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IMPACT ON MĀORI – A NGĀI TAHU PERSPECTIVE

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I am not a lawyer. My function has been to fund legal systems, as distinct from living off them. Be that as it may, I thank the Law Faculty for this opportunity to gather and consider the *Lands*[113] case on its twentieth anniversary.

The first point I want to make is that the southern context for the *Lands* case and our Ngāi Tahu perspectives of it differ from the prevailing "national" narrative. The New Zealand Māori Council was not entirely au fait with our particular circumstances, nor for that matter, was Baragwanath QC. The transfer of Crown assets to newly created state-owned enterprises was not at the forefront of Ngāi Tahu thinking in 1985-86 as much as the proposed transfer of former Lands and Surveys assets to the Department of Conservation. That proposition was, arguably, of far more significance to us. Bear in mind that Fiordland National Park alone at that time constituted some two-thirds of New Zealand's conservation estate. On a basis of National Parks alone the Crown had an ongoing presence in relation to natural resources and land area within our takiwa much more so than for North

[112] This text is a synthesis of Sir Tipene's talk at the Symposium, and at a later meeting in Christchurch, as put together by Michael J Stevens. Michael thanks David Haines, Holly Walker, Joanne Bagrie, Jessica Andrew, and Abby Suszko for making their Symposium notes available.

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

Island iwi. I will return to the ongoing significance of this later on. For now, let me say that to fully understand the *Lands* decision, it must be appreciated that it was largely the result of an accumulation of elements and a significant diversity of circumstances as between iwi. I now turn to highlight and comment on a number of those elements. I hope that it might assist to place the case in a context of the ordinary struggles of an ordinary tribe.

A good place to start is the Treaty of Waitangi Act 1975, which was really the creation of Norman Kirk. The principal resistance to that legislation came not from the National Party as much as from within the Labour Party itself. The resistance was led by Bill Rowling, who exerted much effort to ensure that the potential force of the legislation was effectively muzzled. But Kirk urged Patu Hohepa, who was running Matiu Rata's office at that time, to keep the pressure on. Hohepa's role, in my view, has been insufficiently recognised for its substantial contribution to the advancement of the Māori cause in that period. Overall, Rowling and those of the Kirk caucus who sided with him were reasonably successful in muzzling Rata's intent but it must be said that the Treaty gained its first major legislative foothold with the passage of the 1975 Act.

I was assisting the late Frank Winter, then chair of the Ngāi Tahu Māori Trust Board, to write its submission to the select committee considering the proposed legislation. Ngāi Tahu concern at that time was largely shaped by bundles of interconnected issues affecting our communities mostly in relation to local government and the Town and Country Planning Act 1977. That Act comprised one of the biggest cluster of grievances in the Māori world at that time. At the centre of that cluster was the issue of rates, particularly in rural areas, and the loss of Māori land through the Rating Act and various related processes of local government. There was a great amount of Māori political debate about the ramifications of the Town and Country Planning Act, culminating in the insertion of section 3 into the Act which made Māori issues matters of national importance. I was heavily engaged on behalf of Ngāi Tahu in the negotiations with Duncan McIntyre as National's Minister of Lands and Māori Affairs which eventually culminated in that change. Up until this period, the Treaty of Waitangi had not been central to the arguments made by the Ngāi Tahu Māori Trust Board or the debates it engaged in. We were mainly focussed on undoing the enormous damage done by Hanan's Māori Affairs Amendment Act 1967 and fighting the State over the ownership and management of the Titi Islands – a battle which had been ongoing since the 1870s.

In terms of the Ngāi Tahu Māori Trust Board submission on the proposed Waitangi Tribunal establishment legislation, we said that the problem with it was that its investigative scope did not go back to 1840 or cover local government. In the event we got what we got in 1975. At this time, I was a member of the Terrace Branch of the Labour Party, and Michael Hirschfeld, who subsequently became the president of the Labour Party, was the chair. He was also Labour's Junior Vice-President. Hirschfeld was a very remarkable human being. He was a very wealthy man personally—his father had developed the metal import company where I used to buy all my boat bits. I had known him at university and we had known each other for a long time. He was very wealthy amongst our lot — he was the Jewish boy with all the money. But he was absolutely passionate about issues of social justice.

