

## **Te Tiriti o Waitangi in a Future Constitution**

### **Removing the Shackles of Colonisation**

**2013 Robson Lecture**

**Napier 22 April 2013**

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### **Te Rūnanga-ā-Iwi o Ngāti Kahu and the University of Auckland**

Ever since April 1840, just two months after the initial signing of Te Tiriti o Waitangi, Māori have been requiring the British Crown to adhere to the solemn promises it signed up to in that treaty.<sup>1</sup> It is a treaty of peace and friendship.<sup>2</sup> It sets out the agreed relationship between rangatira of the hapū and Queen Victoria of England. It confirms that the constitutional framework and system of laws that had been observed in this country for many centuries, that is, our mana, tino rangatiratanga and our tikanga, would remain in place and be protected. The Queen of England's role would be to take responsibility for the lawless behaviour of her own British subjects recently arrived in this country and to govern them in accordance with Te Tiriti o Waitangi.

When rangatira reminded the Crown's agent of his treaty obligations in April 1840, he responded that he would uphold those promises. Yet just one month later, in May 1840, he made an announcement that claimed that rangatira throughout the north island had ceded their sovereignty to the Queen of England by signing the treaty. But he was talking about a document written in English that had little or nothing in common with Te Tiriti.<sup>3</sup> It claimed to be a treaty of cession of sovereignty.<sup>4</sup> The rangatira of the hapū had never seen the document he was talking about. The only one they knew was the one they signed and they stuck to it.

To this day Māori are adamant that we never gave up our mana, our equivalent of the European notion of sovereignty. Te Tiriti states that very clearly. Attempts by the Crown to ignore that treaty and to violate it with seeming impunity have led to Māori requiring that a constitution be drawn up for the country that includes Te Tiriti o Waitangi. Constitutional expert and legal philosopher, Moana Jackson, defines a constitution as simply "the values and rules that people use to govern their relationships with each other, with the land and the wider world around them." He goes on to say "A constitution is only tika, or correct, if it is based on a core set of values that reflect the highest and most ineffable hopes of the people of the land."<sup>5</sup> Instructions issued by the National Iwi Chairs

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<sup>1</sup> Susan Healy, Ingrid Huygens, Takawai Murphy and Hori Parata, 2012, *Ngāpuhi Speaks*, Whāngarei, Te Kawariki & Network Waitangi Whangarei, p.290.

<sup>2</sup> Margaret Mutu, 2010, 'Constitutional Intentions: The Treaty of Waitangi texts' in Malcolm Mulholland and Veronica Tawhai *Weeping Waters: The Treaty of Waitangi and Constitutional Change*, Wellington, Huia Publishers, p.35.

<sup>3</sup> Ani Mikaere, 2011, *Colonising Myths, Māori Realities*. Wellington, Huia, p.125.

<sup>4</sup> Mutu, 'Constitutional Intentions', p.36.

<sup>5</sup> Moana Jackson, 2013, 'Treaty Debate Series 2013: My Voice Counts', Wellington, Te Papa Museum of New Zealand, 24 January 2013. Accessed at

Forum in 2010, quite some time before the current Crown constitutional advisory panel was thought of, established a working party whose brief is to draft a constitution based not only on Te Tiriti o Waitangi of 1840, but also on tikanga and on He Whakaputanga o te Rangatiratanga o Nu Tirenī of 1835 while having regard to, amongst other matters, the United Nations Declaration on the Rights of Indigenous People of 2007. To date more than 130 hui have been held with Māori groups and communities throughout the country. At those hui Māori are asked to imagine that if the way in which this country was governed, if the way power was exercised, could be changed tomorrow, what are the values on which you would like that government to operate? How would you uphold rangatiratanga? How could it reflect the relationship agreed to in Te Tiriti? These are not hard questions for Māori to answer because we have been discussing them since 1840.

So why have the National Iwi Chairs' Forum asked for a constitution? What tikanga are they talking about? What is He Whakaputanga? Why Te Tiriti o Waitangi – the Māori language document - and no mention of the English language document often referred to as "The Treaty of Waitangi"? Why does the Crown continue to insist that Māori ceded sovereignty when clearly they did not? What is the United Nations Declaration? In this lecture I will set out to answer these questions and to demonstrate how the shackles of colonisation that have imprisoned Māori for over one and half centuries can be removed. I will then consider the potential benefits for this country that this will unlock.

