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UPDATE ON STATE-OWNED ENTERPRISES AND THE TREATY OF WAITANGI

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The Black poet, Dudley Randall composed the following poem *Booker T and W.E.B.* which focuses on the famous educational debates between Black scholars W.E.B Du Bois and Booker T. Washington.

Booker T and W.E.B

"It seems to me," said Booker T.,
"It shows a mighty lot of cheek
To study chemistry and Greek
When Mister Charlie needs a hand
To hoe the cotton on his land,
And when Miss Ann looks for a cook,
Why stick your nose inside a book?"

"I don't agree," said W.E.B.
"If I should have the drive to seek
Knowledge of chemistry or Greek
I'll do it. Charles and Miss can look
Another place for hand or cook.
Some men rejoice in skill of hand,

And some in cultivating land,
But there are others who maintain
The right to cultivate the brain."

"It seems to me," said Booker T.,
"That all you folks have missed the boat
Who shout about the right to vote,
And spend vain days and sleepless nights
In uproar over civil rights.
Just keep your mouths shut, do not grouse,
But work, and save, and buy a house."

"I don't agree," said W.E.B.,
"For what can property avail
If dignity and justice fail?
Unless you help to make the laws,
They'll steal your house with trumped-up clause.
A rope's as tight, a fire as hot,
No matter how much case you've got.
Speak soft, and try your little plan,
But as for me, I'll be a man."

"It seems to me," said Booker T.-

"I don't agree,"
Said W.E.B.

Booker T Washington's autobiography was entitled, *Up from Slavery,*[229] giving some insight into his upbringing. Washington's philosophy on education was that Black students should not only be taught to think but to be able to perform a service needed in the community as well. Du Bois strongly disagreed with Washington's views on education and called him "the great compromiser", believing instead that equality among the races could only come from equality in education by "allowing black minds to soar along with white minds".

[229] Booker T Washington was born circa 1856. His autobiography *Up from Slavery* was first published in 1901.

The poem shows in a lyrical way the difference in thinking between the two men and different strategies for the advancement of Blacks.[230]

This poem has always seemed, to me anyway, to speak directly to a number of Māori situations. Du Bois' view reflected in the lines, "unless you help to make the laws, they'll steal your house with trumped up clause" that participation in lawmaking is important to protect minorities against abuse of power seems particularly relevant today. Also, the notion of one great thinker labelling another as a "great compromiser" applies to the diversity of Māori views about Treaty settlement processes generally (though sometimes the labels are not as kind). And the famous phrasing throughout the poem, "it seems to me..., I don't agree..." reminds us that debates of this nature are ongoing and probably never ending.

And so, on the one hand, the *Lands* case is responsible for a number of positive practical consequences for Māori who have brought and continue to bring matters to the attention of courts calling into question the manner of their Treaty partner's actions. Those benefits include, most obviously, the protection of Crown held resources for Treaty settlements; the establishment of the Crown Forestry Rental Trust which provides funding to certain Treaty claimants, and the consideration of Treaty 'principles' at times when the Crown and its agents enter into new proposals, or make decisions on major issues – even where there is no equivalent to section 9 of the State-Owned Enterprises Act 1986 in an empowering Act. State-owned enterprises, themselves, are conscious of the scope for review of proposals or decisions by way of judicial review in the Courts, and before the Waitangi Tribunal[231] theoretically ensuring that our interests are taken into account in major decisions that affect us.

And yet, despite all of this, twenty years after the celebrated *Lands* case,[232] the protection mechanisms for lands, and those established later

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[230] Deborah Hare " 'Douglass, Booker T. and W.E.B' A study of Black Educational Theories". www.yale.edu/ynti/curriculum/uits/1991/3/91.03.05.x.html. (last viewed 23 November 2007)

[231] The Treaty may found an application for judicial review where an empowering statute expressly enforces or promotes the principles of the Treaty either as binding restraints on decision-makers or as factors to be taken into account such as in the State-Owned Enterprises Act (express reference review), and where a statute is silent but the context of the decision-making imports Treaty considerations (contextual review). According *to Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 223, the Treaty or Treaty principles are of such significance that they should be presumed mandatory considerations in the context of a statutory power of decision making.

