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Ka Kohi Te Toi, Ka Whai Te Maramatanga: Te Arawa Partnership Proposal Hearings Validity Assessment Report

Abstract

The following is a report of the results of a validity assesment as requested by Nga Uri o Ngati Whakaue in regards to research presented to date at the Te Arawa Partnership Proposal hearings currently taking place in Rotorua. This report has been complied by The Forum for Indigenous Research Excellence (FIRE) at The University of Wollongong (UOW). This short report is the forerunner report to further research to be undertaken by members of FIRE on the topic of local government in New Zealand and the Te Arawa Partnership Proposal.

Disciplines

Arts and Humanities | Law

Publication Details

Simon, H. (2015). Ka Kohi Te Toi, Ka Whai Te Maramatanga: Te Arawa Partnership Proposal Hearings Validity Assessment Report. Wollongong: University of Wollongong.



Forum for Indigenous
Research Excellence

Ka Kohi Te Toi, Ka Whai Te Maramatanga: Te Arawa Partnership Proposal Hearings Validity Assessment Report

Hemopereki Hōani Simon

Indigenous Studies Unit and The Australian Centre for Cultural Environmental Research

May 2015





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Glossary of Te Reo Māori Terms

Hui	Gathering, Meeting
Io Matua Kore	The supreme spiritual being
Iwi	Indigenous Nation
Kaupapa Māori Research	Kaupapa Māori as research, "is 'culturally safe;" that involves the 'mentorship' of elders; that is culturally relevant and relevant and appropriate while satisfying the rigour of research; and is undertaken by a Māori researcher, not a researcher who happens to be Māori. ¹
Kōhanga Reo	Full immersion pre-school that aim to revitalise Māori language, culture, and tikanga
Kura Kaupapa	Full immersion primary education schools that operate on the philosophy of Te Aho Matua they aim to revitalise Māori language, culture, and tikanga
Mana Whenua	[Customary] Authority over land and the right to occupy those lands. This in brief It is the way Māori determine 'ownership' to the land. Land (or whenua) is a tūpuna, an ancestor, through whom mana has been acquired through whakapapa by the modern day descendants. ²
Marae	A Māori ceremonial courtyard with communal buildings with an ancestral house as the focal point
Ngāpuhi	An Iwi based in the Far North region of Aotearoa New Zealand
Pākehā	Non-Māori ethnicity usually of European descent
Rangatahi	Youth (usually generic term to mean everyone up until about age 30).
Rangatira	Chief
Rangatiratanga, Tino	Self-Determination
Tā	Sir
Tikanga Māori	Māori Customary Practices
Te Aho Matua	Māori educational philosophy and its principles the philosophical body of knowledge which bonds us to our ancestors, the land, the universe, and Io Matua Kore
Te Arawa	An Iwi based in the Bay of Plenty region of Aotearoa New Zealand
Te Tiriti o Waitangi	The Treaty of Waitangi
Tūpuna	Ancestor
Whakapapa	Genealogy
Whakataukī	Proverb

Abbreviations

¹ Kathy Irwin, "Māori Research Methods and Practices," *Sites*, 28 Autumn (1994): 27.

² Apirana Mahuika, "A Ngāti Porou Perspective," in *Weeping Waters: The Treaty of Waitangi and Public Policy*, eds. Veronica Tāwhai and Katarina Gray-Sharp (Wellington: Huia, 2011), 148.

Abbreviations

LGA	Local Government Act 2002
LGNZ	Local Government New Zealand
RLC	Rotorua Lakes Council
RMA	Resource Management Act 1991

Ka Kohi Te Toi, Ka Whai Te Maramatanga³:

Te Arawa Partnership Proposal Hearings

Validity Assessment Report

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Keywords: Local Government (New Zealand), LGA, Te Arawa Partnership, Rotorua Lakes Council, Te Arawa

E tipu, e rea, mō ngā rā o tōu ao.

Ko tō ringa ki ngā rākau a te Pākehā hei ara mō tō tinana.

Ko tō ngākau ki ngā tāonga a ō tūpuna Māori hei tikitiki mō tō mahunga.

Ko tō wairua ki tō atua, nāna nei ngā mea katoa.⁶

Background

- 1.0 The following is a report of the results of a validity assessment as requested by Ngā Uri o Ngāti Whakauae in regards to research presented to date at the Te Arawa Partnership Proposal hearings currently taking place in Rotorua. This report has been compiled by The Forum for Indigenous Research Excellence (FIRE) at The University of Wollongong (UOW). This short report is the forerunner report to further research to be undertaken by members of FIRE on the topic of local government in New Zealand and the Te Arawa Partnership Proposal.
- 1.2 This report has been brought into existence by the hearings of the proposal brought forward by Te Arawa of a partnership arrangement with the local Council, Rotorua Lakes Council (RLC), to bring about better consultation and engagement by Council. It was Te Arawa's wish to:
- a) To strengthen Te Arawa's participation in RLC decision making
 - b) Strategic & Integrated Development that identifies opportunities to work together for the betterment of Rotorua
 - c) Build Te Arawa's Capacity and Capability to participate in RLC decision making
 - d) Improve communication, kōrero and information sharing
 - e) Improve RLC's delivery of its obligations to Māori⁷

³ Whakataukī, Translation: If knowledge is gathered, enlightenment will follow

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⁵ Indigenous Studies Unit and The Australian Centre for Cultural Environmental Research.

⁶ Quote, Tā Apirana Ngata. Translation:

Grow up and thrive for the days destined to you.

Your hand to the tools of the Pākehā to provide physical sustenance.

Your heart to the treasures of your Māori ancestors as a crown for your brow.

Your soul to your God, to whom all things belong.

⁷ Te Arawa Standing Committee, "Partnership Model: Te Arawa and Rotorua Lakes Council – Presentation to Rotorua Lakes Council" (Rotorua, Te Arawa Standing Committee for Te Arawa, 18 December, 2014).

Background cont.

1.4 From Council's perspective,

The need to develop a more effective partnership between Te Arawa and Rotorua Lakes Council was identified by the last Council following the 2012 decision of the Environment Court that recognised the need for the Council to improve iwi consultation. The incoming Council and Te Arawa committed to developing a new partnership model after the 2013 local government elections. It was mutually acknowledged that the existing mechanism – the Te Arawa Standing Committee – no longer met the needs of both parties. After 12 months of research and iwi consultation Te Arawa representatives presented their partnership model to Council on 18 December 2014 and recommended community consultation on their proposed model.⁸

The Proposed Model calls for the following:

- a) Provides for the establishment of an independent board outside of the Council to represent Te Arawa interests – members to be elected 'at large' by the Te Arawa community.
- b) Provides for the independent board to nominate, for Council's consideration, representatives to be appointed to specified Council committees, RMA consent hearing panels and strategic working groups.
- c) Gives voting rights to appointed representatives on two of the committees (Strategy, Policy & Finance and Operations & Monitoring).⁹

Public Consultation took place between the 9th – 27th March 2015. A record number of submissions were received for the hearings, which is the topic of this report.

Qualifications

2.0 My name is Hemopereki Hōani Simon. I hold a Bachelor of Māori and Pacific Development in Economics and Māori and Pacific Development, a Bachelor of Arts (honours) in Tikanga Māori, both from the University of Waikato, a Masters of Philosophy in Resource and Environmental Planning. I am near completion of a Doctor of Philosophy in Environmental Planning and Public Policy from the University of Wollongong.

2.1 I also hold a CELTA qualification from The University of Cambridge.

2.2 I hold memberships to The New Zealand Planning Institute and The Planning Institute of Australia.

2.3 My areas of research expertise are as follows: Indigenous and Environmental Planning, Economic Development, Local Government,

⁸ Rotorua Lakes Council, *Statement of Proposal: Proposed Te Arawa Partnership Model* (Rotorua: 2015), 5. Refer to Appendix 2.

⁹ Refer to Rotorua Lakes Council, *Statement of Proposal: Proposed Te Arawa Partnership Model* (Rotorua: 2015). Refer to Appendix 1.

Qualifications cont.

Tikanga Māori, Māori Policy and Politics, State/Indigenous Interaction, Treaty of Waitangi and Kaupapa Māori Research.

- 2.4 I am a decendent of Ngāti Whakaue, Ngāti Pikiao, Ngāti Tararawai, Ngāti Rangiwewehi, Tapuika, Waitaha, Ngāti Rangitahi, Ngāti Uenukukopako, Ngāti Tūhourangi / Ngāti Wahiao, Ngāti Rangiteaorere, and Ngāti Tahu / Ngāti Whaoa.

Task

- 3.0 I have been asked to provide analysis and literature on the following matters listed below:

- a) To assess the validity of quantitative research presented by Dr. Reynold MacPherson for the Pro-Democracy Group.
- b) To assess the accuracy of Census Statistics presented by Mrs. Hilma Gill.
- c) To assess the relevance of the research submitted as evidence for the proceedings by Mrs. Cathryn Benjarnesen.
- d) To provide analysis on the concept of “special privileges” and Māori
- e) To suggest any other relevant research literature that could be helpful to Council in their deliberations over the proposed Te Arawa Partnership Model.

Quantative Analysis Research by Dr. Reynold McPherson

- 3.0 The quantitative research submitted by Dr. MacPherson is highly questionable and within the research community would not be considered valid. The research is based on thematic quantitative analysis of One Hundred and Twenty Six (126) newspaper articles and letters to the editor in Rotorua newspapers. According to the findings by Dr. MacPherson, 66 per cent of seventy (70) articles written around the time of the Hovell Report are representative of the community and are against this proposal based on the articles.¹⁰ According to MacPherson this opposition had increased to 88% by the time the community had digested the Tahana report. This was based on a further fifty-six (56) articles. Written around the time of that report¹¹
- 3.1 It would be unrealistic to claim that One Hundred and Twenty Six (126) newspaper/letter to the editor articles is a fair representation of the community at large. This is not a representative sample of the Rotorua

¹⁰ Reynold MacPherson, “Option 5 – The Democratic Governance Model – Presentation to Rotorua Lakes Council (Te Arawa Partnership Proposal Hearings),” (Rotorua, Rotorua Pro Democracy Society, 30 April 2015). Refer to Appendix 4.

¹¹ Ibid.

community at large. Based on the number articles used in the study this cannot be considered a representative sample.

- 3.2 A research project by Christopher Cooper *et al.* on the analysis of political participation and demographics of people who write political letters to the editor found that, "a disproportionate number of older residents engage in this political activity." This figure is close to 70 per cent of political letters written. The usual age range that comprise this figure was aged between 40-70 years old. Additionally, marginalised groups like woman, youth, and ethnic minorities did not figure highly in the analysis which spoke about their level of political engagement.¹² It is more then likely based on the oral submission hearings that this holds true in this case.
- 3.3 Like the Cooper *et al.* study the general age range of the people writing articles/ letters to the editor that were utilised in Dr. MacPherson's work were of the same age range. This is generally supported by the age range of those supporting the Rotorua Pro Democracy Society.¹³
- 3.4 Based on these findings the research presented by Dr. MacPherson could not be concieved as being representative of the community of Rotorua.
- 3.5 It appears that the research presented by Dr. MacPherson has been complied with political aims in mind. The credibility of the research presented by Dr. MacPherson is, at best, very questionable and is not methodologically sound to be considered to hold validity. By using a quatitative methodology, limiting the data collection methods and the way in which they are analysed the research only moves to provide very broad and liberal generalisations of the community at large and provide a very limited understanding of the social phenomena.
- 3.6 In my professional opinion for this research to be considered to have validity the following would need to occur:

¹² Christopher Cooper, Gibbs Knotts, and Moshe Haspel, "The Content of Political Participation: Letters to the Editor and the People Who Write Them." *Political Science and Politics* 42, no. 1 (2009): 131-137.

¹³ The Rotorua Pro Democracy Society is a society of citizens incorporated to protect members' democratic rights. The objectives of the Society are to:

- Promote and advocate representative democracy in the Rotorua District, and elsewhere
- Ensure the Mayor and Councillors of Rotorua District comply with the law with respect to operations, policy making, purposes, performance and governance principles
- Ensure that Councillors give due consideration to the wishes of citizens when deciding policy
- Ensure that Council officials advise Councillors impartially and act to implement Council policy with fidelity

The Society will give members practical opportunities to promote and defend the democratic rights of all citizens in the Rotorua District, through peaceful, political and legal campaigns. (Rotorua Pro Democracy Society, "Rotorua Pro Democracy Society Inc." Accessed 7 May 2015, <http://www.rotoruaiprodemocracy.nz/wp>) They are the main form of opposition to the Te Arawa Partnership Proposal.

Quantative Analysis Research by Dr. Reynold McPherson cont.

- a) A new study would need to be undertaken;
- b) This new study would need to utilise a mixed-method approach;
- c) This new study would entail a survey of at least 1000 participants;
- d) This new study would need to be followed with unstructured interviews of between 150-200 participants;
- e) Of those participants at least 25% of those participant should be Māori;
- f) A more representative age range of the community at large should be utilised in the study; and

Optional aspects

- g) A Kaupapa Māori methodology may be required.
- h) An indepth non-statistical analysis of the 70 newspaper/letters to the editor articles

Assesment of Census Statistics Presented by Mrs. Hilma Gill

- 4.0 According to members of Ngāti Whakaue the above submitter presented that the current census statistics for the total percentage of the population of the Rotorua District as being 17%.¹⁴
- 4.1 According to Statistics New Zealand as of the 2013 Census the percentage of the total population of the Rotorua District of Māori decent is 34.3% (22,413 of 65,280).¹⁵ This would mean that the statistics provided by Mrs. Gill are infactual and thus wrong.

Assesment of Research Submitted by Mrs. Cathryn Benjarnesen

- 5.0 in Mrs. Benjarnesen oral submission a submission by Anthony Willy for the recent constitutional review was utilised.
- 5.1 According to this submission Willy found that,

Māori activists are utilising the Treaty to make false claims in order to push for power & control over public resources. They are deliberately misleading and manipulating local & central government politicians.¹⁶

This quote was used by Mrs. Benjarnesen.

¹⁴ Anonymous, Personal Communication, email, 1 May, 2015.

¹⁵ Statistics New Zealand. 2013 Census: Quick Stats About Rotorua District, http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-a-place.aspx?request_value=13918&parent_id=13853&tabname=&sc_device=pdf

¹⁶ Cathryn Bjarnesen, Oral Submission, Te Arawa Partnership Proposal Hearing. Rotorua Lakes Council: Rotorua. 1 May 2015. This is contradicted by the existence of co-management arrangements with indigenous peoples all over the world. For more information on this refer to the conference presentation by Bradford Mose as metioned in Section 7 on page 20 of this report.

Assessment of Research Submitted by Mrs. Cathryn Beniarnesen cont.

- 5.2 These statements are incorrect and somewhat inflammatory. It must be noted that Māori ways of knowing and history contradict these statements. Ranginui Walker comments that this activism for Māori is not a recent phenomenon that it has been a constant ongoing tradition that goes back to the signing of the Te Tiriti o Waitangi.¹⁷
- 5.3 The above statement by Willy is not in keeping with history or the reality of "being Māori." Rangimārie Mahuika comments that,

In the early 1980s, the first of several educational initiatives designed specifically to address issues of language and cultural revitalization emerged. As Kōhanga Reo were established and soon followed by Kura Kaupapa Māori, Whare Kura and other similar Māori cultural based institutions, they also created a context in which Māori language, cultural practices and values could be rejuvenated while kaupapa Māori was being refined and reshaped as a theory of liberation.¹⁸

It is widely held that these educational developments back in the 1980s were the beginning of a transformation in Māori culture, politics, and being that has led to more awareness by Māori about their position in society and their incredible uptake of tertiary education has helped to facilitate this change.¹⁹

- 5.4 Mahuika explains that,

It was this history 'under colonialism', and Māori discontent with the continued negative impact this colonial legacy was having on our unique Māori episteme, which created the context for transformation. Graham Smith (2003) has argued that one of the most significant factors in facilitating this transformation was a 'conscientization', a shift in mindset that occurred within large numbers of Māori: a shift away from waiting for things to be done to them, to doing things for themselves; a shift away from an emphasis on reactive politics to an emphasis on being more proactive; a shift from negative motivation to positive motivation.²⁰

¹⁷ Ranginui Walker, "The Genesis of Māori Activism" 93, no.3 *The Journal of The Polynesian Society* (1984), http://www.jps.auckland.ac.nz/document/Volume_93_1984/Volume_93_No_3/The_genesis_of_Māori_activism_by_R._J._Walker,_p_267-282/p1

¹⁸ Rangimārie Mahuika, "Kaupapa Māori Theory is Critical and Anti-Colonial" 3, no.1 *MAI Review* (2008): 2. <http://www.review.mai.ac.nz/index.php/MR/article/viewFile/153/180>.

¹⁹ Refer to Mason Durie, "Towards Social Cohesion: The Indigenisation of Higher Education in New Zealand." Paper presented at How far are Universities Changing and Shaping the World, Kuala Lumpur, 15-19 2009. Palmerston North: Vice Chancellors' Forum/Massey University, http://www.universitiesnz.ac.nz/files/aper_for_ACU_Forum_-_Towards_Social_Cohesion.pdf; Education Counts, "Māori in Tertiary Education Fact Sheets" Education Counts/ Ministry of Education, accessed 7 May 2015. http://www.educationcounts.govt.nz/publications/Māori/english-medium-education/Māori_in_Tertiary_Education_Fact_Sheets

²⁰ Graham Smith, "Kaupapa Māori theory: Theorizing indigenous transformation of education and schooling." Paper presented at NZARE/AARE Joint Conference, Kaupapa Māori Symposium, Auckland, December 2003: 2 as cited in Rangimārie Mahuika, "Kaupapa Māori Theory is Critical and Anti-Colonial" 3, no.1 *MAI Review* (2008). <http://www.review.mai.ac.nz/index.php/MR/article/viewFile/153/180>.

Assessment of Research Submitted by Mrs. Cathryn Benjarnesen cont.

- 5.3 Additionally, Linda Smith adds that the reason for doing so was a conscious effort it is a way of being commonly knowing as Kaupapa Māori this means that,

...there is more to kaupapa Māori than our history under colonialism or our desires to restore rangatiratanga. We have a different epistemological [and cultural] tradition that frames the way we see the world, the way we organize ourselves in it, the questions we ask, and the solutions we seek.²¹

- 5.4 The knowledge of Willy about Treaty issues is questionable in his constitutional review submission he states,

In a constitutional context The Treaty has served its purpose by transferring Sovereignty over New Zealand to the British Crown. that is a *fait accompli*, and therefore that element of the treaty has expired and has no continuing force. The obligation of the Crown to act toward Māori with justice and good faith remains. [sic]²²

- 5.5 Recently the Waitangi Tribunal supported the assertion by Ngāpuhi that even if they signed the Treaty of Waitangi,

[I]n February 1840 the rangatira who signed te Tiriti did not cede their sovereignty. That is, they did not cede their authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal - equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapu and territories, while Hobson was given authority to control Pākehā.²³

- 5.6 This assertion by Ngāpuhi was known at the time of Willy's submission was considered by the constitutional review.²⁴ This assertion by Willy is disproved as the decision by the Waitangi Tribunal enshrines the Treaty as a "living document."

- 5.7 It must be pointed out that unlike Ngāpuhi, Te Arawa did not sign the Treaty. The paternalistic thinking of the British was that they should "extend the privileges" to those Iwi that did not sign. This allowed them to unlawfully usurp the sovereignty of those Iwi. Of particular concern to Te

²¹ Linda Smith, "Kaupapa Māori Research", *Reclaiming Indigenous Voice and Vision*, ed. Marie Battiste (Vancouver: UBC Press, 2000).

²² Anthony Willy, Submission, Constitutional Review August 2013. It seems that the Mrs. Benjarnesen is relying on Anthony Willy's previous position as a Judge to give weight to the credibility of her arguments.

²³ Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry [Volume 2]: Report Summary* (Wellington, 2014): https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_85658510.

²⁴ Refer to Margaret Mutu, "Te Tiriti o Waitangi in a Future Constitution Removing the Shackles of Colonisation," Robsin Lecture (Napier, University of Auckland, 22 April, 2013), <http://www.converge.org.nz/pma/shackles-of-colonisation.pdf>; Susan Healy, Ingrid Huygens, Takawai Murphy and Hori Parata, *Ngāpuhi Speaks*, Whāngarei, (Whangarei: Te Kāwariki & Network Waitangi, 2012), 290.

Assesment of Research Submitted by Mrs. Cathryn Benjarnesen cont.

Arawa is the use of The Doctrine of Discovery and its unknown ramifications of its application to their particular rohe.

- 5.8 Mrs. Benjarnesen quoted two working papers in her submission the first was a paper by Karen Bird entitled, "The Political Representation of Women and Ethnic Minorities in Established Democracies: A Framework for Comparative Research."²⁵ The second paper is by Clem McCartney entitled, "International Review of Public Policies Towards Improving Inter-Community Relations."²⁶ These papers will now be evaluated as to their relevance to the overall conversation about the Te Arawa Partnership Proposal.
- 5.9 The above two working papers where used in the submission to support the argument that these forms of models do not work as, "They lead to resentment, polarization, tension, and conflict. The ethnically appointed delegates tend not to adequately represent the interests of their minority or community. [sic]"²⁷ However, the mere existence of Co-Manangement structures with indigenous people all over the world which are living examples of partnership with indigenous groups would make this assertion null and void. Further literature is provided in Section 7.
- 5.10 Further statements are used in Mrs. Benjarnesen in her oral submission from, "The Political Representation of Women and Ethnic Minorities in Established Democracies: A Famework for Comparative Research." Mrs. Benjarnesen contends that Bird's argument of,

"the quota system of Māori Electoral seats have only served to depress voter turnout and that if representatives are merely appointed due to "a less potically engaged body of constituents" these representatives "are in turn less likely see the necessity of behaving in an accountable and responsive manner to those citizens."²⁸
- 5.11 The use of this quote is not only inflammatory; the application of this paper to the ongoing dicussion is irrelevant. This will be discussed below.
- 5.12 The main focus of this article was to provide a literature review on the topic of ethnic and female political representation in established democracies in order to provide backgrounding to construct a framework for comparative research. The main focus of the paper however, is to provide understanding around migrant inclusion into society.