Because of what I was doing for the Ngāi Tahu Māori Trust Board, I was on the front row of all this change, so that after we had the Ngāi Tahu submissions on the Treaty of Waitangi Bill turned down, I took things back to the Terrace Branch. It supported our position and there was considerable enthusiasm for the cause amongst what might be described as "progressive forces'" within the Labour Party. Crucially, Hirschfeld took it onto the floor of the Labour Party conference and the conference rolled it, without any great angst-laden debate, into its policy. When Labour came to power under David Lange in 1984, suddenly there it was sitting in the middle of the manifesto! Koro Wetere had enough street-cunning to recognise its significance and so did Bob Mahuta and Hori Forbes of Tainui, who were advising him behind the scenes. That is how it happened. As if by accident we found ourselves with a Labour government and our policy in place. I had a very nice description by Geoffrey Palmer one night when he was in a gregarious sort of mood, talking about what happened then. Lange was overseas and the "fish and chip brigade" were sitting in the Cabinet Room: Goff, Douglas, Prebble and Wetere and co. They had a long distance telephone call with the boss, and the question was "what are we going to do about this Treaty requirement?" They said, "We reckon we ought to do it", and of course Koro was in there batting for it. Lange agreed and shortly after the legislation was introduced. If you look at the process by which these things happened, the whole idea of some systematic evolution of policy is nonsense.

The background to section 9 in the State-Owned Enterprises Act 1986, which leads us even more directly into the case we are discussing in this Symposium, also involves Ngāi Tahu. As a result of its colonial marginalisation, Ngāi Tahu was virtually invisible in the national mindset. So too within the wider Māori mindset: consequently, we had limited political associations within Te Ao Māori. Unlike other iwi in

the nineteenth century, the Crown negotiated with us, bought the land, and then simply left. We had little ongoing involvement with each other afterwards, and the Crown actively and ritually denied the very existence of Ngāi Tahu. This, in my view, constitutes the single greatest Treaty breach of all, and distinguishes our dispossession from that in the North Island. Be that as it may, the Ngāi Tahu Māori Trust Board began to be involved in the annual gathering of the Māori Trust Boards, in which Sir Hepi Te Heuheu of Tuwharetoa was heavily involved. Subsequently, we developed close relationships with Tuwharetoa and Tainui, particularly from the late 1950s and 1960s onwards. This proved quite important later, as I will explain in a moment.

The one big thing that gave the Ngāi Tahu profile a lift was our involvement with the issue of Māori Reserved Land leases, which was a big, widely distributed, *take*. This was something that affected our Mawhera people, but it existed in other parts of the country too, making it a national issue. I was the founding chair of the Mawhera Incorporation, one of the first Māori Reserved Land incorporations, which gave us entry to a whole political bloc. It brought Ngāi Tahu, Te Arawa (with all the Rotorua Central Business District), Tainui (particularly Mahuta's predecessor Hori Forbes and the Kawhia lands), together with the Tainui people, who now comprise the Wakatu Incorporation. We were in a continually tense relationship with Sir Henry Ngata and the East Coast incorporations battling over Māori Authority Tax and things like that. The older, more conventional, farming incorporations were anxious to protect their favourable tax position and were resistant to changes aimed at a more equitable position for Māori Reserved Land on the basis that they did not want anyone *rocking the boat.*

You see, Reserved Land incorporations used to have to pay land tax. The only other people in the country who paid it were oil companies! It was like a payroll tax, and the worst part of it was the lessees on valuation owned something like ninety cents in the dollar of unimproved value, and the owners of the land had about ten cents in the dollar. It was a shocking structure. The perpetual lease, though, were not the fault of the lessees: the only people who ever made any serious money out of the whole thing were the first lessees back in the 1870s. They sold their perpetual leases on as freehold title and they have traded as freehold title ever since. So everything was valued in terms of freehold title, except the ownership right. The injustice of this was recognised by everyone but no-one really had the testicular fortitude to do anything about it. There have been Royal Commissions galore on this subject and it still is not properly resolved. But there was always a tension between us and the Māori farming sector.

