Ngāti Mutunga o Wharekauri Iwi
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27 October 2020

Hon Eugenie Sage
Minister of Conservation
Freepost Parliament
Private Bag 1888
WELLINGTON 6160

Email: E.Sage@ministers.govt.nz

Tēnā koe anō i te Minita,

The Crown Proposal to Vest the Taia Historic Reserve upon the Trustees of the Hokotehi Moriori Trust

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1. I attach the submission from the Trustees of the Ngāti Mutunga o Wharekauri Iwi Trust confirming our strong objection to the proposal vest of the Taia Historic Reserve (Taia) upon the Trustees of the Hokotehi Moriori Trust. Our submission is in three parts:

    i. First is the submission itself which sets out the grounds for our objection. Our submission is largely about the ongoing failure of the Department of Conservation (DoC) to give proper effect to section 4 of the Conservation Act 1987 with respect to Taia. I am aware that other submitters from Ngāti Mutunga o Wharekauri are also focusing on the Treaty with the hope that this process will re-set the relationship of DoC with Ngāti Mutunga o Wharekauri to where it needs to be.

    ii. The second part is essential reading: the background paper "*Ngāti Mutunga o Wharekauri Mana Whenua and Taia Historical Reserve*" which explains the cultural and historical basis for our *mana whenua* status on Wharekauri, our Treaty rights in Taia and why these are central to your responsibilities towards us under section 4 of the Conservation Act 1987.

    iii. The third part comprises the deposition of Thomas McClurg (based upon DoC records) that summarizes the history of DoC/Ngāti Mutunga o Wharekauri engagement on Taia from 2001 to 2018. The Thomas McClurg

deposition catalogues an abject failure on behalf of DoC to engage with us as a Treaty partner as required by section 4 of the Act; a failure that continues with this current consultation process.

2. We wish to speak to our submission and we wish to speak to it at Whakamaharatanga Marae, Te One, Wharekauri. We understand from the email from Chris Visser to Tryphena Cracknell (obtained under the Official Information Act) that DoC is planning a hearing of submissions on the Chatham Islands and that the 'Hearing Chair' will apparently be a delegate of the DDG Conservation. Please advise the current position.

3. Given, the focus of our submission on the Treaty of Waitangi, it is imperative that the 'Chair' appointed to hear our submission and others of Ngāti Mutunga o Wharekauri is a person who is an expert in the Treaty of Waitangi and the Māori concepts of *mana, tino rangatiratanga* and *mana whenua*. We have yet to meet anyone in DoC with this expertise and it may be that you will be required to engage someone from outside of the Department for this role. It goes without saying that DoC should not appoint someone to the role of 'Chair' who has been associated in anyway with the last twenty years of denial and disrespect which have characterized the approach of DoC to us over that time.

4. This submission is so large because it addresses an issue that is bigger than Taia. It reflects a heartfelt attempt by Ngāti Mutunga o Wharekauri to move the relationship with DoC into a space of partnership and compliance with the Treaty of Waitangi that will provide a secure foundation for future generations. Much collaborative work by DoC, *iwi* and *imi* is required to ensure that the unique and amazing natural and cultural heritage of Wharekauri is protected in an effective and lasting way. We look forward to a response that is equally sincere.

Nāku noa, nā,

Deena Whaitiri,
Chair, Ngāti Mutunga o Wharekauri Iwi Trust

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Submission to the Minister of Conservation

From Ngāti Mutunga o Wharekauri Iwi Trust

Re Proposed Vesting of Taia Historic Reserve

October 2020

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Wharekauri te moutere

Noninga remu Taiko e

He pā akeake

Ngana hau au e

Puhia ra e te hau

Uaina e te ua e

Ko Matipo, ko Kopi

Hei whakamāurutanga e

Korihi te Tui korari

Koē te weka one e

Ngā mihi whakatau

Maioha e

Whakatau ki Te One

Te iti, te rahi e

Ki te takapou whāriki

Whakamaharatanga e

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Summary

1. On behalf of its members and beneficiaries, Ngāti Mutunga o Wharekauri Iwi Trust strongly objects to the proposal to vest the ownership of Taia Historic Reserve exclusively in Hokotehi Moriori Trust. Exclusive vesting is not necessary to achieve the protection of the cultural and natural heritage of Taia. It would be better by far to engage both *iwi* as Treaty partners with the Crown to achieve this very long-term goal and commitment.

2. Ngāti Mutunga o Wharekauri is the *iwi* that holds exclusive *mana whenua* status over Taia and has done so since Wharekauri was comprehensively conquered and subjugated by Ngāti Mutunga o Wharekauri in 1835/36. The customary authority (*mana whenua*) thereby established has never been extinguished or transferred by Ngāti Mutunga o Wharekauri in the past 185 years and it is inconceivable that it would be transferred, either whole or in part, in the future. With every passing year, the ancestral connection of Ngāti Mutunga o Wharekauri and Wharekauri (now in its 9th generation) continues to strengthen.

3. Furthermore, the *mana whenua* status of Ngāti Mutunga o Wharekauri is integral to the *tino rangatiratanga* of Ngāti Mutunga o Wharekauri secured and guaranteed by Article II of the Treaty of Waitangi which came into effect on Wharekauri in November 1842. Under section 4 of the Conservation Act 1987 "*This Act is to be interpreted and administered as to give effect to the principles of the Treaty of Waitangi*". This requirement is a "mandatory relevant consideration" for the Minister in making her decision on the proposed vesting pursuant to the Reserves Act 1977.

4. It is an impossibility for the Minister to authorise the vesting of Taia exclusively in Hokotehi Moriori Trust and to meet her responsibilities under Section 4. Furthermore, the advertised proposal is itself a proof of a serious failure within the Department of Conservation to understand and implement its responsibilities under section 4 with respect to its relationship with its Treaty partner, Ngāti Mutunga o Wharekauri.

5. The way to rectify this failure before its consequences become irreversible is for the proposed vesting to be declined, the ownership of Taia to remain as is (with the Department of Conservation) and for the Department to develop a management plan for Taia that has the full engagement and support of both *iw*i . In that event, Ngāti Mutunga o Wharekauri will support the most effective means identified under that plan to protect the full range of the cultural and natural values present on Taia including those cultural values of special significance to Moriori.

Introduction

7. On Saturday 26 September 2020, the Department of Conservation (DoC) gave notice of a proposal to vest the Taia Historic Reserve, Chatham Island in Hokotehi Moriori Trust. The legal description of the Taia Historic Reserve is Sections 4 and 23 and Part Section 13 Owenga Settlement and is around 1198 hectares.

8. This is a written submission in strong opposition to this proposal from Ngāti Mutunga o Wharekauri Iwi Trust on behalf of the members of the *iwi* of Ngāti Mutunga o Wharekauri.

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Ngāti Mutunga o Wharekauri Iwi Trust

9. The Ngāti Mutunga o Wharekauri Iwi Trust ("the Trust") represents the collective interests of Ngāti Mutunga o Wharekauri (NMoW) and is a Mandated Iwi Authority for the purpose of the Resource Management Act 1991 and a Mandated Iwi Organisation for the purpose of the Māori Fisheries Act 2004. In 2014, the Trust was also recognised by the Crown as being the Mandated Iwi Authority to negotiate the settlement of outstanding claims under the Treaty of Waitangi. These Treaty negotiations commenced in 2016 and the Trust continues to maintain this formal mandate to represent the interests of all Ngāti Mutunga o Wharekauri claimants and settlement beneficiaries. Although the Trust speaks for NMoW on a wide range of matters and is the only organisation empowered to do so, the *mana* and decision-making powers remain with NMoW, according to NMoW *tikanga/kawa*.

Our Purpose

10. The purpose of the Trust is:
    - To be the repository of the collective *Tino Rangatiratanga* of Ngāti Mutunga o Wharekauri
    - To represent the collective interest of Ngāti Mutunga o Wharekauri and be the legal representative of Ngāti Mutunga o Wharekauri in relation to the collective interest
    - To make and pursue the settlement of claims on behalf and for the benefit of Ngāti Mutunga o Wharekauri under the provisions of the Treaty of Waitangi Act 1975
    - To be the mandated iwi organisation for Ngāti Mutunga o Wharekauri

Benefit Provision

11. To advance the social and cultural development of Ngāti Mutunga o Wharekauri beneficiaries and distribute benefits directly or indirectly to beneficiaries, irrespective of where they may reside, when and where the Trust may decide.

Tikanga

12. To promote and preserve, protect and maintain the identity, *mana, Tino Rangatiratanga*, culture, history, traditions, arts and crafts, *tikanga, reo*, and *taonga tuku iho* of Ngāti Mutunga o Wharekauri.

13. As at October 2020, there are 1,326 members registered with the Ngāti Mutunga o Wharekauri Iwi Trust although it is not necessary to be a registered member of the Trust to qualify for the distribution of benefits from it.

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Who is Ngāti Mutunga o Wharekauri

15. Ngāti Mutunga o Wharekauri share common lineage with their whanaunga based at Urenui in Northern Taranaki. Our *Iwi Waka* include Tokomaru, Okoki, Tahatuna, and Manaia.

16. Ngāti Mutunga played a pivotal role in the migration of Northern Taranaki *Iwi* and Ngāti Toarangatira from Kawhia and Mokau / Urenui / Waitara in the late 1820s eventually settling in Te Whanganui-a-Tara. In 1835, Ngāti Mutunga, along with Ngāti Tama, Kekerewai and Ngāti Haumia, migrated to the Chatham Islands and established a permanent tribal base. Ngāti Mutunga o Wharekauri is an umbrella name that today incorporates all of the sub-identities who took part in that migration.

17. It is a matter of historical fact that Wharekauri was comprehensively conquered and subjugated by Ngāti Mutunga o Wharekauri in 1835/36 and that the customary authority (*mana whenua*) thereby established has never been extinguished or transferred by Ngāti Mutunga o Wharekauri in the past 185 years. With every passing year, the ancestral connection of Ngāti Mutunga o Wharekauri and Wharekauri (now in its 9th generation) continues to strengthen.

18. The existence of this customary authority (*mana whenua*) extends over the entirety of Taia Historic Reserve and no vesting of Taia Reserve to another *iwi* by the Crown should proceed without the prior consent of Ngāti Mutunga o Wharekauri. That consent has been neither sought by the Crown nor granted by Ngāti Mutunga o Wharekauri.

The 2003 and 2020 Vesting Processes

19. DoC has presented the 2020 vesting process as a 're-notification' of the intention to vest and this is how the process was described to Gail Amaru (General Manager, Ngati Mutunga o Wharekauri Iwi Trust) by Chris Visser (DoC Statutory Manager Lower North Island) in an email dated 2 September 2020. It is clear from the paper trail of email correspondence obtained under the Official Information Act (OIA) by the Trust on 21 October that both the Vesting Notice and the associated 'info sheet' were based upon the original 2003 documents.

20. Closer examination of these two sets of documents separated by seventeen years reveals some important differences that mean that the 2020 vesting proposal cannot legitimately be described as a 're-notification'. Furthermore, the information in the 2020 two-page "Taia Bush Historic Reserve Vesting 'info sheet' is inaccurate in important ways.

21. The 2003 vesting proposal notification – by public advertisement - was that '**management and control**' of Taia would be vested in Hokotehi Moriori Trust (subject to the usual conditions of the Reserves Act).

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22. The 2020 vesting proposal is actually that '**ownership**' of Taia would be vested in Hokotehi Moriori Trust.

23. These proposals are not the same thing at all. It is disingenuous of DoC to pretend that they are the same and that the 2020 process is simply a 're-notification'. If this difference has not been clearly explained to the present Minister of Conservation by her officials, (which is not shown by the documents obtained under the OIA) then this is a major failing which will embarrass the Minister. The failure to include the word 'ownership' in the 2020 advertisement obscures the actual nature of the vesting now proposed and is therefore misleading.

24. This is not the only misleading statement in the DoC 'info sheet' which says "*although the Minister advised the reserve should be vested in the said body (Hokotehi Moriori Trust) when approving the purchase of Taia Farm in 2001, the Reserves Act provides for the Ministers intention to vest to be notified for public comment, submission and objection*." This wording is similar to that contained in the 2003 two-page 'info-sheet' and repeats the inaccurate way the Minister's position was presented in that sheet. It is true that the Minister **was advised** the reserve should be vested… It is not true to say that the Minister **advised** the reserve should be vested… especially in the terms proposed today.

25. The series of events around the purchase and original vesting notification are dealt with in detail by the deposition of Thomas McClurg paragraphs 17 to 29. The accurate position is that the Nature Heritage Fund (NHF) did recommend that Taia be vested in Te Kotahi Moriori but that the Minister did not accept that advice. Rather, the Minister's instructions were that Taia was "*to be protected as historic reserve under the Reserves Act 1977, to be managed jointly by the Department of Conservation and Moriori*."

26. This seemingly clear Ministerial direction was obfuscated by an internal letter from the Director General of DoC (Hugh Logan) which carelessly (at least incorrectly) and without Ministerial authority, revived the NHF wording that Taia was to be "*protected as historic reserve under the Reserves Act 1977, to be vested in Te Kotahi Moriori*". This pattern of recommendations being over-ruled by the Minister and then the Ministerial direction being undermined by officials seems continuous – from the earlier time to the present day.

27. It is not surprising, given the mis-representation of the Minister's instruction by Hugh Logan, that his staff prepared a media release advice paper announcing the purchase of Taia by the Crown that indicated that management control of the reserve would be vested in Hokotehi Trust. Once again, the Minister plainly did not accept the media release advice paper text for the media statement as drafted by officials. What the actual media statement said (as opposed to the draft) was: "*Ms Lee said a management plan would be required for the reserve and this plan would recognise Moriori as kaitiaki, although legal title would remain with the Crown. Buildings on the land would be vested in Hokotehi Trust for its use*".

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28. Returning to the 2020 DoC 'info sheet', it is plainly misleading for people to be told by DoC that the Minister "*advised the reserve should be vested in the said body when approving the purchase of Taia Farm in 2001*" thereby implying a Ministerial commitment to the current vesting proposal. In fact, in the Ministerial media statement of February 2002, the Minister clearly stated that legal title of Taia would remain with the Crown. This position is arguably consistent with the wording of the 2003 notification (vesting management and control) but is irreconcilable with the 2020 notification (vesting ownership). The 2020 DoC 'info sheet' reflects a long-standing set of preferences by officials but it is overtly misleading of officials to present their preferences as also historical Ministerial positions when the record is clear on the significant differences between the two.

29. Finally, the parallel sections describing the Hokotehi Moriori Trust in the 2003 and 2020 'info-sheets' are revealing. The 2003 sheet states "*The objects of the Trust are to improve the health and welfare of Moriori and promote education and training, and the powers of the Trustees are to promote and protect ancestral lands, and restore manawhenua and customary rights*." The 2020 sheet reads: "*The objectives of the Trust are to improve the health and welfare of Moriori and promote education and training. Hokotehi has a commitment to restoring the cultural and ecological integrity of much of the land under its ownership and management…The powers of the Trustees are to promote and protect ancestral lands, and restore indigenous tāngata whenua and customary rights*."

30. The notable differences are that the powers of the Trustees to "restore manawhenua" in 2003 has been displaced in 2020 by powers to "restore indigenous tāngata whenua rights" combined with a reference to a commitment to "restoring the cultural integrity of the land…" We question what the authors might mean by their reference to 'cultural integrity of the land' but it is plain to us that Hokotehi Moriori Trust is exclusively concerned with protection and promotion of Moriori interests and not about 'restoring the cultural integrity of the land' in a general sense.. Given this narrow objective, Hokotehi Moriori Trust is not a suitable entity to own and/or manage Taia Historic Reserve - an area over which Ngāti Mutunga o Wharekauri has customary rights secured by Article II of the Treaty of Waitangi. The fundamental unsuitability of Hokotehi Moriori Trust to be the 'Administrating Body' for Taia cannot be disguised by selectively quoting from the Trust's objectives or powers, nor by the addition of statements of intent from the Trust customised to better meet the criteria for vesting under the Reserves Act 1977 and then incorporated into the DoC 'info-sheet'.

31. It is sensible that Moriori and DoC have deleted reference to the 'restoration of manawhenua' as this is something completely beyond the powers of the Trust to achieve. The vesting of the ownership of Taia by DoC in Hokotehi Moriori Trust would neither promote the restoration of Moriori manawhenua nor detract from Ngāti Mutunga o Wharekauri *mana whenua* status over Taia. What it would do is create a Treaty grievance that DoC is either unwilling to acknowledge the existence of those *mana whenua* rights there or too culturally ignorant to recognise them.

Lack of Consultation with Ngāti Mutunga o Wharekauri

32. The fact that Ngāti Mutunga o Wharekauri Iwi Trust is responding to a public notice is clear proof that DoC has not properly distinguished Treaty rights from 'interests' and a Treaty partner from a member of the public. There is no prospect that DoC can meet its responsibilities under section 4 of the Conservation Act while this distinction is ignored.

33. It is a serious grievance that DoC continues to consult with Ngāti Mutunga o Wharekauri about this vesting proposal on the basis that the Ngāti Mutunga o Wharekauri rights in Taia can be dealt with by a process of engagement that is no different than that offered any other member of the New Zealand public. Ngāti Mutunga o Wharekauri have rights in Wharekauri (and in Taia in particular) that are secured and guaranteed by the Treaty of Waitangi. This must form the starting point for any engagement of DoC with Ngāti Mutunga o Wharekauri.

34. Given the facts that:
    i. Ngāti Mutunga o Wharekauri Iwi Trust is a mandated organisation engaged in Treaty negotiations with the Crown (since 2016);
    ii. has supplied extensive correspondence to DoC on Taia and has been so vexed with the lack of response to that correspondence that it issued legal proceedings against DoC. Expensive legal action taken by the Trust is, by itself, compelling evidence that Ngāti Mutunga o Wharekauri collectively feel extremely strongly about Taia and its Treaty rights there.

    On this evidence, it is not open for DoC to then conclude that those rights are unimportant and can be disregarded and for DoC to proceed in this way is inexcusable.

35. The history of DoC engagement with Ngāti Mutunga o Wharekauri with respect to Taia is set out in the sworn deposition of Thomas McClurg[1] (attached) that forms part of this submission. His affidavit summarises the engagement between DoC and Ngāti Mutunga o Wharekauri that has occurred between 2001 and 2018. It demonstrates that early Ngāti Mutunga o Wharekauri objections to the exclusive vesting of Taia were dismissed by DoC in a cavalier manner on specious grounds. The record also shows an extremely unbalanced approach by DoC to both *iwi* and the advertising of this proposal against the strong objection of the Trust is yet more evidence that DoC is entrenched in a highly unbalanced engagement with its Treaty partners.

36. The fact that DoC is not the only Government agency to be afflicted with this bias provides a partial explanation but no excuse for it. The Office of Treaty Settlements began Treaty Settlement negotiations with Moriori in 2004 but did not commence parallel negotiations with Ngāti Mutunga o Wharekauri until 2016. This has inevitably meant that the rights and interests of Moriori received priority attention from a range of Crown entities associated with negotiation discussions in an uncontested and sequestered environment for twelve years. This

[1] Affidavit of Thomas McClurg in Support of Application for Case Management Directions; in Support of Any Interim Orders which may become necessary; and in Support of Substantive Relief Sought Herein (CIV-2017-485)

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process may have shaped Crown perceptions accordingly. However, the fundamental Crown obligations to Treaty partners are not defined by the process of negotiation, they are defined by the Treaty of Waitangi.

37. The Court cases were an attempt by Ngāti Mutunga o Wharekauri to bring discussions about Ngāti Mutunga o Wharekauri Treaty rights back to fundamentals rooted in history, Whakapapa and a plain reading of the Treaty of Waitangi.

The Taia Litigation

High Court

38. In 2018, The Trustees of Ngāti Mutunga o Wharekauri Iwi Trust sought declarations from the High Court that Ngāti Mutunga o Wharekauri was:

- the *iwi* with *mana whenua* status over the entirety of Wharekauri, including Taia;
- that *mana whenua* status was a right that was secured under Article II of the Treaty of Waitangi and;
- that certain aspects of that Treaty right are also rights recognized and protected under the New Zealand Bill of Rights Act.

39. Justice Collins declined to make these declarations. He observed that "*the case for Ngati Mutunga o Wharekauri raises a number of novel issues that have not been tested in New Zealand Courts. It is unfortunate that such important issues have been raised in the format of an application for a declaration and in the context of unresolved factual disputes concerning crucial points of difference between the parties*."[2]

40. As he explained earlier in his judgement[3], *the jurisdiction to make a declaration is discretionary and that the High Court may refuse to issue a declaration "on any grounds which it deems sufficient*". This invitation to sidestep a declaration was further expanded by the Judge's contention that there was an unresolved dispute as to facts in that both *iwi* claimed *mana whenua* status. Outside of the judiciary, it is commonly understood that 'claims' are not 'facts' but, in summary, Justice Collins declined to make a declaration on arguments that he found 'novel' on the basis that the evidence before him did not compel him to do so (considering his great discretionary remit).

41. It is plain from his judgement that Collins J's attempts to come to grips with the meaning and importance of *mana whenua* status were unserious. For example, the Judge states "*While Ngati Mutunga o Wharekauri has asserted mana whenua over Rekohu in general, it has not demonstrated that it has mana whenua over Taia*". As Taia is part of Wharekauri (or Rekohu as Collins Jprefers to call it) once it is established that Ngāti Mutunga have *mana whenua* over the

[2] Judgement of Collins J CIV-2018-485-000005, paragraph 51.
[3] Ibid paragraph 38

whole, it is not necessary to then demonstrate that *mana whenua* applies to its parts anymore than it would be for the Crown, having established that it has sovereignty over New Zealand, to then be required to provide a separate body of evidence that it has sovereignty over Wellington.

42. That is why Ngāti Mutunga o Wharekauri concentrated its *mana whenua* evidence in the case on Wharekauri – not on Taia. Furthermore, that evidence was not in the form of claims by Thomas McClurg or the Trustees but based upon authoritative scholarly works on Māori culture by Hirini Moko Mead and Te Rangi Hiroa applied to the bare and indisputable facts of Chatham Island history. In reaching his conclusion that Ngāti Mutunga o Wharekauri "*has not satisfactorily established its mana whenua over Taia*" Collins J does not identify which of the three possible grounds for this conclusion he relies upon. These possible grounds are:

i. That Hirini Moko Mead and Te Rangi Hiroa are wrong in their descriptions of Māori culture
ii. That Ngāti Mutunga o Wharekauri are not Māori
iii. That the conquest and occupation of Wharekauri by Ngāti Mutunga o Wharekauri did not occur.

43. Here is the most unsatisfactory aspect of Collins J's judgement. The Court was unwilling to declare that Ngāti Mutunga o Wharekauri have *mana whenua* over Wharekauri but gave no substantial reasons why not. The Court was equally unwilling to declare that Ngāti Mutunga o Wharekauri do not have *mana whenua* over Wharekauri. All DoC can conclude from the judgement is that, according to Collins J, Ngāti Mutunga o Wharekauri may, or may not, have *mana whenua* over Taia. In those circumstances, the sensible course of action would be to assume that it does.

Court of Appeal

44. Having not obtained the declarations and protections sought from the High Court, the Trust appealed to the Court of Appeal seeking similar declarations. That hearing took place on 17 April 2019 before Gilbert, Williams and Courtney JJ and the Judgement of the Court (drafted by Williams J)[4] was eventually released on 29 January 2020 – nine months later.

45. This judgement confirmed the highly discretionary nature of judicial declarations and declined to give the declarations sought by Ngāti Mutunga o Wharekauri – there being no compelling onus on the Court to do so in its view. The reasons for not providing a declaration followed those provided by Collins J (including that there was a dispute as to facts) and were supplemented with the additional reason that it was premature for the Court to make declarations prior to the vesting decision of the Minister of Conservation and its details being known.

46. The conclusions of the Court of Appeal were:

[4] Judgement of the Court CA519/2018, 29 January 2020

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- *The evidence is insufficient and the declaratory procedure inapt to address questions of manawhenua;*
- *There are no property rights engaged in this dispute for which protection under s21 of NZBORA is available;*
- *Consistency of the proposed vesting with ss18 and 20 of NZBORA (freedom of movement and the right to enjoy culture) cannot be assessed until after the Minister has settled the terms and conditions of the vesting; and*
- *The Treaty consistency of the proposed vesting cannot yet be assessed for the same reason*[5].

47. In other words, the consequences of the two Court judgements is that it is now left to the Minister of Conservation to determine whether the *mana whenua* status of Ngāti Mutunga o Wharekauri will be recognized in the Taia vesting decision and what the appropriate response to that recognition should be. These are not decisions to be approached with the historical complacency displayed by DoC to date: on the contrary. As the Court of Appeal clearly indicates, the Treaty consistency of those decisions (when they are made) can be judicially reviewed and assessed.

48. There is only one certainty in this process which is that Ngāti Mutunga o Wharekauri will not rest until its *mana whenua* status is given the recognition and protection secured and guaranteed by the Treaty of Waitangi.

Ngāti Mutunga o Wharekauri – the Importance of Historical Accuracy

49. The effect of the Court cases is to place the onus for determining whether Ngāti Mutunga o Wharekauri has *mana whenua* over Taia and what the implications of that determination are for the proposed vesting process squarely upon the shoulders of the Crown – in the office of the Minister of Conservation. A determination of *mana whenua* status requires a solid understanding of what *mana whenua* is, the processes by which it exists and may be gained or lost; and its significance under the Treaty of Waitangi. This is a large topic and one that the Courts (above) considered they had insufficient information about and insufficient opportunity to scrutinise. It is also a topic that DoC has previously failed to engage with us on.

50. In this submission, we seek to remedy this alleged information deficit.

51. In order to assist DoC and the Minister, have set out a summary of our understanding in an attached paper, that also forms part of this submission, titled "*Ngāti Mutunga o Wharekauri Mana Whenua and Taia Historical Reserve*". As we did with the Courts, we rely upon acknowledged experts in Māori culture for standard definitions of cultural concepts. Similarly, our understanding of the Treaty of Waitangi relies upon the published writings of acknowledged

[5] Ibid, paragraph 38

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experts. DoC does not, on any objective basis have any expertise in these matters, and its apparent willingness to rely on its own (incorrect) knowledge does not withstand scrutiny.

52. There is no real question that because of the close relationship between *mana whenua* and *tino rangatiratanga*, *mana whenua* status is of critical significance under Article II of the Treaty of Waitangi. It is a pity that the High Court and the Court of Appeal could not find room in their judgements to make this small and sensible observation. Be that as it may, it has now been brought to the attention of the Minister of Conservation on several occasions that it is of fundamental significance to the definition of her responsibilities under section 4 of the Conservation Act towards Ngāti Mutunga o Wharekauri.

53. However, the Minister's vesting decision does not just (or only) require a coherent and accurate general understanding about *mana whenua* and its role in the Treaty. That understanding must then be applied to particular site-specific facts, especially the fact of who holds *mana whenua* over a particular site (that is, here, Taia) today. In turn, that inevitably leads into an examination of the history of that site, particularly the historical situation prevailing when the Treaty of Waitangi was applied to that site.

54. Therefore, in reaching a decision about vesting, the Minister of Conservation also requires an accurate historical appreciation of the process through which Ngāti Mutunga *mana* over Taia was obtained, when it was obtained and how it has been maintained. In a submission such as this, it would not usually be necessary to supply an extensive historical record to supply these facts. However, in this case it is necessary. The historiography of the Chatham Islands is sketchy and contaminated by the problem that many chroniclers had an obvious axe to grind. Inaccurate and selective stories develop a certain currency when repeated often enough, especially in the many books that touch on the popular history of the Chatham Islands. As is shown below, these inaccuracies even penetrate the text of Court of Appeal judgements.

55. Because the Treaty principles derive from a compact between particular people at a particular time with particular rights over particular places and things that were evermore secured and guaranteed by the Crown, these historical particulars cannot simply be ignored or unilaterally modified by the Crown without abandonment of principle and the creation of a serious Treaty grievance.

56. Unfortunately, this is exactly the situation that has been occurring on Wharekauri. The decision of the Minister for Treaty of Waitangi Negotiations to vest the Glory Grazing Block on Rangiauria (approximately 1200 hectares) exclusively in Moriori against the opposition of Ngāti Mutunga o Wharekauri is a recent example. This was a mistake; not a precedent to follow. A similar grievance will be created if the Minister of Conservation elects to proceed with the advertised vesting of Taia for much the same reasons.

57. The Department of Conservation has a very poor record of engagement with Ngāti Mutunga o Wharekauri; vesting of Taia will make the existing relationship even worse. This is not the

relationship that Ngāti Mutunga o Wharekauri wish to have with DoC but the ball is very much in DoC's court at this critical moment. One certainty is that Ngāti Mutunga o Wharekauri are not going anywhere and will always comprise by far the most populous *iwi* on Wharekauri. It is past time therefore for DoC to start educating itself on a Chatham Island history that includes a Ngāti Mutunga o Wharekauri historical account that is not a travesty.

Ngāti Mutunga – Haerenga ki Wharekauri

58. The bare historical facts that support the conclusion that Ngāti Mutunga o Wharekauri held exclusive *mana whenua* over the entirety of the Chatham Islands in 1842 are that Wharekauri was invaded by Ngāti Mutunga o Wharekauri in late 1835. Within a short time of arrival, Ngati Mutunga o Wharekauri seized full customary control and authority there by subjugating the entire Moriori population - reducing their status to that of slaves as that term was understood in *Te Ao Māori*. This invasion was not a raid, nor a genocide, but a carefully planned conquest, occupation and settlement designed to secure and safeguard the survival and security of Ngāti Mutunga o Wharekauri *iwi.*

59. The *iwi* had previously journeyed from their home base in Northern Taranaki into the Wellington region with their Ngāti Toa relatives. From 1810, trading between Māori, Pākehā settlers, visiting boats, and with New South Wales was well underway. The introduction of the musket and its impact on war made this weapon an essential survival tool for *iwi*. The musket fundamentally changed the balance of power for *iwi*. Those that had it survived – those that did not have it perished. This was the environment within which Ngāti Mutunga was forced to develop a strategy for survival. The 1820s was a tense time across the country as *iwi* used their newly acquired comparative technological advantage in the form of firearms to devastating effect against traditional enemies. At different moments Ngāti Mutunga was both the victim and aggressor in these major societal upheavals.

60. After having experienced almost a generation of constant migration, conflict and loss of life, Ngāti Mutunga looked towards Wharekauri as a potential refuge that could secure the ongoing survival and *mana* of the *iwi*. Accordingly, they took every measure to ensure that their relocation to the Chatham Islands would be successful. The settlement of Wharekauri by Ngāti Mutunga was carefully planned.