²⁵ Karen Bird, "The Political Representation of Women and Ethnic Minorities in Established Democracies: A framework for Comparative Research," Working Paper (Academy of Migration Studies in Denmark, 2003), http://www.hks.harvard.edu/fs/pnorris/Acrobat/stm103_articles/Karen_Bird_amidpaper.pdf

²⁶ Clem McCartney, "International Review of Public Policies Towards Improving Inter-Community Relations," Working Paper (INCORE, 2003), http://www.incure.ulst.ac.uk/publications/pdf/CR_paper.pdf

²⁷ Cathryn Benjarnesen, Oral Submission, Te Arawa Partnership Proposal Hearings, 1 May, 2013: 1.

²⁸ Karen Bird, "The Political Representation of Women and Ethnic Minorities in Established Democracies: A framework for Comparative Research," Working Paper (Academy of Migration Studies in Denmark, 2003): 30, http://www.hks.harvard.edu/fs/pnorris/Acrobat/stm103_articles/Karen_Bird_amidpaper.pdf as cited in Cathryn Benjarnesen, Oral Submission, Te Arawa Partnership Proposal Hearings, 1 May, 2013: 1.

Assessment of Research Submitted by Mrs. Cathryn Benjarnesen cont.

- 5.13 Firstly, in terms of Māori or indigenous peoples this research is irrelevant. Due to its aim to create a framework for minority comparative research it moves to marginalise Māori and indigenous people in a number of ways. This is done by:
- a) Comparing Māori to international non-indigenous examples like African Americans
 - b) It places Māori outside of their “lived experience” context
 - c) The New Zealand political context as a “Treaty based” country is not considered and that Māori seats in Parliament are an obligation on the Crown
 - d) There is no real comparison between Māori and other indigenous groups
 - e) Indigenous groups are assumed to be a minority grouping but not a “treaty partner.”
- 5.14 The comparison made that were quoted by Mrs. Benjarnesen was against that of an example of African Americans.
- 5.15 The author did not consult or engage with Māori and in doing so makes large generalisation and assertions that are baseless. This is why only a case study comparative research on Māori should only be done in comparison with other indigenous peoples in their respective contexts. Additionally, the researcher should be indigenous and look to further indigenous aspirations. This paper was written with government policy aims in mind and does not meet the requirements for indigenous research.²⁹
- 5.16 The author based this section of the study on research by Susan Banducci, Todd Donovan, and Jeffrey Krap. There is a significant difference between their work and the work of Karen Bird. In the Banducci *et al.* study that they acknowledge the impact of colonisation on Māori, however limited, and their participation in voting. In their work they utilise James Riechle and Ranginui Walker.³⁰ The problem with relying on Karen Bird’s working paper is that it is largely a literature review – it only seeks to broadly survey what is known to create a particular framework. In the construction of its aims it loses its context of indigenous issues. Secondly, if this was Kaupapa Māori research this comparative exercise would not have taken place. This piece of research framed in the ideas around minority rights, is outsider western research, and carries with it all the

²⁹ For more information on indigenous or Kaupapa Māori research refer to Linda Tuhiwai Smith, *Decolonizing Methodologies* (London: Zed Books, 2012).

³⁰ Susan Banducci, Todd Donovan, and Jeffrey Krap, “Minority Representation, Empowerment, and Participation,” *The Journal of Politics*, 66 no.2 (1999): doi: [10.1111/j.1468-2508.2004.00163.x](https://doi.org/10.1111/j.1468-2508.2004.00163.x); Susan Banducci, Todd Donovan, and Jeffrey Krap, “Proportional Representation and Attitudes About Politics: Results from New Zealand,” *Electoral Studies*, 18 no.1 (2004): doi: [10.1016/S0261-3794\(99\)00019-0](https://doi.org/10.1016/S0261-3794(99)00019-0).

problems associated with that when dealing with indigenous peoples. Further research is needed on the impact of colonisation on indigenous participation in established democracies using mix-method research.

- 5.17 The working paper by Karen Bird is not relevant to this discussion on the Te Arawa Partnership Proposal. It deals with political participation of minorities and women largely at a national level. The partnership proposal does not deal with these issues in particular but focuses on creating partnership with the local indigenous population in local government and meeting their . Also the research fails to be relevant because this proposal was created by the local indigenous community. The ownership to ensure that it is functional and operative lies first and foremost with that indigenous community. This, it is expected, will increase their participation and hopefully the relevance of local government to the community at large.
- 5.18 Similar issues are found with Clem McCartney's working paper entitled, "International Review of Public Policies Towards Improving Inter-Community Relations." The argument of Mrs. Benjarnesen being that by enacting the Partnership Proposal will led to ethnic conflict that possibly could be violent is unfounded. The paper is geared towards problems and issues in Northern Ireland. It is meant to provide background case studies to inform and "consider developments in policy and interventions related to improving community relations in other relevant jurisdictions."³¹ This paper has no real bearing on these proceedings. Of note is a case study of First Nations Canada and their interaction with the Crown. While interesting it does not deal with engagement relevant to the Partnership Proposal.

Concepts of "Special Privileges" and Māori

- 6.0 To assist decision makers with issues surrounding Māori and so-called "special privileges." To enlighten decision makers on the issues surrounding Governor Hobson's declaration analysis by Augie Fleras comments that:

He iwi kotahi tatou; We are one people. Captain Hobson at the signing of the Treaty of Waitangi, 1840. For much of the nineteenth and early part of the twentieth century, a commitment to assimilation provided the ideological paradigm for defining government interaction with the aboriginal population. Early British Māori policy revolved about the need to protect and assist the Māori, but with the eventual objective of assimilation into the mainstream always present. Assimilation as policy sought to establish government control over the Māori by phasing out as humanely as possible the cultural basis of their society. Virtually all legislation passed in Parliament concentrated on achievement of this objective.³²

³¹ Clem McCartney, "International Review of Public Policies Towards Improving Inter-Community Relations." Working Paper (INCORE, 2003), http://www.incore.ulst.ac.uk/publications/pdf/CR_paper.pdf.

³² Augie Fleras, "Towards 'Tu Tangata': Historical Developments and Current Trends in Māori Policy and Administration," *Political Science*, 37 no.1: 20, doi: 10.1177/003231878503700102.

6.1 On the topic of how this statement impacts upon Māori identity and being,

Another practice, was to indoctrinate into the minds of Māori people a sense of national identity. Slogans such as "We are one People" and "We are all New Zealanders" were coined. The origins of such views can be traced back to a statement made at the signing of the Treaty at Waitangi in 1840.³³ Dr. Pat Hohepa noted that Lieutenant Governor William Hobson is said to have uttered to each leading chief, He Iwi Kōtahi Tatou. His words have been used to support the doctrine of assimilation. Now we are one people, has been the usual translation and this one people view has been the catch cry of many non-Māori New Zealanders.³⁴

Such slogans have been heard during these hearings

6.2 It is widely held that assimilationist policy was a failure. Scholars comment that over time, the policies of assimilation and integration have become less reputable. These policies were clearly derived from ethnocentric views held by dominant Pākehā concerning the need for Māori people to change to suit Pākehā. Many Māori people have become more effective in asserting themselves and are refusing to accept that Māori lifestyles or practices are less desirable than Pākehā ones.³⁵ By claiming the phrase 'he iwi kōtahi tātou' as an inclusionary measure only moves to marginalise Māori in the current colonially imposed model of local government that does not work for Māori.³⁶

6.3 On the topic of privilege in Aotearoa New Zealand Claire Gray comments that,

Consedine and Consedine (2005) provided an overview of historical and current social policy which they argued has worked, and continues to work, overwhelmingly to disadvantage Māori in favour of white New Zealanders. White privilege was defined by the authors as the benefits, that white New Zealanders have access to simply through belonging to the dominant majority group. This privilege consists of living in a country where to be white is to be 'normal'. In the process of colonisation, the language, culture, legal and education systems, decision making processes and delivery of medical services were all established to cater to this norm; [this includes local government]. Many members of the white majority, they contended, continue to ignore the overwhelming evidence of the damage done to Māori by colonisation, and consequently are unable to see the ways in which New Zealand institutions continue to perpetuate privilege through legislation and policy designed to meet their [Non-Māori] needs.³⁷

³³ Taima Moeke-Pickering, "Māori identity within whānau: A review of literature" Working Paper (University of Waikato, 1996), <http://researchcommons.waikato.ac.nz/handle/10289/464>.

³⁴ Pat Hohepa, "Māori and Pākehā: The One People Myth," in Tihe Mauri Ora, ed. Micheal King (Wellington: Hicks Smith, 1978), 98 as cited in Taima Moeke-Pickering, "Māori identity within whānau: A review of literature" Working Paper (University of Waikato, 1996): 3, <http://researchcommons.waikato.ac.nz/handle/10289/464>.

³⁵ Ranginui Walker, "Māori identity," In *Culture and Identity in New Zealand*, eds. David Novitz & Bill Willmott (Wellington: Government Printer); Hauraki Greenland, "The Politics of Māori Cultural Revival" (Masters Thesis, University of Auckland, 1984).

³⁶ Refer to research results of the Royal Society of New Zealand Marsden Fund Project by Christine Cheyne and Veronica Tāwhai on Māori and Local Government Engagement located on page 21 of this report. The report highlights

³⁷ Claire Gray, "White Privilege: Exploring the (In)Visibility of Pākehā Whiteness" (Masters Thesis, University of Canterbury, 2012), 20; Consedine, R., & Consedine, J. (2005). "White Privilege: The Hidden Benefits." In R.

- 6.4 In continued analysis of privilege in Aotearoa New Zealand Claire Gray further comments that,

In....[Gina Colvin's] analysis of newspaper articles from the early to late nineteenth century she identified the discourses of "sovereignty, discipline and paternalism." Sovereignty emerged as the ideology utilised in order to establish British authority in all of its manifestations. Discipline appeared as a common discourse to justify reactions to Māori protest and paternalism was utilised to imbue actions and attitudes with an element of concern for Māori welfare. These repertoires worked together to bolster white British rule, serving as one avenue to establish and justify settler dominance while at the same time undermining a strong Māori resistance.³⁸

- 6.5 It appears from the research utilised within the hearings by Non-Māori submitters that the process of providing for Council's obligations under s81 of the LGA has raised awareness for them about their dominance and privilege. On the topic of biculturalism Raj Vasil comments that, "Some Pākehā are threatened by such assertiveness [by Māori] because of its perceived challenge to Pākehā dominance [and privilege]."³⁹ Based on projected demographics, the wealth of up and coming young educated Te Arawa rangatahi, and the future growth of the CNL Iwi proportion of the Māori economy; I believe that this assertiveness by Māori in the Rotorua District will only grow. This is *fait decompli*. These are not people who are activists as portrayed by Willy but well-educated and engaged people who happen to be Māori.

- 6.6 In international human rights instruments,

"the United Nations Declaration on the Rights of Indigenous Peoples (2007) explicitly refutes the notion that recognition of indigenous rights may somehow put other peoples' rights at risk, and stipulates that indigenous rights are to be exercised in a manner that respects the human rights of others."⁴⁰

The proposed Te Arawa Partnership Proposal adheres to this principle. UNDRIP also provides for the right to exercise self-determination. This proposal clearly provides for that as well and in doing so meets Council's obligations to the principles of The Treaty of Waitangi. In doing so Te Arawa Partnership Proposal sets a high standard nationally for local government to aspire to when meeting its s81 obligations under the Local Government Act 2002.

- 6.7 On the topic of Māori rights under the Treaty of Waitangi and "special privileges" granted to Māori the Human Rights Commission comments that,

Consedine & J. Consedine (Eds.), *Healing Our History: The Challenge of the Treaty of Waitangi* (2nd ed.). Auckland: Penguin Books.

³⁸ Claire Gray, "White Privilege: Exploring the (In)Visibility of Pākehā Whiteness" (Masters Thesis, University of Canterbury, 2012): 20-21; Gina Colvin, "The Soliloquy of Whiteness: Colonial Discourse and New Zealand's Settler Press 1839-1873. PhD Thesis, University of Canterbury, Christchurch, 2009): 11.

³⁹ Raj Vasil, *Biculturalism: Reconciling Aotearoa with New Zealand* (Wellington: Victoria University Press, 2000).

⁴⁰ Human Rights Commission, *Human Rights in New Zealand 2010: Ngā Tika Tāngata o Aotearoa 2010* (Wellington, 2010), 40. Please note that UNDRIP is a non-binding human rights instrument.



Concepts of "Special Privileges" and Māori cont.

The Treaty does not, as is sometimes claimed, confer 'special privileges' on Māori, nor does it take rights away from other New Zealanders. Rather, it affirms particular rights and responsibilities for Māori as Māori to protect and preserve their lands, forests, waters and other treasures for future generations. In 2005, United Nations Special Rapporteur Rodolfo Stavenhagen commented that he had been asked several times during his visit to New Zealand whether he thought Māori benefitted from 'special privileges'. He responded that he "had not been presented with any evidence to that effect, but that, on the contrary, he had received plenty of evidence concerning the historical and institutional discrimination suffered by the Māori people".⁴¹

6.8 Human Rights Instruments are also relevant to this discussion the Human Rights Commission comments on the International Convention of All Forms of Racial Discrimination (CERD) and the Treaty that,

CERD affirms the rights to equality and freedom from discrimination also contained in ICCPR and ICESCR. The Convention requires governments to eliminate racially discriminatory policies, prohibit racial discrimination, encourage intercultural communication, and undertake, where required, special measures to achieve equality. It declares all people, without distinction as to race, colour, national or ethnic origin, to be equal before the law and in the enjoyment of civil, political, economic, social and cultural rights. This reaffirms the guarantee of equal rights in Article 3 of the Treaty.⁴²

6.9 The Human Rights Commission also comments on Article 6 of the International Labour Organisation Convention 169 on Indigenous and Tribal Peoples and the Treaty that,

Respect and participation are the core principles of ILO Convention 169. Several articles provide for states to respect Indigenous peoples' culture, spirituality, social and economic organisation, and identity. Article 6 requires governments to establish means by which Indigenous peoples can freely participate at all levels of decision-making in elective and administrative bodies [like Councils].... These rights affirm the right to self-determination contained in Article 2 of the Treaty.⁴³

6.10 In turning decision makers attention to the idea of special privileges, Māori, and indigenous rights whether under international human rights instruments or The Treaty of Waitangi a definition of the term indigenous must be provided then analysis by Keith Barber on Māori issues surrounding indigeneity and special privilege must take place. A definition of indigenous peoples according to,

the United Nations Working Group on Indigenous Populations, an indigenous population is one that (a) has priority in time with respect to the occupation and use of a specific territory; (b) voluntarily perpetuates its cultural distinctiveness; (c) self-defines as a distinct collectively and is recognised as such by other groups and state authorities; and (d) has an

⁴¹ Ibid.

⁴² Ibid, 42

⁴³ Ibid.

experience of subjugation, marginalisation, dispossession and exclusion or discrimination, whether or not these conditions persist.⁴⁴ On all counts, this definition fits the Māori population of New Zealand⁴⁵ and, by the same token, does not fit the non-Māori population, people and the descendants of people from other parts of the world who have been settling in New Zealand since the nineteenth century.⁴⁶

6.11 Keith Barber further comments that,

The framing of the Māori/non-Māori relationship in terms of 'indigeneity' is clearly beneficial to Māori, because it draws attention to the historical experience of subjugation, dispossession, marginalisation and exclusion that is arguably responsible for their contemporary socioeconomic disadvantages; and, in a society committed to the values of justice and equality, it justifies political demands for ameliorative⁴⁷ action. Herein lies the political convenience, for those who oppose such actions, of describing Māori/non-Māori relations as 'race relations'. Whereas the term 'indigenous' historicises social relationships, the term 'race' naturalises them: it removes them from the realm of historical explanation. For as long as Māori/non-Māori relations are described as 'race relations', historical explanations for Māori socioeconomic disadvantage can be elided in favour of explanations that focus on the characteristics of individuals and give support to minimalist policies of nondiscrimination on the grounds of race. Furthermore, by framing Māori/non-Māori relations as 'race relations', political arrangements designed to redress historical injustices and overcome the present day inequalities experienced by Māori can be openly criticised as examples of 'racial discrimination'.⁴⁸

A third way of framing the relationship is in terms of ethnicity as relations between ethnic groups. In these terms, the various political arrangements that in the 'race relations' discourse are described as instances of 'racial discrimination' would more correctly be described as instances of 'ethnic discrimination'. The term 'ethnic' has a ring of culture about it⁴⁹ and some forms of 'ethnic' discrimination can easily be justified on the grounds of long-standing cultural differences between peoples. To talk of 'ethnicity' is to raise the issue of the rights of a people to preserve their cultural heritage and identity and, for these reasons, those who oppose the recognition of indigenous rights use the discourse of 'race' rather than that of ethnicity. The former allows them to describe those policies that recognise indigenous rights as being 'race based' rather than 'ethnicity' or 'culture' based. The rhetoric of 'race' elides arguments about cultural heritage and cultural identity and allows those policies that take such factors into consideration to be attacked as 'racist'.⁵⁰ In a discourse of 'race relations', the defenders of

⁴⁴ Justin Kenrick and Jerome Lewis, "'Indigenous peoples' rights and the politics of the term 'indigenous'", *Anthropology Today*, 20 no.2: 4-9 as cited by Keith Barber, "Indigenous Rights' or 'Racial Privileges': The Rhetoric of 'Race' in New Zealand Politics," *The Asia Pacific Journal of Anthropology*, 9 no.2 (2008): 142, doi:10.1080/14442210802023665.

⁴⁵ Ranginui Walker, *Ka Whawhai Tonu Mātou: Struggle Without End* (Auckland: Penguin, 1990) as cited by Keith Barber, "Indigenous Rights' or 'Racial Privileges': The Rhetoric of 'Race' in New Zealand Politics," *The Asia Pacific Journal of Anthropology*, 9 no.2 (2008): 142, doi:10.1080/14442210802023665.

⁴⁶ Keith Barber, "Indigenous Rights' or 'Racial Privileges': The Rhetoric of 'Race' in New Zealand Politics," *The Asia Pacific Journal of Anthropology*, 9 no.2 (2008): 142, doi:10.1080/14442210802023665.

⁴⁷ Make (something bad or unsatisfactory) better. Refer to Oxford Dictionaries, "Ameliorate." Oxford Dictionaries, accessed May 10, 2015. <http://www.oxforddictionaries.com/definition/english/ameliorate?q=ameliorative-ameliorate> 9.

⁴⁸ Ibid, 142-143.

⁴⁹ Steve Fenton, *Ethnicity: Racism, Class and Culture* (London: Macmillan, 1999): 3-4 as cited in Keith Barber, "Indigenous Rights' or 'Racial Privileges': The Rhetoric of 'Race' in New Zealand Politics," *The Asia Pacific Journal of Anthropology*, 9 no.2 (2008): 143, doi:10.1080/14442210802023665.

⁵⁰ Richard Prebble, 'End government racism', ACT Waikato Regional Conference, Hamilton, Available at: <http://www.act.org.nz/item.jsp?id24910>, accessed 24 November 2003 as cited in Keith Barber, "Indigenous

Concepts of "Special Privileges" and Māori cont.

'indigenous rights' are cast as racists, whereas the opponents of 'indigenous rights' cast themselves as 'antiracist'.⁵¹

6.12 Additionally in terms of race, racism and special privilege Mason Durie comments that,

[I]n 1840, when Britain assumed sovereignty. Further constitutional change was heralded in a British statute, the New Zealand Constitution Act 1852, which provided for New Zealand to establish its own legislature and act as a self-governing colony. One of the first pieces of legislation passed by the new settler parliament was the English Acts Act... In a single statute the Act made all English laws applicable to New Zealand. It was an economic use of parliamentary time that spared the colonial politicians the task of developing a whole raft of laws specific to the new colony. Instead, it was taken for granted that if the laws worked in England, they should work in New Zealand. Part of the Crown's rationale for assuming sovereignty over New Zealand had been expressly to institute British law so that Māori tribes would be protected from unruly settlers and settlers would be forced to live up to their obligations as law abiding British subjects. As it transpired, British law was less protective than well-intentioned humanitarian officials in the Colonial Office had contemplated; if anything, the law was to be used as a mechanism to advance settler interests regardless of impacts on Māori.⁵²

Do policies based on race and ethnicity work? From the perspective of the coloniser the English Acts Act worked very well. It introduced a series of racially inspired reforms into New Zealand and laid the foundations for a policy environment within which English common law was the norm and Māori common law (culture) was the problem. Land tenure, criminal law, taxation policies, fishing policies and the authority of the Crown had more or less worked in Britain and were now to work in New Zealand. But the point is that law and culture are intimately linked, and English law in 1854 was as much a product of an ethnic-English culture as Māori lore was a product of tribal world views. From that perspective the English Acts Act 1854 was New Zealand's first racebased policy. Built on the presumption that English common law had a universal dimension, the culture, customs and conventions of Britain were imposed on all New Zealanders to the benefit of a few (at that time Māori outnumbered settlers).⁵³

6.13 Similarly with the argument around democracy is of the same nature. many supporters of the Rotorua Pro Democracy Society have included the argument in oral submissions that on top of being "all one people" that democracy is all "ours" and that this is "our" tradition that goes back thousands of years. While due to power and privilege those submitters may have not considered that these traditions are not Māori. They are imported for Western culture. By including Māori in this equation is racist. It denies Māori a right to express or acknowledge a different cultural tradition, a different form of knowledge distinct from Western thought about

Rights' or 'Racial Privileges': The Rhetoric of 'Race' in New Zealand Politics," *The Asia Pacific Journal of Anthropology*, 9 no.2 (2008): 143, doi:10.1080/14442210802023665.