[232] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (commonly referred to as the *Lands* case).

in relation to Crown Forests, have been and continue to be evaded with 'trumped-up clause'. And despite the reassuring judicial language of partnership, mutual respect and obligation, an active Crown duty of protection, reasonable cooperation and so on, if the result of the *Lands* case and the associated cases that followed is that the notion of Crown Sovereignty remains unchallenged and becomes so deeply entrenched in the law, or at least in Pākehā law, then, in the words of the great thinker, Ani Mikaere,

> tino rangatiratanga cannot be realised and tikanga Māori will foreever be positioned as inferior to Pakeha law, tolerated to varying degrees and for different purposes, but ultimately subject to...the stroke of the legislative pen, or to misinterpretation at the hands of the judiciary.[233]

These cautionary words are difficult to ignore in balancing the overall ramifications of the *Lands* case in relation to the tangata whenua systems of law and government that existed in this country prior to colonisation by the British.[234]

I. BACKGROUND

Te Tiriti o Waitangi was signed between many hapū and the Crown in 1840 - a time when Māori constituted over 95% of the population and the Māori language was the dominant language – and it was five years after Māori chiefs had signed a declaration of independence. The Māori text recognises the governmental authority of Māori, a different and wider concept than the English version, which has been limited to property rights.[235] We have heard much about the inconsistencies between the texts that have spawned many different interpretations of

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[233] A Mikaere, "The Treaty of Waitangi and Recognition of Tikanga Māori" in M Belgrave, M Kawharu and D Williams, *Waitangi Revisited - Perspectives on the Treaty of Waitangi* (Auckland: Auckland University Press, 2005), 341-342.

[234] Māori society was collectively organised with whakapapa (genealogy) forming the backbone of a framework of kin-based descent groups[234] led by rangatira – leaders for their ability to weave people together. Māori societies developed tikanga Māori, the first law of Aotearoa/New Zealand by which Māori governed themselves.

[235] By the Māori text of the Treaty, Māori gave up 'kāwanatanga' - the right to govern - but retained 'tino rangatiratanga' - sovereignty or the right to self-determination. However, the English text of the treaty speaks of Māori giving up 'sovereignty' (translation of 'kāwanatanga') while retaining 'full exclusive and undisturbed possession' of lands, estates, forests, fisheries and other resources.

the Treaty and its so-called principles. But in any event, it seems to me at least that the Crown has failed to adhere to either version and the consequences have been devastating for Māori. Traditional tribal structures collapsed. Ways of life and landholdings were destroyed. Māori opportunities to develop paralysed.

The historical context to the *Lands* case is important. Māori strategies to resist Crown action over the generations include the establishment of the Kīngitanga in 1858 as a unified force to halt unauthorised land alienation. The Second Māori King, Tāwhiao, attempted to visit Queen Victoria to discuss grievances rangatira to rangatira. His son, King Mahuta, joined parliament to participate in the lawmaking process. Māori across the country have engaged in protest occupations and marches. Resistance came to a head in the 1970's with the establishment of the Waitangi Tribunal[236] and into the 1980's in response to the Labour Government's massive restructuring programme.

I mentioned earlier that tangata whenua systems of law and government existed prior to colonization. The late Michael King wrote that "at the same time as the land and its resources were being explored and exploited so was the country's system of government."[237] In 1852 the British Government accepted Governor George Grey's draft constitution for New Zealand, which came into effect the following year. The new blueprint for governance brought the "Crown" to New Zealand and laid the foundation for the manner in which the country has been governed since.

