detailed analysis of the history and meaning of He Whakaputanga o te Rangatiratanga o Niu Tireni, the 1835 Declaration of Independence. It also considered the relationship between He Whakaputanga and Te Tiriti o Waitangi.

10. It is that work and history which informs this Brief. However, it is most informed perhaps by the findings of the Tribunal in the Paparahi o Te Raki hearing. In particular it references the finding of that Tribunal that the Hapū in the North did not cede "sovereignty" in te Tiriti and the consequences of that finding on the Crown's purported unilateral authority to treat with others.

11. This Brief also concludes that the finding of "non-cession" in Te Paparahi o Te Raki necessarily and logically applies to every other rohe in the country and that

no Iwi or Hapū ceded its mana to the Crown. In spite of the government's peremptory dismissal of the Tribunal's findings (and thus its logical extension to every Iwi and Hapū) it is my considered view in this brief that they are crucially important both in a broad constitutional sense and in the particulars of this hearing.

12. In presenting it I am mindful and respectful of the evidence already given to this Tribunal by the other claimants and parties with expertise in many other areas relating specifically to the TPPA. The complexity of the agreement and its undoubted negative effects are well-canvassed in those submissions and I acknowledge the time, concern and skill which has motivated their presentations.

13. Indeed, it is an honour to speak before them today and I support their contention that the Crown actions and omissions in regard to the TPPA are a breach of Te Tiriti. That the TPPA also adversely impacts upon the interests and well-being of other members of New Zealand society is, in my view, an abuse of kāwanatanga which seems especially egregious because it is also a Treaty breach.

14. During the negotiation of the Agreement on Trade-Related Intellectual Property Rights (TRIPS), during the Uruguay Round of the GATT, and in the WAI 262 claim, I have consistently pointed out to the Crown that the commodification of knowledge and conferring rights on commercial interests to exploit and profit from monopolies on knowledge is a violation of He Whakaputanga, te Tiriti and the UNDRIP, and with the limited and conditional kawana role it holds, the Crown has no authority to unilaterally enter into international agreements that commit to the adoption of such rules. This was made clear in the findings of the Waitangi Tribunal in the Wai 262 Report. Discussion on these points has already been put before the Tribunal by way of the Affidavit of Professor Jane Kelsey dated 19 June 2015[1] and in the expert paper on the TPPA and the Treaty by way of the discussion of traditional knowledge by Dr Carwyn Jones.[2]

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1 Wai 2522, #A1 at [70]-[84].

2 Dr C Jones, Associate Professor C Charters, A Erueti and Professor J Kelsey *Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement* attached as Annex I to the Brief of Evidence of Cletus Maanu Paul – see Wai 2522, # A28 and Wai 2522, # A28(a).

15. However in this Brief I wish to ask the Tribunal to consider the broader constitutional issue of whether the Crown in fact has a right under Te Tiriti to unilaterally enter into any international agreements in the way that it has done with the TPPA and indeed all other multilateral and so-called "free trade" arrangements. The question posed in the Brief is whether the unilateral negotiation of international agreements purporting to bind everyone in this country (such as the TPPA) is a valid exercise of the kawanatanga granted to the Crown in Te Tiriti o Waitangi. It is my considered view that it is not.

16. The constitutional analysis I will follow has several papa or foundations that are distinct but interrelated. They are:

    a) The tikanga-based concept of power that Iwi and Hapū have defined as mana, and which they have exercised as a unique, absolute and independent constitutional authority;

    b) The key constituent parts of mana, including, in particular, the right to treat. This right is enjoyed by all polities as a necessary component of political and constitutional authority and was clearly exercised by Iwi and Hapū for centuries prior to 1840;

    c) The use of treaties in Māori law and diplomacy as a means of cementing relationships, making peace, securing trade, negotiating borders, and protecting the nature and exercise of mana itself;

    d) The notion of treaty making as an inherent and inalienable consequence of any independent political and constitutional authority, including mana;

    e) The contrasting Pākehā concept of power known as sovereignty, and the concomitant constituent authority to treat with other sovereign polities as defined in Pākehā politics and law;

    f) The development in English and international law of what may be called the notion of "petty sovereignties" that enabled colonising States to rationalise treating with, and subsequently dispossessing Indigenous Peoples who were regarded as culturally, racially and politically inferior;