### **History as Māori Know It**

If we take a closer look at the history of our country since Pākehā arrived here and understand the context of the signing of both He Whakaputanga, which was a declaration of the sovereignty of the rangatira of the hapū, in 1835 and Te Tiriti in 1840 we can start to answer these questions. I grew up knowing my whānau's stories about these two immensely important documents. I would go with my kaumātua to hui or tangihanga where I would hear these documents being talked about and their meaning being debated. We had wānanga at home about them and yet like so much of our very rich oral traditions, most of the written material I found about them in libraries bore little resemblance to the knowledge of my kaumātua. And then the Waitangi Tribunal came along and with it came the opportunity for all that knowledge to be recorded. Our kaumātua gave freely of their knowledge but only selected parts made it into the Tribunal's reports.

### **Ngāpuhi Speaks**

And then finally one of our neighbouring and closely related iwi, Ngāpuhi, decided to take a claim to the Tribunal specifically on the interpretation of both He Whakaputanga and Te Tiriti. For the first time I was hearing what my kaumātua had talked about being aired in the Tribunal at great length, in meticulous detail and by those who hold the oral traditions that have been so carefully passed down through the generations, that is, the descendants of those who signed these documents. Several of my ancestors were signatories. Late last year the panel of independent observers appointed by the kaumātua issued their report on the evidence presented by both Ngāpuhi and the Crown. At last we have an authoritative and clearly written report that sets out not only Ngāpuhi's understanding of the history and context of He Whakaputanga and Te Tiriti but also the Crown's account of why it

decided to ignore them both and try to substitute them with another document altogether. The report's title is *Ngāpuhi Speaks*.

It demonstrates conclusively that

- Ngāpuhi did not cede their sovereignty;
- the Crown had recognised He Whakaputanga as a proclamation by the rangatira of their sovereignty over this country;
- the treaty entered into by the rangatira and the Crown, Te Tiriti o Waitangi, followed on from He Whakaputanga, setting out the role that the British Crown would have in respect of Pākehā;
- the treaty delegated to Queen Victoria's governor the authority he needed to exercise control over hitherto lawless Pākehā people in areas of hapū land allocated for the Queen;
- the Crown's English language document it calls The Treaty of Waitangi was not seen or agreed by Ngāpuhi and instead reflects the hidden wishes of the British imperial power.<sup>6</sup>

So why did the British think they could get away with relying on a fraudulent document and why have so many of this country's histories written to date not picked up on this fundamentally important fact?

### **British Attitudes**

The answer lies largely in the attitudes of the British at that time. Alan Ward, the historian for the Crown in the Ngāpuhi hearings, showed that while the European nations had a fair measure of respect for one another's lands, they wrongly assumed that the rest of the world was theirs for the taking.<sup>7</sup> This presumption dates back to the 15th century when Columbus claimed the Americas using a fiction known as "right of discovery". Moana Jackson has pointed out '...colonisation after 1492 was based on the belief of most of the White States in Europe that they had the right to dispossess most of the non-White Indigenous Peoples of the world. Colonisation was driven by racism, and efforts to "improve" race relations in this country will fail unless we address that, and try to deal with the constitutional, social and economic injustices which it creates'.<sup>8</sup>

In discussing the reasoning used by European powers to justify the "taking away of lands, lives, resources and power of innocent people" Jackson pointed out that central to this reasoning was the projection of these peoples as inferior because they were "un-Christian, uncivilized and un-White".<sup>9</sup> One senior British official writing in England described my ancestors as "a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are

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<sup>6</sup> Healy et al. *Ngāpuhi Speaks*, pp.1-2. The Crown's Treaty of Waitangi was not agreed to anywhere in the country. It has 39 signatures all collected at Manuka and Port Waikato. Mike King, in his television series *Lost in Translation*, records that the missionary who oversaw the signing at these two locations assured the rangatira that it was the same as the Māori document.

<sup>7</sup> Healy et al., *Ngāpuhi Speaks*, p.125.