At any rate, the Ngāi Tahu Māori Trust Board took up the cause of Māori Reserved Land on behalf of the Mawhera people. We were politically quite regularly and steadily involved in select committees, over dinner talking, negotiating, pushing; all sorts of devices to bring these issues forward. In a sense I did what H K Taiaroa did in the nineteenth century: I moved these questions of ours into the mainstream, and because we were pretty competent at it, we got a standing vastly greater than our net asset worth justified. Poutini Ngāi Tahu's Mawhera lands ended up being the first of the new Reserved Land incorporations in 1975 and we were to have quite a hand in assisting the establishment of the much larger economic entities that followed.

By the mid-1980s therefore, the older relationships between Ngāi Tahu, Tuwharetoa and Tainui, and our shared belief in an emphasis on property-rights in Article Two of the Treaty, had been considerably expanded to include a much wider range of Iwi mutually involved in a whole range of questions generally centred around land, fisheries and the collective Māori economy. We had accumulated into a broadly based, nation-wide, community of interest with a considerable political presence and significant capacity. This was quite critical. It brought us all together although it had no formal structure and was rooted in the autonomy of our respective iwi.

The leading identity in this grouping I describe was Sir Hepi Te Heuheu of Ngāti Tuwharetoa. His was, however important, an informal leadership. Like Sir Graham Latimer he was an avowed Tory, a National Party man but he was also an Ariki figure and there was no way the political world could ignore him. Another important factor was the traditional role of Tuwharetoa as the *convenor of the tribes*. When there was a need to confront the Crown, Sir Hepi was our tekoteko. He was an influential counterbalance to Latimer's New Zealand Māori Council, an institution which we of Ngāi Tahu had historically been pretty negative towards. The Ngāi Tahu Māori Trust Board had dismissed the Māori Council from its outset — Ngāi Tahu viewed it as an institution created and funded by the State for its own purposes. It was an entity without whakapapa and for most of us in the South it was all suspiciously far North. Who could have imagined that, in the fullness of time, it would become the convener and advocate of iwi interests in the way that it did?

As the collective iwi anxiety over the state-owned enterprises legislation grew through 1985-86, all the forces I have been describing began to coalesce around the ideas which were to become Section 9 of the Act. The New Zealand Māori Council's legal advisor was the late

Martin Dawson of Wellington and he produced a form of words with which we could all agree. There was no essential difference between the iwi-based grouping I have been describing and the New Zealand Māori Council group but that, of course, did not mean there was no debate! In the event the cloak of the Treaty united us. When the moment came for us to meet with Prime Minister Lange and Geoffrey Palmer we went in with a framed set of words and with Sir Hepi as our spokesman. It was all over quite quickly. Palmer seized on the *principles of the Treaty* and it was agreed. We were mollified and the State was calmed. I'm not sure any of us – let alone Palmer and Lange – realised what we had done.

It was, of course, a victory but a victory of sorts. We of Ngāi Tahu were not the only ones who remained deeply suspicious of the concept of the "principles" of the Treaty. We saw it as a device for avoiding the terms of the Treaty itself and we believed that was Geoffrey Palmer's intent. The Article 2 property focus we had led us to think this way.

As an aside, I was subsequently, much later, to be greatly relieved when at page five, paragraph two, of the Privy Council's decision on Māori Broadcasting in 1994, it said something along the lines that "the principles of the Treaty must necessarily include but are not limited to the actual terms of the Treaty itself."[114] I recall Palmer once asked me to launch a book of his, which I agreed to, so I felt I had better read it. I found that he justified section 9 and legislative references to the principles of the Treaty on the grounds that they could help improve the generally poor social and economic standing of Māori. That is, they could be justified because they can function as a kind of proxy for the State in meeting its social equity obligations to Māori as per Article Three of the Treaty. I made use of the book launch to tell Geoffrey Palmer that he was, in my humble view, wrong. Section 9 properly viewed is about securing iwi interests in property, as per Article Two—which are rights independent of and separate to our citizenship rights that we share with non-Māori New Zealanders. The Crown deliberately conflates the rights of iwi, that is, Article Two rights, with Article Three rights common to us all. So does the media and society generally. This calculated political ploy is a fundamental challenge. Such a view treats iwi members as individuals and reflects upon their needs, instead of seeing them as shareholders of a collective by virtue of their whakapapa alone. The European legal system, hung-up as it is on particular notions of equity, finds this very difficult to understand. It is my personal view that in some areas, the Treaty conveys to iwi, a right to control and manage resources that is greater than that of other citizens. Mind you,