g) The related development of a distinct colonising jurisprudence to rationalise and "legalise" all aspects of the dispossession of Indigenous Peoples, including the links between the colonising right to treat with "petty sovereignties" in order to secure a purported cession of indigenous authority and the subsequent claim of a colonising right to unilaterally treat with others;

h) The refinement of that law and ideologies in New Zealand and the continuing and damaging effects they have had on Māori;

i) The meaning and parameters of kawanatanga in Te Tiriti as understood from Iwi histories and the Tribunal's formulation in the Paparahi o Te Raki hearing where it is described as a discrete "sphere of influence" which the Crown has consistently and wrongly assumed to include a unilateral Crown authority to treat with others; and

j) The continued misuse of that purported authority in the particular negotiations for the TPPA and especially the drafting of the "Treaty exemption provision" which constitutes a specific breach of Te Tiriti.

Mana, Constitutionalism and the Authority to Treat

17. In all societies the ability and the right to conduct negotiations and enter into relationships with other polities has always been among the foundational realities of diplomatic and political authority. If co-operation and co-existence with others is seen as the reason for inter-nation or international relations, then the right to enter into treaties is part of the power that societies have always accepted as fundamental to both their independence and their necessary interdependence with others.

18. Iwi and hapū have been no different. However, the particular cultural imperatives of the right to treat within Māori society were inevitably defined by the wider relationship between tikanga as "The first law of this land," and mana as the collective political and constitutional authority that vested in Iwi and hapū.

19. Tikanga was relationship and values-based and sought to regulate how people should relate to each other and the wider world. It was bound by the ethics of

what ought to be in a relationship as well as the values that measured the tapu and mana of individuals and the collective. It set the prescriptive guidelines for what is legal (tika) behaviour and what is not.

20. Just as our people lived within the relationships of their whakapapa as a daily matter of political and social life so we lived within tikanga as the first law. In that context we in fact lived *with the law* rather than under it, and the law existed to protect who and what we were while recognising the importance of the most intimate relationships within our own polity as well as with those of other Iwi and Hapū.

21. The jurisprudence, institutions and practices of law, and thus of treating, were uniquely developed by each Hapū and Iwi, but they also shared a common philosophical and value base. As a result, our tīpuna lived in an ordered and organised society that was both independent and interdependent. We were never a law-less nor an isolationist people.

22. And just as all societies learn they cannot live in a law-less state, so our people also learned that law and social order cannot be maintained in a power vacuum. We therefore developed political and constitutional ideas and practices to govern ourselves within the distinct polities of Iwi and Hapū.

23. In this context government is the process or system that people choose to regulate their affairs and a constitution may be understood as the code upon which government will proceed, akin to the kawa of the marae which outlines the way the marae will be governed.

24. A natural corollary of government is citizenship which is simply membership within a self-governing polity. The membership of the polity always carries reciprocal citizenship obligations and rights and in our history. It is clear that each Iwi and Hapū defined them within tikanga and the relationships of whakapapa.

25. In doing so we developed all of the components of an independent constitutionalism, including the right and capacity to treat and to create or

enhance relationships through the act of treaty-making. That constitutionalism was a unique cultural creation, just as it is in every polity.

26. Each is, however, based on what may be called a ***"concept of power"*** and a corresponding ***"site of power"***.

    a) A *concept of power* is the idea of political and constitutional power. It is the philosophical base that a people develop about what government should be, as well as the values upon which the will of the people should be manifest.

    b) Throughout our history that concept of power was known generically as mana, although it is described in some Iwi and Hapū as mana motuhake, mana taketake, or mana tōrangapū. More latterly it was called rangatiratanga or tino rangatiratanga.

    c) A *site of power* is the governing institution through which the concept of power is given effect. It is the institutional place where governing and constitutional decisions are made.

27. In Aotearoa prior to 1840 that site of power resided within the collective of rangatira or ariki who were acknowledged by each Iwi and Hapū as having the skills and ability and mandate to govern. In some rohe it was also on occasion vested in properly constituted huihuinga or whakaminenga involving a collective of Iwi and Hapū. Through such institutions the concept of power was given effect and the exercise of power was mandated through the sanction of law.

28. The tenure of ariki and rangatira was always subject to how well they preserved and defended the wellbeing of the people and the whenua, and how well they ensured their protection. John Rangihau once described the authority and status of rangatira as being "people bestowed"[3] and for that reason it was ultimately exercised for and by them.