<sup>8</sup> Moana Jackson, 1997, 'The Good, the Bad and the Ugly' in *Mana Magazine* December 1997-January 1998, pp.16-7; See also Moana Jackson, 2010, *Brief of Evidence of Moana Jackson*. Wai 1040, Doc#D2. Wellington, Waitangi Tribunal.

<sup>9</sup> Healy et al., *Ngāpuhi Speaks* p.125 taken from Jackson 2010 *Brief of Evidence*, paragraphs 62-74.

incompetent to act, or even deliberate in concert”.<sup>10</sup> He used that to justify British notions of superiority that allowed it to accord to itself the right to determine the nature of another people’s reality.<sup>11</sup>

### Dismissing British Attitudes

Evidence presented to the Tribunal in the Ngāpuhi claims demonstrated the ease with which such a statement can be dismissed. Claimants described in detail that iwi and hapū had always had

- law in common;
- commonly-understood ethics;
- a shared philosophy of government;
- philosophies and practices that fostered long-held political and trading relationships which bound groups to one another through the length and breadth of the country;
- governing structures for the undertaking of major enterprises;
- and leaders who habitually came together to deliberate in concert.<sup>12</sup>

When we discuss these matters we use terms that include

- the different types of mana (the paramount and absolute authority and power derived from the gods);
- tapu (spiritual power or protective force);
- tikanga (law, the correct ways of doing things);
- kaitiakitanga (responsibilities of taking care of Papatūānuku, that is, our lands, seas, waters, air and all other natural resources and other taonga);
- rangatiratanga (the exercise of power and authority derived from the gods);
- whakapapa (genealogies);
- whanaungatanga (kinship);
- manaakitanga (hospitality, caring for others).

### Colonising Myths

Yet Crown officials such as Hobson and his successors were not interested in developing relationships of mutual respect and abiding by the existing law of the land. Their hidden wish was to take over the country. Their attitudes allowed them to construct myths that would shield them as they set out on their colonizing mission. The first myth was that Pākehā were supreme and could do and have whatever they desired. The second myth was that Māori were inferior and would inevitably yield to Pākehā supremacy. Layer upon layer of myths were constructed on top of these two. They included that Māori had ceded sovereignty to the British queen, that Māori benefitted from British colonization, that Māori had no use for their lands, waters, seas and other taonga, that only Pākehā know what is good for Māori, that only Pākehā can define what a Māori is and how he

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<sup>10</sup> Lord Normanby to Captain Hobson, August 14, 1839, *Compendium*, Vol. 1, pp.13-17 quoted in Healy et al. p.126.

<sup>11</sup> Healy et al., *Ngāpuhi Speaks*, p.126.

<sup>12</sup> Healy et al., *Ngāpuhi Speaks*, P.126.

must live, that the history of this country is that taught in schools for the past 140 years, and so the list goes on. So rather than keeping lawless Pākehā under control, as Te Tiriti promised, Crown officials were instead given free rein to continue the same uncivilized lawlessness that had led to Kororāreka (Russell) being named “the hell-hole of the Pacific”. As the Waitangi Tribunal has reported repeatedly and at length, they lied to, cheated, stole from, plundered and murdered Māori.<sup>13</sup> To cover their tracks they made up laws to sanction their atrocities and legalize their crimes.<sup>14</sup>

With this as the ideological background created by their leaders, it is small wonder that British immigrant settlers acquired an insatiable greed for Māori land and resources and an immovable determination to have complete political and economic dominance in New Zealand. That left Māori as a marginalised, deprived and oppressed minority in our own land, stripped of our lands and natural resources, denied our sovereignty, language and culture, reduced to servitude and subjected to racism and discrimination. And that is the situation we have today.

### **Racism**

It is important that we not shy away from talking about the affects of racism in this country even though it causes great discomfort and anxiety for many. Sociologist Paul Spoonley’s work provides a helpful definition that I have summarized as: Racism is the attitudinal or ideological phenomenon that accepts racial superiority, and, when present in those in power, justifies them using that power to discriminate against and deprive others of what is rightfully theirs on the basis of their race.<sup>15</sup>

Three levels of racism are often identified:<sup>16</sup> Institutionalised racism, interpersonal racism and internalised racism. Institutionalised racism is the systemic maintenance and reproduction of ethnic inequality; Interpersonal racism is racially motivated verbal and/or physical abuse; Internalised racism is the acceptance of the negative ideologies about one’s own ethnic group. Of these three, institutionalised racism is the most powerful as it denies people access to a range of social and economic benefits such as healthcare, housing, justice, education, financial and constitutional security. The most heinous however is internalised racism where members of an oppressed ethnic group, such as Māori, internalise the racism of their oppressor. In doing so they develop a belief that they are inferior to their oppressor and that the oppressor can determine their reality. For example, that government officials, teachers and judges can tell them who they are, whether or not they are Māori, what their history is and how they are to live their lives.