⁵¹ Keith Barber, "Indigenous Rights' or 'Racial Privileges': The Rhetoric of 'Race' in New Zealand Politics," *The Asia Pacific Journal of Anthropology*, 9 no.2 (2008): 143, doi:10.1080/14442210802023665.

⁵² Mason Durie, "Race and Ethnicity in Public Policy: Does it Work?" *Social Policy Journal of New Zealand*, 24, no. 1 (2005): 3-4, <http://www.seniors.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spi24/24-pages1-11.pdf>.

⁵³ Ibid, 4.

Concepts of "Special Privileges" and Māori cont.

governance, it promotes customs and conventions that are British over those which developed naturally this land in conjunction with Māori ways of doing things. It is seen as racist because it implies the idea that anything that is Western is superior to what could be created by indigenous peoples. It continues a way of thinking and the results of the introduction of the English Acts Act 1854.

Other Relevant Research

7.0 To help decision makers with their deliberations the following research projects are highlighted. It must be noted that there are only a handful of researchers in the area of Local Government and Māori or Indigenous Peoples and Local Government.

7.1 An international analysis of Indigenous-Settler State Co-Management arrangements in New Zealand, Canada, Australia, and the United States by Indigenous Rights and Legal expert Prof. Bradford Morse from the University of Waikato entitled:

Morse, Bradford. "Co-Management of Natural Resources by Indigenous People and States: A Method to Promote Environmental Justice and Sustainability." Paper presented at the 10th annual colloquium of the International Union for the Conservation of Nature Academy of Environmental Law, Baltimore, Maryland, July 1-5, 2012.
<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1155&context=gelc>

Attention should be paid to the New Zealand example of the Waikato River Trust as a model of a Treaty partnership in action. (See Appendix 7).

7.2 There are two sources of a similar nature to that of the conference paper by Prof. Bradford Morse. This report by Local Government New Zealand entitled:

LGNZ, *Local Authorities and Māori: Case Studies of Local Arrangements*. Wellington, 2011.
<http://www.lgnz.co.nz/assets/Uploads/Local-Authorities-and-Māori.pdf>

The report discusses the nature, similarities and differences of co-management or Joint Management Agreements between Iwi and Councils

Other Relevant Research cont.

providing four case study examples. The other example is the Rutherford Lecture by Dame Anne Salmond:

Anne Salmond, 2014 Rutherford Lecture: Rivers. University of Auckland and Radio NZ, Whanganui, <http://www.radionz.co.nz/national/programmes/rutherford-lectures/20141228>

- 7.3 The most recent and relevant research produced is a report on Māori engagement with Local Government. The report was produced by Massey University researchers, Christine Cheyne and Veronica Tāwhai and was funded by the Royal Society of New Zealand's prestigious Marsden Fund. It is entitled:

Cheyne, Christine and Veronica Tāwhai. *He Wharemoa Te Rakau, Ka Mahue. Māori Engagement with Local Government: Knowledge, Experiences and Recommendations*, a research project supported by the Royal Society of New Zealand Marsden Fund (MAU-039). Wellington, 2008. <http://mro.massey.ac.nz/bitstream/handle/10179/552/hwtrct.pdf?sequence=3&isAllowed=y>.

The results produced by the study are significantly relevant to the discussion on the Partnership Proposal. They found the following results⁵⁴:

Knowledge about Local Government

- Participants had some knowledge of past and current representatives, including the current mayor, but low-level awareness of current councillors.
- Participants had high-level knowledge of local government responsibilities, but low level knowledge of local government structures, i.e. "who to contact for what".
- There is generally confusion around both enrolling to vote and voting; how, where (electoral area), and when.
- Low-level knowledge of other avenues to participate is a factor in citizens' low-level participation in local government.

Information from and about Local Government

- Information is hard to obtain, and when obtained, is not considered user-friendly (including candidate profiles).
- Low-level awareness and interest in local governments is partly caused by the lack of coverage in popular media, such as radio and television.

Other Relevant Research cont.

⁵⁴ This report is the most up-to-date research on Māori and Local Government.

- The lack of good information is a factor in Māori perception of local government as irrelevant, and contributes to overall frustration in local government matters.
- The shortage of information, low-level visibility, and the subsequent perceived low level relevance of local government, is a primary cause of Māori low-level participation and non-participation in local government.

Contact with Local Government

- Most participants had had contact with local governments and authorities over general Council issues, such as water.
- Māori are positive about what services local government has to offer, but are discouraged by poor provision of those services and seemingly difficult processes.
- Māori feel positive and encouraged by representatives with high-level visibility in their communities, and who are easily accessible to citizens.
- Levels of contact with representatives effect Māori interest and motivation to participate (i.e. low-level contact = low-level interest).
- In particular, a lack of familiarity with candidates is a key factor in Māori abstention from or feelings of meaningless voting.

Representation of Māori Concerns

- Participants felt there is little opportunity for Māori representation or consideration of Māori issues in local government, and where there is, it is often tokenistic.
- Participants felt there is little room given for incorporation of tikanga and Māori processes in local government, and when there is, it is often tokenistic.
- Due to a lack of support, Māori express a concern that representation by Māori is dangerous (in terms of wellbeing) for those who choose those roles.
- Participants feel Māori representation in local government is essential; however, express that being of Māori ethnicity is not qualification enough to be a representative.
- Rather participants emphasised that all representatives, including non-Māori, should commit to 'kaupapa Māori'; Māori issues and ways of doing things (including tikanga). Māori participation is affected by a sense of belonging, i.e. primarily people are interested in participating in their homeland / tribal area, which might be in another electorate.
- Some Māori consequently do not participate in their local government as they feel it is the sole business of mana whenua, whereas others participate to purposively support mana whenua.

Other Relevant Research cont.

Participation by Māori

- Māori consider citizenship rights, such as voting and other ways to participate, as important. However, there is a major lack of confidence, trust and faith in local governments, which causes Māori non-participation.
- Participants feel it is not made easy for the 'everyday person' to access or participate in local government; especially people who have busy lifestyles with work and families.
- Participants' awareness of others' unsuccessful attempts to engage with local government is a deterrent to their participation.
- Local governments would be accessed by Māori if Māori believed local government would be helpful, their participation was valued, and engagement would result in a positive outcome.

Engagement of Māori (by local government)

- Māori feel consultation is not genuine, but 'after the fact', i.e. after the real decisionmaking has occurred.
- What contributions are made by Māori through consultation, participants feel are then undervalued.
- Participants feel that any interest in engaging Māori is only expressed during electiontime, with representatives showing no accountability or effort to communicate with or engage citizens once elected.
- There is a frustration that the onus is on citizens to participate, rather than local governments to engage citizens.
- There is a concern that local governments prioritise funding, rather than communities, and are therefore interested in those with resources, such as employers, instead of meeting the needs of the average and poorer communities (especially low socioeconomic Māori communities).
- Central government has different affects on Māori interest in local government; on one hand, the lack of responsiveness to national Māori issues causes disinterest in local government; on the other, central and local government are viewed separately, including who has jurisdiction over what Treaty issues.
- For other participants, both local and central government are intrinsically linked; an entire system that needs to become more representative and accountable in its engagement of Māori and all citizens generally.
- The visibility and accessibility of local governments must be enhanced to foster Māori participation, including the establishment of offices in the community with scheduled after-hours and weekend times.
- The visibility and accessibility of local government representatives can be enhanced through greater attendance at community events. Holding local government events, such as consultation hui, at marae and other local venues will assist in capturing Māori interest and encouraging Māori participation.

Other Relevant Research cont.

- Avenues for participation should take into account Māori diverse lifestyles and preferences, such as the use of technology (email, texting, web-based interaction).
- Incentives and other measures to increase participation should be considered, as Māori are unsure and sceptical of how they or their communities will benefit from participating.

Improving engagement of Māori (by Local Government)

- Greater representation of Māori at all levels of local government will improve local government attempts to engage Māori, through a perceived higher-level of accountability and responsiveness to Māori and Māori concerns.
- Again, all representatives, Māori and non-Māori, should be concerned with and make an effort to advance 'kaupapa Māori', and engage themselves with Māori over Māori issues.
- A real commitment to the tikanga of mana whenua would both help local government appropriately engage with Māori, and increase Māori respect for local government.
- Major structural change in local government is needed to successfully engage Māori and secure their full confidence, trust, faith, and thereby participation, in local government decision-making. This includes restructuring for greater power-sharing with Māori in decision-making processes.
- Efforts for structural change and greater power-sharing in local government are considered by Māori as both a Treaty of Waitangi issues and an issue of democracy.

Improving accountability to Māori

- Māori are concerned with how they can hold local government accountable, are unaware and frustrated about how they can do so, and are interested in the development of accountability measures such as 'snap elections' and calls of 'no confidence'.
- Local governments' representatives must develop effective communication networks with their respective Māori communities, so they can properly represent and be held accountable to those communities and their issues.
- Regular, ongoing meetings with mana whenua are recommended to ensure accountability to mana whenua, mana whenua tikanga and processes, as well as mana whenua issues, needs, concerns and aspirations.
- Other initiatives that engage citizens one-on-one, such as door to door surveys, was also viewed favourable by Māori with regards to increasing
- peoples sense of local governments connection and accountability to citizens.⁵⁵

⁵⁵ Cheyne, Christine and Veronica Tāwhai. *He Wharemoa Te Rakau, Ka Mahue. Māori Engagement with Local Government: Knowledge, Experiences and Recommendations*, a research project supported by the Royal Society

Other Relevant Research cont.

6.11 Māori did have a Local Government tradition distinct from the colonially imposed British Model. For more information on this please refer to⁵⁶:

Allan Arlidge, "Some Thoughts on the History of Local Government of the Māori People" *The Journal of The Polynesian Society* 89, no.3 (1980) 328-340.

http://www.jps.auckland.ac.nz/document/Volume_89_1980/Volume_89,_No_3/Some_thoughts_on_the_history_of_the_local_government_of_the_Māori_people,_by_Allan_S._Arlidge,_p_329-340/p1.

6.12 Of note to these proceedings is a need to provide an interpretation of The Treaty of Waitangi and Hobson's declaration of "He iwi kotahi tātou." This is provided for by the Waitangi Tribunal and Former Supreme Court⁵⁷ Judge and Governor-General Sir David Beattie who comments that,

As we have said the Treaty of Waitangi has been referred to as "The Māori Magna Carta" and as "the great Charter of Māori rights". It may well be so described but we consider that that is but one aspect of the Treaty's significance and that it has broader implications.

Governor Hobson's view of the broad implications is illustrated in his statement to each Māori signing the Treaty of Waitangi when he said "He iwi kotahi tatou" which has been translated as "We are now one people". At Waitangi on 6 February 1981 however the present Governor-General, Sir David Beattie was to say,

"I am of the view that we are not one people, despite Hobson's oft-quoted words, nor should we try to be. We do not need to be."

The Treaty was an acknowledgement of Māori existence, of their prior occupation of the land and of an intent that the Māori presence would remain and be respected. It made us one country, but acknowledged that we were two people. It established the regime not for uni-culturalism, but for bi-culturalism. We do not consider that we need feel threatened by that, but rather that we should be proud of it, and learn to capitalise on this diversity as a positive way of improving our individual and collective performance.

The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.

We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles.⁵⁸

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<http://mro.massey.ac.nz/bitstream/handle/10179/552/hwtrct.pdf?sequence=3&isAllowed=y>.

⁵⁶ Currently this is the only research produced on Māori Local Government tradition.

⁵⁷ Former name of the High Court

⁵⁸ Waitangi Tribunal, Report on the Motunui/Waitara Claim: Interpretation of the Treaty of Waitangi (1983), accessed 7 May 2015, <http://www.justice.govt.nz/tribunals/waitangi-tribunal/Reports/wai0006/06ch10>.



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Appendix One: Te Arawa Standing Committee Presentation

Partnership Model

Te Arawa and Rotorua Lakes Council

Presentation to Rotorua Lakes Council

Presented by TASC on behalf of Te Arawa

18 December 2014



*Today we can honour the past,
empower the present and strengthen
our future...*

*We believe in
“Tātau, Tātau - We Together”*

Today is a kōrero about how this can happen...

Overview

4

1. Introduction
2. Te Arawa Snapshot & Background
3. Legislative Framework
4. **Partnership Model**
5. Model Development
6. Summary

Introduction

5

Te Arawa wants to work in partnership with RLC to:

1. To strengthen Te Arawa's participation in RLC decision making
2. Strategic & Integrated Development that identifies opportunities to work together for the betterment of Rotorua
3. Build Te Arawa's Capacity and Capability to participate in RLC decision making
4. Improve communication, kōrero and information sharing
5. Improve RLC's delivery of its obligations to Māori

Te Arawa Snapshot



Historical Background

7

Changing Landscape



1880 Fenton's Agreement

1993 Establishment of Te Arawa Standing Committee

2009-2013

- Te Arawa expressed concerns with effectiveness of committee and Council practises
- Environment Court decision against RDC, advised to review practises in consulting Māori
- RDC announce commitment to undertake cultural audit

October 2013/14

- Rotorua 2030 Vision adopted – commitment to Te Arawa Partnership
- Project initiated to explore new Te Arawa/ RDC partnership model

Te Arawa Aspirations

8

- ☑ Need for clear purpose, functions
- ☑ Need for strengthened partnership with Council
- ☑ Affirm Iwi / hapū rangatiratanga
- ☑ Clear connection with stakeholders
- ☑ Effective advocate for Te Arawa interests
- ☑ Need to control own agenda and path
- ☑ Need for budget to effectively carry out objectives

Legislative Framework

9

s81 of the LGA

- ☑ Engaging and Consulting with Māori
- ☑ Building the capability and capacity of Māori to contribute to council decision making
- ☑ Providing relevant information to Māori for the purposes above

Legislative Framework

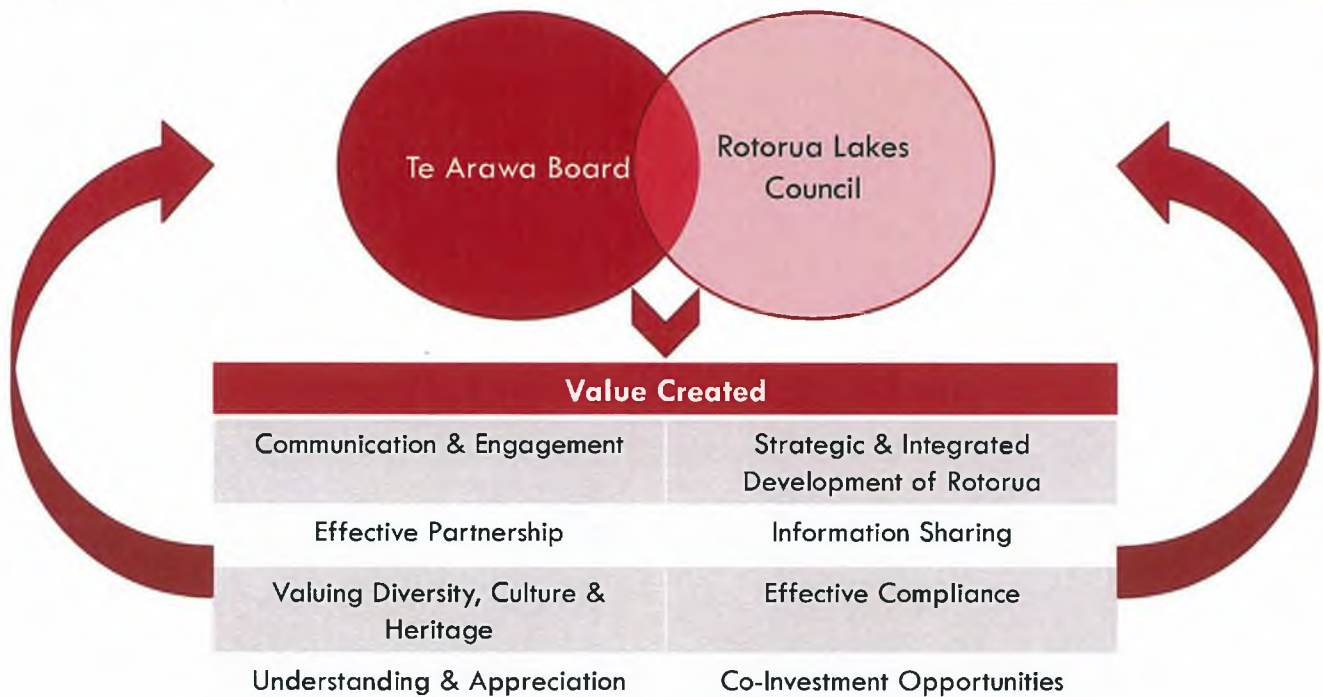
10

s6-8 of the RMA:

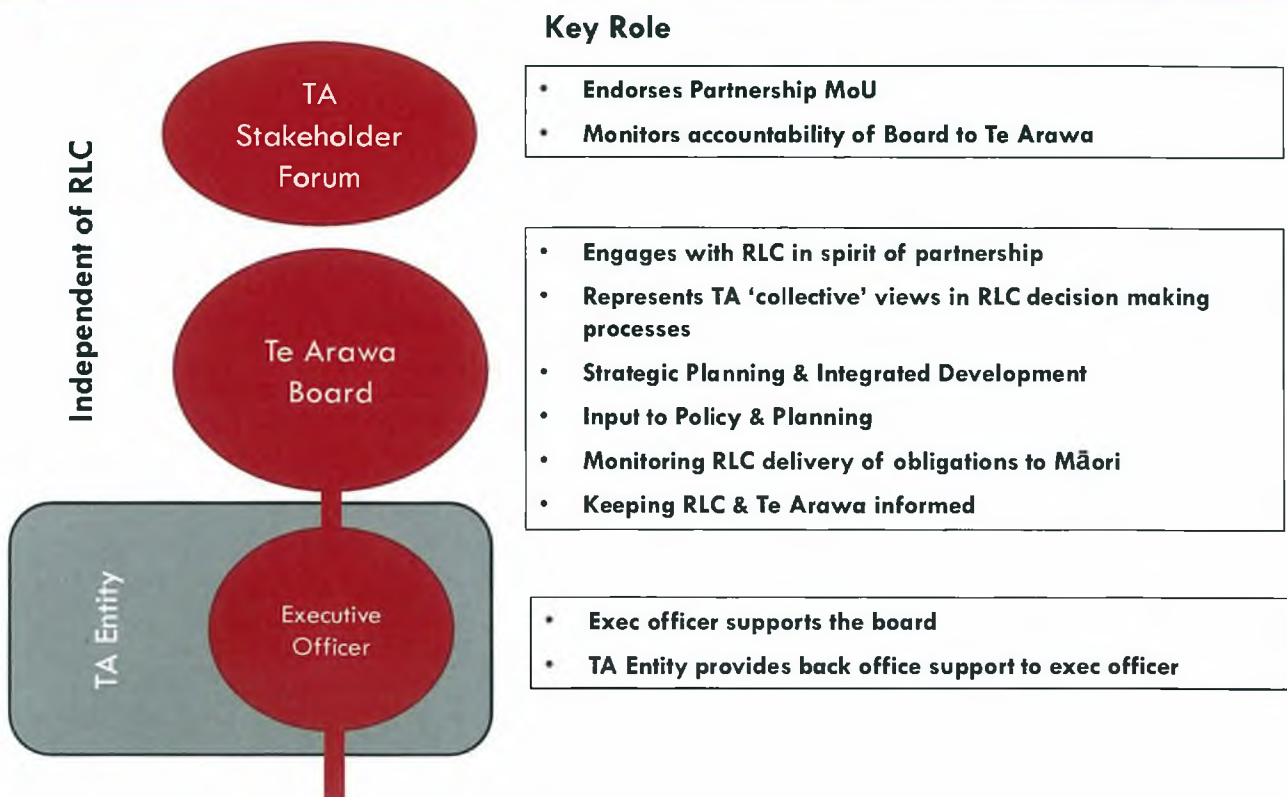
- ☑ Recognition of the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:
- ☑ Have regard to the role of Māori as kaitiaki
- ☑ Take into account the principles of the Treaty of Waitangi
- ☑ Mechanisms in place to 'give effect' to the above