[3] John Rangihau, transcript of presentation on Law Custom, Ngāti Kahungunu wananga, 8 September 1985.

29. The concept and site of power that were encapsulated in the term "mana" reflected the collective aspirations shared across Iwi and Hapū. Although there were often practical differences between Iwi and Hapū in the actual manner of its exercise it always implied an absolute independence that Dame Mira Szazy once defined as "the self-determination" implicit in "the very essence of being, of law, of the eternal right to be, to live, to exist, to occupy the land."[4]

30. Like all concepts of power, mana or tino rangatiratanga is made up of a number of different but inseparable constituent parts that may be called the specifics of power. These included:

    a) The power to define – that is, the power to define the rights, interests and place of both the collective and of individuals as mokopuna and as citizens;

    b) The power to protect – that is, power to be kaitiaki, to manaaki and maintain the peace, and to protect everything and everyone within the polity through an ultimate authority to wage war when necessary;

    c) The power to decide – that is, the power to make decisions about everything affecting the wellbeing of the people;

    d) The power to reconcile – that is, the power to restore, enhance and advance whakapapa relationships in peace and most especially after conflict through processes such as hohou rongo.

    e) The power to develop – that is, the power to change in ways that are consistent with tikanga and conducive to the advancement of the people; and

    f) The power to treat - that is the power to negotiate and commit to formal collective agreements with other polities.

31. This expansive reach necessarily presupposed that mana was an absolute political and constitutional power. It was absolute because it was absolutely the prerogative of Iwi and Hapū, but it was also absolute in the sense that it was

[4] Miraka Szazy, oral submission on behalf of Te Aupouri and Ngāti Kuri (Wai 22: Muriwhenua Fishing Claim), Te Reo Mihi Marae, Te Hapua, 8-11 Dec 1986.

commensurate with independence. It was of course always bound by tikanga but it was a totalising authority that could not be tampered with by that of another polity.

32. Mana was in fact absolutely inalienable. It was a taonga handed down from the tīpuna to be exercised by the living for the benefit of the mokopuna, and no matter how powerful rangatira might presume to be, they never possessed the authority nor had the right to give it away or subordinate it to some other entity. The fact that there is no word in Te Reo Māori for 'cede' is not a linguistic shortcoming but an indication that to even contemplate giving away mana would have been legally impossible, politically untenable, and culturally incomprehensible.

33. And just as mana as a totalising authority could never be ceded, so its constituent parts were inalienable. Thus, the right to declare war was as jealously guarded as the right to hold the land and would never be ceded or delegated to another polity to exercise on one's behalf. It would have been impossible for example for Ngāti Kahungunu to delegate its authority to maintain peace or declare war to say Ngai Tahu.

34. Similarly, the right to treat was also fundamentally inalienable and would never, could never, be ceded or delegated to another polity to exercise on one's behalf. It would have been impossible for example for Ngāti Manawa to delegate its authority to treat and make agreements with others to say Ngāti Mutunga.

35. At a more personal level the citizenship rights of a mokopuna were also inalienable and unable to be subordinated to that of another polity. It would have been impossible for example for Tūhoe to ever accept that its mokopuna could be made "subject" to say Ngāti Porou or have their rights and obligations subordinated in an agreement to which their polity had not been a party.

The Act of Treating: a Case Study

36. In Ngāti Kahungunu, the correlation between the exercise of mana and the process of treaty-making as constituent parts of our independent political and constitutional authority is exemplified in the fact that every Hapū has its own history of entering into treaties with other Hapū. The term we used to describe

such treaties in Ngāti Kahungunu was ***"mahi tūhono"*** or "the work which brings people together."

37. The term "mahi tūhono" is particularly apt as it captures the main purpose of treaty-making as a means of relationship-building. It also encapsulates the mana and indeed the honour in making treaties because relationships could only be tika if the parties acted with integrity and honour.

38. Indeed, the rangatira, Tohara Mohi once described "mahi tūhono" as "an honourable enterprise". It was "the diplomatic process of making friends, whakahoahoa, whether to advance a strategic alliance, to make peace, to ensure access through territory, or to allow for trade…it was the work of politics and mana, the embodiment of whakapapa".

39. One example of such a treaty that expressed both mana and whakapapa involved two of the Ngāti Kahungunu Hapū to which I belong, Ngāti Hawea and Ngāti Pōporo in Heretaunga. It is a mahi tūhono that dealt with reciprocal access to different parts of the whenua and coastline while recognising the whakapapa that links the two Hapū.