If Māori were in any doubt in 2004 as to the vulnerability of tikanga Māori, rangatiratanga, and Te Tiriti o Waitangi within that constitutional blueprint, the events surrounding the enactment of the Foreshore and Seabed Act brought home the chilling reality of parliamentary supremacy. But there was much in the history of this country's system of government to forewarn us that those events should

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[236] The Treaty of Waitangi Act 1975 established Te Rōpū Whakamana i te Tiriti o Waitangi (the group to give mana to Te Tiriti o Waitangi – also known as the Waitangi Tribunal). The Act provides that any Māori person who claims to be prejudicially affected by the actions, policies or omissions of the Crown in breach of the Treaty of Waitangi may make a claim to the Tribunal. The Tribunal has the power to inquire into such claims and make recommendations to the Crown. The Crown is not bound to follow the Tribunal's recommendations except in very limited circumstances. Recommendations often form the basis of settlement negotiations. More than a thousand claims have been registered with the Tribunal citing countless Crown breaches of the Treaty since its signing in 1840 involving the exploitation of land, waters, and other resources.

[237] M King, *The Penguin History of New Zealand* (Auckland: Penguin Books, 2004).

not have been entirely unexpected.

II. CHALLENGE TO CORPORATISATION

For as we know, twenty years earlier, in 1984, the Labour Government began to develop the concept of corporatisation seeking to promote efficiency and better services to the public. We have heard much today about the Māori challenge to this programme which was to provide for certain state assets and resources to be transferred and then 'managed' by private sector boards thereby limiting the Crown's ability to settle Treaty claims.

Today, we were reminded of how sections were added to the State-Owned Enterprises Act during the Bill Stage; of the Māori Council's application for judicial review of the proposed transfer of Crown land to state-owned enterprises, and of the findings of the Court of Appeal – which could well have gone the other way. As a result of the Court of Appeal's decision in the *Lands* case, the Crown and Māori came to an arrangement as to how Treaty claims would be safeguarded. The Treaty of Waitangi (State Enterprises Act) 1988 reflects the terms of this arrangement. Crown land could be transferred but would be subject to provision for the resumption of the land on the recommendation of the Waitangi Tribunal so that it could be returned to Māori ownership. A stream of litigation followed that case as Māori sought to review the actions of the Crown on a number of occasions when the Crown seemed committed to divest itself of State assets in ways which avoided the protection systems.

Tainui Māori for example, returned to Court soon after the *Lands* case to challenge the Crown's argument that coal mining interests were not interests in land and therefore not covered by the resumption back powers.[238]

I recall also the Waitangi Tribunal's Interim Report on Sylvia Park and Auckland Crown Asset Disposals concerned claims lodged by tangata whenua of Tāmaki Makaurau: Ngāti Whatua o Orākei Māori Trust Board, Ngāti Paoa and Ngāitai Umupuia o Tamaki, and Ngāti Whatua relating to twenty one hectares of land at Mount Wellington, known as Sylvia Park and now the site of a large shopping centre. The iwi claimed that the land should have been reserved for them but that

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[238] *Tainui Māori Trust Board v AG* [1989] 2 NZLR 513 (the 'Coal' case). For examples of other cases in this line of litigation see *New Zealand Māori Council v Attorney General* [1989] 2 NZLR 142 (the 'Forests' case); *Love v AG* 15/3/88, Ellis J, HC Wellington CP 135/88, (the 'Petroleum' case); *NZ Māori Council v AG* [1992] 2 NZLR 576 (the 'Broadcasting Assets' case).

the Crown instead kept it for itself, and they were dismayed to learn of the Government's intention to sell the land through the Department of Survey and Land Information. In 1992, the Tribunal of Chief Judge Eddie Durie (presiding), Professor Gordon Orr, and Joanne Morris was advised that the Sylvia Park land had been sold and that there had been no protective arrangements in place. The Tribunal expressed a preliminary view of Crown sales made outside the State-Owned Enterprise arrangement. The duty on the Crown to protect Māori in the ownership of their lands, said the Tribunal, becomes a duty to restore Māori to ownership where practicable, and not to alienate land so as to prejudice Māori claims to them. Then the Tribunal used the 'F' word, saying that: "It is a fraud by any fair law to so dispose of assets as to defeat a creditor's right of recovery."[239]

But that was a generation ago. How much progress has been made? What are some of the contemporary issues facing Māori?