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[114] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513.

this right is not an absolute one and it can be justifiably constrained by other considerations.

Along the way, Ngāi Tahu also had to counter those who argued that the Treaty did not apply to us in the first instance. Robert Muldoon was one who contended that the Queen's Sovereignty existed in the South Island by virtue of discovery and annexation, rather than by cession. According to Muldoon, Ngāi Tahu therefore had no rights under the Treaty despite the fact that there were Ngāi Tahu signatories to the Treaty of Waitangi. Luckily for us, when the Queen visited the South Island in 1990, and spoke at Waikawa Marae in Picton, she made it clear that the Treaty applied to the South Island—that her sovereignty existed by way of a treaty of cession. No New Zealand politician or civil servant need ever again cast doubt on the Crown's position on this matter. My eternal thanks go to then Governor-General Sir Paul Reeves for allowing me to read and edit Her Majesty's notes in advance of her speech!

In a funny way, the accumulation of elements that led to section 9 and the *Lands* case probably had a huge impact in changing and shifting the evolving discourse about the Treaty and what we were going to do about our constitution. You see while all this was going on, we had Palmer marching in parallel with his passionate desire for a proper constitution. Now the point about a constitution is that generally it has to start somewhere. So you had all these quite independent but inter-related things coming to a head. Palmer took his idea about making the Treaty the foundation of an entrenched constitution onto the marae at Ngaruawahia. Manu Bennett, Eddie Durie and others poured scorn all over it. I think all those Anglicans were wrong. They were elevating the Treaty into a realm of almost spiritual intent; basically to avoid getting their hands dirty over issues of property. They could not handle that, so they retreated from it into some higher place where they didn't have to sully themselves. Palmer was always absolutely bemused by the fact that he couldn't get their support for it. I sympathise with him on that at least.

Thus, when one looks at the background to the *Lands* litigation, it is important to recognize that the New Zealand Māori Council was merely the carving on the front of a much larger waka. It convened the disparate Māori voices and the iwi grouping with which Ngāi Tahu was associated. There were a great number of contributory streams. One of these streams, still under-appreciated, is the shifting demography of society. The huge growth of the Māori population in the 1950s and 60s had fundamentally changed things. The centre of our politics has an

increasingly Māori presence and will continue to do so. This in turn will be a driver of change.

As for my view of the case itself, I agree with the reservations expressed by Sir Ivor Richardson and Sir Maurice Casey earlier regarding the use of the term "partnership". For my part, I contend that it was immediately put to use as an "anaesthetic" by the State. As I have said before, an iwi leader must take an extremely cynical view of the State. I agree with the American writer John Williams that the State is the ultimate enemy of the tribe because it is always trying to create a formula to control the tribal citizen. There is a continual tension of conflict and co-operation between the tribal citizen and the State. This in short, is the history of Māori politics. I think it is helpful to conceive of the State, like God, as an ocean. It displays neither grief nor malice. It is neither good nor bad. It's just there. And if you're not careful, it will get you. It is a relationship always there, always to be managed.