Purpose of Partnership

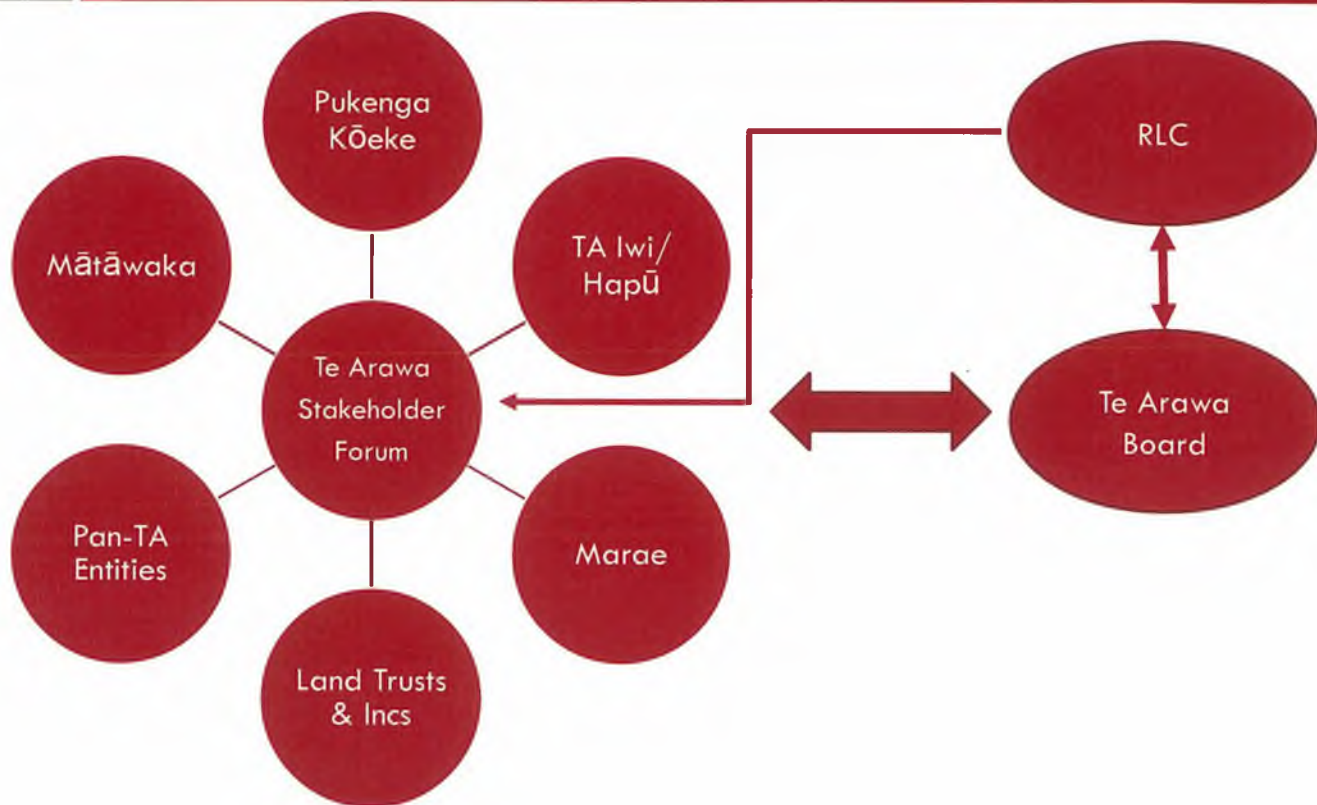
11



Te Arawa - Structure

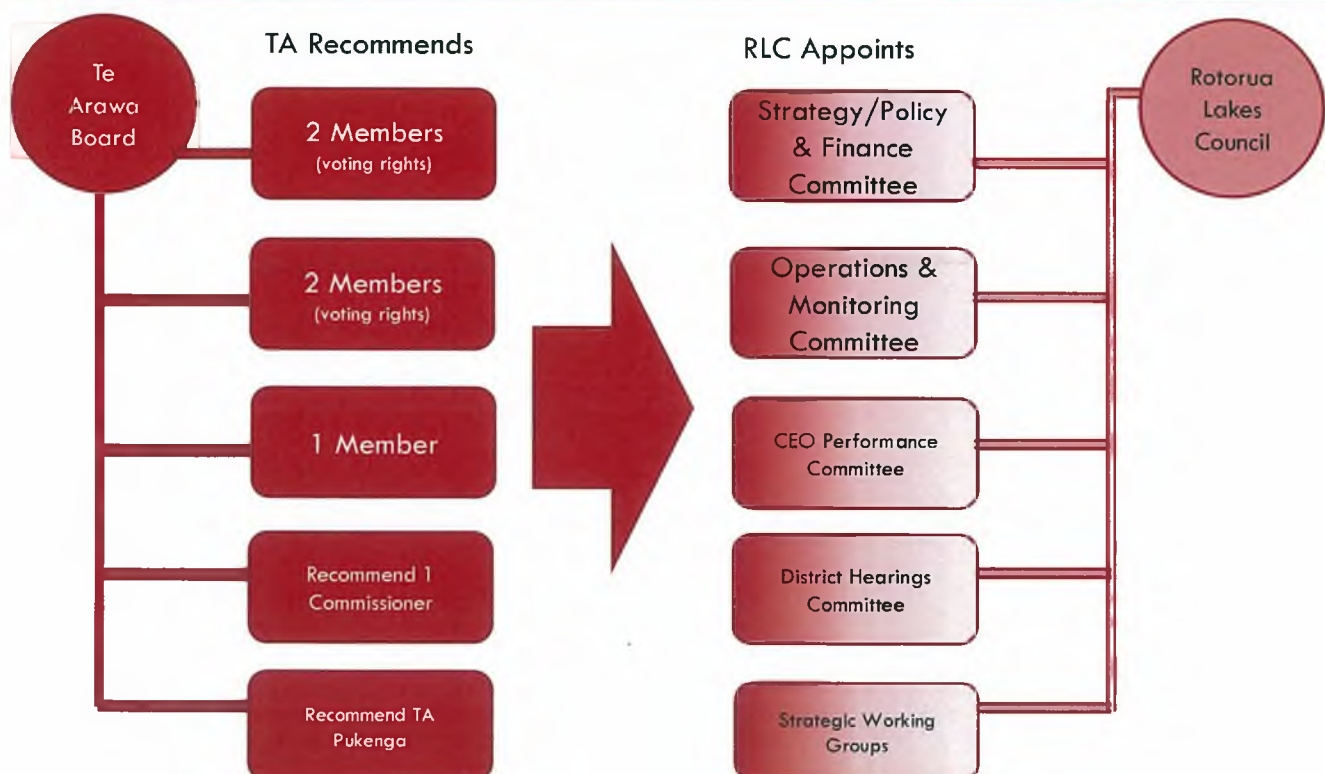


Partnership & Accountability



Input into Policy & Planning

14

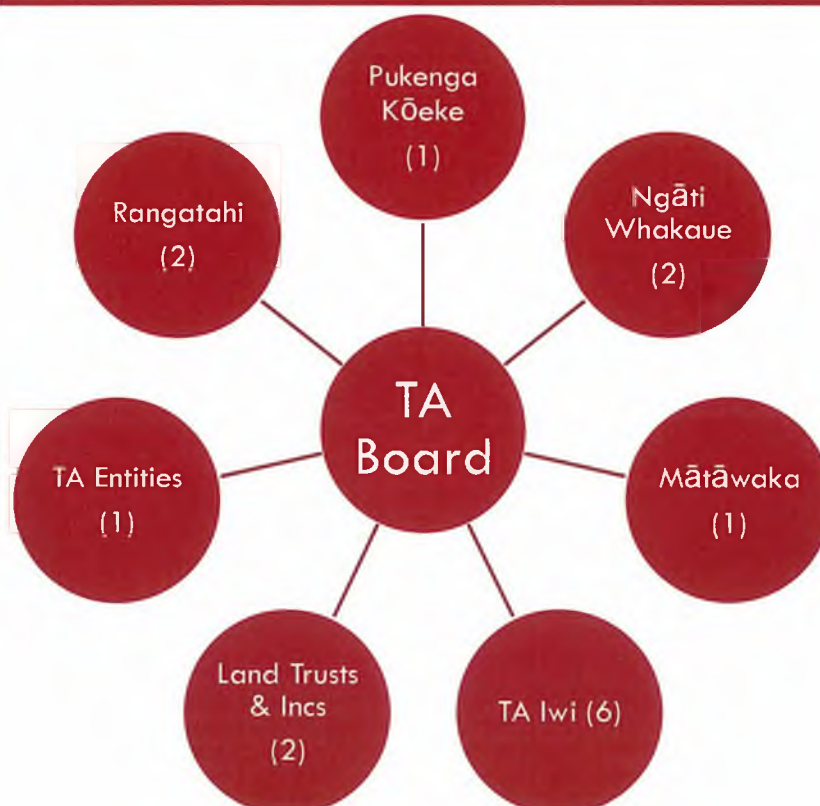


Board Representation – Option 1



- 14 members
- Members nominated & elected by Te Arawa whānui
- Mātāwaka not included but to be included from year 2 onwards

Board Representation – Option 2



- 15 members
- Members nominated & elected by:
 - Te Arawa Whānui
 - Māori Ratepayers
- Mātāwaka included

Model Development

17

Established clear understanding of:

- Situation
- Aspirations
- Model Options

Developed Model Options

Gathered feedback from iwi/ hapū

Deliver comprehensive recommendation to RLC endorsed by Te Arawa

1

...year process to develop, engage and refine model

9

...hui with Te Arawa hapū, iwi and stakeholders

18

...project group and TASC iwi member hui to progress model development

300

...people attended hui

\$28k

...cost to develop model and engage with Te Arawa

Community Consultation

18

- Te Arawa believe this is a major kaupapa for both Te Arawa and the wider community
- We feel it is only right that the Rotorua community has an opportunity to consider this proposal
- We welcome the opportunity to share this vision of partnership

*Today we can...
honour the past, empower the present,
and strengthen our future...*

*We believe in
“Tātau, Tātau - We Together”*



Appendix Two: Te Arawa Partnership Proposal Statement of Proposal



Statement of Proposal:

Proposed Te Arawa Partnership Model

FOR CONSULTATION

February 2015

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Purpose of the Statement of Proposal

This statement of proposal has been prepared as part of consultation with the community and others with an interest in the proposed Te Arawa Partnership Model.

Council has considered the proposed model along with three alternative models and resolved to support the Te Arawa Partnership Model “in principle,” subject to a Special Consultative Procedure (SCP).

The SCP gives the public an opportunity to make submissions and provide feedback on the proposed Te Arawa Partnership Model. Once the submission period closes, hearings will be conducted if people indicate they want to speak in support of their submissions.

The statement of proposal has been prepared in accordance with the requirements of section 83 of Local Government Act 2002 and with guidance from the Office of the Auditor General. It includes making publicly available:

- the proposal (i.e. the proposed model that is supported 'in principle') and the reasons for the proposal;
- reasonably practicable options (i.e. other models that were considered by Council); and
- a description of the consultation and submission process including the period within which views on the proposal may be provided.

1. EXECUTIVE SUMMARY – Te Arawa Partnership Model

Rotorua Lakes Council is seeking feedback on the proposed Te Arawa Partnership Model. **Submissions from the public need to be received before 4pm, Friday 17 April 2015**

The need to develop a more effective partnership between Te Arawa and Rotorua Lakes Council (Rotorua District Council) was identified by the last Council following the 2012 decision of the Environment Court that recognised the need for the Council to improve iwi consultation. The incoming Council and Te Arawa committed to developing a new partnership model after the 2013 local government elections. It was mutually acknowledged that the existing mechanism – the Te Arawa Standing Committee – no longer met the needs of both parties. After 12 months of research and iwi consultation Te Arawa representatives presented their partnership model to Council on 18 December 2014 and recommended community consultation on their proposed model.

Council is required by law to facilitate Māori participation in Council decision-making processes; identify strategic opportunities to work closely together for the betterment of Rotorua district; and to build iwi capacity and capability to partner with local government.

The proposed Te Arawa Partnership Model:

- Provides for the establishment of an independent board outside of the Council to represent Te Arawa interests – members to be elected 'at large' by the Te Arawa community.
- provides for the independent board to nominate, for Council's consideration, representatives to be appointed to specified Council committees, RMA consent hearing panels and strategic working groups
- gives voting rights to appointed representatives on two of the committees (Strategy, Policy & Finance and Operations & Monitoring).

Council considered the proposed Te Arawa Partnership model along with three alternative options:

- **Status Quo** (re-establishing the Te Arawa Standing Committee);
- **Modified Model** (model proposed by Te Arawa but without representatives having voting rights); and
- **No Formal Partnership** (Te Arawa Standing Committee not replaced and multiple statutory and non-statutory relationships with Te Arawa marae, iwi and other entities are acknowledged and extended).

Council then resolved to support the Te Arawa Partnership model "in principle" subject to a Special Consultative Procedure (SCP).

This **Statement of Proposal – Proposed Te Arawa Partnership Model** has been prepared in accordance with the SCP requirements under section 83 of the Local Government Act 2002 and with guidance from the Office of the Auditor-General. It includes making publicly available:

- the proposal (i.e. the proposed model that is supported 'in principle') and the reasons for the proposal;
- reasonably practicable options (i.e. other models that were considered by Council); and
- a description of the consultation and submission process, including the period within which views on the proposal may be provided.

Rotorua Lakes Council encourages residents to have their say on the proposed Te Arawa Partnership Model, any of the alternative options considered, or any other arrangements that residents think appropriate. Residents and other interested parties can use the feedback form, or write to the Council, to say what parts of the proposal are agreed with or not agreed with. Submitters are asked to say whether they also want to speak in support of their submissions at a Council hearing. **Public submissions close 4pm, Friday 17 April 2015**

Submissions can be made in the following ways:

Post to: Submissions: Te Arawa
Partnership Model
Rotorua Lakes Council
Private Bag 3029
Rotorua Mail Centre
Rotorua 3046

Deliver to: Customer Centre
Civic Centre
Rotorua Lakes Council
1061 Haupapa Street
Rotorua

Fax to: 07 346 3143

Email to: submissions@rdc.govt.nz

For more information on the submission process call the Council on 07 348 4199.

Further information including FAQs (frequently asked questions) and minutes of the 18 December 2014 meeting (including slides of the presentation and the relevant Council officer summary report) are available from Council offices or the library. All information is also available on www.rotorualakescouncil.nz, along with a video clip of the presentation of the model made to Council on 18 December 2014.

Timetable for Special Consultative Procedure

- Statement of Proposal (SOP) approved for public consultation Feb 26
- Public notice and SOP available - submissions period commences Mar 2
- Public information sessions Mar 9 – 27

Date	Time	Location
Tue 10 March	5:30pm – 7:00pm	Ngakuru Hall
Wed 11 March	5:30pm – 7:00pm	Waikite Clubrooms, Bellevue Rd
Thu 12 March	6:15pm – 7:45pm	Rerewhakaaitu Settlers Hall
Mon 16 March	9:00am – 10:30am	Rotorua Lakes Council Civic Centre
Tue 17 March	5:30pm – 7:00pm	Lake Okareka Hall
Thu 19 March	9:00am – 10:30am	Ngongotaha Community Hall

Thu 19 March	5:30pm – 7:00pm	Western Heights High School
Tue 24 March	5:30pm – 7:00pm	Reporoa Community Hall
Wed 25 March	5:30pm – 7:00pm	Rotoma Hall
Thu 26 March	5:30pm – 7:00pm	Lynmore Primary School – Cultural Centre

Note: Details may be subject to change and will be advertised and will also be available from www.rotorualakescouncil.nz or from Rotorua Lakes Council.

- Submissions close Apr 17
- Hearings for submitters Apr 30 – May 1
- Submissions considered - deliberations and decisions May 26

2. STATEMENT OF PROPOSAL – Te Arawa Partnership Model

A. The Proposal – Te Arawa Partnership Model

i. Proposed Model

1. Rotorua Lakes Council ('Council') proposes to enable representatives nominated by Te Arawa to actively participate in Council decision-making by appointing:
 - Two representatives of Te Arawa as full voting members of its Strategy, Policy and Finance Committee; and
 - Two representatives of Te Arawa as full voting members of its Operations and Monitoring Committee; and
 - One representative of Te Arawa as a non-voting member of its CEO Performance Committee; and
 - One suitably qualified representative nominated by Te Arawa as commissioner to all statutory hearing committees (typically comprising three commissioners) determining notified resource consent applications under the Resource Management Act 1991; and
 - Ad hoc non-voting representatives nominated by Te Arawa on strategic working groups as and when required by Council; e.g. strategy portfolio steering committee.
2. An independent board, elected by the Te Arawa community, will be established in collaboration with Council ('Board'). The Board will be elected by way of an "at large" Te Arawa election, and it will represent different sectors of the wider Te Arawa community (e.g. Rangatahi 2 seats; Pūkenga Kōeke/Kaumātua 1 seat; Ngāti Whakaue 2 seats; other Te Arawa iwi 6 seats; land trusts and incorporations 2 seats; Pan Te Arawa entities 1 seat) to a maximum of 14 members. In the future an additional seat may be made available for mātāwaka / taura here (Māori from other Iwi resident in Rotorua).
3. The Board will nominate, for Council's consideration, representatives to be members of the various committees.
4. While the composition of its committees is a matter for Council to determine, Council will accept the Board's nominations provided it is satisfied that the nominees have the necessary skills, attributes and knowledge to assist the work of the respective committee.

ii. Background to the Proposed Model

At its meeting on 18 December 2014, Rotorua Lakes Council (Council) considered a partnership model presented by Te Arawa representatives.

Following the 2012 ruling by the Environment Court which was critical of the Council, the Council identified a need to improve its iwi consultation procedures and processes.

The need to develop a new partnership model between iwi and Rotorua Lakes Council was identified by both the incoming Council and Te Arawa after the 2013 local government elections.

Te Arawa was asked to bring an iwi-endorsed model to Council for its consideration. After 12 months of development and consultation within the Te Arawa community, this was subsequently presented to the mayor and Councillors on 18 December 2014. The proposed model was presented by Arapeta Tahana, on behalf of the Te Arawa Standing Committee which had undertaken the development and iwi consultation. At the presentation Te Arawa suggested community engagement on the model.

The Council resolved that the model be accepted "in principle" and due to its significance, a Special Consultative Procedure (SCP) of the LGA 2002 be initiated.

iii. Reasons for the Proposed Model

The model recognises the significance of Te Arawa as Tāngata Whenua within the district of Rotorua and the unique relationship between Te Arawa and Council beginning in the 1880s with the gifting of land by Ngāti Whakāue (an iwi of Te Arawa) by way of the Fenton Agreement to establish the Rotorua township, and in turn receiving one seat (of three) on the town board.

The model was developed by Te Arawa at Council's request as a means to help Council meet its Rotorua 2030 vision commitment to effectively partner with Te Arawa; to improve the delivery of Council's legal and statutory obligations to Māori; to strengthen Te Arawa's participation in Council decision-making; to identify strategic opportunities to work closely together for the betterment of Rotorua district; and to build iwi capacity and capability to partner with local government.

As identified in Local Government New Zealand's document *Council-Māori engagement, October 2007*, Council's legal and statutory responsibilities - particularly under the Local Government Act 2002 (LGA 2002)¹ and the Resource Management Act 1991 (RMA 1991)² are to facilitate participation by Māori in Council decision making processes, including obligations to:

- engage / work closely with Māori and Tāngata Whenua (local iwi),
- recognise the Treaty of Waitangi, as required under legislation;
- provide opportunities and maintain effective processes for iwi to contribute to decision-making,

¹ Refer to Section 4; Part 2 section 14; and Part 6 sections 76 – 81 of LGA 2002

² Refer to sections 6(e), 7 and in particular 8 of RMA 1991

- consider ways in which Māori capacity can be developed for contributing to decision-making processes, and
- take an informed approach to how decision-making can benefit the Māori community's well-being.

The key mechanism by which Council met these responsibilities in the past was via the Te Arawa Standing Committee, established in 1993. However, in recent years this was seen as outdated, no longer effective and not meeting the needs of the two parties.

The need to develop a new partnership model in Rotorua was identified by both the incoming Council and Te Arawa after the 2013 local government elections.

iv. Considerations on the Proposed Model

When determining whether to support the model in principle, Council took into account general, representation-related, and financial considerations - including (but not limited to) the following:

General considerations

1. The model meets the purpose of achieving effective partnership and will likely exceed Council's minimum requirements under legislation
2. Well developed and tested model within Te Arawa
3. Requires multi-levelled relationships adding complexity and risk for Council particularly in terms of relationship management, documentation and contracting.
4. A review of any adopted model will likely take place after the 2016 elections, including the issue of voting rights on committees.

Representation-related considerations

5. The most significant issue within the model that could polarise viewpoints is the provision of voting rights to people not elected at a public election.
6. The LGA 2002 does provide for councils to appoint non-elected members on committees³ (but not to full Council).
7. Council has previously had non-elected members with voting rights appointed to a council committee (Tourism Committee) and sub-committee (Audit & Risk Committee).
8. An argument can be made that there is a difference between a special purpose committee and the Council's key standing committees of Strategy, Policy & Finance, and Operations & Monitoring and therefore voting rights should not be allowed. An opposing argument could be

³ Refer to S7, Part 1 section 31 of LGA 2002

made that to be a member of a committee requires voting rights as the appropriate mechanism for recording views (rather than rhetoric), and therefore the ability to vote is an essential component of a decision-making process. Both views have merit.

9. In accordance with Council's decision making functions and powers, in some circumstances committees of Council will have delegated authority to make binding decisions on behalf of Council. However the power of these committees may also be limited to simply making recommendations to full Council, for it to make the final decision.
10. Although decisions made by the committees may be binding on Council, provided the proper process under its Standing Orders is followed, full Council can revisit those decisions.
11. The LGA 2002 also provides another avenue whereby if Council is not happy with the performance of a committee, it can discharge or reconstitute the committee⁴.