III. CROWN FORESTS ASSETS

I have mentioned earlier the background to the memorials system established to safeguard Māori interests in relation to land. Subsequently, as a result of the *Forests* case,[240] the Crown and Māori negotiated an agreement that restricted the Crown's ability to sell Crown forest land. Under that agreement, the Crown would be able to sell cutting rights to trees on Crown forest land until the Tribunal recommended that the land was no longer liable to resumption for the purpose of transfer to Māori ownership.[241] This agreement was embodied in the Crown Forests Assets Act 1989, which Act also established the Crown Forestry Rental Trust (CFRT).[242] Rental payments received by the Crown from Crown Forest Licence holders are paid to CFRT who holds funds on trust for Treaty settlements concerning Crown forest licensed land. The interest earned on the accumulated rentals held by CFRT is used to fund certain Treaty claimants.

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[239] The Tribunal therefore recommended that the proceeds of the sale be held in a separate trust account pending a determination of the claims, and that the Government negotiate with the Ngāti Whatua of Orakei Māori Trust Board in association with representatives for Ngāti Paoa-Ngāitai for a separate settlement and arrangement for the disposal of Crown or State enterprise assets in Waitangi Tribunal, *Interim Report on Sylvia Park and Auckland Crown Asset Disposal* (Wai 276, 72 and 121, 1992).

[240] *New Zealand Māori Council v Attorney General* [1989] 2 NZLR 142.

[241] Treaty of Waitangi Act 1975, ss 8HA-8HI, as inserted by the Crown Forest Assets Act 1989, s 40.

[242] Crown Forests Assets Act 1989, s 34.

Very recently the Crown's practice of using deeming legislation in Treaty settlements to avoid the process of settling claims to Crown Forest Licensed Land via the Waitangi Tribunal as envisaged under the Crown Forest Assets Act 1989 has been hotly contested in both the courts and the Tribunal. Earlier this year, the High Court felt that it could not intrude upon the legislative process as a matter of Parliamentary Sovereignty.[243] But Justice Gendall did express some reservations about the Crown's actions, particularly in relation to the Crown acquiring accumulated rentals that were claimed to have been intended solely for successful Māori claimants.

IV. LANDCORP SALES

This year, Māori again protested the proposed sales of land that should have been available for Treaty settlements. Tangata Whenua say they were shocked to see the "for sale" signs erected at Whenuakite in the Coromandel, and Rangiputa in the Far North, and one commentator has described these proposed sales inexplicable given that the land available nationwide for Treaty settlements is a tiny fraction of the territories under Māori claim. Are the protection mechanisms actually working for Māori in the context of the Crown's relativity policy and soaring land values making many of the properties that might be available for settlement beyond reach?[244] In response, the Government has begun to review its policy around the land sales processes undertaken by state owned enterprise Landcorp saying that it aims to ensure that land with significant cultural value is properly protected.[245]

V. TRANSPOWER

One might wonder why this was not already standard practice given all that we have heard today, but at least the Government has reacted in a seemingly positive way. For many Māori, however, the biggest problems lie, not with central government but at local government level and with state-owned enterprises who exercise control over resources in our rohe. An example close to my home is Transpower's proposal to introduce a 200 kilometre long 400kV transmission line between

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[243] *New Zealand Māori Council and others v Attorney General and others* 4/5/07, Gendall J, HC Wellington CIV-2007-485-000095. The Court of Appeal more recently upheld the High Court's decision declining to make any of the declarations sought.

[244] R Taonui "Comment: Going, going, gone" *Sunday Star Times*, 18 March 2007.

[245] Press Release New Zealand Government "Landcorp Comment", 28 February 2007.

Whakamaru and Otahuhu in the North Island. Part of the preferred route passes through my ancestral rohe of Ngāti Korokī-Kahukura in and around the town of Cambridge in the central North Island. The current transmission line (established well before the *Lands* case, with no consultation, and no recognition of wāhi tapu) already runs close to our marae and established urupā (burial ground). The new proposed route, announced in mid-2005, will directly encroach upon other burial sites.