Again, the accumulation of elements that led to the *Lands* case was probably more important in changing the discourse than what was being done mechanically or statutorily. To paraphrase the late John Rangihau, it was this that changed the water in the bowl we were all swimming in. Which is to say that the *Lands* case in and of itself was not a revolution. However, its effects are not to be dismissed: it hugely shaped and informed subsequent events of huge importance to this nation. The gift of the judgments, these five great ruminations, these five fine essays, gave Māori claimants a language that was subsequently used in Ngāi Tahu's 1995 Court of Appeal *whalewatch* case[115] and other cases in the late 1980s and 1990s. While the *Lands* case took some time to impact on Ngāi Tahu, it became, in essence, a script for proceedings thereafter. It played a role in that whole string of injunctive proceedings from 1994, whereby every time the Crown tried to assert, what Ruth Richardson used to call the "economic sovereignty of the State", Ngāi Tahu blocked them. I remember on New Years Eve in 1994, one of our lawyers, Nick Davidson, rang me to say that Ngāi Tahu had seventeen cases in various stages of process against the Crown. At the same time a similar kind of thing was happening in relation to fish. There was a whole movement taking place, much of it not directly related but profoundly influenced by, the *Lands* decision.

With respect to the *whalewatch* case, it was, in many ways a disappointing judgment. It saddened me although most saw it as a triumph. We lost the rangatiratanga element of the case on what I thought were absolutely spurious grounds. I truly believe that the

[115] *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

Court of Appeal misinformed itself. It basically held that we had a customary right to hunt and kill whales, but not one to merely watch them or show them to others. The most interesting element of the *whalewatch* case was the way the Court then gave us our "straw man" in the form of legitimate expectation. As a consequence we were then able to negotiate that out to what has been a virtual monopoly. Last year we got another ten years over which the Department of Conservation said that they are not going to issue any more licenses. So we got a total of something like twenty years and if you have not got full control of the beast after that time then you really do not deserve it. It's a great economic result even if it was, as I have suggested, pretty poor law.

Anyway, the long and short of it is that all sorts of ideas flowed from the *Lands* case which infused later thinking. Having said that, I think that the *Lands* case then receded a bit, although it became the foundation of the intellectual base on which the "right of first refusal" thesis has been evolved. This is a major feature of the Ngāi Tahu Settlement[116] and is an ongoing factor. The case also provided a frame, although not a very robust one, for the ongoing relationship between Ngāi Tahu and the Crown in terms of the Department of Conservation. That has not been fully or properly tested yet in the sense of section 4 of the Conservation Act 1987,[117] a point of which some are mortally terrified. The various environmental lobbies, the Forest & Bird Society and their ilk, have gathered their forces quite vigorously via the Department of Conservation and have largely neutralised the capacity of Ngāi Tahu to have a particular relationship with natural resources over and above that of other parties or citizens. This is an area yet to be fully explored. An example of this is Clifford Bay where Te Runanga o Kaikoura is a major shareholder and applicant for a mussel farm and the Crown does everything it can to ignore the fact that they are part of the application. But the Department of Conservation tends to park all that to one side as much as it can. It prefers to ignore the Māori presence in things together with the Ngāi Tahu argument both before the Tribunal and post-settlement that we are entitled to greater consideration than others in the question of concessions, and level of priority. This was mouthed by the Waitangi Tribunal, but it is largely ignored by the State as we go along. So the State reverts to its usual position of saying that it is treating everyone absolutely equally, when of course it is actually playing to its own mates: tough luck Māoris, tough luck Ngāi Tahu. But

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[116] See Ngāi Tahu Claims Settlement Act 1998.

[117] "This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi."

they all want you to be there to perform a karakia at the opening of visitor centres, bridges and roads.

While the *Lands* case contributed to advances made as I have described, I have also tried to show that underlying issues remain unresolved. The ritual denial of the existence of iwi is almost gone, but there is a long way to go. For me, the most important aspect and outcome of the Treaty settlement process is the recognition of the legal personality of iwi, which was vaporised by the New Zealand Settlements Act 1863. The impact of this was possibly even greater than that of raupatu. It is worth remembering though that the Crown has thus far only acknowledged the legal personalities of two iwi, Tainui and Ngāi Tahu. In closing, with respect to current attempts to remove references to the principles of the Treaty in legislation, I have no comment to make except that no sane government would do so due to the growing Māori demographic I talked about earlier.

A little earlier, I coined the expression "this gift of judgments" and described the decision we commemorate today as "these five great ruminations". I can do no better than repeat those perceptions by way of conclusion.