Financial considerations

12. The model is a cost-effective option.
13. Estimate of staff and direct costs to maintain the status quo is approximately \$200,000 per annum, and the status quo does not meet needs.
14. Indicative total costs for the proposed model are estimated at \$250,000 to \$290,000 per year – the larger figure allowing for additional costs during years when board elections would be required.

v. Other Alternative Options to the proposed model

When considering the model, Council also took into consideration three alternative options:

- Status Quo
- Modified Model
- No formal partnership

The table on the following page describes each of the options, the main pros and cons Council considered for each option, and the Council officers' assessment on the viability of each. The table summarises information contained within the Council officer report submitted to the Council meeting on 18 December 2014. A copy of this report is in the minutes of the same meeting which are available from Council offices or the library and is also available on www.rotorualakescouncil.nz

⁴ Refer to S7, Part 1 section 30(5) of LGA 2002

Option	Considerations	Indicative Costs	Officer Assessment
Status Quo: Re-establish the Te Arawa Standing Committee (TASC).	<p><u>Pros:</u> Recognised framework Current issues/limitations are known Low financial risk</p> <p><u>Cons:</u> TASC has not operated in the current Council term, other than to develop and consult with iwi members on the proposed Te Arawa model itself. TASC is considered ineffective and outdated by both Te Arawa and Council. Difficult interface with other standing committees Does not deliver on Rotorua 2030 commitments</p>	Total costs are estimated at a minimum of \$200,000 per year	Not viable
Modified Model: Model proposed by Te Arawa but representatives have no voting rights on Strategy, Policy & Finance Committee (S,P&F) or the Operations & Monitoring Committee (O&M).	<p><u>Pros:</u> May satisfy community members and organisations opposed to giving voting rights to people not elected to Council. Delivers on Rotorua 2030 commitments Modification of a well-developed and tested model with Te Arawa Would provide for Te Arawa's participation and the ability to consult on issues with the Te Arawa Board.</p> <p><u>Cons:</u> Removed voting rights may lead to a negative perception of Council by Te Arawa Complicated relationship documents required Te Arawa still to complete board election and develop management model</p>	Same as for proposed model, ie indicative total costs are estimated at \$250,000.00 to \$290,000.00 per year – the larger figure allowing for additional costs during board elections year	Possible
No formal partnership: No framework is provided to replace TASC. This approach acknowledges and extends various arrangements currently in place including MOUs and other statutory and non-statutory (including informal) relationships with Te Arawa marae, iwi and other entities.	<p><u>Pros:</u> Based on existing networks With significant expansion may meet Council's legal and statutory responsibilities</p> <p><u>Cons:</u> Fails to meet wider needs of both parties Lack of coordination – risk of not adequately meeting statutory obligations to Māori and Tāngata Whenua. Could potentially lead to many MOUs or other formal arrangement needing to be undertaken. Does not deliver on Rotorua 2030 commitments</p>	Total costs cannot be estimated as there are many unknown variables; however this option would likely be the most expensive option due to the number of potential parties and mechanisms used to enable significant expansion.	Not viable

B. Consultation and Feedback Process

Council is planning ten public information sessions where people can come along to hear more about the proposal and submission process and then participate in short workshops facilitated by Council officers to deal with questions and help with submission preparation. A Te Arawa representative will also be available to answer questions at the information sessions.

Date	Time	Location
Tue 10 March	5:30pm – 7:00pm	Ngakuru Hall
Wed 11 March	5:30pm – 7:00pm	Waikite Clubrooms, Bellevue Rd
Thu 12 March	6:30pm – 8:00pm	Rerewhakaaitu Settlers Hall
Mon 16 March	9:00am – 10:30am	Rotorua Lakes Council Civic Centre
Tue 17 March	5:30pm – 7:00pm	Lake Okareka Hall
Thu 19 March	9:00am – 10:30am	Ngongotaha Community Hall
Thu 19 March	5:30pm – 7:00pm	Western Heights High School
Tue 24 March	5:30pm – 7:00pm	Reporoa Community Hall
Wed 25 March	5:30pm – 7:00pm	Rotoma Hall
Thu 26 March	5:30pm – 7:00pm	Lynmore Primary School – Cultural Centre

Note: Details may be subject to change and will be advertised and will also be available from www.rotorualakescouncil.nz or from Rotorua Lakes Council.

Residents are encouraged to have their say on this proposal and to tell the Council what they think about the proposed Te Arawa Partnership Model.

There are a number of ways feedback can be given:

1. By attending a Public Information Session and participating in a workshop
2. By completing and submitting a feedback form online
3. By completing a hard copy feedback form, or emailing or writing to the Council with comments.

Public submissions close at 4pm, Friday 17 April 2015. Submissions received after this date may not be included in the feedback summary to be provided to the mayor and Councillors.

For a copy of the Statement of Proposal and a feedback form please visit the Council website www.rotorualakescouncil.nz or pick up a copy from City Focus, the Rotorua District Library or from the Customer Centre at Rotorua Lakes Council's Civic Centre (1061 Haupapa Street). Copies will also be made available to some local community centres and marae.

We encourage you to have your say and to give your views on the proposed Te Arawa Partnership Model. You can use the feedback form, or simply write to the Council to say what parts of the proposal you agree or do not agree with. Please let us know whether you also want to speak in support of your submission at a Council hearing.

Write to: **Submissions: Te Arawa Partnership Model**
Rotorua Lakes Council
Private Bag 3029
Rotorua Mail Centre
Rotorua 3046

Fax to: 07 346 3143

Email to: submissions@rdc.govt.nz

Deliver to: Customer Centre
Rotorua Lakes Council
Civic Centre
1061 Haupapa Street
Rotorua

For more information contact the Council Customer Centre on 07 348 4199 or email mail@rdc.govt.nz.

Further information including FAQs (frequently asked questions) and minutes of the 18 December 2014 meeting (including slides of the presentation and of the relevant Council officer summary report) are available from Council offices or the library. All information is also available on www.rotorualakescouncil.nz, along with a video clip of the presentation of the model made to Council on 18 December 2014.

Timetable for Special Consultative Procedure

- | | |
|--|----------------|
| • Statement of Proposal (SOP) approved for public consultation | Feb 26 |
| • Public notice and SOP available - submissions period commences | Mar 2 |
| • Public Information Sessions | Mar 9 - 27 |
| • Submissions close | Apr 17 |
| • Hearing/s for submitters | Apr 30 - May 1 |
| • Submissions considered, deliberations and decision | May 26 |

FEEDBACK FORM: Te Arawa Partnership Model proposal

SECTION 1: Please print your details clearly

Name: _____
Organisation: [If applicable] _____
Phone: (day) _____ (evening) _____
Email: _____

NOTE: all submissions are treated as public documents and will be loaded on to the Council's website with the names and contact details of submitters included. Rotorua Lakes Council is the operating name of the Rotorua District Council.

Do you wish to speak about your submission / feedback at a Rotorua Lakes Council hearing?

☐ **Yes** ☐ **No** If you **do not** tick a box we will assume that you **do not wish to speak at a hearing.**

If yes, do you wish to use Te Reo Māori ☐ or Sign Language ☐?

Hearings are expected to be held in April 2015. If you indicate that you wish to be heard, we will contact you once hearing dates have been finalised.

SECTION 2: Please print clearly

Do you **support** in principle the intention to effectively partner with Te Arawa?

☐ **Yes** ☐ **No** Please give your reasoning:

What aspects of the Te Arawa Partnership Model do you **agree** with and why?

What aspects of the proposed Te Arawa Partnership Model do you **disagree** with and why?

Is there another option or arrangement that you prefer and why?

Do you have any further comments?

Attach additional pages if required.

This Feedback Form can be:

- Completed and submitted online: www.rotorualakescouncil.nz
- Faxed to: 07 346 3143
- Emailed to: submissions@rdc.govt.nz
- Posted to: **Submissions: Te Arawa Partnership Model**
Rotorua Lakes Council
Private Bag 3029
Rotorua Mail Centre
Rotorua 3046
- Delivered to the Customer Centre at Rotorua Lakes Council, 1061 Haupapa Street.

All feedback must reach the Council by 4pm, Friday 17 April 2015. Feedback received after this date will not be included in the feedback summary to Councillors.

Appendix Three: Te Tiriti o Waitangi / The Treaty of Waitangi

TE TIRITI O WAITANGI

THE TREATY OF WAITANGI

English Text	Modern-English translation of Maori version	Footnotes of the Maori text by Prof. Hugh Kawharu (used with permission)
Preamble	Preamble	
<p>HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.</p>	<p>Victoria, the Queen of England, in her concern to protect the chiefs and the subtribes of New Zealand and in her desire to preserve their chieftainship (1) and their lands to them and to maintain peace (2) and good order considers it just to appoint an administrator (3) one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands (4) and also because there are many of her subjects already living on this land and others yet to come. So the Queen desires to establish a government so that no evil will come to Maori and European living in a state of lawlessness. So the Queen has appointed "me, William Hobson a Captain" in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents (5) to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.</p>	<p>(1) "Chieftainship": this concept has to be understood in the context of Maori social and political organization as at 1840. The accepted approximation today is "trusteeship".</p> <p>(2) "Peace": Maori "Rongo", seemingly a missionary usage (rongo - to hear i.e. hear the "Word" - the "message" of peace and goodwill, etc).</p> <p>(3) Literally "Chief" ("Rangatira") here is of course ambiguous. Clearly a European could not be a Maori, but the word could well have implied a trustee-like role rather than that of a mere "functionary". Maori speeches at Waitangi in 1840 refer to Hobson being or becoming a "father" for the Maori people. Certainly this attitude has been held towards the person of the Crown down to the present day - hence the continued expectations and commitments entailed in the Treaty.</p> <p>(4) "Islands" i.e. coastal, not of the Pacific.</p> <p>(5) Literally "making" i.e. "offering" or "saying" - but not "inviting to concur".</p>

TE TIRITI O WAITANGI

THE TREATY OF WAITANGI

English Text	Modern English translation of Maori version	Footnotes of the Maori text by Prof. Hugh Kawharu (used with permission)
Article the First	The First	
<p>The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.</p>	<p>The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government (6) over their land.</p>	<p>(6) "Government": "kawanatanga". There could be no possibility of the Maori signatories having any understanding of government in the sense of "sovereignty" i.e. any understanding on the basis of experience or cultural precedent.</p>
Article the Second	The Second	
<p>Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.</p>	<p>The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise (7) of their chieftainship over their lands, villages and all their treasures (8). But on the other hand the Chiefs of the Confederation and all the Chiefs will sell (9) 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 purchase agent.</p>	<p>(7) "Unqualified exercise" of the chieftainship - would emphasise to a chief the Queen's intention to give them complete control according to their customs. "Tino" has the connotation of "quintessential".</p> <p>(8) "Treasures": "taonga". As submissions to the Waitangi Tribunal concerning the Maori language have made clear, "taonga" refers to all dimensions of a tribal group's estate, material and non-material heirlooms and wahi tapu (sacred places), ancestral lore and whakapapa (genealogies), etc.</p> <p>(9) Maori "hokonga", literally "sale and purchase". Hoko means to buy or sell.</p>

TE TIRITI O WAITANGI

THE TREATY OF WAITANGI

English Text	Modern English translation of Maori version	Footnotes of the Maori text by Prof. Hugh Kawharu (used with permission)
<p>(<i>signed</i>) William Hobson Lieutenant Governor.</p> <p>Now therefore We the Chiefs of the C onfederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified. Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.</p> <p>(<i>Here follow signatures, dates, etc.</i>)</p>	<p>(<i>signed</i>) William Hobson, Consul and Lieutenant Governor.</p> <p>So we, the Chiefs of the Confederation of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and our marks thus. Was done at Waitangi on the sixth of February in the year of our Lord 1840.</p> <p>(<i>Here follows signatures, dates, etc.</i>)</p>	

Te Tiriti o Waitangi

KO WIKITORIA te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira – hei kai wakarite ki nga Tangata maori o Nu Tirani – kia wakaaetia e nga Rangatira Maori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu – na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane amua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te tuatahi

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu – te Kawanatanga katoa o o ratou wenua.

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangitira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua – ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini – Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(signed) William Hobson, Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Appendix Four: Relevant Pro Democracy Presentation and Website Pages

Option 5 – The Democratic Governance Model



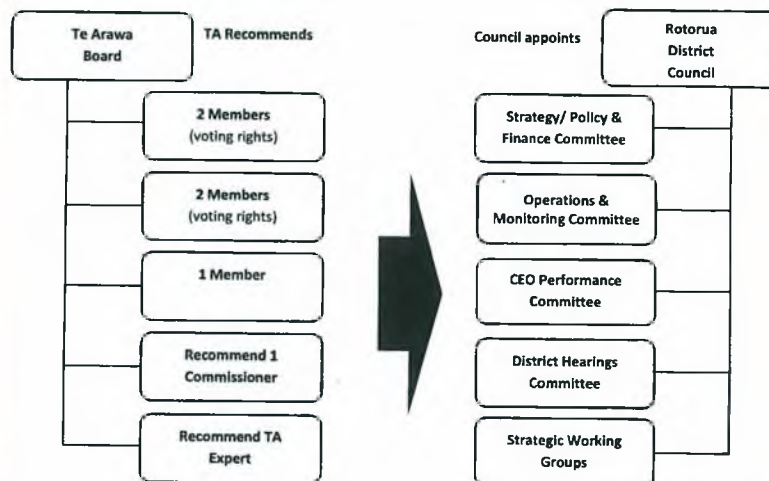
Presentation on behalf of the

Rotorua Pro-Democracy Society

Reynold Macpherson, Secretary
1140-1150 Thursday 30 April

Moral Reaction to the Partnership Plan

Input into Policy and Planning – Option 2 (Te Arawa Partnership Plan)



The Moral Ideal of Democracy

Democracy is a moral ideal that exists as values & principles that guarantee

- A political system for improving government thru free and fair elections
- Active participation of the people, as citizens, in politics and civic life
- The protection of the human rights of all citizens
- The rule of law; laws and procedures that apply equally to all citizens.

Democratic values are about making informed choices through engaging in open dialogue and debate, accessing relevant and objective information, seeing that debate and decision-making has value, feeling safe and making free decisions without suffering or fearing harm.

Democratic principles respect diversity in a common civilisation, value citizenship (with equal powers and rights to participate), and protect human rights (civil, political, economic, social and collective rights).

How Representative Democracy Works

Decision-making power in a representative democracy is reserved to elected representatives, to prevent undue influence by any interest group, to ensure that decisions are made in the public interest, and to hold them accountable.

Democratic decision-making by elected representatives means that citizens and collectives may participate as **advisers** in decision-making processes. They must be given the opportunity to contribute effectively as policy and planning advisers but not to participate in decision-making.

The test of effective representative democracy is not the extent to which it satisfies the preferences of one interest group, but the extent to which it reconciles the plural preferences of many interest groups in a diverse community.

Option 5- Democratic Governance Model

Council elected by and solely accountable to The People

Option 5- Democratic Governance Model

Council of Elected Representatives

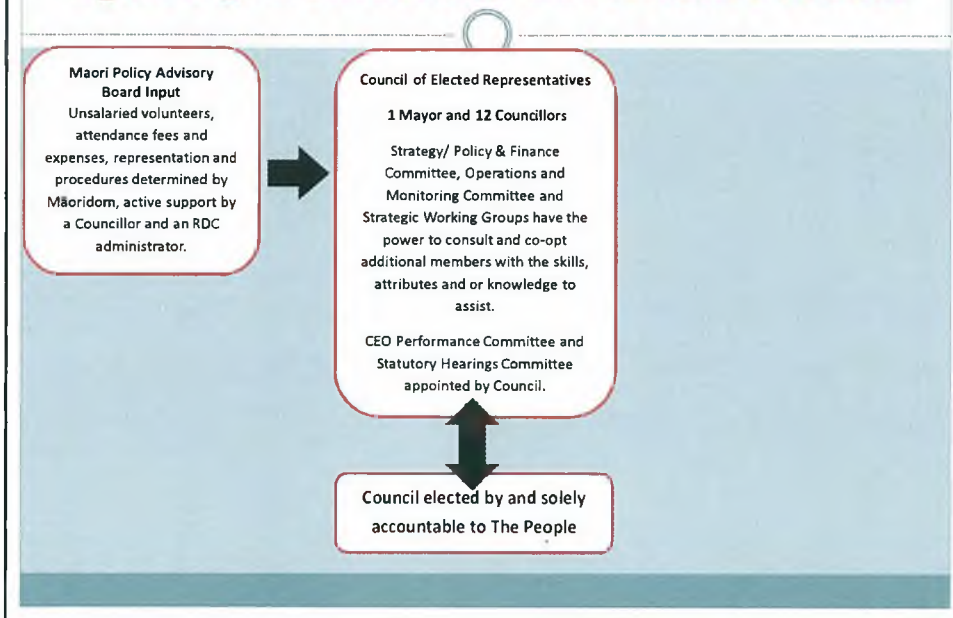
1 Mayor and 12 Councillors

Strategy/ Policy & Finance Committee, Operations and Monitoring Committee and Strategic Working Groups have the power to consult and co-opt additional members with the skills, attributes and or knowledge to assist.

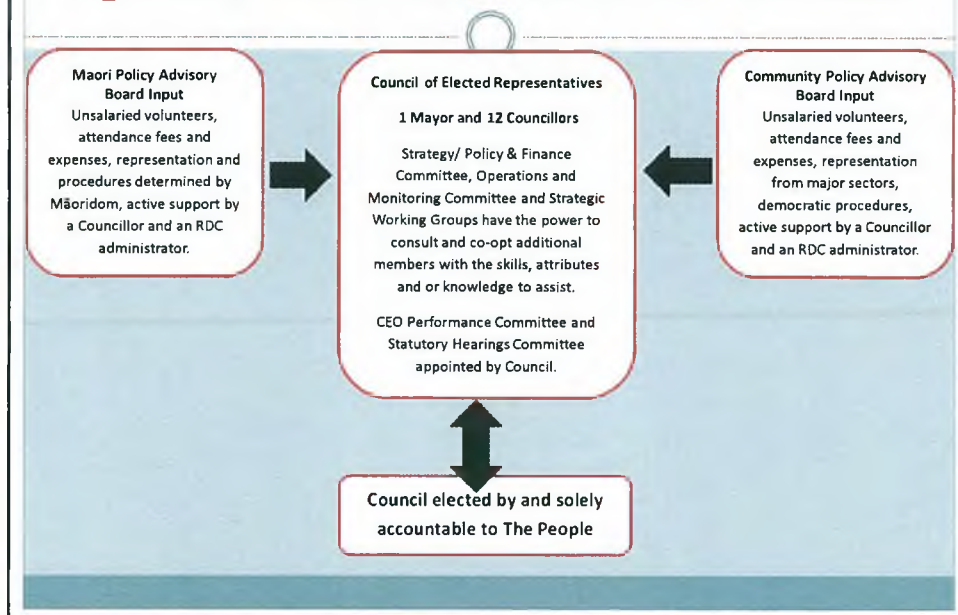
CEO Performance Committee and Statutory Hearings Committee appointed by Council.

Council elected by and solely accountable to The People

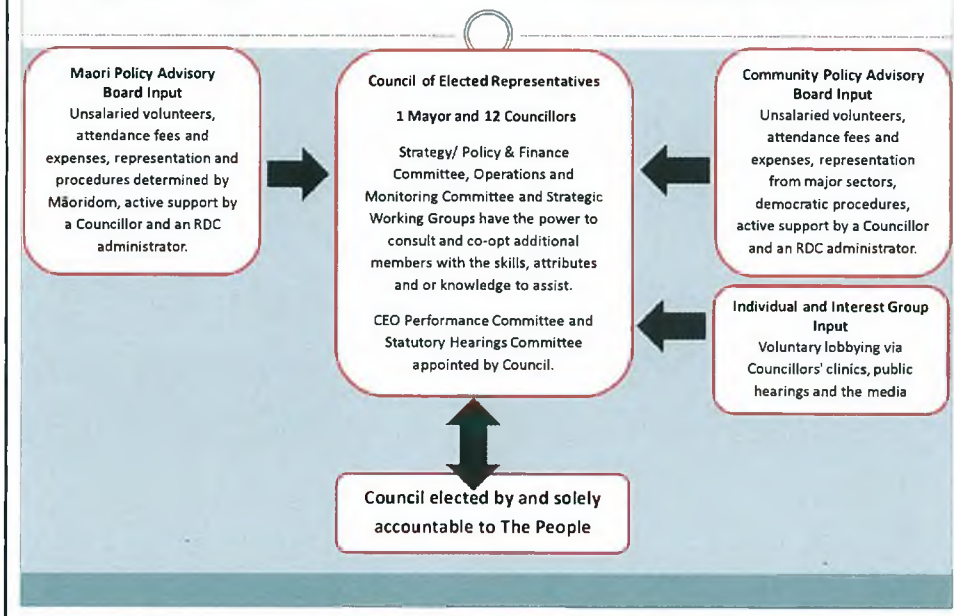
Option 5- Democratic Governance Model



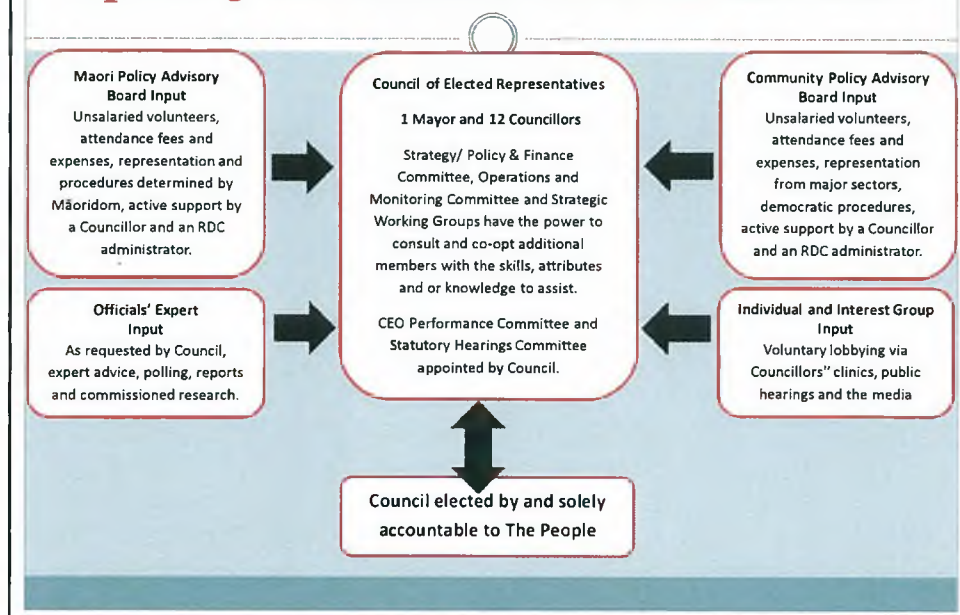
Option 5- Democratic Governance Model



Option 5- Democratic Governance Model



Option 5- Democratic Governance Model



What do The People Want?