40. One of the marae of Ngāti Hawea is situated on the banks of the TukiTuki River at Matahiwi, close to the sea and the Ara Tapu that runs between the TukiTuki and the other two major rivers of our rohe, the Ngaruroro and Tutaekuri. The Hapū has had a long-standing and important relationship with both the rivers and the sea, as evidenced by the name of the whare tīpuna, Te Matau-a-Māui.

41. The marae of Ngāti Pōporo is several kilometres inland across the Heretaunga Plains at Korongata not far from Ngā Puke o Ngā Atua which was an important site for observing Matariki and thus the start of the new planting cycle. As a consequence, the Hapū had extensive gardens but no ready access to the rivers or sea and the plentiful kaimoana on the coast. That lack of access was often a pressing issue.

42. Eventually Ngāti Pōporo negotiated a mahi tūhono with Ngāti Hawea in which reciprocal access was agreed upon – for Ngāti Pōporo to the sea, and for Ngāti Hawea to Ngā Puke o Ngā Atua to more accurately observe and measure the

rising of Matariki. The access was limited in both directions to several of the carefully mapped pathways that give the Plains one of its names, "Heretaunga Ara Rau" or Heretaunga of the many pathways.

43. The Ngāti Pōporo rangatira, Pura Cunningham is recorded as reciting the whakapapa of the mahi tūhono at a Hui-a-Hapū in 1957 which indicated that it was first negotiated in the early 19th century when the people of the area returned to Heretaunga after having sought refuge in Mahia from invading Iwi. In his view it was a mahi tūhono that was also a "mahi taonga whakapapa" and a "tātau pounamu" ensuring a peaceful "doorway" for both Hapū.

44. It was also a carefully considered exercise of mana and a process which acknowledged both the independence and interdependence of Ngāti Pōporo and Ngāti Hawea. It was a political and diplomatic arrangement made by them and for them. It was not and could not have been an agreement made by them in someone else's name.

45. Most of all perhaps it is an indication that the authority and understanding of treaties was an integral part of tikanga as law. Treaties and the power to treat did not suddenly fall out of the sky on unaware or ignorant Māori polities in 1840.

Sovereignty, Colonisation and the Right to Treat

46. Polities in Europe also developed their own culturally distinct concept of power which they called "sovereignty". It naturally reflected their histories and culture, and after the consolidation of (Catholic and then Protestant) Christianity it reflected in particular the centralised hierarchy of the Church and its monist beliefs in a single all-powerful god.

47. The Westminster constitutional system developed in the particular cultural circumstances of England. Its hierarchical structure headed by a Crown or sovereign is a cultural product that grew out of the historical tensions between the monarchs and those deemed to be below or in opposition to them.

48. It is a distinct artefact that over the centuries has sought to accommodate the long-disputed interests of the nobility, the Church and the "lower classes" while preserving the notion of individual property rights. Its concept of power became

known as sovereignty which was exercised in a site of power known as Parliament.

49. Although the concept of sovereignty is generally understood as an English or Westminster construct it was of course first defined in France by the political philosopher Jean Bodin in 1569. His definition is still apposite today and still marks the distinctive cultural ethos that is inherent in the Crown notion of political and constitutional authority.

50. Bodin's view of sovereignty was essentially based in a belief that it marked a hierarchy of progress from societies of apolitical barbarism (such as those of the recently "discovered" Indigenous Peoples in the Americas) to those countries in Europe with a "civilised" constitutional order. It presumed that proper political power could only exist once "man…purged himself of troubling passions" and moved up "the great chain of being…and its hierarchical order".[5]

51. Once a peoples became "civilised" they attained the reason to develop a concept of power vesting in a sovereign, "a single ruler on whom the effectiveness of all the rest depends".[6] Sovereignty was thus the "most high…and perpetual power over the citizens" and it was that power "which informs all the members and…to which after immortal God we owe all things".[7] It was a hierarchical ideal of constitutionalism that could only be held by civilised peoples.

52. The site of that power throughout Europe was the monarch or alternatively the "monarch in Parliament" which had absolute authority and dominion over the land and its peoples. It was that culturally-defined and "civilised" notion of constitutional authority or "dominion over" which the Crown of course brought to Aotearoa after 1840.