61. A number of visits by Ngāti Mutunga and its related Iwi Ngāti Toa had occurred prior to arrival on Wharekauri of the Ngāti Mutunga and Ngāti Tama in 1835. Matioro (Ngāti Tama) was instrumental in providing much of the scoping information used by the Iwi during its domicile at Whanganui-a-Tara, in the years leading up to the migration and was present on the Island to meet the *Rodney* upon its arrival in 1835. Interestingly, Toenga Te Poki, in objecting to the validity of a Land Claim by James Coffee in front of the Land Claims Court in 1868, gave the following testimony: "*Pakiwhara was **sent** down by Patu Kaiwenga from Wellington **to see** Wharekauri and I know that they arrived here before Coffee came* (in 1833) *because the vessel*

Coffee arrived in here (Wharekauri) took back Pakiwhara…" (emphasis added)[6]. This testimony supports a view that reconnaissance of Wharekauri was organised – not simply dependent on ad hoc reports.

62. By the time the agreement to leave Te Whanganui-a-Tara was made in 1835, important decisions on land rights, food gathering rights, and the order in which these would occur, had been made on Matiu (Soames) Island.

63. The level of planning and preparation for the migration was in-depth and detailed. Preparations to migrate included the transportation of 85 tonnes of seed potatoes, other seeds, pigs, dogs, tools and equipment, canoes and other possessions thought necessary to establish an economically successful existence on the island. The focus was on ensuring the correct tools to enable successful birding, fishing, gathering, farming and trade with Europeans (especially the large whaling fleet that visited the Chathams grounds at that time), were identified and transported.

64. When Ngāti Mutunga left Te Whanganui-a-Tara for Wharekauri, they exhumed the bones of their dead and burned them, to indicate that they did not intend to return there.[7] This determination was reflected in careful military preparations as the level of resistance from the larger Moriori population that would be encountered could only be established after arrival. No-one was more aware than Ngāti Mutunga that weapons, military prowess and experience in contemporary warfare meant survival and Ngāti Mutunga was well equipped with all three. Accordingly, some 40 muskets, 2 fowling pieces, 1 cannon as well as other traditional and modern weapons were taken to Wharekauri.

65. The first voyage, carrying an estimated 500 men, women and children of Ngāti Mutunga, Ngāti Tama, and Ngāti Haumia, left Wellington on 14 November 1835 and made landfall at Whangatete on 17 November, before Captain Harewood relocated to the superior harbour of Whangaroa on the advice of Baker, Coffee, Matioro and Rihari where the main disembarkation took place.[8] Despite prior agreements that no land should be claimed on the Chathams until all of the migrants had arrived, some members of the first shipment immediately scouted the main island and began to establish themselves at Waitangi and around Kaingaroa Harbour.[9] The second voyage, carrying an estimated 400 people of Ngāti Mutunga, Kekerewai, Ngāti Tama and Ngāti Haumia,[10] left Wellington on 30 November and arrived in the Chatham Islands on 5 December 1835.[11] They began to establish a settlement at Whangaroa, building a *pā* and planting seed potatoes.[12]

[6] Euphraim James Coffee, 1868 Land Claim, Correspondence and Court Records, National Archives of New Zealand, OLC 8/3 folio 310.
[7] Waitangi Tribunal, *Rekohu Report*, p. 40.
[8] Shand, A. *The Occupation of the Chatham Islands by the Maories in 1835*, Journal of the Polynesian Society, 9. 155. Baker, Coffee and Matioro were already present on Wharekauri prior to the arrival of the *Rodney*.
[9] Wai 64, C37, p. 5.
[10] The term Ngāti Mutunga o Wharekauri is used as an umbrella term to include these four identities.
[11] http://nzetc.victoria.ac.nz/tm/scholarly/tei-SmiHist-t1-body1-d21-d8.html
[12] Wai 64, C37, p. 6.

66. Moriori did not react aggressively to the new arrivals.[13] Initially, Ngāti Mutunga o Wharekauri also appear to have acted peacefully.[14] According to one source, the Ngāti Mutunga chief Pomare gave the Island's inhabitants £500 worth of property including muskets, clothing, and pigs "as a compensation for the land which he and his tribe intended to take possession of."[15] However, after a period of time Ngāti Mutunga o Wharekauri migrants began to formally take possession of the land according to their tikanga by walking the land (*takahi*). Some Moriori resisted these claims, and several were killed as a result.

67. Following these events, a large number of Moriori men met at Te Awapatiki to discuss how to respond.[16] According to Moriori accounts, some proposed attacking the newcomers, while others insisted on maintaining their peaceful stance. After three days of discussion the attendees ultimately agreed not to attack the newly arrived Māori. Ngāti Mutunga o Wharekauri had become aware of the *hui* but did not know the outcome of the Moriori deliberations. After the meeting ended, Ngāti Mutunga o Wharekauri sought to secure complete control of the Island by walking the land (*takahi-whenua*). In some instances, this involved taking its residents prisoner and making them subservient, while in other cases those who resisted or fled were killed. .[17] [18]

The Establishment of Ngāti Mutunga o Wharekauri Mana Whenua

68. According to Moriori sources, 216 out of a population of named Moriori of 1,673 were killed in the process of subjugation by Ngāti Mutunga o Wharekauri.[19][20] These numbers were compiled some thirty years after the conquest. It may be that some names were excluded as a result. Equally, it may be that some of the names included are of people who died around that time but not at the hands of Ngāti Mutunga o Wharekauri. However, in spite of these uncertainties, the numbers clearly indicate that the killings were part of a culturally governed strategy of subjugation – not extermination or genocide. In front of the Land Court in 1870, the *rangatira*, Rakatau, described the events of 1835 as follows… "*we took possession … in accordance with our customs and we caught all the people. Not one escaped. Some ran away from us, these we killed, and others we killed – but what of it? It was in accordance with our custom*."[21] Toenga Te Poki gave almost identical testimony as Rakatau and, at the same hearing, Naera Pomare stated simply of the Moriori conquest "*We took their mana.*"[22]

[13] Wai 64, C37, p. 6, citing King: *Moriori: A People Rediscovered*, pp. 60-1.
[14] Wai 64, C37, p. 6-7.
[15] Walter Brodie, 'A Visit to the Chatham Islands', 23 March, ms papers, ATL Wai 64, C003 Research File 1, doc 23 (quote at p. 195 of pdf).
[16] Wai 64, C37, pp. 7-8.
[17] Wai 64, C37, pp. 7-9.
[18] King, *Moriori,* p. 62; Wai 64, C37, p. 8.
[19] Wai 64, C37, p. 8-9. The overall population estimate is based on the figure provided in the Moriori historical account. King, *Moriori,* p. 64 cites evidence that the names of 216 Moriori killed at this time were recorded but that this number excluded many children.
[20] Mair, Gilbert. The Early History of the Morioris: with an Abstract of a Moriori Narrative, presented by Captain Gilbert Mair during the Adjourned Discussion on Mr. A. Shand's Paper of the 3rd August 1904. (Read before the Wellington Philosophical Society, 7th September 1904). Pages 161-171.
[21] King, M. *Moriori – A People Rediscovered*. Page 66
[22] Native Land Court Minutes, Wharekauri, 1870

69. The violence of the conquest was at a level deemed necessary to completely achieve the objectives of Ngāti Mutunga o Wharekauri which were to extinguish Moriori *mana* and to take possession of the entirety of Wharekauri and all of its resources. "*Anyone who carefully scrutinizes the evidence must conclude that the commonly accepted verdict of unmitigated barbarity on the part of the Maori conquerors is not justified. A conquest in which two hundred out of a population of sixteen hundred were killed does not connote exceptional ferocity, even less so when the narrow confines of Chatham Island are considered. Nor can nineteenth century civilization which achieved the extermination of the Tasmanians afford to assume a righteous pose in recounting misdeeds of the Neolithic Māori*."[23]

70. The undeniable result of the *takahi-whenua* was that within about four weeks of the initial arrival, Ngāti Mutunga o Wharekauri had established complete control and possession of all of Chatham, Pitt and off-shore islands which secured the present *rohe* of Ngāti Mutunga o Wharekauri meaning the area over which Ngāti Mutunga o Wharekauri exercise *mana whenua* or tribal authority. Such authority is the basis for Ngāti Mutunga o Wharekauri rights to lands, forests, fisheries and other things secured by the Treaty of Waitangi as at the time of its application to Wharekauri in 1842.

71. *Mana whenua* was initially exercised at sub-group level including the exercise of authority over, and responsibility for, Moriori within the orbit of those sub-groups. Subgroup *mana whenua* areas under the leadership of particular chiefs was the basis for the large blocks recognized by the Native Land Court in 1870. The detailed pattern of these customary rights was not immediately apparent until the relationships between the various arms of Ngāti Mutunga had stabilised within the new environs of Wharekauri. "*Members of various Ngāti Mutunga hapū including Ngāti Auruti*[24]*, Te Kekerewai and others were among those who came off the brig. Initially, a large group of Ngāti Mutunga consisting these various hapū all lived together at Whangaroa. However, subsequently there was a dispute and the Kekerewai were driven out of Whangaroa by Toenga's people assisted by the Tupuangi people. Toenga's people were chiefly Ngāti Kura, another hapū of Ngāti Mutunga. When they left Whangaroa the Kekerewai people joined Ngāti Tama at Waitangi. Another section of Kekerewai lived with other Ngāti Mutunga at Matarakau (or Wharekauri)*."[25]

72. Within a short time of arrival, the various groups comprising Ngāti Mutunga o Wharekauri had established *kāinga* at Whangaroa, Waitangi, Kaingaroa, Matarakau, Wharekauri and Tupuangi. In addition, there were *kāinga* elsewhere that were not relevant to Shand's evidence such as that of Apitia and his people at Owenga who exercised *mana whenua* rights over Taia. *Kāinga* were established and occupied immediately after conquest in all parts of the island where the most promising hunting, gathering, fishing, agriculture and trade opportunities were perceived.

[23] Skinner, H. D. (lecturer in Ethnology, University of Otago) *The Moriories of Chatham Islands*, Bermice P. Bishop Museum, Honolulu, publisher, 1923, page 33.
[24] Aurutu?
[25] *Ngāti Mutunga Land Utilisation*, Walghan Partners (Tony Walzl), June 2008, page 14

The Maintenance of Ngāti Mutunga o Wharekauri *Mana Whenua*

73. As Te Rangi Hiroa stated, "*Conquest (*raupatu*) alone did not confer right of ownership unless it was followed by occupation. If the invading party retired, the survivors of the defeated tribe could return and still own their land. Occupation to establish a title had to be continuous, as idiomatically expressed in the term* ahi kā*, or lit fire".* It is important to bear in mind that these comments relate to traditional arrangements that precede the Treaty of Waitangi. After the Treaty of Waitangi secured and guaranteed the *tino rangatiratanga* held by Ngāti Mutunga o Wharekauri over the entirety of Wharekauri in November 1842, the only process by which Ngāti Mutunga o Wharekauri could subsequently lose their *mana whenua* status would by voluntarily relinquishing the *mana whenua* status of Ngāti Mutunga o Wharekauri.

74. After 1842, it is not clear that the Treaty guarantees to *iwi* were contingent upon the ongoing maintenance of *ahi kā* in strict accordance with the ancient traditions of *Te Ao Māori*. In any event there was no failure by Ngāti Mutunga o Wharekauri to maintain *ahi kā* on Wharekauri and as neither process has occurred (voluntary relinquishment or abandonment of *mana whenua*) it is absolutely safe to conclude that the *mana whenua* status of Ngāti Mutunga o Wharekauri over Wharekauri remains exclusive and comprehensive today. That status has been re-inforced by the passing of the generations and the lengthening ancestral connection thereby created.

Attacks on Ngāti Mutunga o Wharekauri Mana Whenua

75. Given these simple historical facts, it is a source of extreme disappointment and frustration that the Crown, and DoC in particular, has sought to deny or ignore the existence of Ngāti Mutunga o Wharekauri *mana whenua*. These denials rest on non-transparent Crown positions that evidently blend historical inaccuracy, mis-interpretation of the Treaty of Waitangi and indefensible ignorance of Māori custom and culture. The time has long since past for DoC to develop the cultural understanding and historical knowledge that will allow it to begin meeting its obligations to Ngāti Mutunga o Wharekauri under section 4 of the Conservation Act 1987.

76. An example of the historical inaccuracy Ngāti Mutunga o Wharekauri must forbear is provided by the Judgement of the Court of Appeal delivered on 29 January written by Williams J[26]. The judgement contains a section titled '**Background facts**' that summarizes the history provided in fuller and referenced form above. The summary provided by Williams J is succinct, confident and **wrong in many of its particulars**. For example:

- Ngāti Mutunga were not a 'fighting force of 900' but perhaps as many as 900 men, women and children.[27]
- Ngāti Mutunga were not 'conveyed to Wharekauri on two British merchant vessels', but one (the *Rodney*).[28]

[26] Kamo v Minister of Conservation [2020] NZCA 1 [29 January 2020]
[27] Ibid para 3.
[28] Ibid para4

- Williams J concedes that 'not all' of the decline in Moriori population from his estimated 2,000-3,000 prior down to 200 by the middle of 19th century was a result of the Ngāti Mutunga invasion but his description of this sad decline is nevertheless misleading because, by Moriori accounts (see above) only 8% to 12% of the population reduction estimated by Williams J can be attributed to Ngāti Mutunga o Wharekauri.[29]
- According to Williams J 'by the late 1860s, most of the Ngāti Mutunga invaders were drawn back to the North Island…'. The description of people as "invaders", nearly 35 years after the invasion is a clumsy slight on an entire *iwi* that identifies itself as Ngāti Mutunga o Wharekauri. It is true that while Ngāti Mutunga people were representing themselves (necessarily in person) before the Compensation Court in Taranaki in 1869, the Moriori population was higher than the Ngāti Mutunga o Wharekauri population on Wharekauri **for a short time**. This brief disparity in numbers did not disturb Ngati Mutunga o Wharekauri *ahi kā* or *mana whenua* status in the slightest. As is equally well known, that by the 1880s, and in spite of the enormous sacrifice necessary to return after the ruinous results delivered by the Compensation Court, the Ngāti Mutunga o Wharekauri population on Wharekauri had returned to its previous level (see population graph in *Ngati Mutunga o Wharekauri Mana Whenua and Taia Historical Reserve*).
- Perhaps the most serious historical mis-representation in the '**Background facts**' is the description of the decisions of the 1870 Native Land Court. By the account of Williams J "*The Court found that Ngāti Mutunga were the traditional owners of all but a tiny (3%) of the island*". This suggests that the Court recognised both Moriori and Ngāti Mutunga o Wharekauri land title claims albeit disproportionately. Although this is the way the Court decisions are routinely presented by Moriori and in Michael King's book "*Moriori a People Rediscovered*", this is not what the Court determined at all. The Court found that Ngāti Mutunga o Wharekauri had customary ownership of the entirety of Wharekauri. It made provision for the establishment of Moriori Reserves only at the behest of, and at locations identified by Ngāti Mutunga o Wharekauri.[30]

77. In some ways this 'history' followed the background section of the earlier Collins judgement in which he uncritically accepted evidence about Ngāti Mutunga history from the depositions of Maui Solomon and Michael King's book "*Moriori, a People Rediscovered*". These are not un-biased and reliable sources of information on Ngāti Mutunga history and DoC would be well advised to exercise more discretion in its selection of sources.

Conflict Between Ngāti Mutunga o Wharekauri and Moriori – a Red Herring

78. It is not at all clear to Ngāti Mutunga o Wharekauri why the actions and processes employed by the Crown and DoC in particular to recognize Moriori as an iwi and to enter into two separate Treaty Settlement processes with Moriori should also require the derogation or denial of Ngāti Mutunga o Wharekauri *mana whenua* status, but that is the undeniable reality of what has occurred, and continues to occur. It is a process that has its genesis in the appointment of

[29] Ibid para5
[30] Ibid para6

Dr Michael King to oversee the production of the Preliminary Report to the Waitangi Tribunal for what ultimately became the *Rekohu Report* (WAI 64). King had just completed his popular but polemical book "*Moriori A People Rediscovered*" and was clearly not a person to bring an even-handed approach to the treatment of Chatham Island Claims generally. That fateful decision has had distortionary consequences that are still being felt over 25 years later.

79. The 'rediscovery' of a people does not lead naturally to the 'rediscovery' of associated Treaty rights. Identity can survive in spite of history but Treaty rights are very much a product of actual history. The key problematic findings in WAI 64 are that Moriori should be an exception to this rule and the Tribunal's recommendations have led to Crown efforts to redress an alleged imbalance between the recognized rights of both *iwi*. This process of re-evaluation would not be objectionable if it was firmly anchored in a conventional understanding and application of the Treaty of Waitangi. That has not proved possible and it is extraordinary that the Crown has chosen the expedient of abandoning the application of the Treaty in order to deliver 'Treaty settlements' to Moriori of the kind negotiated.

80. This unique process is unsustainable in the medium term and has been the cause of a great deal of regrettable friction on Wharekauri. Nevertheless, this Crown fueled conflict is not as described by Williams J. who states that "*the contest of mana between these two peoples… is seen, at least by the acknowledged leaders of each community, as existential*."[31] It is not clear what Ngāti Mutunga o Wharekauri source is used as the authority for his statement but it is totally incorrect.

81. Neither the *mana*, nor the *mana whenua* status of Ngāti Mutunga o Wharekauri is threatened by the existence of Moriori. Moriori identity, Moriori history and Moriori artefacts such as tree carvings are all unique and special things tightly woven into the very fabric of the Chatham Islands. The recognition and protection of these things is supported by Ngāti Mutunga o Wharekauri, not least because many Ngāti Mutunga o Wharekauri individuals share Moriori heritage. Given this whakapapa reality for many individuals, it is unhelpful for Williams J to incorrectly characterize conflict between Moriori and Mutunga as 'existential'.

82. The conflict brought to a head by this ill-advised vesting proposal is not over Moriori identity or respect for identity. From a Ngāti Mutunga o Wharekauri perspective it is not a conflict with Moriori at all, but a conflict with the Crown over the parameters of the Ngāti Mutunga o Wharekauri Treaty relationship with the Crown and DoC in particular. That is why Ngāti Mutunga o Wharekauri took proceedings against the Minister of Conservation – not Moriori.

83. Ngāti Mutunga o Wharekauri are reconciled to the reality that the Crown recognizes Moriori as an *iwi* and that there are two *iwi* with overlapping rohe in Wharekauri. What Ngāti Mutunga o Wharekauri are insistent about is that only one *iwi* has *mana whenua* status on Wharekauri. This is a simple fact of history; it is not a denigration of Moriori. It is, however, an important fact of history because it defines the nature and extent of the proper Treaty relationship

[31] Ibid para7

between Ngāti Mutunga o Wharekauri and the Crown. It leads to everyday consequences such as identifying the appropriate way for the Crown to engage in the Taia vesting process.

84. Recognition of Ngāti Mutunga o Wharekauri *mana whenua* status does not interfere in any way with the ability of the Crown to secure and guarantee all legitimate Moriori Treaty rights. Ngāti Mutunga o Wharekauri would not want to see any impediment to that process to occur. On the other hand, the ongoing failure of the Crown to recognize Ngāti Mutunga o Wharekauri *mana whenua* status has no bearing on the fact of that status but it cripples the ability of the Crown to secure and guarantee all legitimate Ngāti Mutunga o Wharekauri Treaty rights. In short, it stands in the way of the Treaty relationship that was promised by the Crown, desired by Ngāti Mutunga o Wharekauri but never delivered by the Crown.

Treaty Relationships and Taia

85. Under the Treaty of Waitangi, only one iwi has *rangatiratanga* over Taia and that is Ngāti Mutunga o Wharekauri. It follows inevitably from this that only one *iwi* has *mana whenua* status and the associated rights and responsibilities of *kaitiakitanga*. Although it is a term that is much abused, *kaitiakitanga* over the entirety of Wharekauri is a sub-set of the rights and associated responsibilities secured and guaranteed under Article II to Ngāti Mutunga o Wharekauri and to Ngāti Mutunga o Wharekauri alone. It follows necessarily that Moriori do not have, and cannot have, *kaitiakitanga* over Taia. Vesting a Crown-issued land title over Taia in Moriori does not confer *tino rangatiratanga*, *mana whenua* or *kaitiakitanga* Treaty rights upon Moriori by virtue of that process. These are attributes that are simply not part of the legal incidents of ownership of even fee simple land title in New Zealand.

86. Under the Treaty of Waitangi, Ngāti Mutunga o Wharekauri are the *kaitiaki* of Taia, including having *kaitiaki* responsibilities for all *taonga* species there including the *kopi* trees that have *rakau momori*. *Kaitiakitanga* cannot simply be assumed by the Crown. As an Article II right, it is not a subset of *Kawanatanga* and therefore cannot be held or bestowed by the Crown. The Crown's obligation is to recognize and protect what is there according to Māori custom, not to subvert or invent that custom.

87. Moriori do not have Article II rights over Taia or anything on it. Ngāti Mutunga o Wharekauri recognize that Moriori have historical and cultural 'connections to' Taia including historical and cultural interests in *rakau momori* and sites that are recognized by them as *wāhi tapu*. These interests pre-date the Treaty of Waitangi but are not Article II Treaty rights and should never be used as a reason to detract from any Article II Treaty rights. In the medium term, the effective protection and management of Taia requires the active engagement of the *iwi* with *kaitiakitanga* rights and responsibilities for Taia.

88. This is the fundamental reason why DoC must deal with both *iwi* with respect to Taia – not just Moriori. DoC were mistaken in thinking that it could buy Taia and that action would have

no consequences for the Treaty relationship between DoC and Ngāti Mutunga o Wharekauri with respect to Taia. As owner of Taia, DoC has a Treaty relationship with Ngāti Mutunga o Wharekauri in that capacity. It was a serious error for DoC not to recognize this in 2002. That error was brought to DoC's attention almost immediately and any discussion of vesting should have included Ngāti Mutunga o Wharekauri at the earliest opportunity.

False Rationales for Vesting

89. A number of false or irrelevant reasons for the exclusive vesting of Taia in Hokotehi Moriori Trust have been advanced over the years. These include:
   i. The Purchase was at Moriori initiative
   ii. The 'Promise' by DoC to Vest
   iii. The wishes of Ted Hough
   iv. The Past Expenditure of Moriori Funds

These are briefly addressed below.

The Purchase was at Moriori Initiative

90. The original decision of the Crown to purchase Taia, while at Moriori instigation, was a decision that was not contingent upon subsequent exclusive vesting in Moriori. It was a decision about whether the Crown thought that the historical or natural features of Taia were important enough to warrant the proposed Crown expenditure on Taia so they could be protected by Reserve status. This history is summarised in the deposition of Thomas McClurg (attached, see paragraphs 12 to 29). His deposition records an inconsistent and confusing set of statements from the Minister of Conservation, DoC officials and Moriori about the nature of the involvement of Moriori in the future management or ownership of Taia following its purchase by the Crown.

91. However, the fact that the expenditure of Crown funds to buy a reserve may have been prompted by Moriori in 2001 cannot in any way affect the responsibilities of the Minister of Conservation in 2020 under section 4 of the Conservation Act 1987 towards Ngāti Mutunga o Wharekauri with respect to Taia in 2020. It is a piece of information that has no bearing whatsoever on the *mana whenua* status of Ngāti Mutunga o Wharekauri over Taia.

The 'Promise' to Vest

92. In his "Taia Reserve Update" of 13 October 2020, Maui Solomon described Ngāti Mutunga o Wharekauri statements about *mana whe*nua as follows "*But it seems that part of the strategy of NMOW is to put enough pressure on the Minister of Conservation that she will be afraid to vest the land back to Moriori as was promised in 2002. I trust that she is made of sterner stuff but your support in writing a submission supporting the land being returned to Moriori would be appreciated (which is what the previous owners who are Ngati Mutunga people themselves also wanted).*"

93. There are two potential problems with the description of the somewhat confused statements about vesting made back in 2001/2 as a 'promise'. First, the vesting process under section 26 of the Reserves Act 1977 requires the Minister to satisfy herself that vesting will better carry out the purposes of the reserve classification (section 26(1)). Even if the vesting proposal passes that test, it could not proceed unless the Minister is also satisfied that vesting will also *give effect to the principles of the Treaty of Waitangi* (section 4 of the Conservation Act 1987). Before making a decision, "*the Minister is to give public notice of the proposed vesting and give full consideration to relevant submissions and objections received*" (section 26(3) Reserves Act 1977).

94. Given this process, it is not possible for the Minister to have 'promised' to vest Taia in Moriori without pre-empting the statutory processes of vesting. Any such 'promise' would be unlawful in any event. This leaves only two alternatives:

i. The process we are responding to is a sham, in that the outcome was pre-determined by a binding Ministerial 'promise' made to Moriori in 2002.
ii. There was no binding 'promise' made to Moriori in 2002, in which case it is inappropriate for Maui Solomon to attempt to pressure the vesting decision of the present Minister of Conservation to honour something that could not have been lawfully offered.

95. Finally, there is an issue with the wording of Maui Solomon's wording above "to vest the land **back to** Moriori" and "the land being **returned to** Moriori". It is right for the Crown to 'return' land to Māori that has been taken by the Crown after it entered into the commitments and guarantees contained in the Treaty of Waitangi. However, in this case, Taia was taken by Ngāti Mutunga o Wharekauri well before the Crown established any jurisdiction over Wharekauri. Moriori lands were never taken by the Crown. Neither was there any failure by the Crown to secure lands under the customary control of Moriori in November 1842 (there being no such lands at that time). There is no clear Treaty basis for the Crown 'returning' land to Māori for losses of land that occurred according to customary processes prevailing before the Treaty of Waitangi or the annexation of New Zealand.

The wishes of Ted and Sunday Hough

96. In his judgement, Collins J quotes at length from a November 2000 letter by Ted Hough supportive of Moriori being owners/trustees/*kaitiaki* of Taia if the land was to be purchased from him by Nga Whenua Rahui. This was part of an extended campaign by Ted Hough to find any buyer for his property. His letter to Nga Whenua Rahui was unsuccessful in that they declined to purchase Taia, the sale of which was eventually funded by the Nature Heritage Fund two years later. It is not really clear why Collins J gave such prominence to this background as the wishes of the previous owner (whatever they may have been) have no bearing at all upon the matters that the Minister of Conservation must weigh up under the Reserves Act 1977 and the Conservation Act 1987. Certainly, the views of Ted Hough are in no way determinative of

the content of rights held by Ngāti Mutunga o Wharekauri that are secured by Article II of the Treaty of Waitangi.

97. Collins J also made reference to a letter dated 16 May 1988 by Ted's father, Sunday Hough, who acknowledged Moriori as the *tangata whenua* of Rekohu. Ngāti Mutunga o Wharekauri agree that Moriori are *tangata whenua* of Wharekauri. Obviously, they are not the only *tangata whenua* of Wharekauri (see *Tangata Whenua* section of *Ngati Mutunga o Wharekauri Mana Whenua and Taia Historical Reserve* (attached). This uncontroversial statement by Sunday Hough from 1988 has no relevance to the Taia vesting decision to be made in 2020.

The Expenditure of Moriori Funds on Taia to Date

98. The background information provided by DoC to the vesting notice[32] states "*Hokotehi has…invested over $750,000.00 in protecting rakau momori (tree carvings) at Rotorua, Hapupu, Kairae, Kainga rahu and Taia*". Neither the timeframe over which this expenditure has been made nor the proportion expended upon Taia is indicated. The relevance of this information to the vesting decision is very unclear. Ultimately, the capital base of Hokotehi Moriori Trust derives largely from Crown funding in the form of the Fisheries Settlement and $6m of cultural revitalization grant. Moriori have also signed a Deed of Settlement with the Crown which will deliver a further $18m of redress amongst other benefits.

99. If it is the case that Moriori would not have expended any of this capital, or the revenue therefrom, on the protection of *rakau momori* or other cultural artefacts unless those artefacts were on land over which Moriori had or would receive exclusive ownership, then DoC should say so. Arguably, this would be relevant to the question about whether vesting might be "*for the better carrying out the purposes of any reserve classification*". Moriori are entitled to use settlement redress in any way they choose and could conceivably deny further expenditure on Taia unless exclusive vesting was delivered. The consequence of this strategy would seem to be that DoC would be required to ultimately vest all parts of the DoC estate exclusively in Moriori if co-funding of conservation projects with Moriori was to be available. There are some obvious reasons why DoC should resist this proposition given its statutory responsibility to *give effect to the principles of the Treaty of Waitangi* with both of its Treaty partners on Wharekauri.

100. The bundle of documents obtained by Ngāti Mutunga o Wharekauri Trust under the OIA on 21 October 2020 reported that Hokotehi Moriori Trust had successfully applied for money from the 2020 DoC Community Fund for Taia Landscape – Biodiversity Rehabilitation (Application Number 6-072). This raises a serious question about the basis on which an organization which has no formal responsibilities over Taia (is not for instance the 'Administrative Body') can receive Crown funding of this kind especially as there is no management plan for Taia. The answer appears to be that the Crown is regarding the vesting decision as already effectively made.

[32] https://www.doc.govt.nz/get-involved/have-your-say/all-consultations/2020-consultations/taia-bush-reserve-vesting/

101. In the same bundle of documents, Erin Patterson quizzes her colleague Alan McDonald about the status of a Hokotehi Moriori Trust application to Te Uru Rakau for funding to plant pine trees in a large area of saltmarsh and brackish wetland in Taia Historic Reserve. Alan McDonald reports that "*I am aware of a large project being proposed by the Hokotehi Moriori Trust but don't have detail at this point.*" The fact that such an afforestation project funding proposal has advanced to this stage without DoC knowledge is of concern. Ngāti Mutunga o Wharekauri shares the understandable concerns of Erin Patterson about the impact of the proposed tree planting on the natural systems and species at Taia. It is yet more evidence, if any was needed, that the vesting proposal should not proceed and DoC's priority should be to introduce a far more transparent and inclusive management regime.

102. Section 26(1) of the Reserves Act continues that having satisfied herself the vesting will better carry out or achieve the purpose of the reserve "*the Minister may, by notice in the* Gazette*, vest the reserve in any local authority or in any trustees empowered by or under any Act or any other lawful authority, as the case may be, to hold and administer the land and* ***expend money thereon for the particular purpose for which the reserve is classified***" (emphasis added). In other words, vesting is an action intended to provide a framework and foundation for future expenditure by Hokotehi Moriori Trust on Taia. Past expenditure by Hokotehi Moriori Trust is not a foundation for future vesting – it is irrelevant to the vesting decision. If it is not treated as irrelevant by DoC, then DoC is open to the serious criticism that by allowing the Trust to act for nearly 20 years as if vesting has taken place, the 2020 vesting process is pre-determined. Its integrity is thereby, forever, compromised.