Sadly for Ngāti Korokī-Kahukura, this is not the first time that we have been directly affected by the nation's electricity needs. Rocks that formed the centrepiece of a very significant and sacred site were detonated and destroyed in order to create the Karapiro Dam which lies squarely within our tribal area, and then further desecrated to facilitate international rowing competitions on Lake Karapiro.

It is hardly surprising, then, that Ngāti Korokī-Kahukura would seek meaningful engagement regarding any further transgressions of sacred sites within our rohe. We argued that Transpower has refused to adequately consult with our mandated hapū representatives and sought to have a claim heard under urgency in the Waitangi Tribunal alleging that the establishment of the transmission line was an act carried out by Transpower on behalf of the Crown, and that in failing to adequately consult, the so-called Treaty principles of active protection and good faith were breached. Our application for urgency was dismissed in 2005 on the basis that hearing rights and opportunities to consider Treaty principles existed in accordance with Resource Management Act 1991 processes which were yet to be played out.[246]

Based upon statutes which clearly distinguish between a state-owned enterprise and the Crown, both the Crown and Transpower asserted that Transpower is not, technically speaking, the Crown. Therefore, they argued, the Tribunal did not have jurisdiction to consider the claim, let alone do so under urgency. The Chairperson rejected this argument on the basis that Transpower is required to work closely with the shareholding ministers and through them, the Crown, in undertaking the project and building relationships with Māori. While the relationship is not one of agency, the Chairperson determined that Transpower undertakes its mission in the public interest as a socially responsible Crown-owned company. Its business is carried out in the Crown's name. Accordingly, for the purposes of section 6 of the Treaty of Waitangi Act 1975, the Chairperson concluded that the transmission project is a policy or practice promoted by Transpower on behalf of the Crown and jurisdiction was therefore established.

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[246] Decision of the Chairperson in respect of an Application for Urgency — Ngati Koroki Kahukura Wai 1294.

The decision is clearly based on the particular facts of the case, but offers some opportunity of leverage for our hapū, and possibly others, in our efforts to persuade state-owned enterprises like Transpower and Mighty River Power who exercise control over resources subject to our Treaty claims, to act consistently with the principles of the Treaty of Waitangi in their day-to-day operations.

VI. WHANGANUI

Similar concerns to those of Ngāti Korokī-Kahukura were heard during the consultation process for the Government's Water Programme of Action in relation to freshwater in 2005. Six years earlier in the 1999 Whanganui River Report the Waitangi Tribunal set out its findings that as at 1840, the Whanganui River and its tributaries were possessed by Te Atihaunui-a-Paparangi as a taonga of central significance. The river was conceptualized as a whole and indivisible entity, not separated into beds, banks, and waters, nor into tidal and non-tidal, navigable and non-navigable parts. Through creation beliefs, the river is a living being, an ancestor with its own mauri, mana, and tapu. The Tribunal also found that the extinguishments of the river interests of Te Atihaunui-a-Paparangi arose from acts and policies of the Crown that were inconsistent with the principles of the Treaty of Waitangi.

Based on these findings, the Tribunal recommended that the Crown negotiate with Atihaunui making recommendations about how resource consent applications in relation to the awa ought to be dealt with in a more co-operative way.

At the same time as Whanganui tries to negotiate with the Crown on this basis, there are huge issues that they are expected to respond to every day – changes to the Resource Management Act, the Water Programme of Action, and most recently, Climate Change and Bioprospecting. Whanganui iwi, like Ngāti Korokī-Kahukura, are asked to consider the national interest, when they are more concerned that many of their food sources and puna or bores have been lost all along their river and to add insult to injury the run-off into their tributaries is polluting the awa - all in the name of the "National Interest".