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<sup>13</sup> While many Māori died from the effects of poverty, as a result of being driven off their lands and in armed wars waged against them by Pākehā, most died as a result of the biological warfare waged through introduced Pākehā diseases. The genocide Pākehā practised against Māori reached its height at the beginning of the twentieth century when the Māori population was reduced to 42,000 and Pākehā were celebrating the pending demise of the entire Māori population. (Kukutai 2011:14; Mikaere 2011:72)

<sup>14</sup> See the many reports of the Waitangi Tribunal for the details of how this was carried out in different localities.

<sup>15</sup> Margaret Mutu, 2011, *The State of Māori Rights*. Wellington, Huia, p.3; see also Paul Spoonley, 1995, *Racism and Ethnicity*, Auckland, Oxford University Press, p.3 and Angela Ballara, 1986, *Proud to be White? A Survey of Pakeha Prejudice in New Zealand*, Auckland, Heinemann.

<sup>16</sup> Further types of racism, including symbolic racism and modern racism, are being identified as more research is carried out. See Sue Abel and Margaret Mutu, 2011. ‘There’s Racism and then There’s Racism – Margaret Mutu and the Racism Debate’ in *The New Zealand Journal of Media Studies* Vol.12 No.2, p.6 and David O. Sears and P. J. Henry. “The Origins of Symbolic Racism.” *Journal of Personality and Social Psychology* 85.2 (2003): 259–75.

To see how this plays out in New Zealand we simply need to look at the statistics. The following are taken from the 2006 census and Professor James Anaya, the United Nations Special Rapporteur's report of 2011.

<b>Some Statistics</b>	
<b>2006 census and Anaya 2011</b>	
<b>Māori</b>	<b>General Population</b>
• Māori by ethnicity – 565,329	• European – 2,609,592 – 68%
• Māori by descent – 643,977	• Māori – 565,329 – 15%
• >120,00 in Australia	
• 84.4% live in urban areas	
• 24% speak Māori	• 4% speak Māori
• Median age - 22.7 years	• Median age – 35.9
• 28% post-school qualifications	• 40% post-school qualifications
• Median income \$20,900	• Median income \$24,400
• Unemployment 14%	• Unemployment 6.6%
• Life expectancy male ~70 years	• Life expectancy male ~79 years
• Life expectancy female ~75 years	• Life expectancy female ~83 years
• Prison population 51% - women 61%	

Legal scholar, Ani Mikaere, is careful to set out the nature and effect of racism in New Zealand in her book *Colonising Myths, Māori Realities*. The following are a number of quotes from her book.

- “Despite the fact that Māori have suffered and continue to suffer a great deal as a result of Pākehā racism, racism in Aotearoa is, however, essentially a Pākehā problem. Pākehā people carry an enormous burden of guilt about the way in which they have come to occupy their present position of power and privilege. They also have a deep-seated insecurity about the illegitimacy of the state they have attempted to create on Māori land...p.68
- “Pākehā have developed a range of strategies to deal with these uncomfortable truths. One such strategy is the art of selective amnesia... ability to forget vast chunks of history as and when it suits. Another is denial and distortion of the truth, for example, insisting that colonisation was overwhelmingly a positive experience for Māori...Pākehā...assume the mantle of victimhood, for example, by complaining that any initiative designed to assist Māori constitutes an unjustifiable assault on Pākehā rights.” p.69
- “An essential element of racism in the colonial context is power...In exercising their power, [Pākehā] seek to define us and dictate to us how we should behave. In order to combat racism, therefore, we need to strategise how to reclaim power ourselves (pp.80-1)...If racism is power, it is clear that an end to racism will ultimately require constitutional change in Aotearoa (p.84)...The last thing Māori need is for Pākehā to wallow in guilt about the part their ancestors played in our common history... They need to take ownership of their history and to take positive steps to redress the situation...including learning to let go of some of their power. (p.91)

- For Māori...we must stop collaborating in our own assimilation/extinction by embracing colonised practices...and playing along with Crown-created agendas (such as the Treaty settlements process). We also need to get out of the habit of being polite so as not to make the coloniser feel bad (p.92)...we must challenge the lies that are conveniently sold to us as universal truths (p.93)...we must also reject the coloniser's view of what is realistic (p.94).