Ngāti Mutunga o Wharekauri and Taia

103. Justice Collins felt that insufficient particulars had been provided to him about Ngāti Mutunga o Wharekauri *mana whenua* over Taia for him to confidently declare that Ngāti Mutunga o Wharekauri held mana whenua status there. As mentioned above, this lack of confidence seemed to be associated with some fundamental mis-apprehensions about nature of *mana whenua*. This submission and its attachments eliminates any basis for these mis-apprehensions.

104. Once the Treaty of Waitangi was applied to Wharekauri in November 1842, Ngāti Mutunga o Wharekauri *mana whenua* status was confirmed and guaranteed by New Zealand law, not by the traditional means of tribal military defence of *ahi kā* rights. As has been explained, there is no process other than voluntary relinquishment that can be identified for the loss of *mana whenua* status secured by the Treaty of Waitangi after November 1842. Evidence about occupation and use after that time may indicate that an *iwi* continues to actively use its *mana whenua* status but such active use is no longer essential under the law to preserve it. In other words, evidence of post-Treaty use is interesting but not determinative of post-Treaty

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mana whenua status. It is evident that the High Court had no grasp of this subtlety and the Crown, as Treaty partner, failed in its duty to explain it.

105. Our experience in contemporary Treaty negotiations is that Te Arawhiti does not share this understanding of the Treaty of Waitangi and that DoC is following a similar approach to that we have experienced from Te Arawhiti. It would be unwise of DoC to continue this emulation because Te Arawhiti's "overlapping claims" policy has been found by the Court to be seriously flawed. That policy and practice of Te Arawhiti has been to ask *iwi* to describe their 'interests' in a site (as the Minister of Conservation has done in her correspondence with Ngati Mutunga o Wharekauri Trust). These interests are then weighed by Te Arawhiti in a non-transparent process and offers are then made to *iwi* of exclusive or shared redress. In addition to the subjective and non-transparent nature of this process, the other problem with it is that Te Arawhiti have been very clear that it does not consider *mana whenua* status to be an 'interest'. Bizarrely, 'interests' therefore appear to 'trump' Treaty rights. Clearly this priority is irreconcilable with the proper application of section 4 of the Conservation Act 1987.

106. Te Arawhiti relies heavily upon its aggressively communicated policy that it will immediately terminate Treaty negotiations with any *iwi* that has the temerity to challenge these decisions in Court. Thus, major financial leverage is used by Te Arawhiti to dissuade iwi from seeking the proper recognition of their Treaty rights. As well as being repugnant behaviour in a Treaty partner, the use of such large and unprincipled financial 'leverage' is not available to DoC in this vesting process. As existing Treaty claim negotiations only address grievances up to 1992*, iwi* dissatisfaction with this approach by Te Arawhiti is generating a rapidly growing list of potentially complex and costly contemporary Treaty grievances. The Minister of Conservation would be wise to avoid adding to this list in this case.

107. The following information is included as it may be of interest to DoC. According to the rights and responsibilities of customary owners, lakes and other features of the Taia landscape were given Māori (not Moriori) names. The area is today richly endowed with Māori names (see the three maps of Smith and Robertson (1887), Robertson (1883) and the 1909 Cadastral map of the Chatham Islands). Some of these names include: Taia, Makuku, Kairae, Te Awapatiki, Mangaroa, Parautu, Taihawata, Koropupu, Torere, Maenui Lake, Kaira Lake, Kahupiri Point, Takatapu Shoal, Te Raka Tutahi, Korepuke o Hauoro, Matawhenua o Whangatane, Kopangaru, Kotoke here, Waiotahu, Titihaukae, Kowai a Panga.

108. Even by the standards of Wharekauri, Taia is a difficult proposition for pastoral agriculture. However, it has always been a cherished and outstanding site for customary food gathering. Up until 1840, it was an area under Ngāti Tama control but after Ngāti Tama were relocated to Kaingaroa and the northern coast of Wharekauri, it fell under the control of Ngāti Mutunga *rangatira*. When the land was eventually surveyed and title issued, Taia formed the northern part of Awapatiki 1B (7,848 acres). The three owners were Apitea Punga, Hamuera Koteriki and Hauranga Pihuka.

109. Apitea Punga was the most influential of the three and it was at his instigation that the Moriori Reserve at Manakau was set aside from his lands. He died in 1885 at the age of 58. "*Apitea Punga spent much of his time traveling between Ngāti Mutunga centres of activity at Urenui, Wellington, Parihaka and Wharekauri. He was regarded by Te Whiti and Tohu (from Parihaka) as the "tangata whakahaere o nga huahua". The person responsible for organizing and distributing the preserved food from Wharekauri at Parihaka*".[33] There is no doubt that a large amount of this customary *kai* was collected from Taia and that Taia therefore had a prominent role in cementing the strong links between Ngāti Mutunga o Wharekauri and Parihaka.

110. The importance of Taia as a source of customary food for Ngati Mutunga o Wharekauri continued through the 20th century. In the 1950s, Harold McClurg (who was manager of the adjoining Owenga Station, and later manager of the Solomon Estate property at Manakau), Buzz Hough and Phil Nielson collected 6,000 swan eggs from Taia and distributed them around the entire Island community.[34]

111. The regularity and quantity of customary food gathering on Taia has reduced in recent years because the gates to the property are kept locked. These locked gates have encouraged the false impression that Taia has already been vested in Moriori by DoC. Neither DoC nor Moriori have acted to dispel the impression that the management of Taia is a matter for them exclusively and a number of Ngāti Mutunga o Wharekauri expressed surprise to the Trust about the vesting advertisement because they were not aware vesting had not occurred in 2002 or thereabouts. This is a rather sad commentary on the woeful level of communication by DoC to Ngāti Mutunga o Wharekauri over the last 18 years.

[33] Payne, Matiu. (2020). *Nā te kōti i tatari: The inconsistent treatment of tikanga taurima (whāngai) in Ngāti Mutunga* (1820 – 2019) (Thesis, Doctor of Philosophy). University of Otago. Page 137
[34] George Hough, pers. Comm., 21 July 2018

Conclusion

112. In the background information provided by DoC, the powers of the trustees of the Hokotehi Moriori Trust are "*to promote and protect ancestral lands, and restore indigenous tangata whenua and customary rights*"[35] This is a statement that should raise some very big questions within DoC with respect to section 4:

i. What does 'ancestral lands' mean in the context of section 4?
ii. What customary rights are being referred to?
iii. Are these customary rights that are secured by the Treaty of Waitangi?

113. Moriori have ancestral lands on Wharekauri but Ngāti Mutunga o Wharekauri have *mana whenua* over those ancestral lands and that *mana whenua* status, established in 1835/6, was later secured and guaranteed by the Treaty of Waitangi. Moriori ancestral lands have no relevance to section 4 of the Conservation Act 1987. Moriori have customary rights, and like all New Zealand citizens, the right to "enjoy the culture" of Moriori under section 20 of the New Zealand Bill of Rights Act 1990 (NZBORA). However, section 20 of NZBORA places no obligation on the Crown to buy and transfer land to a minority group in order to achieve the protections of that section. Neither do Moriori have any rights under the Treaty of Waitangi that would require the Crown to buy and transfer land to Moriori for that purpose.

114. The fact that Taia comprises ancestral lands of Moriori prior to 1835 and that Moriori have a right to identity and culture are 'interests'; they are not Treaty rights, and the protection or promotion of those interests by the Minister of Conservation can never be at the expense of the Treaty rights that are the sole focus of section 4 of the Conservation Act 1987.

115. Vesting of Taia land ownership exclusively will not better carry out the purposes of the Taia reserve. Continued DoC ownership and the active involvement of both *iwi* in the future protection and management of Taia will best carry out the purposes of the reserve. This three-way arrangement between Treaty partners is also a very good structure for the management of other parts of the DoC estate on Wharekauri.

116. It is an impossibility for the Minister to authorise the vesting of Taia exclusively in Hokotehi Moriori Trust and to meet the Minister's lawful obligations and responsibilities under Section 4. Furthermore, the advertised proposal and the extremely lop-sided history of engagement with both *iwi* and evidenced in the deposition of Thomas McClurg is itself a proof of a serious failure within the Department of Conservation to understand and implement its responsibilities under section 4 with respect to its relationship with its Treaty partner, Ngāti Mutunga o Wharekauri.

117. The way to rectify this failure before its consequences become irreversible is for:

i. the proposed vesting to be declined;

[35] https://www.doc.govt.nz/get-involved/have-your-say/all-consultations/2020-consultations/taia-bush-reserve-vesting/

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ii. the ownership of Taia to remain as is (with the Department of Conservation), and for;
iii. the Department to develop a management plan for Taia that has the full engagement and support of both *iwi* .

In that event, Ngāti Mutunga o Wharekauri will support the most effective means identified under that plan to protect the full range of the cultural and natural values present on Taia including those cultural values of special significance to Moriori.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY
[TE KOTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE]

CIV-2017-485-

IN THE MATTER	of a proposed decision by the defendant to vest in Hokotehi Moriori Trust the land and all appurtenances thereon on Wharekauri (Chatham Islands) known as the Taia Historic Reserve pursuant to the Reserves Act 1977
AND IN THE MATTER	of New Zealand Bill of Rights Act 1990
AND IN THE MATTER	of the Declaratory Judgments Act 1908
BETWEEN	**JOHN KAMO, MELODIE ERUERA-FRASER, MONIQUE CROON, STEPHEN TUUTA, IWIROA WAIRUA,** being the trustees of the **NGĀTI MUTUNGA O WHAREKAURI IWI TRUST** the governance entity of the Iwi of Ngāti Mutunga o Wharekauri holding mana whenua over all of Wharekauri (Chatham Islands) Plaintiff
A N D	**THE MINISTER OF CONSERVATION** Defendant

AFFIDAVIT OF THOMAS McCLURG IN SUPPORT OF APPLICATION FOR CASE MANAGEMENT DIRECTIONS; IN SUPPORT OF ANY INTERIM ORDERS WHICH MAY BECOME NECESSARY; AND IN SUPPORT OF SUBSTANTIVE RELIEF SOUGHT HEREIN

Dated: 2017

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I, **THOMAS McCLURG** of Wellington, Director, swear:

Qualifications and experience

1. I am a registered member of the iwi, Ngāti Mutunga o Wharekauri.

   Ko Te Moana-nui-a-Kiwa te Moana

   Ko Wharekauri te Motu

   Ko Ngāti Mutunga o Wharekauri te iwi

   Ko Whakamaharatanga te marae

   Ko Richard McClurg toku mātua

   Ko Tom McClurg toku ingoa

2. My father, Richard McClurg was born at Owenga, Chatham Island in 1925. His father (Thomas (Putaka) Patrick McClurg) was born at Te Roto, Chatham Island in 1890. My father's mother (Bertha Florence Paynter) was born on Pitt Island in 1898. Thomas was a descendent of Ngahiwi Dix (nee Puahuru). Bertha was a descendent of Wikitoria Kawhe (nee Patea).

3. I am a director of Toroa Strategy Limited in which capacity I offer independent business and strategic advice to organisations operating in a range of sectors, particularly organisations concerned with seafood, fishing and fisheries management. I founded Toroa Strategy Limited in 2009 and (amongst others) have carried out contracts for Seafood New Zealand, Aotearoa Fisheries Limited, Te Ohu Kai Moana Trust Limited, Tainui Group Holdings Limited, Pare Hauraki Asset Holdings Limited, the World Bank, The Parties to the Nauru Agreement Office and the Maori Trustee (Te Tumu Paeroa).

4. Between 2009 to the present, in addition to the consulting activities above, I have been appointed to the following directorships: I am Chairman of Commercial Fisheries Services Limited (Fishserve) and (since 2010) a

director of Ngāti Mutunga o Wharekauri Asset Holding Company Limited which is a wholly owned subsidiary of Ngāti Mutunga o Wharekauri Iwi Trust Limited. I am also a director of Port Nicholson General Partnership (2012) and Koura Inc General Partner Limited (2015). In 2016 I was appointed as a director of Ngā Kai Tautoko Limited, which is the Asset Holding Company for Ngāti Mutunga (Taranaki).

5. My qualifications and experience are as follows:

5.1 I have a Master of Science Degree with first class honours in Natural Resource Management from the Centre of Resource Management at Canterbury University and Lincoln College (1986);

5.2 Between 1991 and 1994, I was Manager Strategic Policy for MAF Policy.

5.3 Between 1994 and 1999, I was General Manager of Policy and Operations at the Treaty of Waitangi Fisheries Commission (Te Ohu Kai Moana).

5.4 Between 1999 and 2004, I was a Principal, Corporate Finance with Ernst & Young.

5.5 Between 2004 and 2008, I was General Manager Strategy and Planning for Aotearoa Fisheries Limited.

6. I give this evidence having regard to my academic qualifications and 25 years' public and private experience and expertise in natural resource management, economics, organisational management, organisational governance, consulting, Treaty of Waitangi claims, and settlements including those of Ngāti Mutunga o Wharekauri.

7. In 2016 I was appointed Lead Negotiator on behalf of Ngāti Mutunga o Wharekauri Iwi Trust which is the organisation mandated to negotiate a settlement of historical Treaty claims by that Iwi with the Crown. However, I confirm that the issue at the core of this proceeding is not (and has not been) an issue that is being considered by the Crown under the framework of that Treaty settlement negotiation.

8. The Crown has declared an intention to vest the Taia Reserve on Wharekauri in Moriori through a distinctly separate process which commenced in 2001. Although seemingly now a parallel process to what is occurring under our Treaty negotiation framework, it is being processed by a different Minister and government department; and the Crown is insistent that not only is the vesting it proposes for Taia not part of the Treaty settlement process but also that Taia is not available for use as a Treaty Settlement asset.

Purpose of this deposition

9. The substantive purpose of this deposition is to provide the evidence necessary to expose what the Crown is proposing to do with the Taia land on Wharekauri (Chatham Islands), which the Crown owns, and proposes to vest in a third party (a Moriori entity) in defeat of the plaintiff's rights and interests in that Taia land. That vesting will negatively impact upon and defeat the rights and freedoms of the people represented by the plaintiffs, being rights and freedoms affirmed in (and are to be promoted and protected by) the Bill of Rights Act 1990 (BORA).

10. Documents provided by the Department of conservation (DOC) are relied upon and referred to throughout this deposition.

History of the Taia Bush Reserve on Wharekauri and Crown Conduct in Respect of it

11. Taia Farm (now Taia Historic Reserve) ("Taia") comprises 1198.8404 hectares of land situated in Blocks VII, IX and X Rekohu Survey District Blocks XII and XIV Te Whanga Survey District and Block I Rangimene Survey District and being part Section 13 and Section 4 and 23 Owenga Settlement (Chatham Island). In the year 2000 the owner, Ted Hough, had been trying to sell the property without success. By that date, Taia had been passed down through the Hough family for nearly 100 years.

12. On 14 November 2000, Te Kotahi Moriori (writing on behalf of Te Iwi Moriori Trust Board and the Moriori Tchakat Henu Association of Rekohu Trust Inc.) lodged an application to the Nga Whenua Rahui Fund to purchase Taia Farm so as (it said) to preserve the flora and fauna there and

to protect Moriori waahi tapu and rakau momori (tree carvings). Moriori expressed a wish to be involved in the future management of Taia but the management arrangements were to be developed later. A copy of the Te Kotahi Moriori application is attached as exhibit "A".

13. The covering letter (attached as exhibit "B") also dated 14 November 2000 accompanying the Moriori application stated (among other things):

> "*Thirdly while Moriori hold assert* (sic) *customary authority over the islands of Rekohu and it is appropriate that Moriori are key management stakeholders in this property, it is not feasible for Moriori to carry the obligations and costs alone. The project is one for the whole community, and Te Kotahi Moriori envisage that other groups with special interest in the preservation of Chatham Islands flora and fauna also take responsibility for the maintenance of the Taia reserve in conjunction and consultation with ourselves*".

14. The application made clear that it was made without prejudice to any position Moriori may wish to advance during future Treaty negotiations. The application was also copied to The Nature Heritage Fund (NHF). Although historic and cultural values were part of the background information supporting the applications, the bulk of the supporting material focussed on the natural and landscape values of Taia.

15. Neither application met with a favourable response. As a letter signed by Allan McKenzie, Manager Landowner Relations, NHF, dated 26 November 2001 (attached as exhibit "C") explained:

> "*this case was originally considered as a joint Nature Heritage Fund/Nga Whenua Rahui project in December last year. While the NHF Committee fully supported the purchase, the case did not rate a high priority in regard to NHF ecological criteria and the Committee considered it more appropriate for Nga Whenua o Rahui to purchase the block*".

16. In other words, the NHF initially declined to fund the purchase and so did Nga Whenua o Rahui.

17. The McKenzie letter goes on to then describe a surprising turn of events in this way:

> "*Having reconsidered the case, the NHF now recommends that the land be purchased* (100%) *from Nature Heritage Funds and that the land be purchased by the Crown as historic reserve under the Reserves Act 1977, and vested in the Kotahi Moriori (a unification committee of members of Te Iwi Moriori Trust board and Moriori Tchakat Henu Association of Rekohu Trust Inc), subject to the removal of any buildings assessed by the Department of Conservation and Moriori as inappropriate or unnecessary for reserves management, cultural or interpretation purposes and also that the property is destocked and the cattle yards removed*".

18. No explanation has been provided to Ngāti Mutunga as to why the case was reconsidered and why the project was re-oriented from the protection of natural and ecological values to a historic reserve. However, the day before the McKenzie letter was received by the Department of Conservation (DOC), the then Minister of Conservation (Sandra Lee) had signed (as attached as exhibit "D") the approval for the purchase of Taia farm with $314,625 of funds from the 2001/02 NHF allocation according to a Schedule of Recommendations made by the NHF in which Taia was

> "*to be protected as historic reserve under the Reserves Act 1977, to be vested in Te Kotahi Moriori...*".

19. The following day, 30 November 2001 (the same day as DOC recorded receiving the recommendation letter from the NHF) the Minister signed a letter (attached as exhibit "E") to Hugh Logan (Director General, Department of Conservation) in which he was authorised and instructed by the Minister to make payments relating to Taia according to 'attached schedules'). The relevant schedule was the same as that produced by the

NHF in all respects (as noted above), except one. The 30 November schedule now stated that Taia was:

> *"to be protected as historic reserve under the Reserves Act 1977, to be managed jointly by the Department of Conservation and Moriori..."*.

20. The differences between the 29 and 30 November schedules identified above introduced a recurring pattern of Crown confusion over the nature of the future ownership and management arrangements to apply to the Taia historic reserve. At least three (logically, four) different arrangements are referred to at various times:

    (a) Vesting of land in Moriori;

    (b) Vesting of management in Moriori;

    (c) Joint management by Moriori and DOC; or (given that vesting arrangements are subject to consultation a fourth option being);

    (d) None of the above.

    This confusing pattern cannot be explained by one arrangement being successively superseded by others.

21. On 7 December 2001, Hugh Logan, in a letter (attached as exhibit "F") to Eru Manuera (Tumuaki Kaupapa Atawhai, DOC) explained that Taia was to be:

> *"protected as historic reserve under the Reserves Act 1977, to be vested in Te Kotahi Moriori..."*.

22. This was not what was contained in the schedule of instructions provided to him by his Minister only a week previously.

23. Implementation of the Minister's decision proceeded swiftly and the task was accorded the highest Departmental Priority ('very high'). In December 2001, the Minister of Conservation, through the Nature Heritage Fund, purchased Taia farm. The executive summary prepared by DOC of and for the approved media release prepared on 25 February 2002

stated that management control (of the reserve) would be vested in Hokotehi Moriori Trust under Section 26 of the (Conservation) Act. At the appropriate time the Minister would be asked to sign the vesting *Gazette* Notice.

24. The media release advice paper of 25 February 2002 (attached as exhibit "G") stated that "*the protection of the spiritual and ecological values through a Crown purchase has general community support*". No evidence for this statement was provided. In fact, many members of the community were not aware of the process until after the media statement had been made.

25. The media statement actually released the following day (26 February 2002) (attached hereto as exhibit "H") departed from the media release advice paper background in important ways:

> "*Ms Lee said a management plan would be required for the reserve and this plan would recognise Moriori as kaitiaki, although legal title would remain with the Crown. Buildings on the land would be vested in the Hokotehi Trust for its use*".

26. The media release continued:

> "*DOC's Chatham Islands Area Manager Adrian Couchman said the department was pleased to see the land protected and it was looking forward to working in partnership with the Hokotehi Moriori Trust, to manage the property*".

27. The chair of that Trust, Alfred Preece, also picked up the theme of partnership:

> "*Mr Preece said the land management partnership between DOC and Moriori was a new and "exciting" initiative for the Chatham Islands.*"

28. The Chair, Mr Alfred Preece, went on to reveal that Moriori also had commercial aspirations for Taia "*Mr Preece said he encouraged eco-sustainable cultural or heritage tourism on his own land, and the Trust*

would be looking at this as a longer-term option for the Taia property". These commercial aspirations also extended to possible aquaculture development in Makuku, Kairae and Taia lakes under the terms of the proposed vesting.

29. In a letter dated 28 October 2003 (attached as exhibit "I") from Dave Bishop (DOC) to Alfred Preece (Hokotehi Moriori Trust) it was explained that the beds of the three lakes above were not included in the Historic Reserve and any reference to aquaculture should therefore not be included in the information sheet intended to provide background information about the vesting proposal.

30. Contrary to DOC assurances that the arrangements announced in February 2002 had "general community support" the press release was greeted with dismay by Ngāti Mutunga o Wharekauri who comprise some 60% of the Chatham Islands population. Writing on behalf of Ngāti Mutunga o Wharekauri Trust on 5 August 2002[1], Sue Thomas advised "*the Department of Conservation that they (the Trust) have acquired a copy of the Taia documentation under the "official information act" and object to the process of purchase of the property known as Taia, by the relevant Crown agency*". Amongst other things, the letter (attached as exhibit "J") objected to the lack of consultation or communication with Ngāti Mutunga o Wharekauri, failure to consider the traditional significance or relationship of Ngāti Mutunga o Wharekauri with the whenua and that mono-cultural assumptions about historic significance were not acceptable.

31. The Trust did not agree with "evidence" provided by Moriori as set out in the applications. In particular, Ngāti Mutunga o Wharekauri do not agree that "Moriori hold assert customary authority over the islands of Rekohu" – at least after 1835. The Thomas letter proposed that the ownership of Taia be reviewed for negotiation and that the interim management of Taia be provided by the Department of Conservation.

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[1] The letter appears to be incorrectly dated 2001.

32. On 16 October 2002, Allan Ross, Conservator for the Wellington Conservancy of DOC responded by letter (attached as letter "K") to Sue Thomas. His letter did not address any of the recommendations to DOC contained in the Thomas letter. It attempted to explain the independence of the Nature Heritage Fund and the Nga Whenua Rahui Fund from the Department of Conservation. Allan Ross did note that all expenditure by those funds required the approval of the Minister of Conservation.

33. He explained:

> "*the funds do not themselves consult with the community or with iwi. Implicit in their decisions is acceptance that the party applying is the appropriate party and in the Taia case the Nature Heritage Fund and the Minister accepted the importance of the Taia property to Moriori as expressed by the Hokotehi Moriori Trust's application*". ... "*the ongoing management of the property reflects the Minister's acceptance of Taia's importance to Moriori by vesting the land in the Hokotehi Moriori Trust. This retains Crown ownership but passes management to that body, subject to the Crown (The Minister of Conservation) approval of a management plan*".

34. The letter contains some extraordinary advice to Ngāti Mutunga o Wharekauri from the Department of Conservation: "*I would suggest that your iwi should in due course, discuss your concerns over Ngāti Mutunga taonga with Hokotehi Moriori Trust during the preparation of their management plan.*"

35. The Ross letter ends with a curious statement: "*it is inappropriate to delay the protection of cultural and heritage values, using mechanisms such as the funds, because the applicant is awaiting Treaty claims to be resolved.*" It is curious because the property purchase by the Minister through the NHF had already occurred. Ngāti Mutunga o Wharekauri were questioning the subsequent vesting proposal and requested that Ngāti Mutunga o Wharekauri values also be considered in future management. It certainly did not suggest that the cultural and heritage values of Taia should not be protected legally.

36. In 2003, the Department of Conservation appears to have commenced the vesting process for Taia Reserve. The DOC Information sheet described the vesting process thus: Although the Minister advised the reserve should be vested in the said body (HMT), the normal procedure is to give consideration to publicly notify vesting of the reserve. The first step in this process was to consult with the Chatham Island Conservation Board and the Fish and Game Council to ascertain whether in their view public consultation was required. Since the Chatham Islands are not part of any Fish and Game region, the Minister of Conservation retains the Fish and Game Council roles; however the department was guided by the advice it received from the Conservation Board. The Chatham Island Conservation Board advised that the public should be consulted over the proposed vesting, and that the standard consultation process under the Reserves Act be followed.

37. Ngāti Mutunga o Wharekauri were informed by the Office of Treaty Settlements in 2016 that a public notice relating to the proposed vesting was placed in a single edition the Chatham Islander newsletter in November 2003. The advertisement requested that written objections to or submissions in support of the proposal should be made before 31st of January 2004. The wording of that notice (at least that intended to be published – attached as exhibit "L") was that *"the Minister of Conservation gives public notice of his intention to vest the management and control of Taia Historic Reserve in the Hokotehi Moriori Trust for the better carrying out of the purposes of the reserve. The vesting will be subject to conditions to guide reserve management."* No advertisements were placed in mainland newspapers.

38. On 5 February 2004, in a letter (attached as exhibit "M") to Jeff Flavell (DOC), Hokotehi Moriori Trust (HMT) requested copies of all submissions received during the consultation period that ended on 31 January. Apparently, no submissions were received as indicated by a comment in a letter (attached as exhibit "N") dated 26 February 2004 from Leo Watson (HMT) to Alison Davis (DOC) "*Given the lack of objections to the investiture process, I look forward to discussing the process from here to finalise the vesting*".

39. That "process" was explained by Allan Ross (DOC) in a letter dated 16 July 2004 (attached as exhibit "O") to Leo Watson (HMT) as follows: "*The Minister of Conservation will shortly be asked to approve the vesting of the reserve in Hokotehi Moriori Trust under section 26 of the Reserves Act*" (by gazette notice). That letter also included a list of some vesting conditions and principles that would need to be agreed by DOC and HMT.

40. The pace of the vesting process slows markedly at this point. Versions of interim protocols and a Memorandum of Understanding (MOU) appear to have been exchanged and the MOU formed the basis of a draft Crown Maori Relationship Agreement (MRA). This agreement was first referred to in 2006 but had not been executed by the parties by 2012 and no gazette notice was issued. DOC has not released a copy of any early versions of this MRA.

41. On 26 August 2014, Maui Solomon (Hokotehi) wrote to the Minister of Conservation (Hon Nick Smith) to attempt to re-animate the vesting process. In his letter (attached as exhibit "P"), Maui Solomon described a dramatic decline in the condition of Taia since its acquisition by the Crown and its management by the Department of Conservation as a historic reserve:

> "*.. over the last few years little work has been done to protect the ecological significance of the reserve, which has suffered damage from wild cattle, pigs and possums. As a result, the integrity of the reserve along with the kopi trees and rākau momori are in serious decline.*"

42. Nearly, a year passed without a substantive response to this letter. Maui Solomon wrote a second letter dated 22 July 2015 (attached as exhibit "Q") to the Minister of Conservation requesting an update about the status of the vesting and management agreement. By letter dated 16 September 2015 (attached as exhibit "R"), the Minister of Conservation (Hon Maggie Barry) replied:

> "*I am advised by the Department of Conservation that work on the legal transfer and vesting of the Taia Reserve in Moriori can begin*

immediately. I understand that local departmental staff will be in touch regarding the vesting and the putting in place of a management plan for Taia."

43. The proposed Crown Maori Relationship Agreement (initiated in 2006) was then (2015) re-examined by DOC and HMT and changes to clauses negotiated. In an email (attached as exhibit "S") dated 16 May 2016 to Connie Norgate and David Bishop (both of DOC) relating to the latest iteration of the MOU, Maui Solomon declared "*4.2 – I am not aware of any other "Treaty claimant" (i.e. Ngati Mutunga) ever having asserted or claimed an interest in this area so this clause would appear to be redundant. Indeed, I cannot imagine upon what basis they could claim any interest in Taia given its cultural and spiritual associations with Moriori*;"

44. In response to the email from Maui Solomon, David Bishop sought on 18 May 2016 the advice of Connie Norgate who was based on Chatham Island: "*are you of the view that there is no other Iwi group (e.g. Ngati Mutunga etc) who would assert an interest in the general area and resources encompassed by the Taia Reserves?*" Connie Norgate replied on 19 May 2016:

> "*To date there has been no interest from Ngati Mutunga on any of the Taia area, including marginal strips however that is likely due to the fact that it has been well known that Moriori have been progressing discussions on vesting. Given the lapse of time that could well have changed things however I have had no requests from them*".

45. On that basis, David Bishop emailed back on the same day, "*I will look to remove reference in the MOU to other Iwi interests being part of the Taia reserve and associated marginal strips in this general locality*". This was done and the draft MOU dated 2017 does not contain any reference to Ngāti Mutunga o Wharekauri in section 4. The draft MOU is attached as exhibit "T".

46. The advice provided by Connie Norgate to Dave Bishop was wrong advice. Ngāti Mutunga o Wharekauri had indeed clearly communicated their particular interest in Taia in 2002. That interest and concern remained; and remains. The last public notification about possible vesting occurred in 2003 and since then no further formal Crown action had ensued. It is therefore not surprising that Connie Norgate had received "no requests from" Ngāti Mutunga o Wharekauri about a process that had been apparently dormant for thirteen years. All doubt about the Ngāti Mutunga o Wharekauri position on Taia could have been eliminated if Connie Norgate had chosen to make the journey across the road from her office on the Chathams to the office of the Ngāti Mutunga o Wharekauri Iwi Trust before offering her advice to David Bishop.

47. To my knowledge, at the date of this deposition, the proposed MOU has not been executed by Hokotehi Moriori Trust and the Department of Conservation. Interestingly enough, the draft MOU contains a Treaty of Waitangi clause which begins: "*The parties acknowledge that the Treaty of Waitangi is a founding document of Aotearoa/New Zealand and as such lays an important foundation for the relationship between the Crown and Moriori.*" Ngāti Mutunga o Wharekauri agree with this statement which applies equally to the relationship between the Crown and ourselves as the iwi holding mana whenua over all of Wharekauri (Chatham Islands).

History of Recent Ngāti Mutunga o Wharekauri Correspondence with the Minister of Conservation over the Proposed Vesting of the Taia Historic Reserve

48. As noted above, Ngāti Mutunga o Wharekauri communicated its concerns about the proposed vesting of Taia to the Department of Conservation in 2002. These various concerns were not addressed by the Department of Conservation in a letter signed by Allan Ross dated 16 October 2002. Those concerns have not abated. For many years, however, it appeared that the vesting process had died and other more pressing issues occupied Ngāti Mutunga o Wharekauri people and its Iwi Trust.