A Personal Position: A Political Analysis

Reynold Macpherson

The People were polarised by the Hovell Report

Between early May and late July 2014, 46 (66%) of the 70 Letters to Editors and Articles **rejected the Partnership model** for the following reasons (n);

- **Race-based privileges** in representation going to Te Arawa (13)
- **Policy process** managed by the Mayor was biased in favour of a predetermined 'partnership' model and any lacked public consultation (13)
- **Politics of ethnicity** had created disharmony and may cause civil strife (7)
- **Giving unelected people power** over citizens corrupts representative democracy (6)
- **Reallocation of power not justified** by the Treaty or economic power of Te Arawa (5)
- **The undeclared costs** to the ratepayer would probably be unreasonable (2).

The People were polarised by the Hovell Report

24 (34%) of the 70 publications **supported the Partnership model** for the following reasons (n);

- **Maori sovereignty and partnership** guaranteed by Treaty and English common law (9)
- **Past and present contributions** by Te Arawa to Rotorua (4)
- **Representation required** by new Te Arawa entities and their economic power (4)
- **The Mayor's prior commitment** to co-governance and her courageous stand (4)
- **The Environment Court** judgment (2), and
- **Te Arawa not served well** in the past by democracy (1).

The People were polarised; 66% against, 33% for the proposed Partnership model.

The People were further polarised by the Tahana Report

56 articles and letters were published between 18 Dec 2014 and 31 Jan 2015

The 10 (18%) **supportive of the Tahana Report emphasised**

- Need for better and separate Maori representation (4)
- Democracy is part of racist colonisation (2)
- It reflects 12 months of consultations with Te Arawa (1)
- It meets legal obligations to engage Maori (1)
- The Mayor's electoral majority (1)
- Need for greater social justice (1)
- The unreasonable fearism of some correspondents (1)

The People were increasingly opposed to the Partnership Plan

46 (82%) articles and letters published between 18 Dec 2014 and 31 Jan 2015 **opposed the Partnership Plan**

- **Undemocratic**; unelected people to be given power (15)
- **Poor quality governance**; biased policy processes with outcome pre-determined (11)
- **Disproportionate ethnic representation** socially divisive, (8)
- **Limited public consultation** despite Council's Significance and Engagement Policy (5)
- **Risk to ratepayers** (5)
- **Exceeding legal obligations** exposing the Council to a judicial review (4)

On the basis of published commentary, The People's resistance to the Partnership Plan had hardened from 66% in July 2014 to 82% by the end of January 2015.

What did The People say through recent Petitions?

A Petition signed by 1370 (today 1712) requested: **That Council does not implement the Te Arawa Partnership Plan, Options 2 or 3, because they are undemocratic.**

An Online Petition signed by 250 (today 266) requested the Rotorua District Council **to adopt a Democratic Governance Model**

The 1978 petitioners actively opposed to the Partnership Plan and/ or preferring a democratic governance model, are 4.9% of the electorate, **22 signatures under the 5% needed to request a referendum.**

What did The People say in their Submissions?

Over **40% have rejected the vague platitude** about supporting in principle a partnering model: the proposal is deeply divisive and will be resisted.

The Feedback Form was **biased** to predetermine the outcome; Option 2, or to concede voting rights (Option 3) to get Option 2 by stealth.

I was **denied access to analyse** The People's responses.

The degree to which The People supported each of the four, now five options, **was not measured**.

This is unsound and divisive policy making.

What did The People say during the Special Consultative Process?

- **The SPC did not consult The People** on the four options, as promised, nor admit an Option 5, until today.
- The so-called Information Sessions were **push marketing of Options 2 or 3 by the partners**
- **The Feedback Form did not measure the degree of support for each of the four, now five Options.**
- The Mayor and Councillors **don't have the evidence they need** about what The People want to make fundamental changes to the governance.

Options and Implications for Councillors

1. **Reject the** data that indicate implacable and growing **resistance** by The People, **ram through** a decision to implement, and **endure a politics of regime change**.
2. **Game** the data, **evade** the moral ideals of democracy and **fudge** the doubtful legality of the Partnership Plan, and **risk a Judicial Review**.
3. **Accept that The People are deeply divided** by the Partnership Plan, **defer any decision**, and **refer the Plan to the Local Government Representation Review** with a view to a fresh, inclusive, democratic and effective policy settlement.

Rotorua Pro-Democracy Society Inc.

(<http://www.rotoruaaprodemocracy.nz/wp/>)

A Society to defend Rotorua citizens' rights to democratic local government.

Welcome to the Rotorua Pro-Democracy Society Inc. website

Support Us Now ! (<http://www.rotoruaaprodemocracy.nz/wp/support-us/>)

He aha te mea nui o te ao?

He tangata! He tangata! He tangata!

What is the most important thing in the world?

It is people! It is people! It is people!

The Rotorua Pro-Democracy Society is a society of citizens incorporated to protect members' democratic rights. The objectives of the Society are to

- Promote and advocate representative democracy in the Rotorua District, and elsewhere
- Ensure the Mayor and Councillors of Rotorua District comply with the law with respect to operations, policy making, purposes, performance and governance principles
- Ensure that Councillors give due consideration to the wishes of citizens when deciding policy
- Ensure that Council officials advise Councillors impartially and act to implement Council policy with fidelity

The Society will give members practical opportunities to promote and defend the democratic rights of all citizens in the Rotorua District, through peaceful, political and legal campaigns.

Rotorua Pro-Democracy Society Inc.

(<http://www.rotoruaprodemocracy.nz/wp/>)

A Society to defend Rotorua citizens' rights to democratic local government.

About Us

WHO WE ARE

The Rotorua Pro-Democracy Society is an incorporated society formed to defend the democratic rights of citizens living in Rotorua District. Formed initially by two District councillors, Mike McVicker and Rob Kent, together with a well-known local academic, Dr. Reynold Macpherson, it came about as a result of their concern at events taking place within Rotorua District Council. In a matter of only a few weeks the Society became a strong, vocal, and prominent advocate for the maintenance of democracy in the District.



District Councillors Mike McVicker and Rob Kent, and academic Dr. Reynold Macpherson

After calling for expressions of interest, and an initial society formation meeting attended by over 50 of those who had responded, the Society now has an elected committee, headed by Chair Glenys Searancke (also a long serving and well respected District councillor), and is now formally registered as an incorporated society.



District Councillor and Society Chairperson Glenys Searancke

The full elected and co-opted committee comprises District Councillor Glenys Searancke (Chairperson), Dr. Reynold Macpherson (Secretary), Len Watson (Treasurer), District Councillors Mike McVicker and Rob Kent, past District Councillor Julie Calnan, Blanche Kingdon, Hopuruahine Wairama-Whitu, Allan MacKenzie, Paddi Hodgkiss, Jim Hartwig, Eddie Hayllor, Marinus Koope and Waitsu Wu.

WHAT WE STAND FOR

The objects of the Society are to:

- Promote and advocate representative democracy in the Rotorua District, and elsewhere
- Ensure the Mayor and Councillors of Rotorua District comply with the law with respect to operations, policy making, purposes, performance and governance principles
- Ensure that Councillors give due consideration to the wishes of citizens when deciding policy
- Ensure that Council officials advise Councillors impartially and act to implement Council policy with fidelity

The Society will give members practical opportunities to promote and defend the democratic rights of all citizens in the Rotorua District, through peaceful, political and legal campaigns

OUR CONSTITUTION

The Constitution and Rules of the Society provide for the annual election of a Committee comprising a Chairperson, Secretary, Treasurer and five elected members, with the power to co-opt other members to the Committee. The Committee manages the Society under the leadership of the Chairperson.

A full copy of our Constitution is available here (http://www.rotoruaiprodemocracy.nz/wp/wp-content/uploads/2015/02/The-Constitution-and-Rules-of-the-Rotorua-ProDemocracy-Society-_Registered_.pdf)

WHY THE SOCIETY WAS FORMED

In May 2013 the Council was defeated in the Environment Court in an Appeal action by Ngati Pikiao Environmental Society Incorporated, Ngati Makino Heritage Trust, and Lake Rotorua/Rotoehu Ratepayers Association [2013] NZEnvC 116, and Council was ordered to pay the Applicants \$115,000 as a contribution towards their legal costs. Mr Tama Hovell of Auckland legal firm Atkins Holm Majurey represented Ngati Pikiao in this matter.

In the judgement of Judge J A Smith the Council was strongly criticized for “a significant dysfunction between Council and iwi residing within the district that needs to be addressed as a matter of urgency” [96], and for being “proven to have misled both the parties and the Court on several important matters”, and for “the reported lack of use of the Maori consultative committee” [102]

As a consequence of that criticism, a “Cultural Audit” was commissioned by Council to look into the Council’s failures to act and consult appropriately, Mr Tama Hovell who had represented Ngati Pikiao in the Appeal case being awarded the commission at a cost to Council stated at the time to be some \$30,000.

The results of that Cultural Audit had not seen the light of day some 12 months later, and still haven’t. On the appointment of the new Chief Executive, and a change of Mayor in October 2013, that Cultural Audit became a new commission for Mr Hovell unbeknown to the majority of Councillors – the design of a “Partnership Plan” to involve the iwi in Council decision making.

In May 2014, at the Mayor’s instigation, the “Te Arawa Partnership Plan” drafted by Mr Hovell was proposed to Council. This Te Arawa Partnership Plan [TAPP] proposed that the Te Arawa iwi form a Board outside of Council control, at ratepayer expense, which board would have the right to elect two unelected representatives, with full voting rights, to the two main Council committees, the Strategy Policy and Finance committee, and the Operations and Monitoring committee. In addition the proposal required that representatives of the Te Arawa Board would replace elected councillors on the Statutory Hearings committee that hears and determines Resource Management Act consents, and unelected Te Arawa Board representatives would also sit on the Chief Executive’s Performance committee, and on other committees and portfolio groups in Council.

The plan was flatly rejected by Rotorua District ratepayers as soon as it became public knowledge, and the Mayor’s intention to implement the TAPP by June 2014 came unstuck. Councillor Mike McVicker resigned his leadership of the Economic Development Portfolio in protest at the Mayor’s intention to gain seats on Council committees for an unelected pressure group whose membership was racially selected.

The matter was then referred to Te Arawa and a number of hui were financed by Council and supported by Council staff, and the same TAPP, with only relatively minor changes, resurfaced in December 2014 in the guise of a proposal from Te Arawa, sponsored by the Mayor.

In the intervening period a number of progressively unilateral decisions were rammed through Council by the Mayor on split votes, without proper consultation procedures being followed, and Councillor Rob Kent resigned his role on the Economic Development Portfolio in protest at the blatant bias used by committee chairs to force through decisions under the Mayor's direction.

In late November 2014 Councillor McVicker became aware of the Mayor's intention to re-introduce the TAPP without prior warning to Councillors at the last Council meeting before Christmas, on 18th December 2014, and he made the matter public. Councillor Kent joined him in protesting the Mayor's undemocratic intentions, and together with local academic Reynold Macpherson, who was also vocal on the subject; the decision was made to form the Rotorua Pro-Democracy Society.

At the Council meeting at 7pm on 18th December 2014, after a briefing to Councillors held only hours earlier, in front of a packed gallery the Mayor exhibited blatant bias, and used her position as Chairperson to overrule an amendment by Councillor Sturt, already seconded, proposing that the issue should go out to public consultation before Council made any decision on preferred options. Instead she proposed her own amendment (immediately seconded in a clearly pre-arranged set-up), to force through her own preference ensuring the option with full voting rights became Council's stated preference in the Statement of Proposal to go out to public consultation.

WHERE WE ARE NOW UP TO

The Rotorua Pro-Democracy Society is determined to see our democratic rights are protected, and that our local authority, Rotorua District Council obeys the law. We do not want to see democracy tampered with and legal requirement to enable Maori to contribute to local authority decision-making processes turned, by misrepresenting those legal requirements, into Te Arawa being given unelected seats on key council committees and Statutory Hearings panels, and therefore having undue influence in controlling council decision-making itself. If it's OK for Te Arawa to be given this unelected power, then why not all the other major interest groups that comprise our community being social, economic, and ethnic lobby groups as well?

We strongly urge everyone to join us in preventing this travesty against democratic principles, and erosion of our democratic rights, from being allowed to happen.

 (<https://www.facebook.com/pages/Rotorua-Pro-Democracy-Society-Inc/436732829817775>)

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Appendix Five: Fenton Agreement

Agreement for a Township at
Ohinemutu, between Francis Dart
Fenton, for the Government of New
Zealand, and the Chiefs of
Ngatiwhakau, Ngatirangiwewehi,
and Ngatiuenukikopako, the supposed
owners of the soil: —

5626

Certified as a correct translation of the original
except as to those clauses on pages 3 and 4 bracketed
and marked "Paragraphs omitted by the copyist may be
regarded as in the original." Those clauses are not in the
original.
Dated the seventh day of March 1895.

King of the
Tribes of the
South Island
and
Native Department
Wellington

1. The land from the West end of Te Pūkeroa
to Pueranga Stream, and from the lake Rotoma
up to the mountains, must be investigated;
and the ownership thereof certified by the
Native Land Court of New Zealand, excluding
the Native Village of Ohinemutu, as hereafter
defined. With this view, a claim defining the
boundaries must be immediately sent in to
the Registrar of the Native Land Court.
2. Immediately on the receipt of the Claim,
Mr. Smith, Chief Surveyor, will survey the
land comprised therein. As soon as possible
afterwards, the Court will sit at Ohinemutu.
3. As soon as the land is surveyed, Mr. Smith
will set off the town in the manner partially
indicated to Te Anohau and the other Chiefs,
this morning. The particulars of the Town
are as follows: —

Agreement for a Township at
Ohinemutu, between Francis Dart
Fenton, for the Government of New
Zealand, and the Chiefs of
Ngatiwhakau, Ngaturangiweuwhi,
and Ngatienukukopaki, the supposed
owners of the soil: —

5626

Certified as a correct translation of the original
except as to those clauses on pages 3 and 4 bracketed
and marked "Paragraphs omitted by the copyist may be
regarded as in the original." Those clauses are not in the
original.
Dated the seventh day of March 1839.

King of the
Tribes of New Zealand
and
Native Department
Wellington

1. The land from the West end of Te Pūkeroa
to Pueranga Stream, and from the lake Rotoma
up to the mountains, must be investigated;
and the ownership thereof certified by the
Native Land Court of New Zealand, excluding
the Native Village of Ohinemutu, as hereafter
defined. With this view, a claim defining the
boundaries must be immediately sent in to
the Registrar of the Native Land Court.
2. Immediately on the receipt of the Claim,
Mr. Smith, Chief Surveyor, will survey the
land comprised therein. As soon as possible
afterwards, the Court will sit at Ohinemutu.
3. As soon as the land is surveyed, Mr. Smith
will set off the town in the manner partially
indicated to Te Anohau and the other Chiefs
this morning. The particulars of the Town
are as follows: —

- 562
1. The site of the present Maori Village, between Te Pukeroa and the lake, will be left as it is, a "Kainga Maori"; but the present road is to be widened, if necessary, and carried on into the Town.
 2. Te Pukeroa to be a reserve for public recreation, under the management of certain Pakehas and Maories, to be nominated by the Committee.
 3. The persons who own pieces of land on Te Pukeroa are to be compensated by allotments in the Town. Te Komiti Nui of Roturua will arrange these exchanges.
 4. The Roman Catholic Church will receive a section of the Town, as compensation for their claims on Pukeroa.
 5. An experienced Doctor is to be stationed in the Town.
 6. All the medicinal waters within the claim shall be public reserves, and under the management of the Doctor, who may make laws regulating

Fide Agreement (see 2)
of 1841-83. 183/665

but for

- 562
1. The site of the present Maori Village, between Te Pukeroa and the lake, will be left as it is, a "Kainga Maori"; but the present road is to be widened, if necessary, and carried on into the Town.
 2. Te Pukeroa to be a reserve for public recreation, under the management of certain Pakehas and Maories, to be nominated by the Committee.
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 4. The Roman Catholic Church will receive a section of the Town, as compensation for their claims on Pukeroa.
 5. An experienced Doctor is to be stationed in the Town.
 6. All the medicinal waters within the claim shall be public reserves, and under the management of the Doctor, who may make laws regulating

Vide Agreement (see 2)
of 1881-83. 183/665

but for 1

their use.

5628

4. All the streets of the Town are to be conveyed to the Queen.
5. Land is to be given for a water course, to bring the water of Utuhina R. to the Town, free of charge.
6. Maori sick are to be admitted to the Hospital, without payment.
7. As soon as the Town is of sufficient importance, a Resident Magistrate, appointed by the Government, is to be stationed here. The Resident Magistrate, the Doctor, and a Native appointed by the Committee, shall be a Licensing Board for Public Houses, to the exclusion of all other licensing authorities, but until these persons are appointed, the existing authorities may act.

Paragraphs omitted
by the copyist,
may be regarded
as in the Contract.

The allotments in the principal streets of the Town to be a quarter acre; around the margin of the Town, to be larger.

The streets to be one chain and a half wide.

Reserves to be made for Court House, Telegraph Offices, Schools, Hospitals, and other public objects.

their use.

5628

4. All the streets of the Town are to be conveyed to the Queen.
5. Land is to be given for a water course, to bring the water of Utukina R. to the Town, free of charge.
6. Maori sick are to be admitted to the Hospital, without payment.
7. As soon as the Town is of sufficient importance, a Resident Magistrate, appointed by the Government, is to be stationed here. The Resident Magistrate, the Doctor, and a Native appointed by the Committee, shall be a Licensing Board for Public Houses, to the exclusion of all other licensing authorities; but until these persons are appointed, the existing authorities may act.

Paragraphs omitted
by the copyist,
may be regarded
as in the Contract.

The allotments in the principal streets of the Town to be a quarter acre; around the margin of the Town, to be larger.

The streets to be one chain and a half wide.

Reserves to be made for Court House, Telegraph offices, Schools, Hospitals, and other public objects.

5629

The Town to be drained into
Pueranga Stream.

8. The Allotments of the Town will be
let by auction, in Auckland, by the
Commissioner of Crown Lands, for a term
of ninety nine years. Rent payable half
yearly: — first half year's rent to be paid
in advance, on the signing of the Lease.

The Commissioner of Crown Lands
shall sign the leases, on behalf of the
Native Owners. The first half year's rent
will be received by the Commissioner of
Crown Lands, on the signing of the Lease.
All subsequent rents will be received by
him, or some officer appointed by him
for the purpose. These officers must
hand over the rents, after deducting costs
of advertisements, to some person to be
appointed by the Committee for the purpose.
If the Maori owners desire to have their
pieces partitioned, the subdivisions must
follow the lines of the sections. If the
Town or any part thereof is so apportioned,
the Commissioner or his appointee shall

File Dec. 2
of agreement
of Feb. 1893
1893/665

Appendix Six: Anthony Willy's Written Submission to Constitutional Review

Please Note: The submission has been sourced from a third party website. It has been used as an appendices item. For transparency the whole document has been provided for readers.

Anthony Willy, Sovereignty and the Treaty of Waitangi accessed 6 May, 2015, <http://www.nzcpr.com/wp-content/uploads/2013/09/SovereigntyAndTheTreatyOfWaitangiByJudgeAnthonyWilly.pdf>

SOVEREIGNTY AND THE TREATY OF WAITANGI

Anthony Willy LLM¹

August 2013



CONTENTS:

PREFACE - Notes on Sovereignty and the Treaty

PART 1 - Introduction

PART 2 - The Legal Status of The Treaty

PART 3 - The Treaty of Waitangi Act

PART 4 - The Principles of the Treaty

PART 5 - Conclusion on the Sovereignty question, and the honouring of the Treaty

APPENDIX 1 – Submissions on Constitutional Review

PREFACE- Notes on Sovereignty and the Treaty

In forming a government at the last election the National Party needed, and received the support of the Maori Party on matters of confidence and supply. Part of the price of that support was the establishment of a committee to examine, and make recommendations to the Government on various aspects of the New Zealand Constitution. Included among the matters to be enquired into is the place of the Treaty of Waitangi (the Treaty) in any proposed changes to the existing, largely unwritten, constitution.

My purpose in writing this paper is to review what I take to be the current legal status of the Treaty to ensure that any suggested changes to the current constitutional arrangements proceed from the law as it is, and not from notions of

¹ Judge Anthony Willy is a Barrister and Solicitor, and former Lecturer in Law at Canterbury University. He was appointed a District Court Judge and a Land Valuation Court Judge in 1985, an Environment Court Judge in 1993, and an Accident Compensation Appeal Judge in 1999 - retiring from those positions in 2005. He presently acts as an Arbitrator, a Commercial mediator, and a Resource Management Act Commissioner, and is a Director of several companies.

the law as some would like it to be. In particular whether or not the Treaty has any residual constitutional significance which could lead to it being incorporated into a written Constitution such that it might form the basis of some form of shared sovereignty.²

In the paper which resulted from that interest I make it plain that the law has recognised the moral force of the Treaty and on a number of occasions both in the domestic Courts, and The Privy Council, has required the Government of the day to honour promises which were made by the Crown to Maori leading up to the signing of the Treaty. Parliament has also passed the Treaty of Waitangi Act 1975 which established the Waitangi Tribunal with jurisdiction to examine whether or not the Crown has since 1840 failed to honour any of those promises. In the event that breaches are established the Tribunal has the right to recommend what should be the response of the Government to remedy such breaches. This is all well understood and both major political parties have embraced the process greatly enhancing the mana, and financial standing of Maori. No doubt this process will continue until all of the tenable claims have been settled.