### **United Nations Declaration on the Rights of Indigenous Peoples**

Faced with this reality and the fact that Māori have never ceded sovereignty, National Iwi Chairs Forum simply followed on from decisions of previous national Māori gatherings. We had to take the necessary steps to bring about constitutional transformation. However now we also have the backing of the United Nations Declaration on the Rights of Indigenous Peoples. The New Zealand government refused to support it for many years but finally signed up to it under international pressure in 2010. It provides a strong moral directive from the international community. The Declaration has forty six articles setting out the human rights and fundamental freedoms of indigenous peoples, including Māori. It provides a blueprint for the implementation of Te Tiriti o Waitangi and is a clear set of instructions for the removal of the shackles of colonisation that have imprisoned Māori for over 150 years. Its articles include the following:

- They set out the rights to self-determination, autonomy, identity, culture, traditions, language, knowledge, institutions, world view and way of life.
- States are called on to prevent and redress theft of land and natural resources and forced assimilation (into Pākehā culture);
- States are urged to return land wherever possible or to provide full compensation;
- States are to establish minimal standards to eliminate racism, discrimination, marginalisation and exploitation that inhibit the development of indigenous peoples.

### **Implementing UNDRIP**

Implementing the Declaration and upholding the mana and rangatiratanga of hapū would go some way to putting Te Tiriti o Waitangi back in its proper place. Once that happens, and it will, Māori will be free: free to be who we are, free to identify and organise ourselves according to our own structures and institutions, free to live under our own values and our own tikanga (laws), free to plan for and decide our own futures. Our language, culture, values and the way of life of our whānau and hapū will be protected and preserved. Our knowledge systems will be fully preserved and enhanced to meet our and the country's changing needs and circumstances. Respecting and caring for Papatūānuku, our earth mother, and understanding that our lands, our mountains, our rivers, our seas are a part of who we are will be fundamental to the constitutional arrangements of the country. We will have full access to the positive aspects of English culture, to technology, literacy and material wealth. We will have full health, education, housing, employment and our own justice system and media. We will be thriving and prosperous, economically self-sufficient and fully participating in both Māori and Pākehā worlds.

My hapū and my iwi of Ngāti Kahu are very clear about our own tikanga and what He Whakaputanga and Te Tiriti set down as the constitutional basis for this country in 1835 and in 1840.

While we constantly strive to implement them, in practice we currently exercise only very limited forms of our mana and rangatiratanga. Take, as two examples, our treaty claims and our kaitiaki responsibilities. After twenty four years, we finally managed to negotiate a settlement for part of our claims. Having signed an Agreement in Principle we then wrote our own 700-page deed of settlement to make sure it properly reflected what Ngāti Kahu had agreed to. However when the Minister of Treaty Settlements, Chris Finlayson, agreed to Ngāti Kahu writing our own deed, his officials in the Office of Treaty Settlements were incensed. They dismissed the deed out of hand and Chris Finlayson ended up telling Ngāti Kahu to “Go to hell”, much to the disgust of our kaumātua.

In respect of the management and use of our ancestral territories, developers cause us major problems as they desecrate our wāhi tapu, pollute our waterways and have no thought for the damage their developments cause. Persuading councils to adhere to their own laws in respect of these matters is an exercise in frustration when pursuit of the dollar is prioritised over wise management of precious resources. As a result we have taken developers, councils and government departments to court in order to force them to adhere to their own laws<sup>17</sup> – a very expensive exercise that has always relied on the generosity and voluntary work of sympathetic law firms.