49. Prominent amongst these issues was the opportunity to enter into negotiations with the Crown to settle outstanding Treaty of Waitangi

claims. After a mandate confirmation process that ran from 2011, with an extensive round of publicly notified hui in 2014, recognition of the Ngāti Mutunga o Wharekauri Iwi Trust's settlement negotiation mandate was confirmed by the Minister for Treaty Negotiations (Hon Christopher Finlayson) and Te Minita Whanaketanga Māori (Hon Te Ururoa Flavell) on 16 March 2016.

50. I was appointed to the role of Lead Negotiator for the Ngāti Mutunga o Wharekauri Iwi Trust in May 2016 and negotiations with the Crown also commenced that month. Parallel negotiations between the Crown and Moriori (represented by their mandated organisation Hokotehi Moriori Trust) began around the same time. It was plain from the outset that the geographic extent of customary interests of the two iwi in the Chatham Islands was total, although the nature of the respective customary interests within those geographic bounds was different.

51. The consistent general position on overlapping claims presented by Ngāti Mutunga o Wharekauri throughout these Treaty Settlement negotiations has been that Ngāti Mutunga o Wharekauri have a cultural interest in every part of Wharekauri and its associated islands and have mana whenua and mana moana over the entirety of that area. Ngāti Mutunga o Wharekauri recognise that Moriori have similarly extensive overlapping interests; but the Moriori interests are of a different nature to those of Ngāti Mutunga.

52. The Ngāti Mutunga o Wharekauri position presented to the Crown on numerous occasions is that offering exclusive cultural redress to Moriori in the form of exclusive interests in land without the prior consent of Ngāti Mutunga o Wharekauri is likely to result in the creation of new grievances and should be avoided. Rather, land should remain in the DOC estate where it can be managed to protect **all** natural and cultural values and that the two iwi should co-operate to assist DOC in the identification and protection of all values. On that basis, Ngāti Mutunga o Wharekauri have not so far claimed any of the existing DOC estate on the Chatham Islands as exclusive customary redress.

53. In contrast, Moriori have pursued extensive areas of the DOC estate on an exclusive basis as part of a Treaty Settlement with the Crown. On 29 October 2016 at Kopinga Marae, Maui Solomon (lead negotiator for Hokotehi Moriori Trust informed me of their intention to claim approximately 3,700 hectares of the DOC estate (on the assumption that such lands were confirmed as being available for claim). This claimed area did not include Taia Historic Reserve for reasons that were unclear. However, it did include the Glory Block of approximately 1,200 hectares on Pitt Island that was subject to a Heads of Agreement (HoA) between Hokotehi Moriori Trust, The Pitt Island Community, the Department of Conservation and the Office of Treaty Settlements dated 3 October 2007 under which title to the Glory Block was to be transferred to Hokotehi.

54. On 29 September 2005 (by letter attached as exhibit "U"), Ngāti Mutunga o Wharekauri Iwi Trust had advised the parties to the Glory HoA that they wished to be involved in any negotiations relating to Pitt Island. That request was denied (see letter attached as exhibit "V") but in any event, the 2007 HoA was not implemented. The question arose therefore in 2016 as to the status of the historic processes negotiated by the Crown to vest both Taia Historic Reserve and the Glory Block in Hokotehi and the relationship between those separate processes and the current Treaty settlement negotiations.

55. On 20 January 2017, Paula Page (chair, Ngāti Mutunga o Wharekauri Iwi Trust) wrote (letter attached as exhibit "W") to Ben White at the Office of Treaty Settlements (OTS) expressing the view that vesting of the Glory Block (as envisaged in the 2007 Heads of Agreement) would be premature and should not proceed until this matter is addressed through negotiations. Ben White replied on 10 March 2017 (letter attached as exhibit "X") that the 2007 Heads of Agreement had no current status and was/is not the starting point for current negotiations. Parallel verbal questions to OTS about the status of the historic Taia vesting process received the reply that Taia was outside of the current Settlement negotiations and that any questions about the status of the Taia vesting process should be directed to DOC.

56. Accordingly, on 23 February 2017, Paula Page (Chairperson, Ngāti Mutunga o Iwi Trust) wrote (by letter attached as exhibit "Y") to the Minister of Conservation (Hon Maggie Barry) pointing out the lack of engagement between her department and the Trust (as representative of the iwi holding manawhenua over the Taia lands) and that any vesting of Taia in the Hokotehi Moriori Trust should not proceed until addressed and agreed by the parties (including Ngāti Mutunga o Wharekauri) through negotiations. Finally, she asked for immediate notice if DOC intended to continue with the vesting process.

57. Ngāti Mutunga o Wharekauri concerns were heightened by the 13 March 2017 meeting with OTS in Wellington wherein DOC officials presented a (without prejudice) schedule of the redress mechanisms and sites DOC was willing to offer iwi on Wharekauri and Rangiauria (Chatham and Pitt Islands). This schedule excluded both the Glory Block and Taia but for different reasons. The existing ownership and management arrangements on Glory were to be maintained. However, DOC officials could provide no explanation for the exclusion of Taia other than it was not a settlement asset. Of course, this status left open the possibility that vesting was proceeding outside of the framework of the settlement.

58. No substantive response from the Minister was received to the 23 February letter, so on 22 May 2017, Paula Page wrote again to Minister Barry making an OIA request for a full response to her earlier letter and all relevant documents to the Taia vesting process.

59. By letter dated 1 June 2017 (attached as exhibit "Z"), Minister Barry replied to this letter saying that the Official Information Act request had been forwarded to officials for their consideration and that DOC officials were also finalising a MOU with Moriori which would prescribe the respective accountabilities and responsibilities for the future management of Taia Historic Reserve. On completion of the MOU, the Minister would then be formally asked to make an administrative decision on whether to vest the reserve in Moriori under section 26 of the Reserves Act 1977. No indicative timeframe for these steps was provided but Ngāti Mutunga were invited to provide further information to Dave Carlton, the newly

appointed Operations Manager for DOC on Wharekauri. The Minister's letter was posted to the Chatham Islands and was received by Ngāti Mutunga o Wharekauri on 12 June 2017.

60. On 11 June 2017, a redacted bundle of Taia papers (138 pages from the period 2000 to 2017) was sent to Ngāti Mutunga o Wharekauri Iwi Trust by Jay Eden (DOC). The information in these papers provides much of the base information for the chronology of events outlined in the first part of this affidavit. The bundle revealed some of the problematic assumptions underpinning the vesting process. On 11 July 2017, Paula Page wrote again to Minister Barry expanding on the exact nature of Ngāti Mutunga o Wharekauri concerns about the vesting process also enclosing a three-page attachment explaining the detailed basis of Ngāti Mutunga o Wharekauri mana whenua status over Taia. That letter (annexed hereto as exhibit "AA") also contained the request to deal directly with the Minister on this matter. It was apparent to Ngāti Mutunga o Wharekauri that Dave Carlton on Wharekauri was not party to decisions being made about the Taia vesting and was in a position to provide information only after he was informed of such Departmental decisions himself.

61. No response was received to the 11 July 2017 letter to Minister Barry so Paula Page wrote again to Minister Barry seeking a written undertaking by 18 August 2017 that the Crown would not proceed with the proposed vesting of Taia Reserve in Moriori. No such undertaking was provided by the Crown. Minister Barry replied to Paula Page on 21 August 2017 (annexed hereto as exhibit "BB") indicating that she did not intend to halt the Taia vesting process as requested. The letter contained the information that DOC officials had modified the vesting proposal to exclude the Taia Bush Historic Reserve land (enclosed by the Taia Historic Reserve) along with marginal strips around lakes, foreshore and lagoon edge of Taia Historic Reserve on the grounds that appointing Moriori as managers of those areas "would not be appropriate". Confusingly, these areas "may now be considered for inclusion in the Treaty settlement negotiations with iwi/imi".

62. One reason this is confusing is that appears to contradict the Crown's own Guide to Treaty Claims and Negotiations with the Crown:

> "*The Conservation Act 1987 provides that if land next to a body of water is transferred from the Crown, a strip on either side of the body of water (a 'marginal strip') is held back from sale and managed by the Department of Conservation on behalf of the Crown. This preserves public access to bodies of water, such as lakes, rivers and the sea. The marginal strip is usually 20 metres wide. All land vested through Treaty settlements must have a marginal strip unless the Minister of Conservation approves an exemption.*"[2]

Cultural and Historical Associations of Ngāti Mutunga o Wharekauri with the Taia Historic Reserve

63. Ngāti Mutunga o Wharekauri have held mana whenua over Taia since 1835 and have never relinquished mana whenua. The cultural basis for this has been briefly but authoritatively explained to the Crown in the letters of 11 July 2017 and 10 August 2017 both of which are annexed hereto marked "AA" and "BB" respectively. By my use on behalf of the plaintiff of the term "mana whenua" I am referring to and relying upon the independent scholarship of Sir Dr Hirini Moko Mead in Chapter 17 of his published work, "Living by Māori Values: Tikanga Māori", Revised Edition, 2016. In his dissertation, Sir Hirini provides a definition of mana whenua and a framework to determine whether a particular Māori group holds mana whenua. In this regard, I refer to the attachment to the letter of 11 July 2017 attached as exhibit "AA".

64. The fact that Ngāti Mutunga o Wharekauri were the undisputed customary owners of Taia was recognised by the Native Land Court in 1870 when the first title to Taia was issued to Ngāti Mutunga o Wharekauri.

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[2] *Healing the Past, Building a Future*, The Office of Treaty Settlements, March 2015. Page 116

65. According to the rights and responsibilities of customary owners, lakes and other features of the Taia landscape were given Maori (not Moriori) names. Some of these names provided to me include:

Taia, Makuku, Kairae, Te Awapatiki, Mangaroa, Parautu, Taihawata, Koropupu, Torere, Maenui Lake, Kaira Lake, Kahupiri Point, Takatapu Shoal, Te Raka Tutahi, Korepuke o Hauoro, Matawhenua o Whangatane, Kopangaru, Kotoke here, Waiotahu, Titihaukae, Kowai a Panga.

66. I have also been reliably informed that there is a Ngāti Mutunga urupa at Taia but I do not know its exact location.

67. There is other information known to our kaumatua and kuia, but any of the pieces of information set out in the preceding four paragraphs above are sufficient to establish that Ngāti Mutunga o Wharekauri has a strong customary interest in Taia.

68. The proposal to vest Taia in a third party (Moriori) denies Ngāti Mutunga o Wharekauri its right and freedom to enjoy its cultural associations with that land; and amounts to an unreasonable seizure of our property.

.....

SWORN at Wellington by the abovenamed deponent this day of 2017 before me:

.....

A Solicitor of the High Court of New Zealand

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY
[TE KOTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE]

CIV-2017-485-

IN THE MATTER	of a proposed decision by the defendant to vest in Hokotehi Moriori Trust the land and all appurtenances thereon on Wharekauri (Chatham Islands) known as the Taia Historic Reserve pursuant to the Reserves Act 1977
AND IN THE MATTER	of New Zealand Bill of Rights Act 1990
AND IN THE MATTER	of the Declaratory Judgments Act 1908
BETWEEN	**JOHN KAMO, MELODIE ERUERA-FRASER, MONIQUE CROON, STEPHEN TUUTA, IWIROA WAIRUA,** being the trustees of the **NGĀTI MUTUNGA O WHAREKAURI IWI TRUST** the governance entity of the Iwi of Ngāti Mutunga o Wharekauri holding mana whenua over all of Wharekauri (Chatham Islands) Plaintiff
A N D	**THE MINISTER OF CONSERVATION** Defendant

AFFIDAVIT OF THOMAS McCLURG IN SUPPORT OF APPLICATION FOR CASE MANAGEMENT DIRECTIONS; IN SUPPORT OF ANY INTERIM ORDERS WHICH MAY BECOME NECESSARY; AND IN SUPPORT OF SUBSTANTIVE RELIEF SOUGHT HEREIN

Dated: 2017

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I, **THOMAS McCLURG** of Wellington, Director, swear:

Introduction

1. I have read the affidavits of James Brent Parker, Reginald Victor Robert Kemper, Ian Gordon Barber, Susan Patricia Thorpe, Thomas Henry Lanauze and Maui Ashley Solomon. On behalf of the plaintiff trustees, I wish to record the following comments relating to those affidavits.

Affidavit of James Brent Parker

2. This contains a partial history of the land ownership history of Taia. It does not address the period from 1901 to 1955 other than to say (para 15) "*Over the following years a large number of separate titles issued for each share until 1955, when the Crown acquired the land...*" It would have been of interest to have had a fuller record of ownership, occupation and use of this land during this period and I do not understand why this fifty-year period was omitted from his research or his affidavit given his research mandate as described in the affidavit.

Affidavit of Reginald Victor Robert Kemper

3. Paragraphs 6 to 17 of this affidavit describe the power to vest under the Reserves Act 1977. Since the passing of the Conservation Act 1987, these provisions and powers have been the responsibility of the Minister of Conservation and Department of Conservation (DoC) officials. Section 4 of the Conservation Act states "*This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.*". The alleged failure of the Minister of Conservation and DoC officials to interpret and administer their responsibilities so as to give effect to the principles of Treaty of Waitangi is a central issue to these proceedings. That issue surely cannot be evaded by ignoring the connection between the Reserves Act and the Conservation Act that covers the entire history of the Taia purchase and proposed vesting. To the extent that this legislative connection has been ignored in the Kemper affidavit, it is deficient as a

description of the current interpretation of powers and processes originally established under the Reserves Act 1977.

4. I refer to para. 21 of Mr Kemper's affidavit. As I said in my original affidavit, neither the Nga Whenua Rahui Fund nor the Nature Heritage Fund considered the application from Te Kotahi Moriori rated sufficiently highly to warrant funding for the purchase. I consider the penultimate sentence of para. 21 to be inaccurate and misleading. Nothing happened for nearly twelve months. With reference to para. 22 I also note from the sequence of events that the Minister, the Hon. Sandra Lee, formally approved the purchase the day before the date on which the Minister's office recorded receipt of Mr Allan McKenzie's letter of 26 November 2001.

5. In para 29 of Mr Kemper's affidavit he states "*the land was purchased expressly for the purpose of a historic reserve, to be vested in HMT...*" The difficulty with this assertion is that the "express purpose" as above was not what was contained in the DoC media release of 14 March 2002 nor the letter to Sue Thomas of Ngāti Mutunga o Wharekauri by DoC official Mr Allan Ross on 16 October 2002. What the affidavit confirms is that these two communications by DoC were both misleading as to what was the "express purpose" for the purpose and vesting. These communications were the only communications from DoC to Ngāti Mutunga o Wharekauri at that time; and only one of them was a direct communication to an iwi, which after all had identified its interests in Taia to DoC.

6. Turn to para. 34: "*It is my understanding that the Department would set out concerns raised by Ngāti Mutunga o Wharekauri (including those in 2002) in briefing the Minister for her consideration at the time she is asked to make a decision on whether to vest the Reserve in HMT...*" The problem here is that Mr Kemper has already deposed that the "express purpose" of purchasing Taia was to vest it in HMT. Any failure on the part of DoC and the Crown to proceed with vesting would obviously cause problems as between Moriori and the Crown. But just as importantly it

would also raise questions about the original rationale and process for the purchase of Taia.

7. Furthermore, with reference to para 44: "*that consultation with the relevant iwi on a vesting proposal is required so that an informed decision can be made*". DoC has never consulted Ngāti Mutunga o Wharekauri as a "relevant Iwi". Its communication with Ngāti Mutunga o Wharekauri is only in the same fashion as any other member of the public. In 2002 and more recently, communications with DoC about Taia have been at the initiative of Ngāti Mutunga o Wharekauri. We (Ngāti Mutunga o Wharekauri) do not accept that the action of DoC "responding" to a letter from Ngāti Mutunga o Wharekauri represents consultation. Ngāti Mutunga o Wharekauri is a "relevant Iwi" that should have been consulted in its capacity as a Treaty partner from the outset but has not been.

8. In Mr Kemper's affidavit at para 44 he describes the post-vesting arrangement as "*that HMT would maintain ongoing consultation with Ngāti Mutunga o Wharekauri*". In other words, the responsibilities of the Crown as Treaty partner to Ngāti Mutunga o Wharekauri while Taia remains in crown ownership are seemingly to be abandoned in favour of a suggested iwi to iwi relationship after vesting. Our position is that the iwi to iwi relationship can never be a substitute for the Crown/Iwi relationship.

9. The failure of DoC to recognise the importance of the Treaty relationship between the Crown and Ngāti Mutunga o Wharekauri in relation to Taia is additionally demonstrated by what Mr Kemper says at para 65 with reference to the MOU between the Crown and HMT: "*The goals of the relationship between the parties include providing a framework to work together towards improving the Reserve for the benefit of Moriori and all New Zealanders*". Our position is that it is simply wrong (but also unacceptable) to lump Ngāti Mutunga o Wharekauri together with "all New Zealanders" in this context.

Affidavit of Ian Gordon Barber

10. In para 12 Mr Barber states "*There are no archeological indications of non-Moriori settlement from any of these forests or adjacent lands*

extending from Kaingaroa Station all the way down to Taia until the era of nineteenth century settler pastoralism." This statement overlooks the known historical facts. Pastoralism was never the exclusive domain of "settlers" on Wharekauri. The first sheep introduced to the Chatham Islands were 50 saxon merinos landed on South East Island by Baron Alsdorf in 1841 (the year before the Crown asserted sovereignty over Wharekauri). In 1845 some were relocated to Pitt Island and hence to the Missionaries at Te Whakaru. Some of these sheep were purchased from the missionaries and farmed by some of my Ngāti Mutunga tupuna at Matarakau. Maori had become widely engaged in pastoral farming on Wharekauri independently of, and in certain endeavours, parallel with settler pastoralism.

11. Fences, buildings (including a house that is still in use) tracks and non-native vegetation are all evidence of non-Moriori (Ngāti Mutunga o Wharekauri) settlement. In a sense, the establishment of Ngāti Mutunga o Wharekauri connection with Taia and, for that matter, the rest of Wharekauri was co-incident with the introduction of pastoralism. This evidence does not tell against a Ngāti Mutunga o Wharekauri connection with Taia but supports it.

Affidavit of Susan Patricia Thorpe

12. Much of this affidavit elaborates the very strong historical and cultural significance of Taia to Moriori and the recent efforts to protect that legacy. I recognise this significance and support these preservation efforts. This case, however, is not about what Moriori have but what Ngāti Mutunga o Wharekauri do not have. The recognition of Ngāti Mutunga o Wharekauri rights and interests by the Crown must not deny the recognition of Moriori rights and interests. The preservation of Moriori interests on Taia does not require an exclusive vesting of Taia in Moriori any more than the preservation of Ngāti Mutunga o Wharekauri interests in Taia would require its exclusive vesting in Ngāti Mutunga o Wharekauri.

13. In para 20. Ms Thorpe says: "*there are no recorded sites in the Taia landscape associated with Maori occupation*" (excepting the house etc). The absence of recorded sites does not mean there are no sites.

14. In para 33 and 34 Ms Thorpe discusses the origins of the place names in the Taia vicinity. Mr Solomon, in his affidavit, has deposed that 40% of the [Moriori] language is uniquely Moriori and it shares many similarities with the Maori language (para 16). This element of crossover makes the definitive origins of place names difficult.

15. The list of place-names provided to me by the kaumatua kaunihera of Ngāti Mutunga o Wharekauri excludes any that have distinctive Moriori elements and are taken from the Smith and Robertson maps of 1868 and 1883. I agree with Ms Thorpe that "*It is difficult to know who Smith and Robertson consulted when preparing their map of Rēkohu in 1868 and 1883 and how they came to ascribe the names to the various places that appear on that map. It is also the case that many of the old Moriori men who had in depth knowledge of the Rēkohu landscapes were long dead by this time*". All I can add is that the names I have supplied in my earlier affidavit were in common usage by Ngāti Mutunga o Wharekauri by those dates.

16. Attachment ST1 (page 9) to Ms Thorpe's affidavit includes a photograph of personal interest. The tin hut shown on the edge of the Hapupu Reserve was built by my grandfather (Thomas Putaka McClurg) and others. He was farming leased land at Te Whakaru at the time and the hut was on the Kaingaroa Station (two properties away from his farm). It formed part of a hunting and gathering infrastructure on the Island that preserved long-established Ngāti Mutunga o Wharekauri customary food gathering practices and their associated social elements. It also serves as a reminder that, on Wharekauri, land ownership is not determinative of the patterns of customary use.

Affidavit of Thomas Henry Lanauze.

17. Para 13 of the affidavit of my relative Tom Lanauze records the view of Sunday Hough that Moriori are tangata whenua of Rekohu/Wharekauri. I agree with this. Indeed, I would say that it is irrefutable. Moriori and Ngāti Mutunga o Wharekauri are both tangata whenua. However, since the conquest of Wharekauri and subjugation of Moriori by Ngāti Mutunga

in 1835, only Ngāti Mutunga o Wharekauri have held and exercised mana whenua.

18. In para 21 Mr Lanauze states "*I have read Tom's evidence and in it he states at paragraph 66 that there is a Ngāti Mutunga urupa at Taia.*" The wording of my affidavit was precise on this matter. What it actually says is: "*I have been reliably informed that there is a Ngāti Mutunga urupa at Taia but I do not know its exact location*". I have been told that more than once by kaumatua kaunihera of Ngāti Mutunga o Wharekauri and I have no reason to doubt it.

19. It is correct, as suggested by Tom Lanauze and Maui Solomon, that I have never been on to the Taia property (only to its boundary). Nothing in my affidavit is dependent upon such a visit.

Affidavit of Maui Ashley Solomon

20. Much of this affidavit comprises various attempts to refute the existence of Ngāti Mutunga o Wharekauri mana whenua over Wharekauri. In summary the main arguments presented are:

- An appeal to authority (the Waitangi Tribunal Rekohu Report of Chief Judge Eddie Durie)
- An assertion that conquest and subjugation of Moriori by Ngāti Mutunga o Wharekauri in 1835/36 was not 'legitimate'
- Alleged abandonment of Wharekauri by Ngāti Mutunga in 1869
- Alleged Mistakes by the Native Land Court in awarding land to Ngāti Mutunga o Wharekauri in 1870

Waitangi Tribunal Rekohu Report (WAI64)

21. As the lead negotiator for Ngāti Mutunga o Wharekauri in the current process to negotiate a Treaty Settlement with the Crown I am familiar with this report. The Tribunal makes no specific recommendations relating to Taia. Furthermore, Ngāti Mutunga o Wharekauri continues to rely on the statement of the Minister of Conservation that this matter is not a Treaty

Settlement issue. That clear statement of Crown position influenced the decision of Ngāti Mutunga o Wharekauri to deal directly with the Minister of Conservation about the proposed vesting of Taia outside of Treaty settlement negotiations to attempt to avoid a new breach of the Treaty that would, at some time in the future, require a negotiated remedy.

22. In para. 32 of his affidavit, Mr Solomon quotes the analysis of Chief Judge Eddie Durie concerning the writings of the Ngāti Mutunga scholar, Te Rangi Hiroa, on the subject of customary Maori title to land. Durie did not provide a reference for the basis of the views he attributed to Te Rangi Hiroa. However, the source is Chapter 4 of *The Coming of the Maori* first published in 1949. I attach this chapter as Attachment 1 to this affidavit. The most relevant sections of the chapter are on pages 380 and 381.

23. It is apparent that Durie was very selective in the way he quoted Te Rangi Hiroa and the conclusions he derived from this selectivity are not an accurate or reasonable presentation of what Te Rangi Hiroa actually wrote. In summary, Te Rangi Hiroa wrote "*The title (take) to the ownership of land was based on two main claims: right of inheritance through ancestors (take tupuna) and right of inheritance through conquest (take raupatu)*" (page 380). He also added "*However, no matter what the title, the length of tenure of the land depended on the military strength of the people to hold it.*" (page 381). This critical qualification was ignored by Durie.

24. Page 381 and 382 of *The Coming of the Maori* also set out the customary basis on which Ngāti Mutunga had valid claims to lands in both Taranaki and Wharekauri; a proposition rejected by Durie in WAI64.

25. In paras. 51 to 57 of his affidavit, Mr Solomon attempts to deprecate the work of Professor Hirini Moko Mead on the grounds that the Tribunal preferred instead the writings of Sir Peter Buck (Te Rangi Hiroa). Professor Mead's 1995 submission is appended to the affidavit of Mr Solomon. It is entirely consistent with what Te Rangi Hiroa actually wrote and it is also entirely consistent with his later work on the subject published first in 2003 in his book *Tikanga Māori*.

26. The framework of requirements for mana whenua set out on pages 306 to 308 of *Tikanga Māori* are scholarly and clear (two attributes in my experience that do not always go together). The framework and its elements are also orthodox and that is why we have used this framework as a convenient and comprehensive way of presenting the basis, nature and extent of Ngāti Mutunga o Wharekauri mana whenua and the contemporary rights and interests that derive from it that require Crown protection within the Treaty relationship.

"Invalid Subjugation and Abandonment"

27. As indicated by my comments above, I wish to avoid being drawn into a debate on Treaty Settlement negotiations with my fellow lead negotiator Mr Solomon that is out of scope for this case. There are, however, in his affidavit, inaccuracies relating to Ngāti Mutunga o Wharekauri history that I will briefly note.

28. The invasion of Wharekauri in 1835 and its rapid and total conquest by Ngāti Mutunga o Wharekauri was not "*facilitated by a foreign ally*" (para 57 of the Solomon affidavit). By 1835, Ngāti Mutunga used a wide variety of western technologies, particularly arms (including a cannon) and tools. Ngāti Mutunga also came equipped to establish a very successful "potatoes and pigs" economy focussed on trade with European vessels.

29. Ngāti Mutunga o Wharekauri did not abandon their continual occupation of Wharekauri in 1869. "*By 1870, all but a small number (estimated at less than 20 individuals either too old or sick to travel) had returned to their home in Taranaki*". (para 58 of the Solomon affidavit). In December 1867 about 120 Māori returned to New Plymouth on the *Despatch* and a further 150 Chatham Island Māori landed in Taranaki from the *Collingwood* on 28 November 1868. This was a carefully planned and extremely expensive venture to attend hearings in the Taranaki Compensation Court held during 1869 which required the personal attendance of all claimants.

30. These departures temporarily reduced the Maori population on Wharekauri to a lower number than the Moriori population. However, twenty-eight

Ngāti Mutunga o Wharekauri representatives remained on Wharekauri to protect the interests of the iwi generally. This group included significant chiefs such as Pomare and Toenga as well as my great grandmother Ngahiwi Dix (a prominent Wharekauri matriarch) who was in her early thirties at the time and would no doubt have been surprised to be described as "too old and infirm to travel". Ahi Kaa was thereby maintained by Ngāti Mutunga o Wharekauri through the entire period and, in spite of the difficulties in funding a return to Wharekauri following the general failure of claimants to the Compensation Court, the Ngāti Mutunga o Wharekauri population on the Island returned to pre-1868 levels by the mid eighteen eighties.

1870 Land Court Hearing

31. In his affidavit, Mr Solomon advances the argument that the fact that the Native Land Court in 1870 awarded all land to Ngāti Mutunga o Wharekauri (except where Ngāti Mutunga requested reserves be set aside for Moriori) was not evidence that Ngāti Mutunga o Wharekauri had mana whenua over Wharekauri. "*As noted previously in my evidence, the Native Land Court did not decide who had 'mana whenua'* (para 58(o) Solomon affidavit). This is a semantic, rather than a substantial point.

32. The Native Land Court was charged with identifying who held customary possession of land so that those customary owners could be issued a land title. The attributes of customary ownership, authority and possession are inseparable from the concept of mana whenua. The process followed by the Land Court on Wharekauri was open so that any claims to customary ownership could be (and were) debated in open Court.

Assimilation

33. In para. 65 of his affidavit, Mr Solomon takes issue with my estimate of the Iwi affiliation composition of the population of Wharekauri. The acknowledgement of Iwi affiliation is a very personal matter and not everyone is interested in, or knowledgeable of, their whakapapa. Estimation of iwi affiliation is therefore an imprecise art. The latest available objective analysis of this matter is from the 2013 New Zealand

census in which 1,641 people identified themselves as affiliated to Ngāti Mutunga o Wharekauri and 32.9% of these recorded this as their sole iwi affiliation. 198 Ngāti Mutunga o Wharekauri were resident in the Chatham Islands and a further 18 people who identified themselves as Ngāti Mutunga were also resident there.

34. In the 2013 census, 738 people identified themselves as affiliated to Moriori and 14.2% of these recorded this as their sole Iwi affiliation. 36 Moriori were resident on the Chatham Islands.

35. There is extensive assimilation of Moriori on Wharekauri into Ngāti Mutunga o Wharekauri and, by the same token, many Ngāti Mutunga o Wharekauri people are also Moriori. Tom Lanauze and I are relatives, although to my knowledge I am not Moriori. Alfred Preece (Chatham Islands mayor and prominent Moriori spokesperson) frequently sits on the Ngāti Mutunga o Wharekauri paepae at Whakamaharatanga marae as is his birth right.

36. Scattered through his affidavit, there are a number of unfortunate examples where Mr Solomon has placed words in my mouth that I have not spoken, and attributes views to me that I do not hold.

37. In para 28 he states "*This, declares Mr McClurg, affords NMOW what in effect amounts to a right of veto over the return of any Crown land to Moriori "without the prior consent of Ngāti Mutunga*". I declare no such thing. Ngāti Mutunga o Wharekauri do not claim a 'right of veto' over Moriori but hold to the principle that no redress should be offered by the Crown to any Iwi that is at the expense of the Treaty rights of any other Iwi.

38. In para 60 of his affidavit Mr Solomon states that I explained to him that Ngāti Mutunga o Wharekauri are the *"primary Iwi" on the Island.* I am absolutely certain that I have never said that to Mr Solomon. Neither do I hold the view that Ngāti Mutunga o Wharekauri hold *suzerainty or 'feudal overlordship'* (para 62 of Mr Solomon's affidavit). Neither do I believe *that NMOW are somehow "superior" to Moriori* (para 64 of Mr Solomon's affidavit).

39. In para 132 of his affidavit, Mr Solomon states that "*There have been many instances in past years where Moriori have been confronted with claims by NMOW to "prior occupation" ... cross claims over Moriori taonga, and to Moriori remains.*" I do not personally ascribe to "prior occupation" theories and oppose Ngāti Mutunga o Wharekauri claiming anything that belongs to Moriori. It is therefore wrong to associate me, even indirectly, with such views or actions.