53. It was therefore an inalienable and absolute authority which was exercised within a site of power that was most often based upon a single sovereign – a King,

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5 He Whakaaro Here Whakaumu Mō Aotearoa – The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation at 32.

6 He Whakaaro Here Whakaumu Mō Aotearoa – The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation at 32.

7 He Whakaaro Here Whakaumu Mō Aotearoa – The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation at 32–33.

Queen, or Emperor whose power was ordained by god. Over time that site of power was modified in England in particular within a constitutional monarchy framework as "The King (or Queen) in Parliament". However the inalienability and the singularity of its absolute power remained its most essential component.

54. Under that system the various constituent parts of sovereignty were also inalienable including the authority to treat and the obligation to maintain the peace and the right to declare war when necessary. Treaty-making was an honourable expression of the sovereign's will and like the act of mahi tūhono it was an authority that could never be ceded or delegated to another polity to exercise on the sovereign's behalf since only the sovereign was ordained by god to make treaties just as he or she was ordained by god to declare war.

Treaty-making and the Development of a Colonising Jurisprudence

55. When Christopher Columbus stumbled into the Caribbean in 1492 he unleashed a frenzy of European colonisation in the Americas that eventually led to the world-wide dispossession of millions of Indigenous Peoples. It also led to the creation of a colonising jurisprudence in which the purported reason of the law in countries from England to Spain became the unreasoned rationalisation for the violent and unjust taking of the lives, lands, and power of innocent peoples. Colonisation spawned a new and pernicious legalism that was eventually brought to Aotearoa.

56. Its foundation was a deliberately developed and rationalised presumption that Indigenous Peoples by their very nature were an inferior "other" who could be legitimately dispossessed because of their inferiority. Among its many deliberately engineered falsehoods was the claim that Indigenous People had neither a "real" law nor a "real" capacity to "properly" govern themselves which led in turn to a number of doctrines which attempted to justify everything from the actual taking of indigenous lands to a definition of "aboriginal rights" that were necessarily subordinate to the rights of the colonisers. They have neither reason nor justice but are rather a kind of verbal gymnastics based on little more than a will to dispossess and ultimately a certain racist illogicality.

57. I am aware of course that the Tribunal will be aware of much of that colonising law and it is not possible or necessarily appropriate in this Brief of Evidence to canvass it in depth. However it is not just some historical artefact that has now been jettisoned in more enlightened times but instead remains the base of Pākehā law and the base for the whole Treaty jurisprudence which rests upon the assumption that Iwi and Hapū ceded sovereignty to the Crown in the Treaty.

58. That erroneous and damaging misconception arose from the core presumptions of indigenous inferiority and a consequent lesser entitlement to their own lands, lives and power. It may be illustrated by one example of a colonising doctrine and one of its foundational beliefs, both of which, in my respectful view, are especially relevant to this hearing.

59. That doctrine is the "right of discovery" which presumed that the mere "discovery" of indigenous lands by someone from Europe validly transferred title in said land to the "discoverer". The doctrine was of course limited in its application to indigenous "others" and no European jurist ever suggested for example that an English explorer could have a valid claim to France simply by asserting that he had "discovered" it.

60. Yet such arrogant presumptuousness marked all of colonising law which the Lumbee jurist Robert Williams has described as the "discourses of conquest" devised solely to give some "veneer of legitimacy" to an essentially illegitimate dispossession. By the 18th century such ideas were fundamental to Britain's own colonising jurisprudence and were inevitably brought to New Zealand. Thus for example James Cook's Secret Admiralty Orders in 1769 included an instruction to claim whatever lands he encountered by right of discovery, which he subsequently did at Whitianga and Motuara Island in what is now Queen Charlotte Sound.

61. Later in 1840, even while the Treaty of Waitangi was still being signed, Hobson issued proclamations taking the land in the north by right of discovery while one of his functionaries did the same in the South Island. The discovery proclamations were part of the colonising legal theatre which purportedly gave the Crown its "veneer of legitimacy" in this land.

62. The proclamations in fact became an accepted part of the "jurisdictional steps" which the legal academic Paul McHugh has claimed were necessary for the Crown to "annex" our land. Annexation is really just a euphemism for colonisation, yet it is somehow accepted that "discovery" along with the Treaty gave to the Crown the overarching authority to govern, and thus to unilaterally treat.