### **Treaty Settlements**

However the reality is that, even though we have some tiny remnants of our lands and we live on them according to our tikanga, we have been stripped of our economic base, and our papakāinga struggle with dire poverty and deprivation and all its associated problems. Most of us have been forced to live elsewhere, mainly in cities like Auckland or increasingly in Australia. We return home whenever we can but even getting to tangihanga is becoming increasingly difficult. Much is made of the so-called “Treaty Settlements” process, how it is providing relief for the poverty, marginalisation and deprivation and how it is benefitting Māori. The public are told that “settlements” acknowledge past wrongs and millions of dollars are paid to Māori. Māori are promised that the numerous treaty breaches will be acknowledged and that they will get an apology and some of their land back. As a sweetener the Crown may toss in a few million dollars. There are a lot of smoke and mirrors around this process so a little honesty would not go amiss here.

The process is not about settling claims at all. Nor is it about giving Māori many millions of dollars in compensation. Rather it is a unilaterally Crown-determined policy which aims to legally extinguish all historic Māori claims against the Crown as cheaply and as expeditiously as possible. The whole process is deeply racist, dishonest and yet another gross violation of Te Tiriti o Waitangi. These claims most often involve hundreds of thousands of acres of lands and other resources and gross atrocities perpetrated against Māori. Close examination of a number of Deeds of Settlement available on the Office of Treaty Settlements website confirms that

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<sup>17</sup> The Beneficial Owners of Karikari II Residue Block vs The Northland Regional Council and The Minister of Conservation, Planning Tribunal, Whangarei, 1990, Decision No. A93/93; The Environmental Defence Society and Te Runanga-a-Iwi o Ngati Kahu v the Far North District Council (FNDC) and Carrington Farms Ltd, High Court, Whangarei 1999 (settled out of court); Te Rūnanga-ā-Iwi o Ngāti Kahu v Carrington Farms Ltd, Carrington Estate Ltd, Carrington Resort Ltd & Far North District Council, CIV-2010-488-766 in High Court, Whangarei, decision issued 29 September 2011.

- The Office of Treaty Settlement is adamant that the Crown is absolutely supreme and that its power cannot be challenged. Claimant negotiators must accept this and effectively cede their mana and rangatiratanga to the Crown;
- The historical accounts found in each deed have little to do with recording the atrocities that took place. Even though claimants hire professional historians to write their histories, officials in the Office of Treaty Settlements decide what ends up in the deeds. In doing so they strip out everything that may offend Pākehā leaving accounts that fall well short of the full truth;
- The Office of Treaty Settlements will not admit that the Crown or any individual Crown agent acted illegally regardless of findings of the Waitangi Tribunal to the contrary. Neither will it ever admit to having passed laws to legalise its own criminal activities;
- Each deed states that full compensation will not be paid and that almost all of the lands and resources stolen will not be returned. Instead the deeds and legislation effectively gift millions of acres of land to the Crown with no recompense. The only recognition given to this is contained in the disingenuous clause found in many deeds that claimants have agreed to forego full compensation “to contribute to New Zealand’s development”;<sup>18</sup>
- The Crown may relinquish its claims to a few acres of stolen land it has not already sold off but the Office of Treaty Settlements will encumber them with a number of restrictions on their use, including that public access must be preserved (in other words, the land is not being returned at all);
- For certain other lands that the Crown is prepared to relinquish without retaining these types of encumbrances Māori must pay market value for them – in other words Māori have to pay for their own settlements;
- Any land that claimants do regain control over can only be held and managed according to Pākehā culture and law in management structures determined by the Office of Treaty Settlements.

But the ultimate purpose of this process is to extinguish all Māori claims. First off, the Waitangi Tribunal’s legislation was changed in 2008 so that it can no longer accept any historical claims. Then, every so-called “settlement” legally extinguishes every claim ever lodged against the Crown not only by those negotiating the settlement but also by any others who have claims in the geographic region involved whether they have been addressed or not. The Waitangi Tribunal and the courts are then legally barred from ever hearing any of those claims ever again. It is no wonder that the Waitangi Tribunal is currently clogged with claims against Deeds of Settlement that have yet to be legislated, that iwi throughout the country are split asunder over this extremely divisive, disruptive and destructive process and that, as a result, the government’s aim of extinguishing all claims by 2014 appears to have been abandoned. Despite this, and more than twenty years of protest against the policy, the Crown, through the Office of Treaty Settlements, has coerced and bullied more than fifty claimant groups into so-called “settlements” although only 31 of them have been legislated. Many