40. Para 130 of Mr Solomon's affidavit states "*On 13 June 2017 in a DOC email to Reg Kemper, DOC Regional Manager, it was noted that the Ngāti Mutunga position on Taia was unchanged because they say that they have mana whenua over all of the Chatham Islands and did not recognise Moriori claims (attached as exhibit "MS45").* This quote is misleading. MS45 shows that the DoC memo actually said "*...did not recognise Moriori claims <u>in that regard</u>*" (emphasis added). That is, Ngāti Mutunga o Wharekauri did not recognise any Moriori claims to mana whenua. It is plainly wrong to say that Ngāti Mutunga o Wharekauri do not recognise Moriori claims in any general sense when the Solomon affidavit itself records several examples of joint Treaty claim redress being agreed by the two Iwi.

41. With respect to the degree of Ngāti Mutunga o Wharekauri support for the position on mana whenua reflected in this and my earlier affidavit. In para 67 of his affidavit Mr Solomon says, "*I personally know of many Ngāti Mutunga people on the Island today who do not support the stance being taken by NMOW Trustees regarding Taia lands or the stance taken in the Treaty settlement negotiations concerning claims to 'mana whenua*". I have personally attended all of the consultation hui on settlement negotiations held by Ngāti Mutunga o Wharekauri since I was appointed lead negotiator and can report that Ngāti Mutunga o Wharekauri support for the "stance on mana whenua" at such hui was unanimous.

42. Finally, in para 59, Mr Solomon characterises these proceedings as an example of disrespect by Ngāti Mutunga o Wharekauri towards Moriori. It is unfortunate that Mr Solomon feels this way, but he is wrong to do so. A defence of Ngāti Mutunga o Wharekauri mana whenua is not

disrespectful to Moriori or any other Iwi; it is simply the least we can do to honour our Ngāti Mutunga o Wharekauri tupuna.

.....

SWORN at Wellington by the abovenamed deponent this day of 2018 before me:

.....

A Solicitor of the High Court of New Zealand

The Coming of the Maori

by

TE RANGI HIROA

Sir Peter Buck

K.C.M.G., D.S.O., M.A., Litt.D., D.Sc., M.D., Ch.B.

Late Director, Bernice P. Bishop Museum

Professor of Anthropology, Yale University

WELLINGTON

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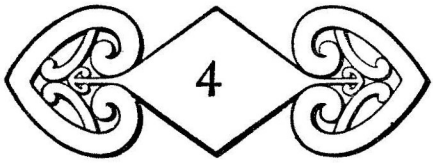
First Published 1949
Second Edition 1950
Reprinted 1952
Reprinted 1958
Reprinted 1962
Reprinted 1966

PRINTED IN NEW ZEALAND
BY WHITCOMBE & TOMBS LTD. CHRISTCHURCH



The Life of the Community

EACH FAMILY HOUSEHOLD REQUIRED ESSENTIAL BUILDINGS for sleeping, cooking, and storing food. The sleeping house (*whare puni*) served as a dormitory for the entire family and was built to shut out the cold air. The cooking house (*whare umu*) sheltered the shallow oven pit (*umu*) with its pile of cooking stones, cover mats, and other utensils. Its end walls were more open than those of the sleeping house to allow the escape of smoke. It could be used by slaves and menials for sleeping but not by the family.

When the family expanded to include a number of households, an assembly house (*whare hui*) was needed to accommodate the increased number at family conclaves and to lodge visitors. This usually took the form of a larger sleeping house (*whare puni*) which served two purposes. In the daytime, the meetings were held in the open space before the house; in bad weather and at night, within it. Hence the saying,

Ko Tu ki te awatea, ko Tahu ki te po.
Tu in the daytime, Tahu in the evening.

Tu refers to the war god Tu, for virile speeches with active movements on the feet and war dances of welcome were exchanged outside, and Tahu (to light) personified the milder and quieter reception within the lighted house at night. The establishment of a guest house and a *marae* plaza before it marked the growth of family strength and prestige.

In the old-time fortified villages, the various families had their establishments arranged on the different terraces. The highest ranking chief had the privilege of occupying the topmost flat, and ample space had to be provided for the *marae* before his guest house. To maintain his prestige, his guest house was the largest and best carved in the village. The significance of the carved guest house (*whare whakairo*) is brought out in the story of Taharakau.

Taharakau was a chief who lived in the Poverty Bay area and who excelled at repartee. He visited a chief of high rank who, for some error, was living in a poorly constructed house out in the wilderness. Jade has always been a chiefly possession, and the exile had a bunch of jade cloak pins (*aurei*) attached to the shoulder border of the cloak he was wearing. Shrugging his shoulder so that the jade ornaments jingled, he asked, "Taharakau, what are the signs of chieftainship?" Taharakau, ignoring the sound meant to prompt his reply, answered,

> *He whare whakairo i tu ki roto i te pa tuwatawata!*
> *Te whare i tu ki te koraha, he kai na te ahi.*
> A carved house standing in a fortified village!
> The house standing in the open is food for the fire.

After the acceptance of Christianity and its gospel of peace, the villages moved down from the fortified hills to the more accessible flats but the arrangement of family units and the central carved guest house with its assembly *marae* followed the established pattern.

The guest house, carved or uncarved, served various social needs and various names were applied to the one structure. Structurally it was an enlarged sleeping house (*whare puni*). If carved, it was also a *whare whakairo*. It functioned variously as an assembly house (*whare hui*), a council chamber (*whare runanga*) and a guest house (*whare manuhiri*). As the prestige of the village as well as that of the chief was gauged somewhat by the meeting house, no effort or expense was spared in employing master craftsmen to expend their greatest skill in carving the various parts. The meeting houses formed the social focus of the tribe, hence they were generally named after tribal ancestors. When the people assembled within its walls for tribal discussions, the orators were justified when they said, "We have gathered together within the bosom of our ancestor." The carved meeting houses were a source of pride to the people and they gave an atmosphere to the village that nothing else could equal.

The term *marae* was applied to the plaza before the guest house. In the cultural development which took place in New Zealand, the meeting house and the *marae* became complementary to each other and one could not function adequately without the other. People were welcomed with speech, song, dance, and food on the *marae* in the daytime and were further welcomed, entertained, and lodged within the house at night. In many important villages, the *marae* received an individual personal name, Te Papaiouru before the carved meeting house of Tamatekapua at Ohinemutu, for example. The prestige of a *marae* was sometimes built up to such a height that people of inferior rank were not allowed to deliver speeches on them.

Inasmuch as the welcome by speech on the *marae* had to be followed by a welcome with food, the *marae* could not maintain its prestige unless it was supported by storehouses plentifully stocked with food. Thus the storehouses formed a third element in the complex which administered to the social needs of the tribe, maintaining and increasing its reputation with outside people. In addition to household stores it was necessary to have a reserve supply to assist in the extra demands made by tribal gatherings and, above all, by the entertainment of visitors. The home people could live upon scanty rations in times of scarcity, but visitors had to receive the best or shame enveloped the community. Thus social gatherings which involved invitations to outside tribes were arranged to fit in with the time when the storehouses were full, and outside tribes arranged ceremonial visits to coincide with the local seasons of plenty. However, the storehouses had to be ever ready to deal with emergencies, such as deaths. In addition to the family storehouses, the chief had a special storehouse on piles (*pataka*) which was often more elaborately carved than the guest house. It was the symbol of hospitality and was often given a proper name. The storehouse of Te Heuheu of Tokaanu was named Hinana, and because it was always stocked with preserved pigeons (*huahua*) from the inland forests and with dried whitebait (*inanga*) from the inland sea of Lake Taupo, the following saying was applied to it:

Hinana ki uta, Hinana ki tai.
Hinana inland, Hinana to the sea.

The *marae,* the guest house, and the storehouse formed a triple complex by which the social prestige of a tribe rose or fell.

Community Co-operation

In Maori communities, mutual help was a fundamental expression of blood kinship as well as human kindness. Only the skilled craftsmen, such as builders, carvers, and tattooers received recompense in food and material goods for their labour. The general tasks requiring a number of people were accomplished by community co-operation without thought of pay.

In the cultivation of the sweet potato, the ground was prepared and the soil loosened at intervals with digging sticks (*ko*) wielded by men who worked in unison to a kind of drill. Plots termed *mara* were prepared in this way for each family. Families attended to the heaping up of the mounds in their own plots and the planting of the seed tubers which came from their own supplies. The subsequent weeding and final digging up of the crop was attended to by the owners of the plots, but when one family had completed their work, they helped their neighbours. Later, the Irish potato superseded the sweet potato as the principal crop. I remember when we had but one plough in my own village. That one implement

ploughed the ground into plots of equal length and width, and the owners of the plots planted their own seed and attended to the weeding, hoeing, and digging, always receiving assistance from those who were free to help. The land was tribal land, and the plots were designated to the individual families by the older men in authority. The crop was gathered in baskets after being sorted, the smaller tubers being kept for next season's seed. The supply was carted to the village by those in charge of the available carts, but each family attended to the storing of their own crop in their own store pits. There was community co-operation in labour where required, but there was individual ownership of the plots and the resulting crops.

When gatherings took place, the feeding of the assembly was automatically a community undertaking by the whole village. Able-bodied men brought in loads of extra firewood which were stacked by the cooking places of each household. Others brought in bundles of flax which were also distributed to the cooking places for plaiting into the circular receptacles, termed *kono,* for holding the cooked food. Each household drew the vegetables from their own store pits but the question of the flesh food (*kinaki*) to go with the vegetables was a more serious problem. If the season was right, men went out fishing and the supply was distributed to the cooking fires. The women of each household collected shell fish and echinoderms, the kind depending on the natural resources of the neighbouring coast. In modern times, pigs were killed and distributed and cattle were bought and butchered to supply any local deficiency in the flesh-food supply. Any bought foods were paid for out of the community chest. With cheerful activity on the part of all, everything was ready by the time the people and the visitors had arrived. Without any fuss or confusion, the various households allocated the various duties. Men chopped the wood and prepared the fires. Women scraped baskets full of potatoes and plaited piles of *kono* platters. If there were such delicacies as dried fish and preserved pigeons in the storehouses, these were ready to be served for some of the meals.

The preparations for a meal are interesting. This is what I saw in my own village over fifty years ago. A man, who happened to be a Moriori named Mana, had somehow become accepted as the public announcer of the village. He was very capable and when the time approached to commence cooking, he toured the village and saw that all the fires were set for lighting and the vegetables and flesh food at hand. He then stood in the middle of the village and yelled at the top of his voice, *"Ka tahu"* ("Light up"). The cry was repeated by the nearer fireplaces and spread outwards to each end of the village. The wood was already stacked in the oven pits with the stones arranged above them. The commander of each fire, usually a woman, applied a match, and soon the smoke of the cooking

fires arose throughout the village. As the wood burned down, the heated stones fell to the bottom of the shallow pit where they rested on live charcoal. Mana, when he saw that the correct time had elapsed, took up his central position and yelled, *"Ka tao"* ("Cook"). The assistants at the fires levelled the heated stones into an even bed with a wooden stake, removing any unburnt wood. Water was sprinkled over the stones, and as the steam arose, women poured in the scraped potatoes to above the level of plaited flax bands (*paepae*) placed around the circumference of the pit, added the fish or meat, sprinkled more water, and quickly covered the mound of food with plaited oven covers (*tapora*). Then earth was heaped over the covers to seal the oven and prevent the escape of steam. The *tao* process was under way.

The time allowed for cooking was an hour or more but it was better to be on the sure side, for an uncooked oven of food brought shame to the housewife. Mana was associated with our family, and I have heard him ask the women who presided over our oven, *"Kua maoa?"* ("Is it cooked?") On receiving an affirmative reply, he took up his position and yelled, *"Ka hura"* ("Uncover"). The assistants at each oven immediately scraped off the earth and carefully removed the mat covers, taking care not to allow any earth to fall on the food. The women quickly placed the cooked potatoes in the *kono* containers and put portions of fish or meat on the top of the vegetables. When a sufficient number of *kono* had been filled, the rest of the food was left in the oven for the workers.

In our village, the meeting-house, with its *marae,* was set on a rise with an open space extending to the public road in front. The houses stretched away from either side of the middle space. Women and girls, carrying a *kono* in each hand, assembled at the nearest house on either side of the central space. Mana, on receiving from either side a signal that all were present, yelled his final command, *"Ka hari"* ("Carry"). The women in two lines then marched slowly in single file towards the *marae,* the leading women singing songs, joined by the chorus behind them. Every now and then, a short posture dance was performed to enliven the march, there being a number of songs and dances specially composed for processions carrying food. The procession having reached the *marae,* the food was laid down before the guests who sat in small groups to permit their hosts to serve everyone. The only available liquid in those days was water, and young men acting as waiters stood by with buckets of water and tin pannikins ready to serve those who called, *"He wai"* ("Water").

Gatherings usually lasted some days, and the feeding of the people went on during the whole time without any trouble. The organization was perfect and there were always people ready to do the work cheerfully. To break the monotony, shell fish, preserved pigeons, or whatever delicacy was available were served on some days. The guests derived pleasure

while the hosts acquired prestige. When the guests returned home, the stay-at-homes asked, *"He aha nga kai o te hui?"* ("What were the foods at the gathering?"). Reputations rose or fell upon the reply. When particular local foods were abundant, guests were given a special distribution to take home. I remember receiving a string of dried clams (*pipi*) from relatives who had been away to a distant gathering.

We have often been accused of wastefulness in holding such gatherings in modern times, but our critics belong to a culture based on a money economy and they cannot realize that there are emotional values which the individualist cannot feel.

The *ohu* Custom

Co-operation in labour took the form of working bees, termed *ohu,* which were frequently organized for clearing bush land for cultivations. Sometimes they were arranged to promote social intercourse between two tribes. The tribe owning the land sent out an invitation to another tribe to clear the land for them. The home tribe provided the food and entertainment and the visiting *ohu* put forth their best efforts to gain the approval of their hosts. Such exchanges gave pleasure to both sides and served to maintain friendship between the two tribes.

A curious story is connected with the visit of a Ngati Tama *ohu* to clear some land for a Taranaki tribe south of the present New Plymouth. The *ohu* speedily completed its task with a large stone adze named Poutamawhiria, to which a certain amount of magic power was ascribed. The working party had been fed with choice mussels from a local reef. They were so good that the Ngati Tama priest with the *ohu* decided to steal a portion of the reef. He waded out secretly to the reef, cut off its northern end with the adze, Poutamawhiria, and by means of magic incantations, floated it back to his own territory, where it is now fixed in the sea as the mussel-bearing reef named Paroa. However, Poutamawhiria marked its disapproval of the theft by allowing a chip to break off from one corner of its cutting edge. Generations later the adze disappeared, but a description of it was handed down orally. It was of very black polished stone about 16 inches in length, and it had a chip off one corner of its cutting edge. One night a young girl of the Ngati Tama dreamt that Poutamawhiria had been found at the neighbouring village of Pukearuhe by a European farmer named Black. The girl was so insistent that her father, Te Kapinga, visited Mr Black's home, where, to his intense surprise, Mrs Black produced a large stone adze which her husband had found recently. It was of polished black basalt, the right length, and it had a chip off one corner of the cutting edge. Mr Black arrived and, after hearing the story, very generously gave it to Te Kapinga as the representative of the rightful heirs. The Ngati Tama and Ngati Mutunga tribes held a meeting at which

Poutamawhiria was laid in state on a flaxen robe on the *marae,* and the people greeted its return with a welcome of tears. The finder was publicly thanked and given a suitable present. Later, on a visit, I was shown Poutamawhiria. I looked doubtingly, perhaps, at Te Kapinga, as I felt the chipped corner. "Well," he replied, "If you examine the Taranaki reef, you will see that its northern end is cut off clean and if you examine the Paroa reef you will find that its southern end is cut off clean. Now if you were to bring the two reefs together, you would find that the two cut ends would fit perfectly." Who am I to gainsay such proof?

The system of the *ohu* co-operative labour prevailed throughout Polynesia. The spirit of the *ohu* exists among the Maori to-day but the shift to a money economy and the changes in food and occupation render it difficult to recapture the full atmosphere of the past.

Land

As the primary motive for the long sea voyages of the Polynesians was to find land for new homes, the original ownership of land was based on prior discovery and occupation. The first arrivals in New Zealand found no one to oppose their settlement, and they spread out without trouble. The second set of settlers, under Toi and Whatonga, were allowed to settle peaceably in the Bay of Plenty area, and intermarriage with the women of the first settlers gave their progeny the right to inherit from the female side. Even in this period, however, armed conflicts were frequent and groups which were strong enough did not hesitate to extinguish the rights of prior discovery and occupation by conquest. An invading army may resemble a tidal wave, which, after sweeping over the land, subsides without increasing the ocean's permanent domain. The war party which returns to its own land after slaying and looting, does not increase its tribal territory. Conquest is interesting historically, but it cannot establish ownership over the conquered territory, unless the conquerors remain in occupation. During the second settlement period, though there were some changes in ownership owing to conquest, there was more than enough land to allow the developing tribes to find new areas for peaceful prior occupation.

The third wave of people came definitely to colonize, and if the story of Kupe's discovery is true, they must have expected to find the land uninhabited. The manner in which the historic canoes selected different parts of the coast for landing indicates that they wished to avoid clashing with each other. They had a certain respect for prior discovery of material things as well as land, as evidenced by the story of the stranded whale at Whangaparaoa. The first arrivals tied a rope to the whale to indicate ownership and then went inland to view the country. The second arrivals scorched a rope over a fire to make it appear old and then passed it under

the previous tie. On this trickery they based a claim to prior discovery. Ihenga of the Arawa canoe used a similar subterfuge by placing scorched-leaf offerings on a shrine and so depriving Tuarotorua of the rightful ownership to the land on the shores of Lake Rotorua. Neither story may have occurred as related, but the very fact that they are recorded in traditional history indicates that the rights of prior discovery or occupation were recognized and a guilty conscience led to the use of subterfuge to overcome those rights.

The third settlers established themselves on different parts of the coast, built their houses and villages, and cleared the land for their cultivations. They came into conflict with the earlier inhabitants and extended their territory by the right of conquest and occupation. With increasing population, they spread along the coast line until they met the expanding families of other canoes. Argument and conflict ended in the establishment of boundaries in which rivers, streams, and ranges formed convenient landmarks. Some groups spread inland and occupied the large river valleys and the areas around the inland lakes. Coastal land had its appeal in food supplies of sea fish and marine shell fish, and the inland areas had assets of fresh-water fish and shell fish with rich supplies of forest birds. The historical record is crowded with countless wars over land and the main causes of mortality were summed up in the saying,

> *He wahine, he whenua i mate ai te tangata.*
> Women and land are the reasons why men die.

In newly discovered or newly acquired territory, chiefs sometimes utilized their privilege of personal tapu by invoking the custom termed *taunaha* (to bespeak). They publicly named desirable portions of land after some part of their bodies and so prevented others from claiming them. On the landing of the Arawa canoe, Tamatekapua named a promontory after his nose and two other chiefs named portions of land after their abdomens.

The title (*take*) to the ownership of land was based on two main claims: right of inheritance through ancestors (*take tupuna*) and right of inheritance through conquest (*take raupatu*). The right of prior discovery became historically merged in ancestral right. Conquest (*raupatu*) alone did not confer right of ownership unless it was followed by occupation. If the invading party retired, the survivors of the defeated tribe could return and still own their land. Occupation to establish a title had to be continuous, as idiomatically expressed by the term *ahi ka,* or lit fire. So long as a people occupied the land, they kept their fires going to cook their food. Conversely, the absence of fires showed that the land had been vacated. Even if a conquering tribe did not leave a holding party, they might claim the land subsequently if it remained unoccupied. However, if some of the

conquered people evaded the invaders and remained on the land to keep their fires alight, the right of ownership of the defeated people was not extinguished. When the Waikato confederation invaded Taranaki, they drove the Atiawa out of their territory and the Atiawa migrated south to establish homes in exile. Later, the Waikato tribes claimed ownership of the Taranaki territory by right of conquest. However it was proved conclusively that some families of the Atiawa had remained on the land and, by keeping their fires alight, had prevented the tribal rights of ownership from being extinguished. When conquered territory was occupied for some generations, the title by conquest became a historical event and the functioning title became that of ancestral inheritance (*take tupuna*).

A third and rarer title, termed *tuku* (to cede), included lands which were ceded in compliance with some custom, such as that of paying a raiding party (*taua wahine*) as recompense for the infidelity of a tribal woman to her husband. However, no matter what the title, the length of tenure of the land depended on the military strength of the people to hold it. I once heard a Ngapuhi chief criticise the British for not observing the Treaty of Waitangi to the speaker's satisfaction. He held that as the Maori were the original owners of the land, the land should be returned to them. It so happened that the nearby land had been conquered by Rahiri, a noted ancestor of the Ngapuhi, and he had driven out the Ngati Pou who were the original owners. To create a diversion, I asked the orator what sort of treaty the Ngapuhi had given the Ngati Pou. An amusing discussion followed mainly directed towards proving the dissimilarity of the two events.

In the course of time, the principal tribes with their subtribes came to occupy definite areas with fixed boundaries. The love of their own territory developed to an absorbing degree, for tribal history was written over its hills and vales, its rivers, streams, and lakes, and upon its cliffs and shores. The earth and caves held the bones of their illustrious dead, and dirges and laments teemed with references to the love lavished upon the natural features of their home lands. The prestige of the tribe was associated with their *marae* sites and terraced hill forts, and their religious concepts were bound to their *tuahu* shrines. Captives in distant lands have begged for a pebble, a bunch of leaves, or a handful of earth from the home land that they might weep over a symbol of home. It is the everlasting hills of one's own deserted territory that welcome the wanderer home and it is the ceaseless crooning of the waves against a lone shore that perpetuates the sound of voices that are still.

With the love of home territory so strong, the desire to occupy other lands by conquest faded. The tribes continued to have their quarrels and feuds but war parties returned home with plunder and captives, after satisfying their desire for military glory. However, this period of land

stabilization was rudely shattered by the advent of Europeans and their introduction of firearms. The Ngapuhi in the North, armed with guns swept over the whole of the North Island but they returned without disturbing the existing distribution of tribal lands. The Waikato and King Country tribes drove Te Rauparaha and his valiant Ngati Toa out of their tribal lands at Kawhia and occupied them. One of the most touching laments in Maori poetry is Te Rauparaha's farewell to Kawhia. The Ngati Toa, still strong and unbeaten in spirit, marched south and dispossessed the tribes occupying the Otaki area near Wellington. Sections of the Ngati Raukawa and the Atiawa joined them and conquest with occupation spread north to Horowhenua, south to Wellington, and crossed Cook Strait to the Marlborough and Nelson districts. The Waikato confederation had followed up the conquest of Kawhia by invading Taranaki, but they rolled back without extinguishing the lighted fires (*ahi ka*) which preserved the right of ownership for those who were to return later. The Ngati Tama and Ngati Mutunga, who formed part of the Atiawa forces, occupied the shores of Wellington Harbour but, influenced by stories of the rich supplies of fish, shell fish, and sea birds at Chatham Islands, they crossed over and dispossessed the peaceful Moriori owners. Later, the Ngati Tama, Ngati Mutunga, and Atiawa returned to the Taranaki lands of the unextinguished fires, but sections remained in occupation of the conquered lands to the south. These post-European changes in the distribution of tribal lands may be directly attributed to the acquisition of firearms.

In the history of occupation which ultimately led to the fixing of tribal boundaries, the enlarging families, which became subtribes, spread to occupy plains and valleys for cultivation and hill tops for villages. They had adjusted their movements to the topographical nature of the country. In doing so, they established their rights to the localities which they occupied. Their system of community co-operation in cultivation and sharing the natural resources of their territory inhibited any trend towards individualism and the individual ownership of land. The land belonged to the subtribe and the tribe. It was owned by a number of people, for only numbers could hold it against outside conquest and occupation. The individual had his share in the common ownership, but he could not be said to own any particular portion in perpetuity. He had the use of particular portions and his neighbours respected his allotment as he respected theirs. He had the use of the land during his lifetime and his heirs had the use of it during their lifetime. Cultivations were made in a certain locality in one year and changed to another locality in another year. Even the sites of villages were changed at times. Maori lands occupied the same position as entailed estates and could not be alienated by individuals. Thus they formed a fluid asset which could be adjusted to meet the varying needs of succeeding generations.

The advent of Europeans introduced a totally different system of land tenure, in which individualization of land with fixed boundaries for even small plots was the essential feature. In order to acquire land for themselves, they had to introduce the additional foreign innovation of alienation by sale. The early chiefs, bemused by the rattle of hoop iron and tin pannikins, sold large areas of tribal land for the cheap products of English factories. It has been said that the chiefs and the people thought that they were merely giving the newcomer the right to use the land, not realizing that they were parting with their tribal heritage forever. Probably this was true of the early sales.

The alienation of land became so alarming that the more thoughtful chiefs met, and their deliberations resulted in the Kotahitanga movement (Unity) to oppose the further sale of Maori lands. To add prestige to the movement, a chief from the Waikato tribes was finally selected as the head of the organization and given the borrowed title of king. When Wiremu Kingi of the Atiawa confederation was forced to resort to arms to oppose the alienation of tribal lands at Waitara by a forced sale, the Waikato tribes assisted in the war which ensued. However, in spite of opposition, native lands had to be acquired somehow for the many European settlers.

The Government, to salve its conscience by some form of legal procedure, set up the Native Land Court to administer land laws which attempted to give expression to Maori custom and usage. The claims of various tribes to their lands were investigated, and inheritance supported by genealogical evidence and tribal history was fully recognized. Lands no longer occupied, owing to the decrease in population caused by post-European wars and introduced diseases, were awarded on proof being adduced of previous occupation. Previous occupation was evidenced by the sites of old forts, named cultivations, burial places, and tribal history which recorded the names of the ancestral occupants. The tales of the conquests which led to occupation were told in detail, and the records of the Maori Land Court should contain rich material concerning tribal history. The fact that the land was held in common was recognized and the claimants submitted lists of owners in the block under investigation. The allocation of shares in a block to individuals or heads of families was influenced by social position in the tribe, the chiefs receiving more than those of lower rank. The boundaries of the blocks, defined according to native landmarks, and the total number of shares with their allocation to shareholders were fixed by the Court. The value per share in acreage was usually not known at the time, for the actual survey of the block, owing to an insufficient number of surveyors and the expense involved, lagged far behind the time of the Court's award.

The Government then proceeded to purchase blocks of native land for European settlement, but the right of common ownership having been recognized by law, a majority of the shares had to be signed by their holders before the purchase could be made. The total purchase money was divided among the shareholders according to their shares. Subsequent surveys, in some instances, showed that the actual acreage was more than the estimated number of acres purchased. I do not know whether the Government reaped the benefit of the surplus or whether the shareholders received a *post mortem* dividend. In old land transactions, much depended on the amount of agitation raised by the erstwhile owners and the consideration received by their petitions to Parliament. Suffice it to say that large areas of native land were sold for a mess of pottage which was speedily gulped down. Looking back over the vista of wasteful years, one cannot help wishing that successive Governments had invested the proceeds of the sales of tribal lands in some trust from which annual payments of interest could have been paid. Had such been done, the descendants of our improvident ancestors would have continued to harvest the annual crops from their converted ancestral lands.

During the agitation for acquiring Maori lands for close farming, no thought seems to have occurred to our early legislators that the Maori owners might be educated to farm their own lands as efficiently as Europeans. Sir James Carroll, while Minister of Maori Affairs, tried to hold back some of the desired Maori land against the day when the owners would be sufficiently advanced to utilise it along European lines. This delaying action, disparagingly referred to as the *taihoa* policy, was anathematized by European buyers and adversely criticized by short-sighted owners willing to sell. However, delay without action could not survive indefinitely. The first action took place on the east coast in the territory of the Ngati Porou. Under the inspired leadership of Sir Apirana Ngata, M.P. for the Eastern Maori Electorate, remaining blocks of Maori land held in common were incorporated and administered as sheep stations by committees elected by the owners. The scheme proved a success and demonstrated the hitherto unbelieved fact that the Maori sheep farmers could be as good and better than some of their *pakeha* competitors. However, the Maori lands had been pared down in most districts to holdings not large enough for sheep farming and some of the sheep runs could be cut down profitably for closer settlement. Dairy farming had become the backbone of the Dominion and many Maori with small holdings in the Taranaki district and the South Island were making a living out of dairy farming. The agile mind of Apirana Ngata turned to dairy farming as a solution to the problem of the Maori making the most out of the little they had remaining. While Minister of Maori Affairs, he was able to inaugurate a policy of State aid in financing the breaking-in

of smaller areas of native land and stocking them as dairy farms to be managed by the Maori owners themselves. This was the first instance in which the State advanced funds to enable the Maori to make practical progress with their own lands, and it should be recognized that this overlong delayed act of justice was due to the courage and faith of a Maori in his own people.

In enacting laws to give expression to the customs of the past, complications were bound to occur. The Maori, as a member of a tribe, inherited shares in the different blocks that formerly comprised the tribal territory. In former days, his ancestors moved about and cultivated here to-day and there to-morrow without any inconvenience. In the present age, scattered holdings of a few acres here and a few acres there cannot be efficiently farmed by the same owner. If it were possible, however, to combine the scattered shares into one holding, the result would be a decent sized farm which could be worked with profit. To help on the dairy farming project, Ngata worked out a scheme of consolidation whereby owners could exchange their shares in different blocks and even buy some out so that the scattered holdings could be consolidated in one locality. The task was difficult, complicated, and tedious and could be accomplished only through Government aid. However, a number of dairy farms are now operating successfully through the consolidation scheme.

Another complication followed the conversion of the fluid use of land by the community to the fixed ownership by individual families. In former times, large and small families were merged together and individuals in each generation enjoyed equal rights to the usage of tribal territory. Now, the family is confined to a fixed portion with surveyed boundaries beyond which it cannot exude. Though the family may increase in number in each generation, the plot of family land remains the same in size, and, as each generation inherits from the preceding generation, the size and value of individual shares will progressively decrease to the infinitesimal.

Small areas of land with multiple owners were a problem. An individual shareholder with energy and ambition was deterred from putting his labour and money into farming the land because those who toiled not could claim an unearned share of his results. Under such circumstances, the easiest way to avoid conflict, was to lease the land to a European and divide the annual rent, no matter how small the individual shares might become. Another of the innovations introduced by the change in land tenure is the imposition of land tax, but more advanced cultures than that of the Maori have shared a similar reluctance to accept the inevitable.

The Maori can no longer be accused of holding large areas of unutilized land and so retarding settlement. Tribal territory, as such, has ceased to exist with the exception of small reserves enclosing the sites of villages

where tribal feeling can still find expression. The lands remaining to the Maori are far from being sufficient to enable them all to become farmers. Those who have lands have gone through a process of evolution and, against almost overwhelming odds, have reached the stage where they are endeavouring to make the best use of what they have. Those who have not must seek other avenues of livelihood.