63. The idea that "discovery" could transfer land and power is of course related to the foundational belief referred to above that because Indigenous Peoples were of lesser worth they had lesser rights and capacity – they were only what Lord Normanby's Instructions to Governor Hobson referred to as "petty tribes" with no real understanding of sovereignty or its concomitants such as a right to properly govern themselves.

64. It also necessarily implied a "petty" capacity to treat that only involved the ability to give away or cede "real" sovereignty to the Crown. In effect the petty politics of Iwi and Hapū were only capable of treating in order to give away that capability to the coloniser.

65. In spite of the prevailing humanitarian ethos of the time, and in spite of the fact that we were sometimes labelled as "noble savages" our people were still deemed to be the inherently savage and lesser "other" who could and should be colonised. It was therefore accepted that the Crown should take the absolute right to rule while subjecting Iwi and Hapū to a lesser status.

66. Indeed, the earliest descriptions of Māori society used all of the ideology of the "other," from the very idea of "petty tribes" to the negative and inaccurate depictions of a "warrior race". Most particularly they depicted our people as somehow lesser in both our capacity and right to govern ourselves.

67. The long-term social, legal, and political consequences of that dreadful mythology are outside the scope of this brief but there is no doubt they have influenced the historical narrative about the sort of society that Māori had and consequently the sort of people we were. They certainly reduced our reality from the complex society that it was to a caricature of either violent or compliant

natives who ignored our own history and law and willingly ceded authority to the Crown.

68. Most importantly in terms of this claim they have impacted negatively upon the perceptions held about our rights and authority. They have in effect silenced any appreciation of the clear philosophies developed by Iwi and Hapū about the complexities of mana and especially the capacity and need to treat as a constituent part of its effective exercise.

69. It has replaced them with a treaty discourse which continues to assert that because of the purported cession and other "jurisdictional steps" taken by the Crown we became British citizens under Article Three of the Treaty and thus forfeited any right to treat because we were henceforth merely its subjects.

70. Such an assertion was of course fundamental to the Westminster system as well as the whole discourse of colonising law. However, it was absolutely contrary to the legal and political ideals of Iwi and Hapū as well as Te Tiriti o Waitangi.

71. Those ideals have of course been at the forefront of claims before the Tribunal which gave perhaps its most detailed consideration of them in the Stage One Report of the Paparahi o te Raki claim. It is to that Report which I now turn.

Mana, Te Tiriti, and the right to Treat

72. Because mana could not be ceded in tikanga or Māori legal terms it is in fact axiomatic that the authority and responsibility of Iwi and Hapū to treat could also not be ceded. It is similarly axiomatic that the authority to treat could not be delegated or subordinated in a treaty to that of another polity.

73. If it was impossible and indeed culturally incomprehensible for one Iwi to permit another to treat on its behalf it is at best illogical to assume that Iwi would allow the Crown to do so. At worst such an assumption is a breach of Te Tiriti.

74. The view that mana could not be ceded has of course been consistently advocated by Iwi and Hapū since 1840. As members of this Tribunal will know, that advocacy was finally acknowledged by the Waitangi Tribunal in the Stage One Report of the Paparahi o te Raki claim.

75. It is not necessary to detail the hearings or findings of the Tribunal, but it may be helpful to briefly refer to two of the Affidavits submitted by respected rangatira at that time. The late Erima Henare referred to the historical context of Te Tiriti in quite specific terms:[8]

> *From our perspective there is only Te Tiriti…that is what was signed (at Waitangi)…The other texts I beg to offer is just the English version. It is not the same as Te Tiriti o Waitangi and has no mana. It is an English language version that meant nothing to our tūpuna, nothing. They signed only what they understood, Te Tiriti i te reo Māori (and) because our tūpuna protected the foreigners who lived here at that time…the Māori way of life and the cultural nature of our sovereignty were acknowledged as truths and axiomatic to Te Tiriti…Any other interpretation that would have us ceding our sovereignty or our mana is a denial of historic reality. It is a manipulation of the past to make it fit what exists now…Had ceding sovereignty been suggested at that time, that is that the rangatira gathered at Waitangi should surrender their mana to all the foreigners all hell would have broken loose.*

76. Another rangatira, Rima Edwards, similarly stated that Te Tiriti is a "kāwenata tapu" and that its terms are equally clear:[9]

> *I te tuatahi horekau i tukua e ngā rangatira o ngā Hapū tō rātou mana ki a Kuini Wikitoria.*
> *Te tuarua horekau i tukua e ngā rangatira o ngā Hapū tō rātou mana whakahaere o to rātou whenua ki a Kuini Wikitoria.*
> *Te tuatoru i whakae ngā Rangatira o ngā Hapū kia whakatungia he hononga tapu waenganui i nga mana o Aotearoa me Ingarangi.*
>
> *(In the first instance the rangatira of the Hapū did not cede their sovereignty to Queen Victoria.*
> *Secondly the rangatira of the Hapū did not cede their mana in relation to the land to Queen Victoria.*
>
> *Thirdly, the rangatira of the Hapū did agree to create a sacred relationship between two sovereign nations, that is Aotearoa and England)*.