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<sup>18</sup> See for example the Deeds of Settlement of Te Rarawa, Te Aupōuri, Ngāi Takoto, Raukawa, Ngāti Toarangatira, Ngāti Koata, Ngāti Pūkenga and Ngāti Rārua.

are taking the crumbs they are offered in the hope that it will provide a small contribution towards recovering their economic base.<sup>19</sup>

### **Binding Recommendations**

For Ngāti Kahu, the Crown is the ultimate master thief, very much in the mould of Charles Dicken's character, Fagin. We spent more than fifteen years trying to rehabilitate Fagin,<sup>20</sup> but we have diagnosed the current bout of recidivist criminal behaviour that is gripping the Office of Treaty Settlements as incurable and we have given up on them. So we are now pursuing the one legal option we have to avoid these draconian measures being forced on us – and that is to pursue binding recommendations through the Waitangi Tribunal. Under these provisions the Tribunal can order the Crown to return lands. However the Tribunal has been under threat from successive Ministers of Treaty Settlements since 1997 that its powers will be reduced or that it will be abolished if it ever makes binding recommendations.<sup>21</sup> Despite that being a very serious breach of the rule of law, it has successfully constrained the Tribunal from even hearing such applications for many years until the Supreme Court intervened in 2011 the Mangatū case.<sup>22</sup> Even so, rather than hearing applications independently of the Crown's policy as the legislation requires, the Tribunal works with government, endorsing the policy.<sup>23</sup> This effectively removes the Tribunal from its role as an independent commission of inquiry and makes it just another arm of the government. This raises wider issues of bias, natural justice and judicial independence in terms of the rule of law.<sup>24</sup> The answer in terms of Pākehā law for claimants is to take the Tribunal on judicial review but few have the resources to pursue that avenue. The answer in terms of Māori law, that is tikanga, is that the land belongs to those who are mana whenua, it does not belong to the Crown. It is the hapū who are mana whenua who have paramount and ultimate authority over it.

### **Struggling with Imposed Laws and Structures**

Even those few who have managed to keep cash components sufficient to make some economic headway, such as Ngāi Tahu and Tainui, struggle as laws and management structures imposed from a foreign culture conflict with the centuries old laws and values that underpin whānau, hapū and iwi structures. Tainui's struggles are on public display and remain unresolved. Ngāi Tahu has done a good job of keeping its struggles in-house. But both also struggle with the particular brand of racism

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<sup>19</sup> Margaret Mutu, 2005, 'Recovering Fagin's Ill-gotten Gains: Settling Ngāti Kahu's Treaty of Waitangi Claims Against the Crown' in Michael Belgrave, Merata Kawharu and David Williams (eds.) *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, Melbourne, Oxford University Press, pp.202-4. As at 2005, claims were being settled for an overall average of less than 0.1 per cent of their estimated value and even that was falling.

<sup>20</sup> Mutu, 'Recovering Fagin's Ill-gotten Gains'.

<sup>21</sup> Paul Hamer, 2004, 'A Quarter Century of the Waitangi Tribunal' in Janine Haywood and Nicola R. Whene *The Waitangi Tribunal: Te Roopu Whakamana i Te Tiriti o Waitangi*, Wellington, Bridget Williams Books, p.7. In fact, the Tribunal's powers have been reduced considerably since the 1980s. Its power to make recommendations over local government and private lands and over fisheries was removed in 1992. Its power to register historical claims was removed in 2008. Its powers to consider any claim is removed once settlement of a claim has been legislated (the Office of Treaty Settlements website lists 31 settlements legislated between 1992 and 2012).

<sup>22</sup> *Haronga v Waitangi Tribunal* [2011] NZSC 53.

<sup>23</sup> See, for example, Waitangi Tribunal, 2013, *Ngāti Kahu Remedies Report*.