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11 July 2017

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Tēnā koe anō Minister Barry

The vesting of Taia Block – Wharekauri

On 22 May 2017, I made an OIA request to you which included a request for a full response to my letter of 23 February 2017. We have now received a bundle of documentation on this issue from Jay Eden, Acting Director Operations, Lower North Island. Although it contains redactions, this information is appreciated.

The information received confirms that our concerns about the process to vest Taia in Hokotehi are fully justified and that this process has been proceeding on unsound assumptions since the outset. Accordingly, we request an immediate halt to the vesting process while these assumptions are corrected.

The fundamental problem arises from the unquestioning acceptance of the Department of Conservation and its Minister at the time (Hon Sandra Lee) of assertions made by Te Kotahi Moriori to Ngā Whenua Rāhui in a letter dated 14 November 2000. *"...Moriori hold assert* (sic) *customary authority over the islands of Rēkohu and it is appropriate that Moriori are key management stakeholders in this property..."* In a later letter to Sue Thomas dated 16 October 2002, Allan Ross, Conservator, explained *"The funds[1] do not themselves consult with the community or with iwi. Implicit in their decisions is acceptance that the party applying is the appropriate party and in the Taia case the Nature Heritage Fund and the Minister accepted the importance of the Taia property to Moriori as expressed by the Hokotehi Moriori Trust's application."*

These assumptions are mistaken and actions based on them are untenable. Moriori do not hold customary authority over Wharekauri or Rēkohu. Mana whenua over the entirety of Wharekauri/ Rēkohu is held by Ngāti Mutunga o Wharekauri. The evidence for this is attached to this letter. On that basis, it is completely inappropriate for the Department to vest land owned by the Crown for conservation or historic purposes in any other party without the agreement of Ngāti Mutunga o Wharekauri.

To be clear, we support the purchase of Taia farm by the Crown for conservation purposes. We support the management of the land for these purposes and we recognise the existence of Moriori cultural sites and wāhi tapu on the land. There are also important Ngāti Mutunga values associated with this land that should be recognised and protected as well. The recognition and protection of all of these values is important to Ngāti Mutunga o Wharekauri and support for such protection is part of the ongoing responsibility associated with holding mana whenua.

[1] The Nature Heritage Fund and Nga Whenua Rāhui Fund

The one part of this proposal we object to strongly is the proposal to vest this land in Hokotehi. That vesting achieves nothing in terms of practical protection of anything. Rather, the evidence suggests that Ngāti Mutunga o Wharekauri is excluded from direct involvement in the ongoing management of Taia. Of greatest concern is that the vesting of Taia in Hokotehi thereby destroys the existing opportunity for an ongoing Treaty relationship between the Crown (in the form of the Department of Conservation) and Ngāti Mutunga o Wharekauri with respect to Taia. There is no reason why the Crown cannot maintain a parallel Treaty relationship with Moriori. The special circumstances of the Chatham Islands means that such an inclusive approach avoids the rupture to Treaty relationships that vesting unavoidably causes.

Given the background that has occurred and unsatisfactory way that this issue has been managed by officials over the last seventeen years, we wish to deal directly with you on this matter. Given the circumstances I believe my request is fair and reasonable.

We wish to meet with you at your earliest convenience.

Nāku noa, nā

Paula Page
Co-Chair
Ngāti Mutunga o Wharekauri Iwi Trust

CC Hon Christopher Finlayson, Minister for Treaty of Waitangi Negotiations
Dame Fran Wilde, Chief Crown Negotiator
Ben White, Negotiation & Settlement Manager, Office of Treaty Settlements

The elements of mana whenua: Introduction to the Mead framework and comments on the significance of mana whenua

In 2003, Sir Hirini Moko Mead published *Tikanga Māori: Living by Māori values* described as the definitive book in English about Tikanga Māori, providing an authoritative and accessible introduction to tikanga Māori. Mead, Ngāti Awa, is an anthropologist, historian, artist, teacher, writer and prominent Māori advocate and leader. *Tikanga Māori: Living by Māori values* was re-published in 2016.

As part of his discussion on tikanga Mead discusses mana whenua in the context of Treaty of Waitangi claims and the Treaty settlement process. During the Central North Island (CNI) settlement in 2008 Mead took part in an adjudication process to resolve the allocation of CNI assets. This process was based on tikanga Māori during which mana whenua became a dominant factor in discussions. The purpose of the adjudication process was to determine how the CNI forests land would be allocated to iwi on the basis of mana whenua. The agreements were reached between iwi in a kanohi ki te kanohi process or otherwise determined by the resolution process provided for.

The mana whenua status of NMOW on Wharekauri has become a hot topic of discussion between Negotiators and the Crown, with the Crown reluctant to acknowledge the status of NMOW on Wharekauri. As part of its on-going research on mana whenua the Negotiators have referred to the Mead assessment of mana whenua as an acknowledged authority on tikanga Māori.

Mana whenua presents the Crown with challenges that requires it to provide the correct weightings to customary interests within a given rohe. When this matter becomes too difficult for its policy settings, the Crown's historical preference is to avoid the issue of mana whenua status by ignoring its existence in Treaty settlements. In contrast Mead considers that there is another way to resolve this matter and that 'interests' posed against mana whenua does not provide an adequate solution to the question. Instead he states:

> one has to strip away the layers of interest and eventually reach the point of identifying who had political authority and control over the land, and control of it in 1840.
>
> In a general sense it is useful to consider the history of the land, and if that is done thoroughly, it would tell us who had the authority and control of it in 1840. Then if an iwi claims mana whenua over an area of land and the claim has substance to it, should we not acknowledge that fact?

Mead's view, in the context of Wharekauri, makes it clear that at 1840 NMOW had political authority and control over the land. This is the view that the NMOW Negotiators hold. Presently the Crown is unable to bring itself to recognise NMOW mana whenua status.

In assisting Ngāti Manawa in the adjudication process, Mead developed a mana whenua framework to establish and evaluate Ngāti Manawa customary interests and mana whenua status. He presents his framework in *Tikanga Māori: Living by Māori values* pp. 314-5.

Having considered various views regarding NMOW mana whenua status, the NMOW negotiators have applied Mead's framework to establish and evaluate NMOW customary interests and mana whenua status on Wharekauri. This establishes beyond question that NMOW have mana whenua on Wharekauri.

The elements of mana whenua: Mead framework applied to Ngāti Mutunga o Wharekauri

1. How was mana whenua acquired?
    a. Ngāti Mutunga o Wharekauri (NMOW) established itself and secured mana whenua through ringa kaha in 1835. NMOW has maintained this status through continual occupation of Wharekauri since then. NMOW named the Chatham Islands Wharekauri, which remains its generic name.
2. If by ringa kaha, did the military leaders marry tangata whenua women on the land to maintain the hau (essence) of the land?
    a. There is evidence NMOW rangatira married Moriori women and assimilated them into the iwi.
3. The land is occupied by people and kāinga are established.
    a. Following the establishment of mana whenua on Wharekauri, NMOW reinforced its occupation by establishing various communities and building kāinga across the rohe. It established its pā at Waitangi post-1835. Moriori were assimilated into NMOW. From this point NMOW were the kaitiaki of Wharekauri.
4. A rohe is marked out in some way. How? Provide a map.
    a. Wharekauri is an island meaning that the rohe is defined by natural boundaries.
5. Over time urupā are established over the land, tuāhu (shrines) are placed in appropriate places, and kāinga are built usually near a source of water and wāhi tapu are identified and named.
    a. NMOW established urupā and tuāhu throughout Wharekauri. Kāinga were established across the rohe. NMOW identified and managed wāhi tapu as kaitiaki.
6. The new group adopts a name and becomes known among the neighbours as an identified iwi/hapū.
    a. Ngāti Mutunga is recognised and acknowledged by other iwi as NMOW.
7. The iwi proceeds to embrace their new environment, take charge of it, and place their cultural imprint on it. One way is to rename or give names to significant features of the land.
    a. NMOW has placed its cultural imprint on Wharekauri by populating the whenua and awa and wāhi tapu with names from Māori sources.
8. The rivers and swamps may be populated with Taniwha (monsters) who often act as kaitiaki of the people to warn the children of dangers in the environment. Evidence should be provided of this.
    a. NMOW has identified various Taniwha located at specific sites in Te Whaanga, rivers, swamps, and the moana.
9. The iwi establishes alliances with neighbours and distant iwi, the mana whenua iwi can provide examples of joining with other iwi on military ventures outside their rohe.
    a. NMOW has maintained strong whakapapa and whanaungatanga links to all Taranaki iwi and in particular with Ngāti Mutunga ki Urenui, Ngāti Tama, and Te Ati Awa. NMOW also has whakapapa alliances with Te Tau Ihu iwi. NMOW shares an on-going relationship with Ngāi Tahu;
    b. there are numerous examples of NMOW providing support to Parihaka in terms of kai and money;
    c. NMOW whānau returned to Taranaki to pursue their land interests before the Native Land Court (NLC) in the late 1860s; and
    d. in the event that Taranaki entered into war it is likely that NMOW would have responded with man-power, arms, kai, and money.

10. The rohe provides sufficient sustenance for the people over time and other necessities are obtained through trade. Evidence needs to be provided.

    a. NMOW uri established themselves as prolific farmers, fishermen, and traders. NMOW managed Wharekauri natural resources to sustain themselves and to establish a thriving trade of goods, in particular fresh food, with visiting ships. NMOW also traded goods to markets in New Zealand and Australia.

11. The new iwi is able to defend its rohe and can call on allies to help defend the estate. Is there evidence of this happening?

    a. NMOW secured Wharekauri through ringa kaha in 1835. Although not required to defend its rohe since that time, NMOW possessed the capability to defend Wharekauri from any external threats from other iwi. if required NMOW could call for assistance from Taranaki whanaunga.

12. The new iwi is approved by the neighbours and its presence is validated by their acceptance. Evidence?

    a. NMOW presence on Wharekauri has been validated by iwi – including Moriori.

13. In 1840, when the Treaty of Waitangi was signed, this iwi was part of the Māori nation and is a Māori partner of the Treaty with the Queen of England.

    a. At 1840, Wharekauri was not part of New Zealand. Wharekauri was annexed by the British in 1842. At 1840 NMOW was a part of the Māori nation it was not subject to the Treaty of Waitangi. Once annexation took effect NMOW became a Treaty partner of the Crown through a process unique to NMOW.

14. The name of the iwi enters the historical record through the Native (later Māori) Land Court and other institutions of Aotearoa. There is proof of this.

    a. The NLC sat in Wharekauri during 1870. It found that NMOW had mana whenua awarding 100% land matters to NMOW. NMOW rangatira petitioned the Court to allow land holdings for Moriori, which the Court agreed to and allocated 3% of land holdings. This act is an expression of NMOW mana whenua.

15. The iwi is here today and has a credible number of members.

    a. NMOW is established on Wharekauri. The 2013 census listed over 1800 people identifying as NMOW. The NMOWIT has over 1200 registered members. NMOW estimates that there are approximately 3000 people of NMOW descent.

Ngāti Mutunga o Wharekauri Mana Whenua and Taia Historical Reserve

Introduction

1. In the High Court[1] and Court of Appeal[2], Ngāti Mutunga o Wharekauri provided substantial evidence that it holds mana whenua over Taia Historical Reserve and that this fact should preclude the exclusive vesting of the Reserve in the ownership of another iwi (Moriori) by the Department of Conservation (DoC). Neither Court was willing to make this declaration. On the other hand, neither Court was willing to declare that Ngāti Mutunga o Wharekauri did not hold *mana whenua* over Taia as deposed and argued either. The judiciary thereby side-stepped the issue that lay at the heart of the proceedings brought by Ngāti Mutunga o Wharekauri.

2. An issue sidestepped is not an issue resolved however, and the purpose of this memo is to set out:
    i. How and when Ngāti Mutunga o Wharekauri obtained *mana whenua* over Taia;
    ii. Why Ngāti Mutunga o Wharekauri retains *mana whenua* over Taia;
    iii. How the existence of Ngāti Mutunga o Wharekauri *mana whenua* status over Taia determines the content of the Treaty relationship between the Crown and Ngāti Mutunga o Wharekauri and how this Treaty relationship is relevant to the proposed Taia Historical Reserve vesting process contemplated by DoC.

3. In order to do this, it is first necessary to explain how key terms and concepts are being used in this memo. These terms are:
    i. Rangatiratanga;
    ii. Mana;
    iii. Mana whenua and;
    iv. Tangata whenua.

4. If nothing else, the Court cases highlighted the fact that these terms are used very inconsistently and frequently incorrectly. This is important because an agreed understanding of these terms is indispensible to the development of an agreed interpretation of the Treaty of Waitangi that can then empower *iwi* such as Ngāti Mutunga o Wharekauri to hold the Crown accountable for practical delivery of its responsibilities as a Treaty partner. From a Crown perspective, the flexibility provided by the present confusion may have some short-term appeal but it is obvious that such confusion must ultimately be disastrous for the Treaty relationship and the durability of existing Treaty Settlements.

[1] CIV-2018-485-000005 (Collins J)
[2] CA519/2018 (judgement delivered by Williams J)

5. It is essential that the four terms above be used in a fashion that is both consistent and historically accurate in the context of the Treaty of Waitangi 1840. At the very least, agreement over fundamental inter-related terminology is required within the context of any single Treaty relationship. It is conceivable that there may be nuances in the meaning of these terms between iwi. Beyond a certain point, however, it becomes untenable for the Crown to agree completely different definitions of, say, '*rangatiratanga*' with different iwi.

6. Accordingly, this memo is organised into two parts. The first part deals with the core concepts and terminology that Ngāti Mutunga o Wharekauri use today to describe their customary rights and how these (so defined) rights and interests are relevant to the Treaty relationship with the Crown and the proposed Taia vesting case study. It is not important that other *iwi* may apply different terms to the same concepts, or that other *iwi* have in mind slightly different concepts for the same terms.

7. It is sometimes overlooked that by signing the Treaty, the Articles and principles of the Treaty itself impacted the interpretation of existing terms. For instance, Article II makes clear that Māori with customary authority over land had the right to sell land to the Crown at an agreed price. In other words, the Treaty (axiomatically by agreement) recognised such Māori as land owners under British law even if those British legal incidents of land ownership had not been explicitly or separately identified within the Māori concept of *take* previously.

8. The second part of this memo applies these general concepts and terms (as defined) to the particular history of Wharekauri. This encounters the difficulty that much of the historiography of Wharekauri is of somewhat uncertain quality and contains significant gaps. Nevertheless, it is possible to reach robust conclusions about the sovereignty of Ngāti Mutunga o Wharekauri over Wharekauri at the time when the Crown unilaterally annexed the Chatham Islands in November 1842. This is the earliest date at which it can be argued that the responsibilities of the Crown deriving from the Treaty of Waitangi (to which the Crown was already a signatory) took effect on Wharekauri.

Key Terms and the Treaty of Waitangi

9. The purpose of defining the terms above is to establish their precise meaning in the context of the Treaty relationship with Ngāti Mutunga o Wharekauri. Only one of those terms (*rangatiratanga*) appears in the Treaty and is the subject of ongoing debate as to its full meaning. Although that debate quickly spirals into a discussion about the other terms above such as 'mana', the text of the Treaty of Waitangi is therefore taken as the starting point for the exploration of the meaning and Treaty implications of terms *rangatitratanga, mana, mana whenua* and *tangata whenua*.

Text of the Treaty of Waitangi

10. Article II of the Treaty of Waitangi confirmed *rangatiratanga*. "*By the Treaty in* English*, Maori leaders and people, collectively and individually were confirmed and guaranteed exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties.' By the Treaty in* Maori*, they were confirmed and guaranteed te tino rangatiratanga' – the unqualified exercise of their chieftainship – over their lands, villages, and all their treasures*."[3] As Claudia Orange observes "*To Māori signing the Treaty, its confirmation of rangatiratanga was undoubtedly crucial. 'Rangatiratanga' is a complex word for which there is no exact English equivalent ('possession' is the word in the English text). In 1840, it stood for Māori authority and autonomy – in effect -, Maori sovereignty of a corporate kind. Māori no doubt thought that the mana of the land – the chief's authority over its resources and their allocation – would be retained; in fact, it would be increased by the agreement with the world's major naval power, which would defend the country against France and other nations. There was an expectation that the kawanatanga (sovereignty) of Article 1 would control troublesome Europeans, whereas the chiefs would look after their own people, their rangatiratanga secured in Article 2. There would have to be a sharing of authority in the country, but one that would boost chiefly mana and authority*."[4]

11. Sir Hugh Kawharu has translated the Māori version of Article II into English thus: "*The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchasing agent*."[5]

12. '*Rangatiratanga*' therefore henceforth embodied the idea of land ownership or possession as illustrated by the practical process of pre-emption outlined in Article II. The Treaty, thereby, not only contained novel terminology, it gave new meaning to existing terminology.

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[3] Orange, C. *An Illustrated History of the Treaty of Waitangi*, publisher Bridget Williams Books Ltd, 2004, p. 39.
[4] Ibid. p. 44.
[5] Cabinet Office Circular CO (19)5, 22 October 2019. Page 8.

Rangatiratanga

13. *Rangatiratanga* is indeed a complex word that does not simply mean possession. It was an innovative abstraction of the Māori term 'rangatira' by Reverend Williams that means the attributes of a chief: the many powers, qualities, responsibilities, whether exercised or implicit, of a chief. A full understanding of the concept requires deep understanding of Māori culture. The English word 'chief' has significantly different connotations than 'rangatira'. 'Ranga' carries the idea of placing things in order or weaving (*rāranga)* people into a united and effective group (*tira*). While *Rangatira* exercise rights over property, authority over people and manifest a spiritual power, they do so with the over-riding purpose of promoting the security, cohesion and success of the group.

14. The dimensions of *Rangatiratanga* extend far beyond the English term 'possession' but such as they are, the addition of the prefix *tino* to the term in the context of Article II emphasizes that rangatiratanga was to be guaranteed and protected in its fullness by the Crown.

15. The quote above from Orange, indicates the existence of the connection between rangatiratanga and mana. *Rangatiratanga* embodies both the opportunity and the process by which *iwi* and *hapu* determine what is right for them i.e. to determine what will enhance their *mana*. These judgements are subjective and dependent upon time and circumstance. The role of the *rangatira* is to protect his kin group, to determine their interests and to act to protect and enhance the *mana* of that group.

16. In the Motunui Waitara Report 1983 (WAI 6), the Waitangi Tribunal indicated that *rangatiratanga* cannot be defined without reference to *mana*. "*'Rangatiratanga' and 'mana' are inextricably related words. Rangatiratanga denotes the mana not only to possess what is yours, but to control and manage it in accordance with your own preferences*."[6] In the Te Roroa Report 1992 (WAI38)[7], *te tino rangatiratanga* has been defined as absolute control according to Maori custom, rather than the exclusive possession of lands and properties guaranteed in the English version. In the report of the Waitangi Tribunal on the Orakei Claim 1987 (WAI 9)[8] and again in the Ngai Tahu Land Report 1991 (WAI 27)[9], the Tribunal reiterated that in Maori thinking, *rangatiratanga* and *mana* are inseparable.

17. Accordingly, any adequate understanding of Article II of the Treaty of Waitangi is not possible without a definition of *rangatiratanga*, and the definition of *rangatiratanga* requires understanding of the very broad and complex concept and role of *mana*. Indeed, the Treaty relationship itself from a Māori perspective is a solemn and mutual recognition of the *mana* of each Treaty partner by the other.

[6] Waitangi Tribunal, Motunui Waitara Report, (WAI 6), 1983, 10.2 Particular Aspects of the Treaty
[7] Waitangi Tribunal, Te Roroa Report (WAI 38), 1992, Preliminary Pages, Kaupapa (Subject)
[8] Waitangi Tribunal, Orakei Claim (WAI 9), 1987, 11.11.4 The Two Versions of the Treaty
[9] Waitangi Tribunal, Ngai Tahu Land Report (WAI 27), 1991, The Treaty Provisions

Mana

18. *Mana* provides both the motivation for action in the Māori world and the measure by which the success of actions can be gauged. *Mana* is frequently translated into English as 'prestige' but this translation does not capture the range of temporal and spiritual powers embodied by the Māori term. The personal *mana* of a *rangatira* is a function of both *mana* inherited by *whakapapa* (genealogy) and *mana* 'earned' by performance – success in protecting and enhancing the *mana* of the *iwi*.

19. "*Attributes of Chieftainship*
The ariki *chiefs by reason of their exalted birth, were imbued with the two inherited attributes of* mana *and* tapu*. These attributes have a variety of meanings, depending on whether they are applied to human beings or to inanimate objects. The* mana *of a chief carries the meaning of power and prestige. The first-born son inherited the power to rule and direct his tribe, but this* mana *lay dormant within him, so to speak, until it was given active expression on his father's death or his retirement through age or some other disability. He also inherited the prestige of his position, and the greater the prestige acquired by the family and the tribe, the greater the* mana *that was inherited. Besides the inherited* mana*, a new* ariki *could acquire additional* mana *by the wise administration of his tribe at home and by the successful conduct of military campaigns abroad. Even though tribal successes might be primarily due to good advisers, sub-tribal leaders, and noted warriors, the prestige acquired by the tribe was concentrated on the* ariki *as the figurehead or human symbol of the tribe. On the other hand, poor administration and defeats in war might lead to loss of power and prestige.* ***The* mana *of a chief was integrated with the strength of the tribe. It was not a mysterious, definable quality flowing from supernatural sources; it was basically the result of successive and successful human achievements****"*.[10] (emphasis added).

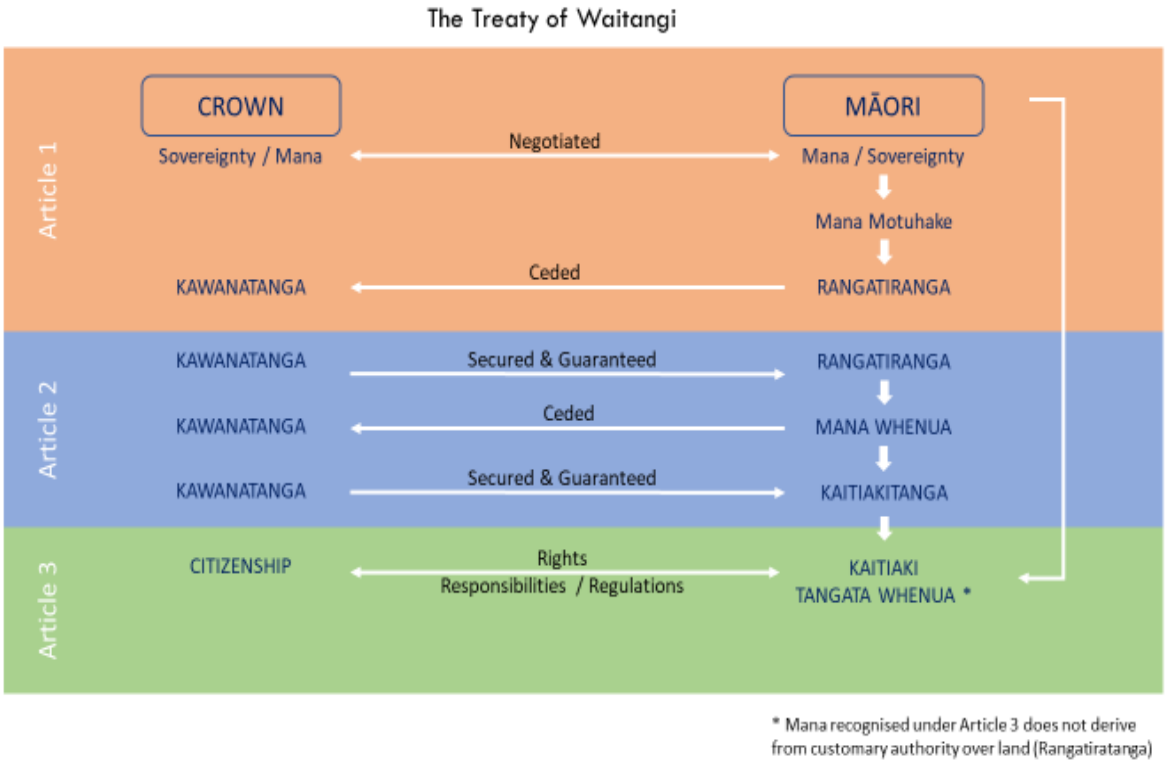
20. In other words, the acquisition, maintenance and enhancement of *mana* are all dependent upon practical and temporal performance that promotes the survival, security, prosperity and cohesiveness of the *iwi*.

21. Returning to the Treaty context, from a Māori perspective, the very existence of the Treaty of Waitangi, its content and the proper relationship between its Articles and terms such as *kawanatanga* and *rangatiratanga* can only be adequately explained by reference to *mana*. The Treaty was negotiated between parties of equal status. Britain was a sovereign power and that sovereignty was embodied in the person of Queen Victoria and her mandated representatives. For its part, Britain recognised that Māori held collective sovereignty over New Zealand and that sovereignty was embodied in the persons of r*angatira* of the respective *iwi* of Aotearoa.

22. The Treaty was negotiated on a *mana* to *mana* basis where neither side conceded *mana* to the other. In fact, as remarked by Orange (above) Māori saw the Treaty as a means of securing and

[10] Te Rangi Hiroa, *The Coming of the Maori*, Whitcombe and Tombs Ltd (pub), 1970, 551 pages plus plates, pages 346-7.

enhancing their *mana*. In Māori terms, *mana* is the first Treaty principle - a principle that is essential to understanding of what is meant by 'partnership' and (on the Māori side) the delicate structure of reciprocal Treaty promises all cascade downwards from *mana* through increasingly narrow manifestations, or subsets, of *mana* in its most encompassing sense or definition (see diagram below).



23. *Rangatiratanga* is a manifestation of *mana*, and *mana whenua* (customary authority over land) is a sub-set of *rangatiratanga*. *Kaitiakitanga* is a bundle or rights and responsibilities of those people who hold *mana whenua* over a particular place. Individual *kaitiaki* (guardians and managers) are appointees or representatives of those who have *kaitiakitanga* collectively. The arrows on the right of the diagram all cascade downward simply as a consequence of the proper meaning of the terms: you cannot have *mana whenua* without *rangatiratanga*; you cannot have *kaitiakitanga* without *mana whenua*. Note that *kawanatanga* cannot affect the direction of the arrows on the Māori side of the diagram - it can only recognise, secure and guarantee the hierarchy that is there. The basic framework of Articles I and II illustrated above is that Māori ceded *kawanatanga* to the Crown that would be used to secure and guarantee *rangatiratanga* and *kaitiakitanga*. The *kaitiakitanga* secured and guaranteed was co-incident with the *mana whenua* of the *iwi*. It is always a source of trouble and conflict when the Crown lifts these concepts out of their context and attempts to define them in isolation.

Mana Whenua

24. *Mana whenua* means the customary authority exercised by an *iwi* or *hapu* over a particular area of land. Land itself does not have *mana*. People have *mana*, individually or collectively. Occasionally, the phrase '*mana whenua*' is used to refer to the power or capacity of land to sustain and benefit people (those who have customary authority over the land and their *manuhiri*) but this is to confuse the perquisites of *mana whenua* with *mana whenua* itself. It is true that having customary authority over land enhances the prestige and *mana* of a group, but the roots of this prestige are not in the attributes of the land itself but in the fact that the group has established title (*take*) to the land and has successfully defended that title against all rival claims or incursions by other *iwi* or *hapu*. No doubt, more desirable land would be subject to stronger and more numerous challenges over its control and the stronger the challenge, the greater the *mana* from its successful repulsion. To hold and exercise m*ana whenua* is therefore a statement about the proper relationships between the *iwi* with *mana whenua* and all other Māori (and the Crown) with respect to the particular area of land concerned.

25. "*The title (*take*) to the ownership of land was based on two main claims: right of inheritance through ancestors (*take tupuna*) and right of inheritance through conquest* (take raupatu*). The right of prior discovery became merged in ancestral right. Conquest (*raupatu*) alone did not confer right of ownership unless it was followed by occupation. If the invading party retired, the survivors of the defeated tribe could return and still own their land. Occupation to establish a title had to be continuous, as idiomatically expressed in the term* ahi ka*, or lit fire. So long as a people occupied the land, they kept their fires going to cook their food. Conversely, the absence of fires showed that the land had been vacated. Even if a conquering tribe did not leave a holding party, they might claim the land subsequently if it remained unoccupied. However, if some of the conquered people evaded the invaders and remained on the land to keep their fires alight, the right of ownership of the defeated people was not extinguished. When the Waikato confederation invaded Taranaki, they drove the Atiawa out of their territory and the Atiawa migrated south to establish homes in exile. Later, the Waikato tribes claimed ownership of the Taranaki territory by right of conquest. However, it was proved conclusively that some families of the Atiawa had remained on the land and, by keeping their fires alight, had prevented the tribal rights of ownership from being extinguished. When conquered territory was occupied for some generations, the title by conquest became a historical event and the functioning title became that of ancestral inheritance (*take tupuna*)*."[11]

26. Traditionally, the fortunes of individual *iwi* and groups ebbed and flowed so that *take* to the ownership of land (customary authority) passed from one to the other. *Mana whenua*, by its nature, can only be exercised by one *iwi* unless there exists an agreement to share access to, or management of, particular resources. In the absence of such agreement, conflicts over *mana whenua* status have a very serious and dangerous character in that the *mana* of the group is under challenge and such challenge cannot go unanswered. Traditionally*, iwi* with *mana*

[11] Te Rangi Hiroa*, The Coming of the Maori*, Whitcombe and Tombs Ltd (pub), 1970, 551 pages plus plates, pages 380-1.

whenua or *take* to the ownership of land in customary terms were always required ultimately to defend that status by force.

27. It is arguably one of the benefits of the Treaty of Waitangi, that it ushered in legal arrangements that eliminated the opportunity of *iwi* to take land by force from others and also simultaneously relieved *iwi* of the constant need to defend their *mana whenua* status by force. A consequence of this development is that the pattern of customary authority over land (*mana whenua*) was frozen at the point in time that the Articles of the Treaty were formally agreed. This does not mean that who held exclusive *mana whenua* over all parcels of land was clarified – there were large numbers of overlapping claims and boundary disputes at that time. However, under Article II, the Crown secured and guaranteed those *mana whenua* rights whatever they were (exclusive, shared or contested).

28. The inclusion in Article II of exclusive Crown rights of pre-emption to purchase land from those Māori with customary authority/*mana whenua* (on a willing buyer-willing seller basis) clarified that *mana whenua* at that time had present and future rights of land ownership and alienation (under the terms of Article II). This was obviously a new opportunity to both the holders of *mana whenua* and the Crown that had not existed in the absence of the mutually agreed Article II. In a sense, Article II therefore changed, or at least elaborated, the practical benefits or legal incidents of holding *mana whenua* to Māori and non-Māori alike. This development did not equate 'ownership' with '*mana whenua*'.