77. In its Report summary the Tribunal stated: "In February 1840 the rangatira who signed Te Tiriti did not cede their sovereignty. That is, they did not cede their authority to make and enforce law over their people or their territories. Rather they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal – equal while

[8] Wai 1040, #A30(c) at 6 [18].
[9] Wai 1040, #A25 at 6 [4.2].

having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapū and territories, while Hobson was given authority to control Pākehā".[10]

78. In my considered view the formulation of different "spheres of influence" is not only helpful but absolutely consistent with the long-held narrative of Iwi and Hapū. It acknowledges that mana was never forfeited and that through kawanatanga the Crown was granted the right to govern those who came here after 1840 – it was given a constitutional "place" where previously it had none in this land.

79. And because mahi tūhono are about building relationships, Te Tiriti also envisaged a sphere of shared influence where rangatiratanga and kawanatanga might work together. It recognised the tikanga of independent polities seeking interdependence without one assuming some unilateral authority over the other.

80. Members of this Tribunal may be aware that for the last eight years I have had the honour of convening Matike Mai Aotearoa, the Independent Working Group on Constitutional Transformation that was promoted by the Iwi Chairs' Forum and other lead Māori organisations. After 252 hui and 70 rangatahi wānanga throughout the country we released the Report "He Whakaaro Here Whakaumu Mō Aotearoa" on Waitangi Day of 2016.

81. In that Report the Working Group conceptualised the promise of independence/interdependence between Iwi and Hapū and the Crown as a "relational sphere". It seemed the appropriate constitutional formulation for the kind of political and indeed the cultural relationship that Te Tiriti envisaged.

82. For the reaffirmation by the Tribunal in the Paparahi o te Raki claim that sovereignty was not ceded by Iwi and Hapū necessarily and logically leads to three different but interrelated constitutional consequences. Each in my view is pertinent to this claim.

83. The first consequence is that one essential "sphere of influence" retained by Iwi and Hapū was the right to treat because it was in the very act of treating that

[10] Waitangi Tribunal, *Te Paparahi o te Raki Report* (Wai 1040, 2014) at xxii

mana was reasserted and kawanatanga allowed a place. To assume that the right to treat was ceded would be contrary to the whole history and understanding of Te Tiriti and indeed the nature of mana.

84. It would imply that only parts of mana were retained which in essence would simply reassign it a lesser or petty worth and thus reinforce the lesser status of our people that the injustices of colonisation have been predicated upon. That in itself would constitute a breach of Te Tiriti.

85. The second consequence is that any unilateral action by the Crown to treat with other polities and to then bind Iwi and Hapū to such a treaty is to exercise an authority it does not have. That would also logically constitute a breach of Te Tiriti.

86. The third consequence of a non-cession of mana is that any unilateral definition by the Crown of Māori rights or even of protective measures for those rights is to similarly assert an authority which Te Tiriti did not give. It would also logically constitute a breach of Te Tiriti.

87. Despite the many conversations I have had with the Crown in the past, during which I have consistently and clearly communicated the constitutional narrative set out in this brief of evidence, Crown agents have continued to conduct themselves as though it was and is unnecessary for them as kawana to engage in any way with Māori, including myself, over the proposal to negotiate a TPPA. I have never been approached to be consulted, let alone my consent to the proposal sought.

Conclusion

88. In submitting this brief of evidence, I am aware that the Crown has summarily dismissed the findings of this Tribunal in the Paparahi o te Raki claim. However peremptory dismissal and corresponding claims that the Crown is now in charge anyway are neither a considered argument nor even a critique. They are a retreat into power unjustly taken and both Te Tiriti and the aspirations of Iwi and Hapū demand something better. They also highlight the fallacy perpetuated by the Crown that the Treaty of Waitangi Exception in the TPPA provides protection