<sup>24</sup> Sir Edward Taihākurei Durie, 2010, 'Land Claims, Treaty Claims and Self Determination', a seminar address to Te Manuao Academy broadcast from Victoria University of Wellington, 3 March 2010.

we have in this country that fears and lashes out at Māori success<sup>25</sup> and works very hard to undermine or exploit it. Tainui leaders were lambasted for months in the Pākehā media over temporary hiccups in its commercial investments portfolio. By way of comparison, failures of large publicly listed Pākehā and state-owned companies involving much larger amounts of money, such as Air New Zealand, ENZA, Qantas New Zealand and Brierley received only passing mention.<sup>26</sup>

It was very interesting to watch the strategies Ngāi Tahu employed to ensure the success of its Whale Watch Kaikōura operation. Trusted Pākehā with commercial expertise sat on the board of the company and provided it with a very sound management and financial base. Then, in the early stages of its operation, the children of the town's most rabid racists were deliberately employed. This strategy was adopted in an attempt to curb the vandalism to its buildings and boats. In fact, the attacks stopped and Whale Watch Kaikōura went on to become one of the country's most successful tourist operations, winning international awards.<sup>27</sup> Other iwi and hapū who have been able to regain at least some of their economic base, such as Ngāti Whātua o Ōrākei in central Auckland,<sup>28</sup> have had to rely on large capital injections from overseas investors willing to back indigenous recovery. At Ōrākei that help came from China.

## Conclusion

Too many Pākehā brought up in this country have been either not been informed or have been misinformed about the shameful devastation that British colonialism has and continues to visit on Māori. All this country's present social systems, be they education, health, justice, government services, parliament, the media or the loathed Treaty claims extinguishment process, have been built on myths developed to ensure White privilege and to justify depriving Māori of what is rightfully ours. For Māori, White privilege is blindingly obvious yet for most Pākehā it is invisible and they deny its existence.<sup>29</sup> Every time I teach the introductory course on Te Ao Māori: the Māori World at the University of Auckland, Pākehā students are stunned by what they hear, read, discuss and learn. They ask me why they didn't know all this before, why have none of their teachers, none of the newspapers, television and radio that they rely on for their information ever made this clear. I tell them that there are increasing numbers of Pākehā who are trying to help their fellow Pākehā citizens fill the huge knowledge gaps they have about the country they live in. For example, two of the authors of the report *Ngāpuhi Speaks* are part of a group of Pākehā Treaty educators called Network Waitangi. In Christchurch there is Waitangi Associates headed by Robert Consedine, author of the very helpful book *Healing our History: The Challenge of the Treaty of Waitangi*. A number of Pākehā churches have also taken up the challenge. There are also Pākehā academics and other professionals.

Yet Māori cannot wait while Pākehā catch up. More and more Māori are starting to climb out of crippling poverty and are working together towards the full recognition of our mana and tino

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<sup>25</sup> Sue Abel and Margaret Mutu, 2011, 'There's Racism and then there's Racism – Margaret Mutu and the Racism Debate' in *The New Zealand Journal of Media Studies* Vol.12 No.2, p.8.

<sup>26</sup> Margaret Mutu, 2011, *The State of Māori Rights*, Wellington, Huia Publishers, pp. 103-5.

<sup>27</sup> Mutu, *The State of Māori Rights*, p.27.

<sup>28</sup> I.H. Kawharu, 2005, 'Orakei' in Michael Belgrave, Merata Kawharu and David Williams (eds.) *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, Melbourne, Oxford University Press, pp.159-62.

<sup>29</sup> Robert Consedine, 2012, *Healing Our History: The Challenge of the Treaty of Waitangi*. Auckland, Penguin, p.200.

rangatiratanga, our sovereignty. We expect Pākehā to take ownership of and address their own problems such as their racism and their own history, and to take positive steps to redress the problems these have caused including letting go of some of their power. Māori are proud of who we are and we are taking back control of our lives and our territories. And Māori are leading out the long conversation this country is entering into about the rules we can all agree to live by – rules about respecting and caring for each other, ensuring people are safe, looking after this beautiful country so that she can continue to nurture the many generations to come and most importantly, living together in peace and friendship. It will take a while and it may not happen in my life time but it will happen. My hope is that my mokopuna will live in a constitutionally different world from the one I grew up in, one that honours He Whakaputanga and Te Tiriti o Waitangi and one in which Māori are free of the shackles of colonisation. Kia ora tātou.

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