29. Williams J missed an important point when he declared "*First mana whenua is not property in the classical western sense; that is, a thing that may be possessed in its entirety, expended, alienated, or rights in it subdivided. Mana whenua is simply not capable of treatment in that way. It is a phrase used to convey the idea of traditional authority over land and its associated resources. It is not the Māori word for 'title' or 'property*'."[12] Indeed, customary authority over land is not the same as ownership of land and it achieves nothing for Williams J to set up this straw man, then despatch it. Ngāti Mutunga o Wharekauri has never deposed that *mana whenua* is the same as land ownership because it does not believe that. However, Article II clearly shows that ownership of land was mutually recognised in 1840 as a subset of customary authority or *mana whenua* over land at that time.

30. Land ownership is a subset of (not the same as) *mana whenua* and *mana whenua* is a subset of (not the same as) *rangatiratanga*. *Mana whenua* may sell land and still remain *mana whenua*. Customary authority is not lost by the sale of land. Rather, defined practical rights and benefits of *mana whenua* are reduced by the sale of land to the extent that they have been bundled into the legal form of a property right that has been transferred to the land purchaser. Customary authority over land is not a property right that is transferred when a land ownership title is transferred to another party. For instance, when the Crown acquires land from Māori under the Public Works Act, it does not extinguish the *mana whenua* status of the former Māori owners by

[12] CA519/2018 (judgement delivered by Williams J) para. 29

doing so. Theoretically, an *iwi* or *hapu* could share *mana whenua* status over land or relinquish their claim to *mana whenua* status over land but these customary processes would necessarily be distinct from the process of land sale and purchase. Such processes are rare and, in most cases, those *iwi* and *hapu* who held *mana whenua* in 1840 still hold it today.

31. In summary, after the Treaty of Waitangi:

- Customary authority over land (*mana whenua*) could no longer be acquired (or taken) by force (*raupatu*).[13]
- Customary authority over land could not be acquired by purchasing land (it is not a thing that is bought and sold even as part of the strongest form of land title; fee simple).
- Customary authority over land was not lost by the sale of land (it is not extinguished by sale).

32. It is true that the introduction of the Crown right of pre-emption over Māori land and the opportunity to sell land had some significant implications for post-land sale evidence of *mana whenua* status which had previously been strongly associated with *ahi kā*. The fact that it was now a pakeha landowner who was (perhaps too enthusiastically) lighting the fires on the sold land did not establish that the land sellers no longer held *mana whenua* there. It is likely that many Treaty signatories gave little consideration to the impact of Article II on the future meaning and relevance of *ahi kā* because they had no firm intentions of selling land to the Crown at the moment of Treaty signing. Arguably, the Treaty itself therefore had a major impact on how *mana whenua* had to be understood and recognised after 1840.

33. This is not the same idea as was expressed by Williams J when he said "*Mana whenua is not frozen in time. It is a living principle of tikanga. Mana whenua might come to be shared, or it might merge in the name of a new shared ancestor*"[14]. To the extent that such evolution occurs, it can only be at the discretion of the *iwi* or *hapu* that held mana whenua over particular parcels of land in 1840 and it would be a process occurring under the umbrella of Māori culture. The Crown's responsibility would be to keep abreast of such agreed changes so that it can properly meet its real-time Treaty responsibilities. This monitoring by the Crown is a process of observation - not determination or interference or pre-emption. However, all accurate observation requires sufficient depth of understanding about a subject to enable critical distinctions to be recognised and acted upon. This memo would be unnecessary if the Crown

[13] In WAI 64 (8.3.2) Durie commented "*Maori speaking on marae today, claim rights by ancestry, not by conquest*". He says this in the context of trying to dismiss the role of conquest in the establishment of customary authority. It is now 185 years (8 to 9 generations) since the conquest of Wharekauri by Ngāti Mutunga o Wharekauri and 180 years since such raupatu was prohibited by the Treaty of Waitangi (this is nearly a third of all of the time that archeologists suggest Wharekauri has been inhabited). Just as Te Rangi Hiroa explained above, customary authority has evolved from conquest to ancestral connection over that long time. This cultural evolution does not mean that customary authority has been diluted or dissipated. Rather, the mana whenua of Ngāti Mutunga o Wharekauri has been strengthened by the passage of time.

[14] CA519/2018, Judgement of the Court, Kamo v Minister of Conservation [2020] NZCA 1 [29 January 2020] para 27.

had made a more serious effort to acquire and document this understanding over the last 180 years.

34. In order to effectively meet its responsibilities under Article II formally accepted in 1840 (and ongoing), it is necessary for the Crown to know exactly what rights it is securing and guaranteeing and to whom. It is matter of historical fact and shame that the Crown has showed remarkably little interest in these two questions and this neglect has led naturally to innumerable breaches of the Treaty of Waitangi. It is also necessarily a matter of fact that the Crown cannot negotiate settlements of such Treaty grievances or move forward in Treaty partnership with *iwi* unless future Treaty relationships are with the right people over the right things. In particular, the Crown cannot avoid engagement with the fundamental question of what Māori group has customary authority over particular lands i.e. who has *mana whenua*.

35. In 2011, Catherine Iorns Magallanes (Senior Lecturer in Law, Victoria University of Wellington) identified that there were three general statutes that referred to *mana whenua* and four statutes that referred to *manawhenua*. The general meaning in all seven statutes is similar or the same (customary authority by an *iw*i or *hapu* or individual in an identified area). In addition, by 2011 there were fourteen claims settlement Acts that used '*mana whenua*' and a further five that used the term '*manawhenua*'[15]. Notwithstanding its increasingly common use, Durie J, in his earlier (2001) Waitangi Tribunal Report WAI 64 (Rekohu) made an extraordinary attack on the term 'mana whenua'.

36. "*Moriori and Maori each have customary authority in their own spheres, for the simple reason that they both exist on Rekohu and manage their own affairs. The authority is in respect of themselves. The authority over land and seas is with the gods. Moriori and Maori have customary use rights and ancestral associations with the land and seas.*

37. *Whether Moriori and Maori have mana is not for them to assert. Mana depends on how others see them… A major difficulty over the use of mana whenua in the statutes is that it requires people to proclaim that they have mana, when in Maori ethic that is not done, except as a boastful challenge or in contemplation of war. More regularly, it is thought that those who find it necessary to proclaim that they have mana will almost certainly not have it.*

38. *For the reasons indicated above, we consider that the term 'mana whenua' should not be used in the statutes. It cuts across customary concepts and protocols. We add that the term appears to be relatively new, having been coined for the authority of Maori as against that of Governor Grey. It was also used in the context of pending war. There is nothing wrong in coining new words. However, it does not sit comfortably with customary concepts when it is used, as here to describe relationships between Maori groups.*

[15] Magallanes, C., I,. *The Use of Tangata Whenua and Mana Whenua in New Zealand Legislation: Attempts at Cultural Recognition*, (2011) 42 Victoria University of Wellington Law Review, pages 259-276.

39. *We especially bring to attention the fact that the word 'mana' was kept out of the Treaty of Waitangi. The drafter of the Maori text was fully acquainted with the term, but it was assiduously avoided and, with hindsight, rightly so. We think that the Treaty provided a good precedent that the Legislature should follow. 'Rangatiratanga' is now used to describe the authority of people in respect of people.*

40. *The association of mana with temporal authority and with whenua offends other concepts. For Maori, mana is primarily a spiritual or personal quality. As for temporal authority, it is seen to exist within the people, and not within the land, as Sir Monita Delamere said…*[16]

41. Dealing with the points raised above in order, the first is the contention that '*the authority over land and sea is with the gods*'. This is an extraordinary statement from the Head of the Waitangi Tribunal who carried the responsibility of investigating failures of the Crown to secure and guarantee *rangatiratanga* (and associated *mana whenua*) of particular *iwi* and *hapu* over their lands, forests, fisheries and other treasures. 'Authority over land' is not a theological question, it is a temporal right that is held by real people over actual places and secured by the Crown under Article II of the Treaty of Waitangi (a temporal document). It is a gross abrogation of duty to airily dismiss this question as being '*with the gods*'.

42. The second point is: 'w*hether Moriori and Maori have mana is not for them to assert. Mana depends on how others see them'.* To some extent, *mana* can be argued to be a matter of perception, however, *mana whenua* is not a matter of perception; it is a matter of historical fact, subject to investigation and the discussion of evidence by the Tribunal. It is the matter at the factual nexus of people, place and customary rights that gives substance to Article II of the Treaty of Waitangi.

43. This leads to the third point: '*…the fact that the word 'mana' was kept out of the Treaty of Waitangi. The drafter of the Maori text was fully acquainted with the term, but it was assiduously avoided and, with hindsight, rightly so.'* The alternative explanation is not that the term *mana* was irrelevant to the Treaty of Waitangi but that it was so ubiquitous it went without saying. Durie J ignores several findings of his own Tribunal (see above) that repeatedly state that the key Treaty term 'rangatiratanga' is inseparable from 'mana' and cannot be understood without reference to *mana*.

44. Fourth, Durie alleges that the term *mana whenua* '*… cuts across customary concepts and protocols.'* It is hard to see how something meaning 'customary authority over land' cuts across customary concepts and protocols. On the contrary, it is a term that is absolutely critical to determining the substance of the promises in Article II to secure and guarantee Maori customary rights on a case by case basis.

45. Fifth, Durie deprecates *mana whenua* as a recent (19th century) term. '*We add that the term appears to be relatively new, having been coined for the authority of Maori as against that of*

[16] Rekohu Report (WAI 64), 2001 Durie, J. pages 261-2

Governor Grey. It was also used in the context of pending war.' This is a curious and weak criticism given that much of Treaty jurisprudence revolves around clarification of the meaning of two words invented in 1840 for inclusion in the Treaty of Waitangi (*kawanatanga* and *rangatiratanga*). Furthermore, it is entirely understandable that Māori used the term *mana whenua* increasingly in the lead up to the land wars made inevitable by the determination of the Crown to forcibly relieve Māori of authority over their lands (*mana whenua*) rather that to secure and guarantee that authority (*mana whenua*) as promised in the Treaty.

46. Sixth, Durie dissociates *mana* from temporal authority and real-world success. '*The association of mana with temporal authority and with whenua offends other concepts. For Maori, mana is primarily a spiritual or personal quality.'* This may be Durie's view, but he is wrong to speak for all Māori and his view is flatly contradicted by Te Rangi Hiroa (above). Certainly, he is wrong to attribute that view to Ngāti Mutunga o Wharekauri. *Mana* and *rangatiratanga* are very much matters of *iwi* or *hapu* security, cohesiveness and prosperity in the temporal realm.

47. Finally, he finishes with the rebuttal of an imaginary non sequitur. *'As for temporal authority, it is seen to exist within the people, and not within the land, as Sir Monita Delamere said…'.* Yes, customary authority resides in people not land. *Mana whenua* means the authority of particular *iwi* or *hapu* over particular land.

48. What to make of this attempt by Durie J to muddy the waters about the meaning and Treaty relevance of *mana whenua*? After the passage of nearly twenty years, the mud cloud he created has settled and it is now possible to recognise all seven of his objections as inadequate excuses for avoiding engagement with the fundamental question of who holds *mana whenua* on Wharekauri. Contrary to his wishes, the issue of *mana whenua* has not gone away but resonates more loudly with the passing years. The term 'mana whenua' is used more frequently today (if not always accurately) compared to twenty years ago.

49. In re-examining WAI 64 today, it is impossible to escape the conclusion that its main recommendations depend upon the avoidance of the issue of *mana whenua* and its implications. However, those Tribunal recommendations should also require links to a fair and balanced historical account of Ngāti Mutunga o Wharekauri history (which is not to be found in WAI 64 either). That history, which is also a history of *mana whenua*, is the topic of the second section of this memo. Before beginning that topic, however, one more term must be defined. It is 'tangata whenua' and Durie J (as well as recommending the banning of the term *mana whenua* in law) recommended that the term *tangata whenua* be re-defined.
"Recommendation
We recommend that the term 'mana whenua' be taken out of the statutes and other words be found to express whatever is the statutory intent. Further thought is also needed on how 'tangata whenua' is defined."[17] It is not clear what Durie had in mind as a re-definition.

[17] Rekohu Report (WAI 64), 2001 Durie, J. pages 262

Tangata Whenua

50. ‘Tangata whenua’ means people of the land, usually carrying the meaning: the people from a certain place or native to it. Māori are the *tangata whenua* of New Zealand. *Mana whenua* are also *tangata whenua* and the two terms are often used interchangeably. It is frequently appropriate to do so but this disguises the distinction between the two terms. *Mana whenua* refers to customary rights and authority of particular people over particular land. These rights and authority mean that *mana whenua* also come from that particular land and maintain *ahi kā* there. In contrast, ‘tangata whenua’ refers to origins, rather than rights. It is within any discrepancy between the geographic origins and the customary rights of people that shades of distinction between the two terms arise. Generally, origins are a less contentious matter than rights.

51. For example, the Crown recognises both Ngāti Mutunga o Wharekauri and Moriori people as *tangata whenua* of Wharekauri/Rekohu. This is correct, but only one *iwi* (Ngāti Mutunga o Wharekauri) held customary authority over Wharekauri when Crown sovereignty and the attendant framework of the Treaty of Waitangi was extended over Wharekauri in November 1842. That customary authority (*mana whenua*) has been maintained by Ngāti Mutunga o Wharekauri to the present day and is secured and guaranteed by Article II of the Treaty of Waitangi.

52. In this memo, recognising people as ‘tangata whenua’ is simply a recognition of origin. If the purpose of ‘recognising’ people is to refer to people with customary rights and interests over particular lands secured and guaranteed by Article II, then ‘mana whenua’ is the appropriate term to use. If this convention is applied, then a reference to people as *tangata whenua* in Treaty terms would be a reference to people from a particular place with Article III Treaty rights held by Māori as citizens. These Article III rights are universal individual rights of New Zealand citizens and the recognition in Treaty Settlements by the Crown of people as *tangata whenua* is usually a rather banal, or even unnecessary, acknowledgement of people who already have no doubt that they are both Māori and New Zealanders.

History of Wharekauri and the Treaty of Waitangi

Invasion and Conquest

53. The bare historical facts that support the conclusion that Ngāti Mutunga o Wharekauri held exclusive *mana whenua* over the entirety of the Chatham Islands in 1842 are that Wharekauri was invaded by Ngāti Mutunga o Wharekauri in late 1835 and who, within a short time of arrival, seized full customary control and authority there by subjugating the entire Moriori population - reducing their status to that of slaves as that term was understood in *Te Ao Māori*. This invasion was not a raid but a carefully planned conquest, occupation and settlement designed to safeguard the survival and security of Ngāti Mutunga o Wharekauri *iwi.*

54. After having experienced almost a generation of constant migration and conflict, Ngāti Mutunga took every measure to ensure that their relocation to the Chatham Islands would be successful. Along with members of Ngāti Tama, Kekerewai, and Ngāti Haumia, they gathered 85 tons of seed potatoes, quantities of other seeds, pigs, dogs, tools, canoes and many other items required to establish themselves on the islands and to enable trade with visiting whaling ships and other visitors. Some chiefs laid claim to particular resources on the Chathams even before they had left Wellington.[18] Ngāti Mutunga and Ngāti Tama also took 40 muskets, a cannon, and other traditional and modern weapons to the Chatham Islands. When they left Te Whanganui-a-Tara, they exhumed the bones of their dead and burned them, to indicate that they did not intend to return.[19]

55. Ngāti Mutunga migrated to the Chatham Islands with their Taranaki kin in two voyages on the brig *Lord Rodney*. The first voyage, carrying an estimated 500 men, women and children of Ngāti Mutunga, Ngāti Tama, and Ngāti Haumia, left Wellington on 14 November 1835 and made landfall at Whangatete on 17 November, before disembarking at Whangaroa Harbour.[20] Despite prior agreements that no land should be claimed on the Chathams until all of the migrants had arrived, some members of the first shipment immediately scouted the main island and began to establish themselves at Waitangi and around Kaingaroa Harbour.[21] The second voyage, carrying an estimated 400 people of Ngāti Mutunga, Kekerewai, Ngāti Tama and Ngāti Haumia,[22] left

[18] Shand, A. *The Occupation of the Chatham Islands by the Maories in 1835*, Journal of the Polynesian Society, 9. 155
[19] Waitangi Tribunal, *Rekohu Report*, p. 40.
[20] Shand, A. *The Occupation of the Chatham Islands by the Maories in 1835*, Journal of the Polynesian Society, 9. 155
[21] Wai 64, C37, p. 5.
[22] The term Ngāti Mutunga o Wharekauri is used as an umbrella term to include these four identities.

Wellington on 30 November and arrived in the Chatham Islands on 5 December 1835.[23] They began to establish a settlement at Whangaroa, building a *pā* and planting seed potatoes.[24]

56. Moriori did not react aggressively to the new arrivals.[25] Initially, Ngāti Mutunga o Wharekauri also appear to have acted peacefully.[26] According to one source, the Ngāti Mutunga chief Pomare gave the Island's inhabitants £500 worth of property including muskets, clothing, and pigs "as a compensation for the land which he and his tribe intended to take possession of."[27] However, after a period of time Ngāti Mutunga o Wharekauri migrants began to formally take possession of the land according to their tikanga by walking the land (*takahi*). Some Moriori resisted these claims, and several were killed as a result.

57. Following these events, a large number of Moriori men met at Te Awapatiki to discuss how to respond.[28] According to Moriori accounts, some proposed attacking the newcomers, while others insisted on maintaining their peaceful stance. After three days of discussion the attendees ultimately agreed not to attack the newly arrived Māori. Ngāti Mutunga o Wharekauri had become aware of the hui but did not know the outcome of the Moriori deliberations. After the meeting ended, Ngāti Mutunga o Wharekauri sought to secure complete control of the Island. In some instances, this involved taking its residents prisoner and making them subservient, while in other cases those who resisted or fled were killed. .[29] [30]

58. According to Moriori sources, 216 out of a population of named Moriori of 1,673 were killed in this process of subjugation.[31][32] These numbers were compiled some thirty years after the conquest. It may be that some names were excluded as a result. Equally, it may be that some of the names included are of people who died around that time but not at the hands of Ngāti Mutunga o Wharekauri. However, in spite of these uncertainties, the numbers clearly indicate that the killings were part of a culturally governed strategy of subjugation – not extermination or genocide. In front of the Land Court in 1870, the *rangatira*, Rakatau, described the events of 1835 as follows… "*we took possession … in accordance with our customs and we caught all the people. Not one escaped. Some ran away from us, these we killed, and others we killed – but what of it?*

[23] http://nzetc.victoria.ac.nz/tm/scholarly/tei-SmiHist-t1-body1-d21-d8.html
[24] Wai 64, C37, p. 6.
[25] Wai 64, C37, p. 6, citing King: *Moriori: A People Rediscovered*, pp. 60-1.
[26] Wai 64, C37, p. 6-7.
[27] Walter Brodie, 'A Visit to the Chatham Islands', 23 March, ms papers, ATL Wai 64, C003 Research File 1, doc 23 (quote at p. 195 of pdf).
[28] Wai 64, C37, pp. 7-8.
[29] Wai 64, C37, pp. 7-9.
[30] King, *Moriori,* p. 62; Wai 64, C37, p. 8.
[31] Wai 64, C37, p. 8-9. The overall population estimate is based on the figure provided in the Moriori historical account. King, *Moriori,* p. 64 cites evidence that the names of 216 Moriori killed at this time were recorded but that this number excluded many children.
[32] Mair, Gilbert. The Early History of the Morioris: with an Abstract of a Moriori Narrative, presented by Captain Gilbert Mair during the Adjourned Discussion on Mr. A. Shand's Paper of the 3rd August 1904. (Read before the Wellington Philosophical Society, 7th September 1904). Pages 161-171.

It was in accordance with our custom."[33] Toenga Te Poki gave almost identical testimony as Rakatau and, at the same hearing, Naera Pomare stated simply of the Moriori conquest "*We took their mana.*"[34]

59. The violence of the conquest was at a level deemed necessary to completely achieve the objectives of Ngāti Mutunga o Wharekauri which were to extinguish Moriori *mana* and to take possession of the entirety of Wharekauri and all of its resources. "*Anyone who carefully scrutinizes the evidence must conclude that the commonly accepted verdict of unmitigated barbarity on the part of the Maori conquerors is not justified. A conquest in which two hundred out of a population of sixteen hundred were killed does not connote exceptional ferocity, even less so when the narrow confines of Chatham Island are considered. Nor can nineteenth century civilization which achieved the extermination of the Tasmanians afford to assume a righteous pose in recounting misdeeds of the Neolithic Māori*."[35]

60. From a 21st century perspective, the events of 1835 may appear barbarous, but it was 'barbarity' that was integral to, and simultaneously proscribed by, Māori custom. The *mana* brought to the Treaty by Māori signatories and secured and guaranteed by that Treaty was a product of preceding generations of such custom and its attendant 'barbarity'. It was the foundation of Māori sovereignty and is a cultural and historical foundation not to be questioned in the context of the Treaty any more than the sovereignty of the British Crown would be questioned on the basis that it also rested on a lengthy history of barbarity, warfare and expropriation. The Treaty ruled a line under the respective cultural processes and histories of the two Parties that brought them to the point of *mana* to *mana* negotiation in 1840 and the signing of the Treaty that began a fresh page in New Zealand history under the heading of 'Partnership'.

61. History teaches that competition between people for resources means that 'sovereignty' commonly rests on, and is maintained by, violence or the threat of violence. Sovereignty is an outcome of history, not an indicator that historical outcomes are moral. The Treaty displaced that historical reality and process (understood in their own ways by Māori and the Crown) with an agreement that from 1840, within the confines of New Zealand, sovereignty was to be maintained by law. After signing, it was not available for Treaty Partners to repudiate their Treaty responsibilities on the basis that some event in the past of one Partner or the other was now regarded as falling short of contemporary ideas of morality or taste.

62. All of the evidence available is that the Ngāti Mutunga o Wharekauri conquest of the Chatham Islands and the subjugation of Moriori in 1835/36 was complete and comprehensive. Moriori,

[33] King, M. *Moriori – A People Rediscovered*. Page 66
[34] Native Land Court Minutes, Wharekauri, 1870
[35] Skinner, H. D. (lecturer in Ethnology, University of Otago) *The Moriories of Chatham Islands*, Bermice P. Bishop Museum, Honolulu, publisher, 1923, page 33.

Māori and Europeans alike recognized that from that time customary authority (sovereignty) over Wharekauri resided exclusively with Ngāti Mutunga o Wharekauri.

The Moriori Version

63. These historical events are portrayed very differently by Maui Solomon in a 'Taia Reserve Update'. It serves as a representative example of what has become a widely publicized, repeated (and believed) version of Chathams history.

64. "*My Moriori ancestors were a people of peace who had outlawed warfare and killing and had lived in peace for over 500 years by the time Maori arrived on these shores in the 'Lord Rodney' (flagged to Great Britain). When they arrived sick and unwell in November 1835, Moriori nursed them back to health, fed them, expecting that they would soon be leaving again as had happened with many sealing and whaling gangs over the past 30 years. However, once they had recovered their health and vitality, they repaid Moriori manawareka (kindness and hospitality) with slaughter, enslavement and cannabalism. Our people offered peace to the newcomers and made a conscious decision (after debating it for 3 days at a place called Te Awapatiki) not to fight and kill the invaders because it was against their ancient law of peace to do so. That offer was rejected.*

65. *Between 1835 and 1863 our population collapsed from 2000 people down to 101 survivors. Whole families were exterminated. By international standards, this is known as 'genocide'. Moriori were forbidden to marry, many were beaten to death, and others died of kogenge or death by despair. Some died of diseases but the significant majority were killed. Moriori were referred to by their captors in the borrowed racist parlance as "paraiwhara" or 'black fellas' - a derogatory term used by sealers and whalers when referring to Aboriginals people in Australia.*

66. *Meanwhile the Crown knew what was happening and stood by and let it happen*".

67. The description of the conquest as genocide is a false narrative as are the suggestions that Moriori offered peace to Ngāti Mutunga o Wharekauri – an offer that was treacherously rejected.

68. The suggestion that Ngāti Mutunga o Wharekauri were initially dependent upon Moriori upon their arrival, were nursed back to health and fed by Moriori is untrue. The voyage from Wellington, although overcrowded and uncomfortable, was quite short and the *Rodney* was guided to Whangaroa harbour by Matioro where there is an excellent water supply. The *Rodney* carried extensive supplies of all kinds to support the successful settlement of Wharekauri – even in the event that there should be resistance to that settlement. An early priority for Ngāti Mutunga was the cultivation of land and the planting of the huge quantity of seed potatoes brought from Wellington. This strenuous task was accomplished without any assistance from Moriori.

69. Rather than Moriori offering a peaceful welcome to Ngāti Mutunga, the evidence is that it was Pomare on behalf of Ngāti Mutunga who attempted (unsuccessfully) to negotiate a peaceful occupation of the Island including through the offering of gifts to Moriori. There is no evidence at all that the large Moriori hui at Te Awapatiki generated an offer to Ngāti Mutunga from Moriori. It was the discovery of this hui and uncertainty about its intent that was the most likely reason for the decision to make a pre-emptive attack on Moriori. That attack was not genocide. Ngāti Mutunga o Wharekauri undoubtedly had the military capacity to eliminate the entire Moriori population but did not do this because that was not their objective. Rather, the evidence strongly supports the view that Ngāti Mutunga o Wharekauri simply wished to achieve complete conquest and subjugation of Moriori and thereby minimise any potential threat to Ngāti Mutunga o Wharekauri safety or plans.

70. The assertion that 'a significant majority' of the Moriori population decline from 2,000 in 1835 to 101 in 1863 was because they were killed by Ngāti Mutunga o Wharekauri is dealt with in some detail below. However, if we take a significant majority to mean more than 1,000 then this claim is certainly false. The main cause of Moriori and Ngāti Mutunga o Wharekauri mortality over this period was European disease.

71. Similarly, the claim that Moriori were prohibited from marrying rests largely on one slender account. "*Resident Magistrate Archibald Shand recorded in January 1859 that Hirawanu Tapu had been betrothed to a Moriori woman, Rohana (also known as Tini Waihe), who had been a slave of Ngāti Mutunga on the Auckland Islands from 1842 to 1856. Rohana's owner, Matioro, tried to prevent the union by abducting her and carrying her back to Waitangi, Chatham Island. But Hirawanu and Rohana were living together by 1861*." It is more than likely that the temporary opposition of Matioro to the marriage was related to his personal view of Tapu.[36]

72. The claim that "*the Crown knew what was happening and stood by and let it happen*" is unfair. The Crown had no authority over the Chatham Islands until nearly seven years after the invasion and did not appoint its first Resident Magistrate until 1855. It is true that Shand, Thomas, Lanauze and Deighton did very little in their successive capacities as Resident Magistrate but the primary reason for this was that there was very little for them to do. Even Tapu, who was not a sympathetic chronicler of Ngāti Mutunga o Wharekauri history, stated in a letter to George Grey in 1863 that "*they* (Ngati Mutunga) *kept killing us like this until the gospel of Jesus Christ arrived, **and then they stopped***." (emphasis added). The arrival of Māori catechists on Wharekauri and the widespread adoption of Anglicism by Ngāti Mutunga o Wharekauri occurred in the summer of 1841/42 – before the annexation of the Chatham Islands.

[36] Tapu, Hirawanu, Dictionary of New Zealand Biography, 1990 (text authored by King, Michael).

73. Finally, the umbrage over the word 'paraiwhara' is a strange addition to the Moriori historical account above. 'Paraiwhara' is obviously a transliteration of the English term 'blackfella' and therefore not invented by Ngāti Mutunga o Wharekauri. It is not a term that seems to have been widely used by Ngāti Mutunga o Wharekauri and extensive correspondence and Court minutes all indicate usual use of the term 'Moriori'. However, the history of Moriori is a history of a people who were conquered and subjugated – reduced to the Māori status of slave – a person without *mana* or rights. This tragic reality seems overall, to be of far more substance than whether sealers and whalers applied a term widely used by them in the Pacific to Moriori. Its use, to the extent that it occurred, cannot detract from the *mana* of someone who is already regarded as having lost their *mana* as a consequence of enslavement.

The Maintenance of Ngāti Mutunga o Wharekauri Mana Whenua

74. As Te Rangi Hiroa stated, "*Conquest (*raupatu*) alone did not confer right of ownership unless it was followed by occupation. If the invading party retired, the survivors of the defeated tribe could return and still own their land. Occupation to establish a title had to be continuous, as idiomatically expressed in the term* ahi ka*, or lit fire".* A surprising amount of WAI 64 is dedicated to propositions that the Ngāti Mutunga o Wharekauri conquest was not conquest and (even if it was) Ngāti Mutunga o Wharekauri failed to maintain *ahi kā*. These propositions are that:
    i. That the conquest of Wharekauri by Ngāti Mutunga o Wharekauri was not representative of "true Māori custom."[37]
    ii. Ngāti Mutunga o Wharekauri sold all of their rights to Wharekauri to the New Zealand Company in 1840.[38]
    iii. Ngāti Mutunga o Wharekauri 'evacuated' Wharekauri in the 1860s and returned to Taranaki.[39]

75. All of these propositions are easily refuted. It is somewhat shameful that the Tribunal even gives space to these falsehoods in WAI 64. This effort is doubly surprising given that they are all obvious attempts to challenge Ngāti Mutunga o Wharekauri *mana whenua* status that the Tribunal had also unsuccessfully attempted to dismiss as an inauthentic and irrelevant concept (see above). If, as WAI 64 claims, *mana whenua* is generally irrelevant, there would be no need to try and attack its reality and strength at successive points in time (with an equal lack of success).