What is of more enduring concern is whether or not the Treaty is capable of forming a platform for some form of shared sovereignty involving the Crown and Maori. After reviewing the relevant law and something of the history of the Treaty I have come to the view that:

1. Maori did not exercise any collective sovereignty over New Zealand in 1840 as that concept was then understood at International law.
2. The Treaty did not confer sovereignty on the Crown. Sovereignty was acquired by the willing concession of the Chiefs who signed the treaty that Queen Victoria would become the sovereign of New Zealand, and possibly in the case of The South Island the acquisition of sovereignty by British occupation.
3. In return for the acceptance of British sovereignty Maori acquired the benefit of the guarantees contained in the Treaty, and the promises made by the British government in the instructions given to Captain Hobson which formed the basis of the treaty negotiations.
4. There is no legal or Constitutional basis on which it could be said that the Treaty contains within it the residual potential to confer some form of joint sovereignty on Maori.
5. The “principles of the Treaty” referred to in the Treaty of Waitangi Act are to be found expressed in the instructions of the British government to Captain Hobson. The Treaty itself does not express any “principles”. It is simply a bargain between the Crown and the Chiefs who signed the document which provided that, in return for recognising Queen Victoria as their Sovereign, the Chiefs would acquire British citizenship and enjoy the protections referred to in the document.

² In an earlier paper (annexed as a appendix to this paper) I expressed the view that there is no legal authority for the proposition that Maori enjoy some form of partnership status with the Crown. What they do have is the benefit of the right to have honoured the promises which led to the making of the Treaty.

PART 1: Introduction

This paper is concerned solely with the question of whether or not there is anything in the Treaty of Waitangi (Treaty) that requires it to be incorporated into a written constitution, and having the effect of conferring sovereignty in and over New Zealand on twenty first century Maori.

"Honour the Treaty" has been a commonly heard cry from Maori since the document was signed by the Northern Chiefs on the 6th February, 1840. It is this repeated refrain that has probably led to the present initiative before the Constitutional Review Committee to enshrine the Treaty within a written New Zealand constitution.

That the Treaty has from time to time been ignored by Governments in formulating legislative policy is clear from the earliest cases in the New Zealand Courts including the Judicial Committee of the Privy Council (The Privy Council). Although these breaches have in the main been rectified, either by Court action or in the legislative process, some elements in the community apparently consider that the Treaty is of such fundamental importance to the history and future of New Zealand that it acts as a specie of Magna Carta and as such needs to become part of our formal constitutional arrangements affecting how the country is governed.³

PART 2: The Legal Status of the Treaty

The two relevant principles relating to treaties are:

- a. To have any lawful effect a treaty can only be made between sovereign states; and
- b. A treaty has no force of law in the signature countries unless it is expressly adopted into the law of those countries according to the constitutional usages of the parties to the treaty; in this case by Act of Parliament by the Governments of New Zealand and the United Kingdom.

a. The first requirement

Whether or not the first requirement is satisfied is fraught with confusion beginning with the instructions given by the British Government to Captain Hobson in 1839 as expressed by Lord Normanby. On the one hand it is stated that:

I have already stated that we acknowledge New Zealand as a sovereign and independent state.

But only:

In so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes who possess few

³ This article is not concerned with "Treaty Settlements." That is a political process which successive governments have thought it necessary and desirable to embark on, actuated by whatever notions of fair play are thought current and necessary to compensate Maori for loss of their lands and economic base in a contemporary world. I am concerned solely with examining what constitutional promises were exchanged between Maori and the British Crown as recorded in the Treaty, and how those promises fared in the courts. See the conclusions on the sovereignty question below.

*political relations to each other and are incompetent to act or even deliberate in concert.*⁴

And throughout the instructions doubt is cast upon whether or not Maori society did recognise any central government capable of exercising sovereignty as that concept was known to European law.

Whatever was intended by the instructions to Hobson on this point the view taken by the New Zealand Courts from the earliest time was that Maori had no sovereignty to cede to the Crown. One of the earliest cases to rule on the matter was *R v Symonds*.⁵ The judgment of Chapman J. in this case has been frequently referred to, approved and applied by later Courts. Chapman J said generally of the acquisition of title to new lands:

*The Crown's right is that it enjoys the exclusive right of acquiring newly found or conquered territory and of extinguishing the rights any aboriginal inhabitants to be found thereon.*⁶

By 1878 the view of the Courts as to the place and constitutional significance of the Treaty and whether Maori tribes enjoyed sovereignty in New Zealand had hardened, and in *Wi Parata v the Bishop of Wellington and the Attorney General*; Chief Justice Prendergast held:⁷

The existence of a pact known as the Treaty of Waitangi entered into by Captain Hobson on the part of Her Majesty with certain natives at the Bay of Islands and adhered to by some other natives of the Northern Island so far as the instrument purported to cede sovereigntyit must be regarded as a simple nullity no body politic existed capable of making cession of sovereignty nor could the thing itself exist.

The Chief Justice held that the title to the lands of New Zealand were:

acquired by discovery and priority of occupation,

saying:

*The sovereign of the settling nation acquiring on the one hand the exclusive right of extinguishment of native title assumes on the other hand the correlative duty as protector of aborigines of securing them of any infringement of their right of occupancy..... The Maori tribes are exactly on the footing foreigners secured by treaty stipulations to which the entire British nation is pledged in the person of the sovereign representative.*⁸

⁴ Although the instructions to Hobson were prepared in Lord Normanby's name, he had nothing to do with their compilation. They were first prepared by Mr James Stephen, Permanent Under Secretary to the Colonial department for the purposes of Lord Glenelg when in the 1838 that Minister was contemplating sending a Consular Agent to New Zealand. Normanby did however make substantial amendments to the text. See Buick, *The Treaty of Waitangi*, Capper Press, 1914, pg 70.

⁵ NZPCC, 1840-1932, 387 SC

⁶ *R v Symonds*, 388

⁷ NZ Jurist, 1878, Vol. 3 NS at pg 387

⁸ Ibid, pg.79

Although later courts differed on the question of whether there was any such legal notion of "native title"⁹ and came out against the views of Prendergast CJ on that matter, the view that the Treaty did not cede Maori sovereignty, or confer any legally enforceable rights on the indigenous population has been repeatedly upheld by the Courts for example in *Hoani v Te Heu Heu Tukina v Aotea District Maori Land Board*,¹⁰ their Lordships said:

If in a treaty it is stipulated that certain inhabitants should enjoy certain rights that does not give title to those inhabitants to enforce those stipulations in the municipal courts.

This proposition has never been doubted and remains the law of New Zealand in relation to the Treaty.¹¹ In *Te Heu Heu* their Lordships administered the additional warning that:

As regards the appellants argument that the New Zealand Legislature has recognised and adopted the Treaty of Waitangi as part of the municipal law of New Zealand it is true that there have been references to the Treaty in the statutes but even the incorporation of the Treaty into the municipal law would not deprive the legislature of the power to alter or amend such a statute by later enactments.

The decision of the Privy Council was affirmed by the New Zealand Court of Appeal in *New Zealand Maori Council v Attorney General*,¹² and expressly reaffirmed again by the Court of Appeal in *New Zealand Maori Council and Ors. v Attorney General and Ors.*¹³

From the forgoing it seems impossible to argue that Maori society in 1840 recognised any notion of sovereignty as was understood by the International Law of the day, and therefore in that sense had none to cede to the British Crown. It seems clear from the speeches of the Chiefs for and against the signing of the Treaty that they accepted (or expressly rejected in some cases) that from the date of the signing of the Treaty the Queen would become the sovereign of New Zealand subject to the guarantees contained in the Treaty, in return for which Maori would become British citizens enjoying the protection of the Crown from each other, and from settler groups which were established in the colony before the Treaty. For a more detailed discussion of the events surrounding the signing of the Treaty see the discussion on the Treaty of Waitangi Act 1975 below.

b. The second requirement

As to the second crucial requirement of the law relating to treaties; that they have no force or effect unless legislated into municipal law. This ingredient, in so far as it affected the land tenure of Maori existing at the date of the signing of the Treaty,

⁹ See *Hoani v Te Heu Heu Tukina v Aotea District Maori Land Board*, 1941, AC 308.

¹⁰ *Ibid*, 324

¹¹ *New Zealand Maori Council v Attorney General*, 1994, NZLR, PC 513, 515

¹² NZLR, 1987, 1, 641

¹³ NZCA, 2007, 269

which is clearly the crucial relationship between the protection of native land ownership rights and the acquisition of sovereignty by the Crown was expressed by Martin CJ in *R v Symonds* in this way:¹⁴

The right of the Crown and its British subjects is not derived from the Treaty of Waitangi nor could that Treaty alter it.....To the state shall belong the management and responsibility for (sic, land) distribution. In general it asserts nothing as to the course which shall be taken for the guidance of colonisation but only that there shall be one guiding power.

And quoting from the instruction to Captain Hobson¹⁵

*It is not however to the mere recognition of the sovereign authority of the Queen that your endeavours should be confined or your negotiations directed but also to land purchases.*¹⁶

About which the Judge commented:

*These instructions were carried out first by the Treaty of Waitangi and afterwards by the Land Claims Ordinance*¹⁷

And specifically of the acquisition of title to New Zealand lands, subject to the guarantees contained in the Treaty the Judge said:

*The Governor in New Zealand derives his authority partly from his commission and partly from the Royal Charter of The Colony.*¹⁸

The background to this assertion was that shortly before Hobson left Sydney for New Zealand in January 1840, Governor Gipps of New South Wales had issued three proclamations relating to New Zealand, one of which extended the boundaries of New South Wales to include such of New Zealand "as might be acquired in sovereignty." This was ratified on the 16 June 1840 by the Legislative Council of New South Wales which passed an Act extending the laws of New South Wales to New Zealand.

The Royal Charter referred to in the judgment of Chapman J. came after the signing of the Treaty and was a claim to sovereignty over all of New Zealand; the North Island by cession pursuant to the Treaty, and over the South Island by "right of discovery." The Charter¹⁹ empowered the Governor to form a Legislative Council to enact laws not repugnant to English law for the "peace order and good governance of New Zealand", but not so as to...

affect the rights of any aboriginal natives of the said colony of New Zealand to the actual occupation or enjoyment in their own persons or in the person of

¹⁴ *R v Symonds*, 1847, Pg. 395

¹⁵ United Kingdom Parliamentary Papers, 1840, pg. 38

¹⁶ In his instructions to Hobson Lord Normanby was at pains to emphasise that "all dealings with the natives for their lands must be conducted on the same principles of sincerity, justice and good faith as must govern your transactions with them for the recognition of her Majesty's sovereignty in the islands.

¹⁷ *Ibid*, Pg 397

¹⁸ United Kingdom Parliamentary Papers, May 11 1841, pg 31

¹⁹ New Zealand Government Act 1840, 3&4, Victoria, chapter 1

their descendants of any lands in the said Colony now actually occupied or enjoyed by such natives.

In 1841 the Legislative Council enacted the Land Claims Ordinance²⁰ (later confirmed in the Charter of 1852),²¹ which expressly recognised native title and conferred on the Crown the sole pre-emptive right to purchase any land which a native land owner wished to sell. The purpose of conferring this pre-emptive right was solely to protect the native land owners from exploitation. Chapman J said in *R v Symonds*²²:

In solemnly guaranteeing native title and in securing what is called the Queen's pre-emptive right the Treaty of Waitangi confirmed by the Charter of the Colony is that only the Queen can extinguish the native title (at least in times of peace) otherwise than by free consent.

The reference to "times of peace" no doubt reflects the fact that in 1863 when the Maori land wars were underway Parliament legislated that the Crown have the right to seize the lands...

of any native tribe or any considerable number thereof since the first of January 1863 being engaged in rebellion against Her Majesty's authority.

The status of the holders of native lands was further strengthened in 1862 with the passing of the Native Lands Act which set up a Native Land Court to enquire into and decide on competing claims to native land, and this protection enures down to the present time.

Conclusions about the current legal status of the Treaty.

- a. It has no force in New Zealand municipal law, and confers no rights which are capable of enforcement in a New Zealand Court.
- b. The stipulations in the Treaty relating to native title to land have been incorporated into New Zealand municipal law and have been enforceable by and against Maori and non-Maori land owners since the earliest time of colonisation.
- c. Sovereignty to New Zealand was acquired by the willingness of the chiefs who signed the Treaty, to recognise Queen Victoria as their sovereign, and possibly in the case of the South Island by discovery and occupation. All of which was subject to the solemn obligating of the sovereign to safeguard the existing rights and property of the indigenous occupants. The Treaty does no more than recognise that "real politic" reality. It was the later legislation discussed above which conferred on Maori the rights expressed in the Treaty not the Treaty itself.
- d. The Promises made in the Treaty were solemnly made and remain binding on the conscience of the Crown.²³

PART 3: The Treaty of Waitangi Act 1975

²⁰ New Zealand Legislative Council 1841,, Sessions 1 and 2

²¹ New Zealand Constitution Act 1852

²² Ibid, Pg. 390

²³ New Zealand Maori Council v Attorney General [1987] NZLR 641

Parliament has had 173 years (at the time of writing) to give legislative effect to the Treaty and incorporate it into the municipal law of New Zealand, but it has declined to do so. The reason must have been obvious to successive governments; there is nothing left of the words of the Treaty to incorporate. The safeguards promised to Maori relating to their land (until recently the overwhelming concern of Maori) have been comprehensively legislated for, and are part of the municipal law of the country protected by the Courts and the Bill of Rights²⁴. There is nothing left of the Treaty document relating to this matter which could be legislated for.

As to sovereignty this passed to Britain in 1840 either by discovery and occupation, or contrary to Chief Justice Prendergast's view by cession pursuant to the Treaty.

However one views it, either from a purist constitutional lawyer's point of view or from that of the lay person, the New Zealand Parliament as successor to the British Crown, has been the de facto and de jure²⁵ sovereign of New Zealand since at least 1840. This being so there is no element of the passing of sovereignty which is capable of enactment into some municipal statute.

All doubt about this matter was removed when Parliament enacted the Treaty of Waitangi Act 1975. If there had been any suggestion that some unlegislated for elements of the Treaty needed to find a home in New Zealand municipal this was the ideal opportunity. Not so, all the Act does is to create the Waitangi Tribunal as a body charged with the jurisdiction conferred by s 6:

6 Jurisdiction of Tribunal to consider claims

(1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—

(a) by any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after 6 February 1840; or

(b) by any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after 6 February 1840 under any ordinance or Act referred to in paragraph (a); or

(c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or

(d) by any act done or omitted at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—

*and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, **was or is inconsistent with the principles of the Treaty**, he or she may submit that claim to the Tribunal under this section. (My emphasis)*

²⁴ New Zealand Statutes, 1990

²⁵ In fact and in law

The jurisdiction is to investigate claims for any of the matters referred to in (a) to (d) above. The only matter of possible historic interest in this collection of matters likely to cause any Maori prejudice is (d) which refers to acts done or omitted since 6 February 1840, and it is that sub section which is the foundation of the Treaty settlement claims process. That said although nothing in the Act makes any provision for the incorporation of the Treaty into New Zealand domestic law, the preamble to the Act promises more it says:

Whereas on 6 February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the Maori people of New Zealand:

And whereas the text of the Treaty in the English language differs from the text of the Treaty in the Maori language:

And whereas it is desirable that a Tribunal be established to make the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles.

Preambles to legislation are not an operative part of document, but three things are apparent from this wording; first the Treaty was not between the British Government and all Maori, it was between the Queen and number of Maori Chiefs. As far as is known the Treaty has not been ratified by the British Parliament.

Second it is clear by necessary inference that there is nothing left of the literal substance of the Treaty which requires enactment into municipal law and all that is left is for Parliament to determine what is the "practical application of the principles of the Treaty".

Thirdly nowhere does the Act state what are the principles of the Treaty which are to be "practically applied". In the ordinary way in which lawyers and lay people construe documents, the principles which inform a bargain (which is what the Treaty is) are those which are clear from the wording chosen by the parties, or if the wording of the document is unclear then by recourse to necessary implication in order to make sense of the bargain. In the case of the Treaty the wording is clear beyond any doubt, and recourse to matters of inference from the surrounding circumstances is unnecessary. It cannot be any other way or there would be endless confusion and re-inventing of the bargain. Nowhere in the Treaty document are any principles enunciated. It is a simple transaction whereby Maori gave up whatever status they claimed over the lands of New Zealand and recognised the Queen as sovereign of New Zealand. In return they received the protection of the British Crown and a guarantee that:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

Like all such documents it must be construed against the background of the times and not as contemporary commentators would wished it to have been.²⁶ In terms of what the Crown guaranteed what must have been crucial to Maori were the practical benefits of security of existing land holding, access to food, access to forests for hunting and wood supply, and access to rivers as a means of transport and livelihood. What the Crown secured in return was sovereignty over the lands of New Zealand without the necessity (at that time) of an expensive and unpopular war.

There was also the altruistic motive spelt out in the preamble to the Treaty:

Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects.

It is clear beyond doubt that the parties to the Treaty acquiesced in this world view or it would not be in the document, and it mirrors what Prendergast CJ was getting at in *Wi Parata* (above).

A view often heard expressed is that the Maori did not understand the content and effect of the Treaty in so far as it ceded sovereignty to the Crown. Apart from being an insult to the intelligence of the chiefs who participated, Hobson was required by his instructions to be clear beyond any doubt that the parties understood the effect of the bargain. In his instructions from Lord Normanby he was enjoined to ensure that...

the natives must not be permitted to enter into any contracts in which they might be ignorant and unintentional authors of injuries to themselves.

The principal accounts as to what took place at the signing of the treaty (for example: Williams, Colenso and Felton) confirm that Hobson did all he could to ensure that the chiefs understood what they were signing, as did the officials charged with obtaining signatures of Chiefs who were not at the Waitangi signing.²⁷ It is also clear from the speeches of the principal chiefs that they were aware of what they were being asked to give up and what they would receive in return²⁸ which was:

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

It is easy to dismiss this as an empty concession of little practical value to Maori in 1840. Nothing could be further from the truth. In fact, as well as the guarantee of its lands etc., the protection of the Crown accompanied by a promise of British

²⁶ In 1839 when Lord Normanby's instructions to Hobson were being considered the British parliament was much concerned at the interest being shown in New Zealand by the French government. It was demanding rights of settlement and denied the sovereignty of Britain over the islands of New Zealand. There was also the earlier incident in 1814 when the Frenchman Baron De Thierry, leading a confederation of Maori Chiefs proclaimed himself sovereign of New Zealand. See also the negative role allegedly played by the Roman Catholic Bishop Pompellier at the signing of the Treaty by encouraging some of his protégé Chiefs to oppose the signing.

²⁷ See below for the views of some of the chiefs.

²⁸ See below.

citizenship, were probably the holy grail sought by the more astute Maori Chiefs. Indigenous society in 1840 was in a parlous state; beset by inter tribal warring (aggravated by the arrival of fire arms)²⁹, bereft of any central authority capable of governing and pacifying the peoples, (as the preamble records), beset by unscrupulous settlers and with food supplies at risk.

The prospect of sharing in the prosperity of the most extensive world power of the day must have presented to Maori a unique opportunity to become part of that empire, and so it proved to be. It is also well documented that the Maori was a natural trader, and the prospect of becoming part of the greatest trading block the world had ever known must have been appealing.

In the middle of the nineteenth century the British Empire was at its apogee. Its dominions extended from the English Channel to the Tasman Sea. More disparate peoples were governed from one capital city (London) than at any time in history. Maori could not have become citizens and subjects of a more extensive or powerful global enterprise. Being the naturally intelligent, and in their past adventurous sea-faring people, and traders they were, they must have realised the enduring benefits of this part of the bargain; particularly as they were not giving up anything in the way of collective sovereignty, and were receiving the guarantees contained in Article Two.

It is equally true that the bargain must have appealed to the British as experienced and shrewd colonisers primarily focused on trade and not conquest for its own sake. As Lindsay Buick writing in 1914 says in the preface to his first edition on the Treaty of Waitangi:

When we consider what Britain would have lost in material wealth, in loyalty, in strategic advantage; when we reflect what it would have cost to have conquered the country by force of arms then it is that we can see in clearer perspective the wisdom of Lord Normanby's policy, the breadth of his statesmanship, and we are better able to appreciate the triumph in diplomacy that the Treaty represents³⁰

PART 4: The Principles of the Treaty

Given there are no "principles" enunciated in the Treaty of Waitangi Act, there are only two possible conclusions as to what Parliament intended in referring to them. Either the preamble to the Act is a piece of empty rhetoric, or the meaning of the phrase must lie elsewhere. It is a well understood tenet of statutory interpretation

²⁹ In a letter dated the 16th November 1831 to King William IV, thirteen of the Chiefs in New Zealand sought the protection of the Crown against neighbouring tribes and British subjects residing in the islands. On the 14th of June 1832, the British government despatched Mr. Busby to New Zealand seeking to remind the Chiefs of the benefits of friendship with New Zealand and promising protection against the depredations of the settlers. It is clear at this time that Britain had no wish to annex the country. Although Governor Gipps and the Legislative Council of New South Wales issued three proclamations: extending the boundaries of that colony to include New Zealand and appointing Captain Hobson Lieutenant-governor over all of the territory of New Zealand that he may later acquire, and putting an end to land speculation in the colony.