In the words of Nancy Tuaine of Whanganui during the Water Programme of Action Consultation Hui,

> We are over-consulted. The issues being presented here are huge and complex and we are not properly resourced to take up the opportunities for consultation. We want to be at the front end of consultation processes – we want to work together. But we are treated as subservient. There is no power when

> someone else decides how much of our korero is taken on. We want to be the drafters of policy - too often there is nothing in these documents that reflects our values despite our experience of hundreds of years.

The Whanganui people also expressed their utter frustration about their dealings with territorial authorities and state-owned enterprises in their rohe. The Environment Court decision in their favour restricting the Genesis resource consent to ten years was the first favourable decision for them in many years. Genesis successfully appealed though, leaving the Whanganui people feeling powerless when challenging the actions of State Owned Enterprises who make millions of dollars of profits every year and who have the funds to take these issues through the Court hierarchy.[247]

VII. WORKING WITHIN THE FRAMEWORK OF THE TREATY PRINCIPLES – A GREAT COMPROMISE, OR A PATHWAY TO THE LONG TERM VISION OF RANGATIRATANGA?

Twenty years after the *Lands* case the stories seem strikingly similar. Māori are still striving to exercise kaitiakitanga, and still utilising a range of strategies to protect resources for future settlements. These days, when they bring their concerns before the courts and the Tribunal, they rely heavily upon the principles in the *Lands* case.

But, if the price of relying upon the *Lands* case is to privilege the English text of the Treaty, then, that price is seen by some, to be too high. In the courts, issues of interpretation of the Treaty were not resolved by using established canons of interpreting international treaties such as *contra proferentum;* that is, interpreting against the party who drafted the words, thereby placing the responsibility for accuracy of language upon the drafting party. In the case of the Treaty the drafters were Crown agents. However, the Court of Appeal "rewrote the Treaty relationship" (to borrow Jane Kelsey's words) by fashioning the "principles" of the Treaty rather than focussing upon the actual words of the two texts. Jane Kelsey has argued that

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[247] Recently however, Whanganui have won the right to take this issue to the Court of Appeal. Leave to appeal has been granted against the High Court's decision that they lacked evidence to prove their cultural interests in the river were being infringed by Genesis Power and the regional council.

> [v]ia the concept of the principles the judgments have gone full circle and returned to adopt the key elements of sovereignty in the English Text at the expense of tino rangatiratanga in the Māori.[248]

And as I mentioned earlier, Ani Mikaere argues that statutory incorporation of the principles of the Treaty has not resulted in any shift in the judicial stance on sovereignty. So long as Crown sovereignty remains unchallenged, tino rangatiratanga cannot be realised and tikanga Māori will foreever be positioned as inferior to Pākehā law. The concept of the Treaty principles, on this view, should therefore be rejected.

On another view, some Māori continue to work within the framework of the Treaty principles trying to make the best of a bad situation, striving towards economic, social, and cultural strength and grateful for the principles articulated in the *Lands* case which provide points of leverage to assist in their dealings with State-Owned Enterprises or Territorial Authorities, and as a basis for future legal battles – biding their time on their pathway to the long term vision of rangatiratanga. As their economic strength grows, and the demography shifts, they will increasingly be recognised as a Treaty partner rather than just another stakeholder. Something more akin to partnership is beginning to show through for example in the Agreement in Principle recently signed between Waikato and the Crown in relation to the Waikato River.

VIII. CONCLUSION

I began with reference to great minds, and I end the same way. Second Māori King Tāwhiao imagined that his ambitions for his people could be reflected in a coat of arms and he commissioned one in 1870 and named it *Te Paki o Matariki* – the widespread calm of Pleiades. The Matariki constellation rises just after the mid-winter solstice – the time when Māori celebrate the dawning of the New Year and the coming of fine weather. In the context of the land wars and the confiscation that occurred during Tāwhiao's reign, by naming his coat of arms *Te Paki o Matariki,* he prophesied that peace and calm would return to Waikato and Aotearoa – a long term vision of hope and prosperity for his people.

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[248] J Kelsey, *A Question of Honour Labour and the Treaty 1984-1989* (Wellington: Allen and Unwin, 1990), 217.