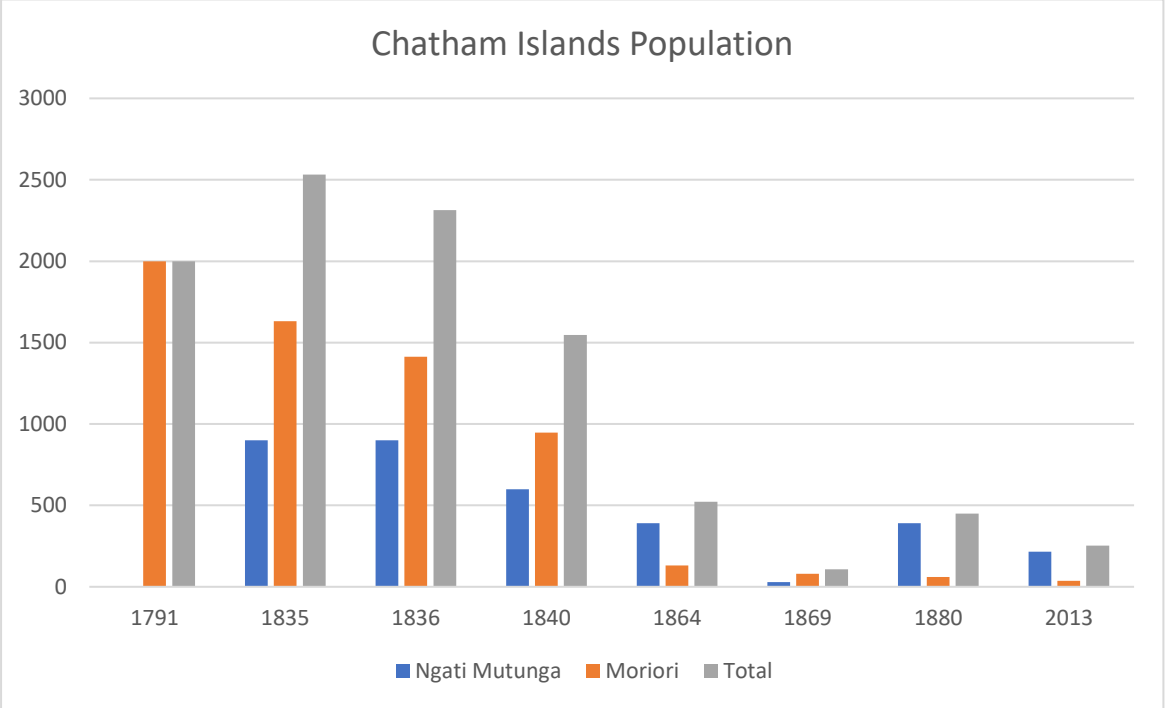
76. First, the objection of the Tribunal to the 'authenticity' of the conquest was that Ngāti Mutunga o Wharekauri employed a European vessel and weapons in that process. The suggestion, which the Tribunal wisely chooses not to develop, is that Māori *tikanga* cannot withstand the adoption of new technology by Māori on their terms. Ngāti Mutunga o Wharekauri, not only believe that Māori culture can incorporate new technology, it has a cultural imperative to do so if the

[37] WAI 64, 3.12 (page 46)
[38] WAI 64, 4.7 (page 57)
[39] WAI 64, 6.5.1 (pages 105-6)

preservation or enhancement of *mana* depends on that innovation. The Tribunal suggestion is also akin to suggesting that Ngāti Mutunga o Wharekauri might question British sovereignty supported by the Royal Navy on the grounds that the Chinese invented gunpowder.

77. Second, Ngāti Mutunga o Wharekauri did <u>not</u> sell their land interests including rights to sovereignty to the New Zealand Company in 1840. New Zealand Company representatives did visit Wharekauri in March 1840 to find Ngāti Mutunga besieging the Ngāti Tama *pa* at Waitangi in a dispute over control of that area and the associated trading opportunities with European vessels at the Waitangi anchorage. The New Zealand Company helped to end these hostilities by evacuating Ngāti Tama to Kaingaroa aboard the *Cuba*. The Company did produce an elaborate Deed in which it purported to buy Wharekauri for no more consideration than a promise to set aside 10% of the land for Native Reserves. The Deed was somewhat undermined by the accompanying report by Richard Hansen that the "chiefs **would** transfer to the New Zealand Company to the New Zealand Company the whole of their interests" (emphasis added). The identities of the persons whose *moko* are supposedly attached to that Deed have never been established. The New Zealand Company claim to have bought Wharekauri was fraudulent and was not recognised by the British Government. It is perhaps significant that the New Zealand Company pretended to buy Wharekauri from Ngāti Mutunga o Wharekauri, rather than pretending to buy it from Moriori.

78. Finally, a rudimentary knowledge of past and present Wharekauri demographics is sufficient to prove that Ngāti Mutunga o Wharekauri did not abandon or evacuate Wharekauri and return home to Taranaki in the 1860s. Many did return to Taranaki in 1867-8 to attend Taranaki Compensation Court sittings in person (as was required in order to be recognised by the Court). They leased land to *pakeha* graziers and borrowed money to fund this process so that in 1869, there were only 28 Ngāti Mutunga o Wharekauri on Wharekauri compared with some 80 Moriori. However, the 28 included notable chiefs such as Pomare and Te Poki and it is wrong to assume that greater numbers allowed any assertion of customary control by Moriori. It was several years before the Compensation Court claims were eventually resolved (generally unsuccessfully from a Ngāti Mutunga o Wharekauri perspective) and by that time many people lacked the means to return to Wharekauri. Nevertheless, Ngāti Mutunga o Wharekauri numbers started to rise for the 1870 Land Court hearing on Wharekauri and by the mid-1880s had returned to pre-1870 levels. Moriori numbers continued to decline.



79. The Moriori population numbers above are taken from Moriori sources for 1791, 1835 (preconquest) and 1836 (post conquest). Ngāti Mutunga numbers on the two voyages of the Rodney are reported by Shand as 900, but it is likely that the real number was lower. The 1840 numbers reflect the report by Dieffenbach that in the previous 18 months of his arrival in March 1840, both the Moriori and Māori populations had been reduced by approximately one third by epidemics. Periodic influenza and measles outbreaks continued to reduce the populations of Moriori and Māori alike through the mid-1800s and child mortality was very high during this period also (as it was in the New Zealand Māori population)[40]. The 1864 numbers are from a thorough census by Captain Thomas (Resident Magistrate) and the 1869 and 1880 numbers are also based upon Resident Magistrate reports. The 2013 numbers are from the census.

80. These numbers also refute the commonly repeated story that the decline in Moriori numbers in the 19th century was attributable them being killed (and eaten) by Ngāti Mutunga o Wharekauri. They indicate that the Moriori population was already in steep decline prior to 1835 through the effects of European disease and the decimation of the Chatham Islands seal population (mostly between 1815 and 1825). European diseases continued to take a terrible toll on both Moriori and Ngāti Mutunga o Wharekauri after 1835.

81. According to the 2013 census, there were 1,641 people who declared themselves affiliated to Ngāti Mutunga o Wharekauri. Of these, 198 were resident on Wharekauri along with a further 18 people who identified themselves as Ngāti Mutunga. In contrast, there were 36 Chatham Island

[40] Durie J. was wrong to claim that by 1870, "*most Maori had been absent* (from Wharekauri*) for about 20 years*" (WAI 64, page 113), Ngāti Mutunga numbers fell primarily not by emigration but by mortality. People succumbed to European diseases and were buried on Wharekauri.

residents with Moriori affiliation. The Chatham Islands today is a community with a strong Ngāti Mutunga identity and this has been the case continuously since 1835. It is bizarre (and insulting) of the Tribunal to try and downplay the importance of the relationship between Ngāti Mutunga o Wharekauri and Wharekauri when that place name is integral to the identity and name of an entire iwi that has brought claims before it.

82. The historiography of the Chatham Islands is sketchy and contaminated by the problem that many chroniclers had an obvious axe to grind. Inaccurate and selective stories develop a certain currency when repeated often enough, however, especially in the many books that touch on the popular history of the Chatham Islands. Notwithstanding these problems, it is absolutely safe to say that Wharekauri was comprehensively conquered and subjugated by Ngāti Mutunga o Wharekauri in 1835/36 and that the customary authority (*mana whenua*) thereby established has never been extinguished or transferred by Ngāti Mutunga o Wharekauri in the past 185 years. With every passing year, the ancestral connection of Ngāti Mutunga o Wharekauri and Wharekauri (now in its 9th generation) continues to strengthen.

83. For nearly thirty years the Crown has wriggled mightily to deny or evade acknowledgement of this simple historical fact and while it continues this evasion and denial, no satisfactory Treaty settlement or Treaty relationship with Ngāti Mutunga o Wharekauri will be possible. This acknowledgement is simply an acknowledgement of Ngāti Mutunga o Wharekauri (i.e. mainstream Māori) tikanga and its place in Article II. This leaves only one issue: tikanga versus tikane.

Waitangi Tribunal Findings on 'Cultural Conflict'

84. In WAI 64, the Tribunal posed the question (of the Native Land Court in 1870) "*Whose culture applies when cultures conflict? We refer to the Maori law of conquest rights… and Nunuku's law for peace. Could they be reconciled*?"[41] This is a general line of analysis and questioning that was raised by Judge P.J. Trapski in his directions to the Waitangi Tribunal dated 8 August 1990. He directed that the Tribunal commission Paul Harman under the supervision of Buddy Mikaere, using Dr Michael King as a consultant, to prepare a Preliminary Historical Report for what later became the WAI 64 Tribunal led by Judge Eddie Durie. Trapski's directions were that the Preliminary Report would specifically cover: "*the rulings of the Native Land Court which disenfranchised Moriori from their land. What weight, if any, should the Native Land Court have*

[41] WAI 64, 6.6, (page 109)

attached to the Moriori customary rights vis a vis Maori customary rights in deciding the outcome of the various claims…(and) Moriori custom concerning claim by conquest".[42]

85. There are a number of conclusions dressed as questions in Trapski's directions. First, the Native Land Court did not disenfranchise Moriori in 1870 (that is stated as a 'finding'). It actually enfranchised Moriori at the behest of Ngāti Mutunga o Wharekauri with 4,100 acres of land. Moriori were disenfranchised by raupatu in 1835 and had no land prior to the 1870 hearing. Second, Trapski states that Moriori had customary rights that the Native Land Court should have considered. This is also a 'finding' which Trapski J. reached without the traditional assistance of referenced evidence or explicit analysis.

86. The Preliminary Report covered the topics as directed by Trapski J. and, after referencing Kawharu[43] and the Māori Appellate Court (Arahura and Kaikoura Deeds of Purchase) views on *take raupatu*, (which were the same as those of Te Rangi Hiroa above) it then declared "*However, the strict application of this customary law is questionable in this instance due to the Moriori's possession of and adherence to a different set of customary practices. While Māori claimed they had rights procured by customary means, concurrently Moriori maintained a customary claim by responding to the invasion in a customary way. On this basis, it can be contested that while the manawhenua of the Moriori was ignored by Maori, it was never extinguished*".[44]

87. This is a 'finding' that contradicts the clear statements of Naera Pomare and other Ngāti Mutunga o Wharekauri to the Native Land Court in 1870. Moriori *manawhenua* was not 'ignored' by Ngāti Mutunga o Wharekauri. On the contrary, they took particular pains to ensure that every vestige of it was erased and not re-established during the process of *raupatu* and subsequent occupation. The origin of this 'finding' is easily identified. In writing about the 1870 Native Land Court hearing, Michael King was clearly of the view that the most persuasive arguments supporting the issue of land title to Moriori (which he strongly favoured) had not been used. "*They had not argued – as they had on other occasions – that conquest was impossible where one side declined to fight because its customary law forbad killing…the Moriori had neglected to argue that their case based on original occupation and adherence to their own customary law was strengthened by continuous occupation – even in slavery -…Tactically, therefore, the Moriori case had been poorly presented. By the time the Moriori witnesses realised this, it was too late to rectify the outcome.*"[45] King and the authors of the Preliminary Report therefore constructed and advanced a line of argument that King believed, with the advantage of hindsight, should have been used by Moriori in 1870 but was

[42] Mikaere M., and Ford J. *Preliminary Report to the Waitangi Tribunal on the claims relating to the Chatham Islands, lodged under Section 6 of the Treaty of Waitangi Act and registered as WAI 54, WAI 64 and WAI 65*. Appendix 1. Also referenced as paper A8 in the WAI 64 document bank.
[43] Kawharu,H. *Maori Land Tenure*, Auckland 1977: 56
[44] Mikaere M., and Ford J. *Preliminary Report to the Waitangi Tribunal on the claims relating to the Chatham Islands, lodged under Section 6 of the Treaty of Waitangi Act and registered as WAI 54, WAI 64 and WAI 65*. Appendix 1. Also referenced as paper A8 in the WAI 64 document bank. Page 49.
[45] King, Michael. *Moriori a People Rediscovered*, Viking (publisher)1989, 226 pages (page 132)

not. This particular line of argument was presented in the Preliminary Report for (hopefully more sympathetic) consideration by the Waitangi Tribunal 120 years later.

88. This retrospective argument was then combined with the definition that "*Māori is deemed to include the Moriori people of New Zealand*" in the 1992 Fisheries Deed of Settlement, subsequently implemented through the Treaty of Waitangi Fisheries Act 1992. Moriori were thereby relieved of the onus of establishing their *iwi* status unlike every other *iwi* eventually recognised as such under the Māori Fisheries Act 2004. The preliminary 'findings' above meant that Moriori entered the Tribunal hearing process with the already 'found' status of a Māori *iwi*, holding customary (albeit undefined) rights on Wharekauri. In contrast, the starting position for Ngāti Mutunga o Wharekauri as described by the Preliminary Report was that its customary rights were "questionable".

89. In fact, WAI 64 took every opportunity to deprecate Ngāti Mutunga o Wharekauri customary rights and interests, even to the outlandish extent of suggesting that those rights were 'repugnant to justice'. "*But the Treaty also envisaged that a just solution would be sought where customary interests conflicted with each other (or where they were themselves repugnant to justice as was the case in this instance*)."[46] The Tribunal did not develop exactly why and how the customary rights of Ngāti Mutunga o Wharekauri were 'repugnant to justice' and therefore not to be protected by Article II. Instead, it relied upon an assumption that a stirring of contemporary feelings of repugnance about pre-annexation tribal warfare, slavery and cannibalism would make its conclusion self-evident. Repugnant to justice and repugnant to contemporary sensibilities are not the same thing.

90. That Tribunal conclusion was that: "*Adopting a Māori manner of thinking, we ourselves would have sought a division between Moriori and Ngāti Mutunga that was as close as practicable to equal*".[47] How the somewhat scattergun anti-Mutunga content of WAI 64 leads to the conclusion that Wharekauri lands should have been (i.e. should be) divided 50:50 between Moriori and Ngāti Mutunga o Wharekauri is not at all self-evident. Simply asserting that you have 'adopted a Māori manner of thinking' does not make this conclusion and its associated recommendations any more understandable. Much of WAI 64 is a catalogue of criticism and condemnation of the traditional 'Māori manner of thinking' of Ngāti Mutunga o Wharekauri. It is a catalogue that does not scruple to use anecdote elevated to generalisation, repetition of stories against which there is strong contrary evidence and the strategic insertion of false assumptions in order to vilify[48] Ngāti Mutunga o Wharekauri who are condemned repeatedly in WAI 64 for simply acting according to their Māori *tikanga*.

[46] WAI 64, 8.2.4 page 135
[47] WAI 64 8.8 page 149
[48] A few examples include the false allegation that Ngāti Mutunga o Wharekauri prohibited marriage between Māori and Moriori, that Moriori were prohibited from having children and that the outrageous insinuation by Durie that it was the objective of Ngāti Mutunga o Wharekauri to kill every Moriori man, woman and child (WAI 64, page 145).

91. To assert that it is 'a Māori manner of thinking' to reject the 'authenticity' or 'validity' of traditional Māori *tikanga* in its historic time and place is not only an absurdity but an insult to Māori generally and Ngāti Mutunga o Wharekauri in particular. It leads to Tribunal findings that are the converse of what Article II requires of the Crown. In turn, these flawed findings have been used by the Department of Conservation, the Ministry of Primary Industries and Te Arawhiti to justify decisions and actions which are disrespectful and prejudicial to *mana* of Ngāti Mutunga o Wharekauri.

92. Before criticising the Native Land Court for its findings in 1870, the Tribunal did note that "*The Native Lands Act specified only one criterion: that rights were to be determined in accordance with native custom*"[49] The Native Land Court did not consider the red herring of whether Moriori or Ngāti Mutunga o Wharekauri *tikanga* or customary rights should apply or prevail. Instead, it concerned itself with ensuring that it only offered land titles to people who held *take* to the Wharekauri lands. This is a practical question, not a moral judgement. Perhaps the best way of focussing the mind on practicalities is to consider the following question; if the Crown wished to buy land on Wharekauri, who would be the proper counterparty to that transaction? The answer to that question is: Moriori for any date before 1835 and Ngāti Mutunga o Wharekauri for any date after 1835 including if the Crown wished to exercise its pre-emptive rights under Article II of the Treaty of Waitangi after November 1842.

93. This was reluctantly acknowledged by the Tribunal: "*After the invasion, Māori controlled the land…for all temporal purposes*".[50] Customary control is temporal control and customary control was recognised, secured and guaranteed by the Treaty of Waitangi. This is equally true in 1842, 1870 and today.

94. The Tribunal would have been wise to have demurred from being drawn into the question of "whose culture applies when cultures conflict?" The ultimate consequence for Ngāti Mutunga o Wharekauri of the Tribunal's dalliance with this question is that the Crown is proceeding with processes intended to deliver the exclusive vesting of ownership of the Glory Block on Rangiauria (approximately 1200 hectares) and Taia Historic Reserve on Wharekauri (1198 hectares) in Moriori on the basis that, either Ngāti Mutunga o Wharekauri do not have *mana whenua* status over those lands, or that *mana whenua* status is irrelevant to those vesting decisions. This is a topic discussed in more detail below in the Taia case study.

[49] WAI 64, 8.2.2, page 132
[50] WAI 64, 6.2.1. page 91

Ngāti Mutunga o Wharekauri Tikanga and Moriori Tikane

95. It is becoming increasingly common for Moriori to assert that they are *manawa whenua* as well as *tangata whenua*. The Crown has only acknowledged Moriori as *tangata whenua* in the Moriori Deed of Settlement. *Tangata whenua* status is uncontroversial but the acceptance of *manawa whenua* status of Moriori by the Crown (or anyone else) requires understanding and acceptance of what this term actually means. It has a close resemblance to the term *mana whenua* but has entirely different foundations. In particular, the meaning of the word *mana/manawa* in the two terms is irreconcilable. The Moriori use of the term *manawa* describes something that is impervious to the consequences of conquest and enslavement. In fact, King went so far as to suggest that Moriori *mana* could be enhanced by slavery.

96. A defining characteristic of Moriori identity is adherence to 'Nunuku's law' that prohibited killing (other than infanticide)[51]. This law forbad warfare between Moriori sub-groups within the close confines of Wharekauri. As an internal arrangement, Nunuku's law has obvious merits. However, a consequence of applying the law for centuries is an unavoidable degradation of military capability. In the competitive environment of Aotearoa, no *iwi* could allow such a degradation and hope to survive. *Mana* in the context of Aotearoa meant that every threat or opportunity required a response and failure to respond appropriately had consequences, not just for *mana*, but possibly for the survival of the *iwi* itself. *Mana*, as understood by traditional Māori, is irreconcilable with pacifism. Pacifism simply accepts conquest – even by a smaller but more aggressive *iwi.* This is anathema to traditional Māori thinking. There is no greater disaster than conquest and slavery. Fighting to the death is preferable.

97. For Ngāti Mutunga o Wharekauri, 'slave' is the word used to describe people who have no *mana* and no customary rights. This is the usual Māori definition of slavery which does not evoke an immediate image of bonded or forced labour, let alone the ownership of another person as property (the common European image of a slave) but refers to a person with no rights - at least

[51] Hunt, F., Twenty-five years in New Zealand and the Chatham Islands - an Autobiography (Richards, R., editor 1990) First published 1866. Page 38 "…*"a Moriori child was born during the night; on the following morning I went to enquire after it. They told me it was a* tamaiti tangi*, i.e. a crying child, and they had destroyed it before sunrise. I requested them to show me where they had put it. They led me to the spot, and to my horror and disgust pointed out a poor infant crushed to atoms beneath a huge piece of rock weighing at least six hundred weight. They appeared to think they had performed a praiseworthy and meritorious action. I told them they must never do so again; if they did a great curse would be put upon them. Their reply was, that it might be bad for white men to do so; but it had been the Moriori custom from time immemorial, and therefore it was not wrong in them*…" This may have been part of cultural practices designed to maintain human population at sustainable levels given the prohibition on warfare (see also King, M. *Moriori a People Rediscovered* page 28).

in their current location. In Māori terms 'slavery' is a matter of what rights a person has or does not have. It is not a matter of how they feel about what rights they have or do not have.

98. The Crown and Moriori agree that Moriori were enslaved by Ngāti Mutunga o Wharekauri. "*The Crown profoundly regrets that it failed for many years to take action to end Moriori enslavement…*"[52] This is an apology that the Crown failed to protect Moriori rights as British citizens under Article III. It is a warranted apology, but it is an apology that has no impact upon the simultaneous responsibility of the Crown to secure and guarantee the rights of Ngāti Mutunga o Wharekauri under Article II of the Treaty of Waitangi. Neither does that apology have any impact upon the nature and extent of those Article II rights.

99. Given the absolutely central role of *mana* in Māori culture and thought, this raises the question as to whether it is possible for Māori culture to incorporate two irreconcilable or inimical definitions of the term *mana*. An honest attempt to address this question leads to three possible outcomes:
    i. The definition of *mana* is so all-encompassing that it has no clear meaning and traditional Māori culture consequently has no coherent core. *Mana* becomes both the imperative to accept slavery and the imperative to resist slavery at all costs.
    ii. The Māori definition of *mana* is accepted and if Moriori are Māori then it is clear that Moriori lost *mana whenua* in 1835/36 and the recommendations of the Tribunal on land sharing are ill-founded.
    iii. Moriori hold to their alternative definition of *mana* in which case other Māori would be entitled to say that Moriori are not culturally Māori and the Treaty of Waitangi was an arrangement exclusively between the Crown and Māori.

100. This unavoidable and serious triangular dilemma hangs over the whole of WAI 64. In the end, the Tribunal elected to try and deflect all attention away from *mana whenua* rather than engage with it and be then forced to follow their logic into one of the three options above. Curiously, the Moriori Deed of Settlement actually contains some support for 3. above. "*It is thought that Rongomaiwhenua (meaning 'peace on the land') and his younger brother Rongomaitere (meaning 'peace on the ocean'), came to the islands directly from eastern Polynesia, most likely from Rarotonga or Tahiti…all Moriori today descend from Rongomaiwhenua*."[53] The two *whakapapa* contained in the Background section of the Moriori Deed of Settlement are broadly consistent in that they trace 124 and 133 generations respectively between the individuals reciting their whakapapa in the 1860s and their common ancestor Rongomaiwhenua. If a generation is taken as twenty years, this would date the arrival of Rongomaiwhenua on Wharekauri between 620 and 800BC i.e. long before there was any evidence for Māori settlement in Aotearoa.

[52] *Moriori and The Trustees of the Moriori Imi Settlement Trust and the Crown Deed of Settlement of Historical Claims*, 2019, section 3.15.
[53] Ibid pages 12 and 13.

101. The relevance of this is that there was no such thing as Māori culture when people first arrived in Aotearoa. Māori culture emerged from its eastern Polynesian roots over hundreds of years as people adapted to a vastly different scale of land, a different natural environment and different resources in Aotearoa compared to their Polynesian homelands. All the while, this cultural development was occurring within an intensely competitive context between rival *iwi*. The outcome of this process of evolution (what we today recognize as Māori culture) could not have been generated by any other people at any other time and any other place. If Moriori were not full participants in this cultural process (as they claim) then it is perhaps not correct to describe them as culturally Māori notwithstanding a common ethnicity and ancient Polynesian heritage.

102. It is deeply problematic for the Treaty and the Tribunal for claimants to be allowed to argue that they are Māori in some ways but not others. Key recommendations of WAI 64 rely upon the Tribunal employing a type of dialecticism that glosses over these inherent contradictions. While these inherent contradictions remain unresolved, it is unsafe for the Crown and its representatives, including the Department of Conservation, to base their Treaty partnership actions on the Tribunal's recommendations. In particular, the Minister of Conservation should take careful note of the fact that WAI 64 does not find that Ngāti Mutunga o Wharekauri does not have *mana whenua* over Wharekauri. It made several unsuccessful attempts to besmirch that *mana whenua* status but mudslinging is not refutation and in the end, WAI 64 was reduced to expressing a wish that it would be better if *mana whenua* was to be generally ignored. By its actions, DoC appears to have embraced this idea. However, in spite of this policy of denial, and contrary to the predictions of the Tribunal, the issue of *mana whenua* status has not gone away and will not go away.

Taia Historic Reserve

103. WAI 64 reports the Department of Conservation position taken during its hearings as follows "*The Department of Conservation resiled from its earlier position that priority must go to Ngati Mutunga in view of the Native Land Court decision, though Moriori remained bitter about the initial stance. At the hearings, the department's position was that it was willing and wanting to consult equally with all. Not surprisingly, it had no idea who it was obliged to consult with and awaited the Tribunal's findings. In the meantime, notwithstanding the statutes, the department wisely proposed to delete all references to tangata whenua and mana whenua in the Chatham Islands conservation management strategy. Those words made life too hard*."[54]

104. There are three parts of the reference above that are relevant to current decisions relating to the Taia Historic Reserve. First, the good news for the Department of Conservation (DoC) is that since that time it has become crystal clear that the Ngāti Mutunga o Wharekauri entity that DoC

[54] WAI 64, 13.2.3., page 259.

should consult with is the Ngāti Mutunga o Wharekauri Iwi Trust Limited based conveniently across the road from the DoC office in Te One.

105. Second, unfortunately, DoC has not kept its promise 'to consult equally with all' (Treaty partners). The affidavit of Thomas McClurg[55] contains a summary of the actions taken by DoC relating to Taia. This summarized chronology is closely based on documents released by DoC under the Official Information Act and its accuracy has not been challenged in Court. It shows that DoC has embarked on a vesting intended to either: lead to the vesting of the exclusive management of Taia by Moriori (the original advertisement publicly notified in the Chatham Islander in 2003) or, lead to the exclusive ownership of Taia by Moriori (other DoC correspondence) without consulting properly with Ngāti Mutunga o Wharekauri first.

106. Ngāti Mutunga o Wharekauri is invited to respond to the re-notification of the intention to vest.[56] This is no more than the same right of submission or objection that any member of the public has. Treating a Treaty partner as just another member of the public is not what "to consult equally with all" means in the context above where it was a promise to consult equally with Ngāti Mutunga o Wharekauri and Moriori. That consultation with Treaty partners has to occur before the Minister forms an intention to vest in one iwi. It is disingenuous to say that a publicly advertised **intention** carries no predetermination. 'Intention' means having an 'aim', 'goal', target, 'objective' or 'plan'. 'Predetermination' means having an 'intention' or a 'plan'. The time is overdue for DoC to drop the semantic games continued in the letter of 24 August 2020 and to deal with Ngāti Mutunga o Wharekauri fairly and squarely (or 'equally') as DoC itself has said.

107. Third, it is an insight into the idiosyncratic concept of wisdom contained in WAI 64 that it would commend DoC as 'wise' for its proposal 'to delete all references to *tangata whenua* and *mana whenua* in the Chatham Islands conservation management strategy' on the grounds that 'those words, made life too hard'. As recorded above, *tangata whenua* and *mana whenua* are both terms used quite widely in general and settlement statutes. The purpose of this memo is to demonstrate that they are terms that are absolutely indispensable if the mutual rights and obligations set out in the Māori version of the Treaty are to be understood and honoured. The Crown and its representatives do not have the option of opting out of these obligations on the grounds that it makes 'life too hard'.

108. It is not appropriate that when Ngāti Mutunga o Wharekauri explains (as it has done several times) to DoC that a specific cultural connection that Ngāti Mutunga o Wharekauri has with Taia is that it has *mana whenua* over its entirety, for DoC to say that *mana whenua* is not a cultural value that it recognizes because such recognition 'makes life too hard'.

[55] Affidavit of Thomas McClurg dated 5 August 2019 in CIV-2019-485-436

[56] Letter from Chris Visser, Statutory Manager, Lower North Island to Gail Amaru, General Manager NMoWIT 24 August 2020.

109. Moriori have cultivated the idea that Ngāti Mutunga o Wharekauri would use recognition of its *mana whenua* status over Taia (and other places) to veto the recognition of Moriori connections there and the protection of Moriori *taonga*. As a general rule, it is best to get the views of Ngāti Mutunga o Wharekauri directly from Ngāti Mutunga o Wharekauri and if that were done today, this notion would be dispelled. Ngāti Mutunga o Wharekauri support the recognition and protection of Moriori wāhi tapu and rakau momori on Taia as well as the protection of natural values there. The exclusive vesting of Taia in Moriori is not necessary to achieve that protection.

110. Moriori are *tangata whenua* with cultural, historical and ancestral connections with Taia. Ngāti Mutunga o Wharekauri are *mana whenua* with cultural, historical and ancestral connections with Taia. This situation does not constitute "a dispute as to facts" as was found by Collins J. in his judgement on CIV-2019-485-436; it indicates the presence of separate but overlapping interests. Both *iwi* and *imi* are recognized by the Crown as Treaty partners. However, this recognition does not then lead to the consequential and beneficial recognition of Treaty rights because it is undermined and confused by a failure to accurately identify the distinct and separate nature of the respective Treaty rights of *iw*i and *imi*. In large part, this confusion arises from a refusal to engage with the fundamental concepts addressed in the first section of this memo, to apply them to the known facts of Wharekauri history and thereby clarify what the separate Treaty rights are of *iwi* and *imi*.

111. The facts of the situation on Wharekauri are unique in that there are two *iwi* with completely overlapping interests in a geographic sense. Those interests and rights are, however, completely different in nature. It is foolish to attempt to elevate Moriori interests over Ngāti Mutunga o Wharekauri rights or to pretend that it is even handed to vest land exclusively in one *iwi* against the opposition of the other on the basis that the Crown subjectively places greater weight on the values, interests or rights of one.

112. The Crown has one over-riding responsibility under the Treaty which is to secure and guarantee **all** of the rights recognized by the Treaty. In order to do this where those rights are overlaid, the Crown must carefully avoid actions that protect some rights at the <u>expense</u> of others. Treaty rights are not always tidy or amenable to Crown initiated and driven housekeeping.

113. The recent approach of the Crown to the issue of overlapping claims between *iwi* in Treaty Settlement negotiations has been to press *iwi* to accept subdivision and exclusive allocations of rights in places where such overlaps have been identified. This has often resulted in a 'first up, best dressed outcome' that is the source of a growing list of contemporary Treaty grievances. The fundamental problems with approach are becoming more and more evident and If there is any place in New Zealand where this approach should be avoided, it is Wharekauri.

114. In the case of Taia, there are only two options available to the Crown that provide for the proper recognition and protection of the Treaty rights of both Ngāti Mutunga o Wharekauri and Moriori. The first (and preferable) option is for the Crown to remain as landowner and to use its status as

landowner to give substance to its respective Treaty partnerships with Ngāti Mutunga o Wharekauri and Moriori by developing a management plan for Taia involving both *iwi* and *imi.* The second option would be for Moriori and Ngāti Mutunga o Wharekauri to mutually agree a vesting arrangement that DoC could then implement (if it chose to do so). The second option is not currently available.

115. Any other option would inevitably create a contemporary Treaty grievance of some kind. The creation of a Treaty grievance would be clear proof that the Minister had failed in the exercise of her responsibilities under section 4 of the Conservation Act 1987.