³⁰ The Treaty Of Waitangi, Capper Press, 1914

that an Act of Parliament is always speaking. Parliament does not legislate for a nullity; therefore it is necessary to enquire what it was the New Zealand Parliament had in mind in referring to "Treaty Principles". In the writer's view it can only be intended to refer to those considerations which were present in the minds of the Ministers of the Crown who were responsible for proposing and concluding a treaty with Maori as set out in the instructions to Captain Hobson.

The timing of the decision to enter into a treaty with Maori is significant. By the time of the acquisition of New Zealand as a colony the British appetite for colonial expansion was on the wane. Indeed it is doubtful, by the eighteen forties, that Britain would have looked to colonise much beyond Australia had it not been for the fact that there was a sizeable body of British settlement already existing in New Zealand comprising; missionaries, and what seems to have been an unsavoury collection of whalers, traders, land speculators, and worse.

Coincident with this in Britain was the growing philanthropic and moral lobby of humanitarian (mostly Anglican) evangelicals which probably had its genesis in the movement for the abolition of the slave trade. The condition of society at that time gave this lobby plenty of other social ills to tackle; child labour in mines and factories, industrial safety, poverty, drunkenness, and widespread exploitation of the working classes. William Wilberforce, so instrumental in the abolition of the slave trade, had died only seven years before the Treaty was contemplated and his powerful influence remained. It was the time of the conscience raising writing of Charles Dickens.³¹ David Livingstone³² was embarked on his missionary exploits in Africa. Lord Shaftsbury³³ was crusading for the relief of child labour, and the reform of the lunacy laws of the day, and the advent of the suffragette movement was around the corner.

It was into this social ferment that Lord Normanby³⁴ (author of the instructions to Captain Hobson) was born and which influenced his career, rising as he did in 1839 to become Secretary of State for the Colonies. Although the instructions were probably drafted for his predecessor Lord Glenelg,³⁵ from the substantial changes which Normanby made to the early draft there can be no doubt that they had his imprimatur. It would also not have been lost on Normanby that Glenelg had been severely criticised in Parliament for his handling of the Canadian rebellion which broke out in 1837 in both upper and lower Canada, involving the use of widespread force against the insurgents. It is clear that Normanby wished to avoid the injustices, trouble and expense which accompanied a violent usurpation of a newly discovered land and this is reflected in his instructions to Hobson. They are comprised in a lengthy document which is a blend of real politic and lofty humanitarian aspirations. Thus it begins with the acknowledgement that New Zealand is possessed of "great natural resources", and occupies:

³¹ Born 1812, died 1870

³² Born 1813, died 1873

³³ Born 1801, died 1885

³⁴ Born 1797, died 1863

³⁵ Born 1778, died 1866

a geographical position in seasons either of peace or war which in the hands of civilised men to exercise a paramount influence in that quarter of the globe

concluding that:

There is probably no part of the earth in which colonisation can be effected with greater or surer prospect of national advantage

The national advantage was of course that of Britain not of New Zealand. Having stated the pragmatic geo-political reasons for colonisation New Zealand the instructions immediately record that there are: "higher motives for the enterprise". These proceed from a recognition that:

an increase of wealth and power consequent on any colonisation would be "inadequate compensation for the injury which must be inflicted on this kingdom by itself by embarking on a measure essentially unjust and but too certainly fraught with calamity to a numerous and inoffensive people whose title to the soil and to the sovereignty of New Zealand is undisputed and has been solemnly recognised by the British Government.

This is an extraordinarily humane approach to colonisation and illustrates how the senior statesmen of the day had come to realise that as a Colonial power Britain was dealing with an established society with its own history, concerns and ambitions which could not be violently trampled underfoot.

The instructions continued with the recognition of what Normanby considered to be settlers being:

persons of bad and doubtful character -convicts who had fled from our penal settlements and seamen who had deserted their ships.

and that such people were:

unrestrained by any law and amenable to no tribunals were alternately the authors and victims of every specie of crime and outrage.

Certainly Normanby had no illusions that the early settlers of the day were in any way more civilised than the Maori inhabitants.

He was also concerned about the amount of land that had been alienated by Maori to European settlers and conscious that much more would follow if the Crown did not intervene to ensure that:

unless protected and restrained by necessary laws and institutions they (sic the settlers) will repeat unchecked in that quarter of the globe the same process of war and spoliation under which uncivilised tribes have almost invariably disappeared as often as they have been brought into the immediate vicinity of emigrants from the nations of Christendom.

It was as to mitigate these evils that the instructions recorded that Britain had decided to:

*adopt the most effective measures for establishing amongst them a settled form of civil government. **To accomplish this design is the principal object of your mission.***

Normanby then turned to the crucial question of sovereignty saying:

I have already stated that we acknowledge New Zealand as a sovereign and independent state so far at least it is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes who possess few political relations to each other and are incompetent to act or even deliberate in concert. But the admission of their rights though inevitably qualified by this consideration is binding on the faith of the British Crown.

The instructions then eschew any intention by the Crown to seize the lands of New Zealand by force but will only govern them:

with the free intelligent consent of the natives.

recognising that this requires :

the surrender to Her Majesty of a right so precarious and little more than nominal and persuaded that the benefits of British protection and laws administered by British judges would far more than compensate for the sacrifice by the natives of a national independence which they are no longer able to maintain".

Normanby was conscious that even the terms of such a treaty would probably be alien to Maori and that this:

might enhance their aversion to an arrangement of which they may be unable to comprehend the exact meaning or the probable results.

The instruction was to overcome these difficulties with:

the exercise on your part of mildness, justice and perfect sincerity,

but recognising that Maori could not be protected from the possible depredations of the settlers and of :

the impossibility of Her Majesty extending to them any effectual protection unless the Queen be acknowledged as sovereign of their country"

Accompanying this was the future promise that only the Queen would be able to purchase land from any indigenous owner who wished to sell, thereby making all such transactions open to the scrutiny of the responsible officials which would ensure that any such sales were:

made with at least some kind of system with some degree of responsibility, subject to some conditions and recorded for general information.

This came with the promise that if the Queen's sovereignty became recognised by Maori then no other form of land sale and purchase would be recognised.

Finally on the matter of the aspirations of the Crown the instructions conclude:

There are yet other duties owing to the aborigines of New Zealand which may all be comprised in the comprehensive expression of promoting their civilisation, understanding by that term whatever relates to the religious intellectual and social advancement of mankind... the establishment of schools for the education of the aborigines in the elements of literature will be

another object of your solicitude;³⁶ and until they can be brought within the pale of civilised life, and rained to the adoption of its habits they must be carefully defended in the observance of their own customs, so far as these are compatible with the universal maxims of humanity and morals

The balance of the instruction to Hobson was concerned with the mechanics of Government, the Administration and the Courts.

How was the proposed Treaty received by the Chiefs who were called on to sign it?

This paper does not in any sense purport to be a history of the signing of the Treaty, but in saying something about how the chiefs regarded the Treaty gives a clue to the principles which they understood it to espouse.

At Waitangi Hobson, Busby and their officials received a mixed reception from the Chiefs. As Hobson was in the course of assuring the Chiefs that the Crown would carry out its promises in relation to Maori land holding and any future sales, Te Kemara chief of the Ngati-Kawa tribe, and a recognised Maori orator, interrupted telling Hobson (in translation);

I am not pleased towards thee. I will not consent to thy remaining in this country....were all to be on an equality then perhaps Te Kemara would say yes...you English are not kind to us like other foreigners you do not give us good things. I say go back, go back governor we do not want the here in this country.

Rewa chief of Ngai-Tawake, Moka chief of Patukeha, and Hakiro a great chief of the Ngati-Rehia tribe expressed similar sentiments, particularly concerning lands which the missionaries had acquired from Maori. In this he was supported by Kawiti, of Ngati-Hine. The tenor of opposition was interrupted by Tamati Pukututu a Chief of the Te-Uri-o-te-hawata tribe who is recorded as saying:

Remain Governor, remain for me. Remain here as father for us. These Chiefs say don't stay because they have sold all their possessions and are filled with foreign property and they have no more to sell. But I say what of that? Remain governor remain.

³⁶ The role of the missionaries was forefront in the realisation of these aims. In the long running court litigation of *Wallis v The Solicitor General*, 1903, AC 173 concerning the gift on 16th August 1848 of 500 acres of land at Porirua by among other chiefs Te Rauparaha, for the purposes of establishing a school similar to St John's already existing in Auckland, Lord Macnaghten in giving the judgment of the Privy Council overturning the New Zealand Court of Appeal, which declared the gift invalid and that the land to revert to the Crown, recorded his view of the interaction between Maori and the church leader of the day in this way. Speaking of Bishop Selwyn to whom the gift was made:

The Bishop as is well known acquired an extraordinary influence in New Zealand. His striking personality, his devotion to his Masters service and his zeal for the welfare of the Maori race had produced a profound impression on the native mind. Pg 17.

The gift of land in question was regarded by Lieutenant Governor Eyre as recorded in the Privy Council judgment as:

Such laudable and generous conduct will be made known in England and cannot fail of ensuring the commendation of all good men and the Queen will rejoice in seeing her Maori subjects setting so good an example to the Europeans.

In this he was supported by Matiu, a Chief of the Uri-o-Ngongo tribe, saying:

Do not go back but stay here a governor, stay remain with us. You are as one with the missionaries a Governor for us. Do not go back but stay here, a Governor, a father for us, that good may increase, become large for us.

But it was Wai, a chief of the Ngati-Awake tribe who brought the debate back to a discussion of the practicalities of land holding including; the return to Maori of any lands of which they had been unfairly dispossessed by the settlers. He also drew attention to the disparities in terms of trade between Europeans and, between Europeans and Maori.

To this point the weight of oratory had been against the signing of the Treaty, and it was then that Hone Hika (who later rose in rebellion against the Crown) delivered powerful support for the signing of the Treaty, saying:

Thou go away, no, no, no, for then the French people and the rum sellers will have us natives. Remain remain stay thou here; you with the missionaries all as one.

This was followed by the late arrival of Tamati-Waaka Nene, and his elder brother Patuone of Ngati-Hao. In his history of the Treaty, Buick³⁷ says of Nene:

To this chief with his great mental powers, his keen perception, his capacity to read the signs of the times it had long been apparent that the advent of the Pakeha was inevitable and that The Maori system was incapable of developing the principles of stable government. To enter now upon a campaign of hostility to the whites would he believed certainly result in the destruction of his own race. It was too late. Yet to govern themselves was manifestly impossible.

These observations are well born out by the extracts from Nene's oration recorded in Buick,³⁸ and was thought by the Reverend Clarke in his Notes on early life in New Zealand, to be the turning point of the debate. He was followed and supported by his elder brother Patuone, regarded as one of the fathers of Nga-Puhi.

Of course not all of the North Island Chiefs were present or represented at Waitangi, and following the signing there the Treaty document was taken on tour of the other great Chiefs. At Kaitia probably the most powerful of all the affirmations of The Threat was delivered by Nopera Panakareao. In the course of a powerful oration he said:

My desire is that we should all be of one heartI am at you head. I wish you all to have The Governor. We are saved by this. Let everyone say yes as I do. We now have someone to look up to.

The expressions of opposition were an entirely understandable. However eloquently it was expressed by Hobson and Busby there was a genuine fear among some Maori that they were losing something of value with no tangible benefits in return, or at least no promises on which they could rely. What is extraordinary is the foresight

³⁷ The Treaty of Waitangi *ibid*, Pg 141

³⁸ *Ibid*,Pg 142

and wisdom of those speaking in favour. They must have known that they were embarking on a voyage into the unknown but they were prepared to trust the word of the missionaries and Hobson that the promises made in the Treaty would be honoured.

Conclusions on the Treaty of Waitangi Act.

If it is correct to view of what is meant by the "principles" referred to in the Act as being a statutory recognition of the aspirations and putative promises of the British Government in instructing Hobson to attempt to effect a treaty with Maori, then the Act fulfils its purpose of setting up a mechanism for enquiring into whether or not those promises have been kept. Viewed in that way, the Treaty settlement process created by the Act is entirely consistent with the terms of the instructions to Hobson. It may be that some of the claims of breach have become a little far-fetched, but it is not the intention of this paper to examine that question. The important point in the writer's view is that the Treaty of Waitangi Act does not purport to enact into New Zealand law the Treaty of Waitangi, and does not do so. What it does do is to recognise the principles which informed the Treaty, and provides a means of enquiring whether the principles have been adhered to.

PART 5: Conclusions on the Sovereignty question, and the honouring of the Treaty

It is apparent from the foregoing that considerable confusion surrounds the passing of Sovereignty over New Zealand to the British Crown, and the instructions to Hobson are themselves unclear on this crucial question. On the one hand they refer to the Maori inhabitants as having sovereignty over New Zealand, and on the other of doubting whether in the social circumstances of the time Maori exercised sovereignty at all as it was understood in international law of the day. Indeed Normanby was doubtful whether they were capable of understanding such a concept given the fact that no one person or institution exercised power over more than localised parts of the country³⁹. Then there is the added difficulty of whether or not the treaty was intended to relate to the South Island, or whether as the Court in *Wi Parata* considered, this was terra nullius and annexed to the British Crown by discovery and occupation.

The Treaty itself does little to clear up this confusion. Article one of the English version states:

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

³⁹ See the judgment of Prendergast CJ in *Wi Parata*, *ibid*

Clearly this was intended to be a cession of sovereignty which the individual chiefs possessed, over the areas of the country which they actually exercised unchallenged control, or as was best known at the time, appeared to do so. That is a far cry from the exercise of sovereignty over a whole country as was then recognised as a necessity at international law. In the annals of the major acquisitions which became the British Empire, sovereignty was acquired either by occupation for example as in the American thirteen founding Colonies,⁴⁰ and Australia, or by conquest as in the West Indies⁴¹, India,⁴² the African colonies, and later Canada following the rebellion of 1837. It is true that treaties were concluded in many cases with the native inhabitants, but these were often imposed on the defeated inhabitants, and in no way similar to the ideals of just dealing and fair play which inspired the Treaty of Waitangi, and which makes the Treaty unique in the history of British colonisation.

The most likely answer to the sovereignty conundrum is that those chiefs who enjoyed exclusive dominion over lands in New Zealand ceded sovereignty over those lands to the Crown. Where there was no effective de facto dominion over the land it was simply acquired by discovery and occupation, both well recognised at international law. Chief Justice Prendergast's description of what took place although expressed in harsh terms is an accurate statement of the law of the day.⁴³

It follows that the Treaty has no continuing constitutional relevance to the governance of New Zealand other than as a platform for the Treaty of Waitangi Act and the resolution of any past breaches by the Sovereign. There is therefore no basis in law by which it should become part of any written constitution if one were to be contemplated. All of the important promises contained in the Treaty have been honoured. Maori land ownership was preserved to the original owners, and they were protected by the Crown's assertion of the right of pre-emption, British citizenship was conferred on all Maori, Maori have complete political equality (indeed unequal if one considers the Maori seats). Maori have completely equal access to educational opportunities and health care. They share in the benefits of the infrastructure introduced by the Europeans. They have equality before the law and have full access to the courts which from the earliest time they have exercised and continue to do so generally with much profit. Notwithstanding these enviable benefits (denied to many of the world's citizens) Maori enjoy in addition the court sanctioned benefit of having the spirit of the Treaty live on as it is embodied in the instructions to Hobson and the terms of the Treaty itself, and the Treaty of Waitangi Act, leaving it to the governments of the day to decide what are and what are not Treaty breaches. It is difficult to see how more comprehensively this transaction could have been honoured, or more completely it can be said that we are one people.

⁴⁰ Originally established in the seventeenth century by chartered companies which were subordinate to the Crown, and leading to the war of independence in the mid eighteenth century when the colonists attempted to assert independence from the crown on matters relating to taxation.

⁴¹ Ceded to The British Crown for the trading purposes of the South Seas company by the Treaty of Utrecht in 1713 with no regard for the native inhabitants.

⁴² Originally a trading destination founded by the East India Company which held a Charter from the Crown, and later the subject of prolonged and successful wars against the native rulers.

⁴³ See footnotes 13 and 14, *ibid*

APPENDIX 1

SUBMISSIONS ON CONSTITUTIONAL REVIEW

Anthony Willy LLM
June 2013

My submissions concerning possible constitutional changes in New Zealand are under the following headings:

1. Status quo
2. Social implications of change
3. Political implications of change
4. Economic considerations
5. Legal considerations

1. Status Quo

It is understood that the Constitutional Review Committee has been established as part of the political process by which The Maori Party agreed to support the National Party on matters of confidence and supply following the 2112 general election. The terms of reference make it clear that the committee's remit is wide ranging.

I comment generally under the above headings.

The status quo is that New Zealand has a unicameral Parliament elected pursuant to the Mixed Member Proportional system (MMP). This means that the party winning the most electorates does not necessarily govern. It is the party with the most list votes which carries the day.

Since the inception of MMP this has resulted in coalition governments comprising more than one party. The perceived advantages of MMP are that it provides for a wider spread of opinion in The Parliament and allows minor parties the opportunity of a real voice in government. This in turn reflects the overall unity of New Zealand society within a system which allows for a wider variety of opinion and input into the political process.

The MMP system is the only political check on the exercise of political power by any single group within the process. Specifically New Zealand lacks the oversight provided for by a second chamber, neither does it enjoy the checks and balances afforded by a Federal system of government which requires constant balancing of the rights and powers of states with those of the Nationally elected government.

2 Social Implications of departure from existing constitutional conventions

In my view the necessary protections of fundamental human rights and enforcement of obligations, rests heavily on the collective tolerance and common sense of the electors. To date this has delivered stable and effective government.

Any constitutional change which has the potential to erode this tolerance and common sense is not only unnecessary it is positively harmful. In that sense the present constitutional arrangements are not "broken and do not need fixing".

The elephant in the room in any New Zealand constitutional debate is always the status and rights of the indigenous people, and presumably that is why The National Party was persuaded by its coalition partner to set up the present review committee. I focus on this group because there does not appear to be any agitation by more recent immigrant groups or the descendents of the early European settlers for added, or amended constitutional rights.

It seems clear that Maori are not content with their status within the present constitutional arrangements but seek political influence disproportionate to the size of their voting population. This is apparently based on the dubious notion that they are the "first people of the land" and has in turn been encouraged by the pattern of Treaty Settlements, and the legal significance given by the Courts in more recent years to the Treaty of Waitangi. These added rights are pursued against the background of absolute political equality currently enjoyed by Maori people, including the unique privilege of race based seats in Parliament enjoyed by no other group of electors and therefore any change can only alter the present balance of political equality currently enjoyed by all New Zealand citizens.

By definition if added political rights are given to Maori then that will diminish the political rights enjoyed by all other New Zealand citizens. The constitutional cake is finite and to cut it more generously in favour of one group is to leave less for all of the others. That will without doubt erode the collective tolerance and commonsense upon which the present constitutional arrangements rest and which is crucial to the government of a society by means of an unwritten constitution.

It has been demonstrated repeatedly in other countries which do not enjoy a truly representative system of government⁴⁴ that this will lead to widespread resentment and given the necessary spark will lead to civil unrest. This is particularly so of New Zealand which historically has presented as a truly egalitarian society having its settler roots in rebellion against unrepresentative ingrained privilege.

The problem for the committee is compounded by the fact that Maori society has no such tradition. Left to itself it is historically more akin to a feudal society in which the power and the wealth is shared unequally among members of the group. There is no reason that any additional constitutional rights acquired as a result of the

⁴⁴ For example South Africa under the apartheid rule, and any of the numerous theocracies and one party dictatorships which currently exist around the world. We do not wish to ever see a "New Zealand Spring" or the need for "Velvet or Orange Revolutions" in New Zealand.

recommendations of the committee will be shared in any other way. Indeed if it were to be supposed that Maori would exercise any newly created privileges in some way more compatible with the existing arrangements then they would not need them, because they already enjoy complete political equality.

3. Political implications

A central tenet of the Maori agitation for increased constitutional rights is the enshrining of the Treaty of Waitangi as a document having constitutional significance. The implications of this are as unknowable. Of necessity the significance of such a constitutional change will be left to the Courts to decide and as in the case of some earlier judgments of our higher Courts this will depend on the political and social predilections of individual judges.⁴⁵

In the way in which these matters come before our courts it will take many years before the altered constitutional arrangements are bedded in, and when finally revealed they will represent not the democratic views of the voters but the views of a small and unrepresentative group of Judges.

In addition there will, of necessity occur a prolonged period of political uncertainty which will damage the economy and result in a loss of public confidence in the government of the day.

Before the Committee considers the place of the Treaty in the present day New Zealand constitutional arrangements it needs to do two things:

(a) Be satisfied to the highest standard of proof precisely which iteration of the Treaty is the valid original. There is respectable body of literature to suggest that the document included as a schedule to the Treaty of Waitangi Act 1975 is a modern revision which contains material crucial to the current debate which is not found in the original document signed by the Chiefs⁴⁶. On a matter of such enduring political significance Parliament has a duty to all New Zealand citizens to review this matter afresh and not be caught up in revisionist history no matter how well intentioned it was at the time of writing.

(b) The committee should look afresh at the legal status of the Treaty in the light of the validity of the pronouncements of various courts over the years since the Treaty was signed, and having regard to the social conditions which existed at the time of signing. There is much talk of the "principles of The Treaty" but beyond a vague association with a notion of "partnership" these have never been enunciated. Even a cursory reading of the text of the original document is sufficient to demonstrate that there are no "principles" enshrined in the treaty. It was a pragmatic Victorian political document which simply evidenced an exchange of the Sovereign rights enjoyed by the Maori signatories, for the protection of the British Crown; and a

⁴⁵ See below

⁴⁶ See essay by Bruce Moon- Real treaty , False Treaty Tross Publishing 2013

guarantee that lands and rights currently enjoyed by some of those Maoris⁴⁷ would be respected by the Crown.

There is a great deal of published material on both of these matters, much of which does not accord with the thinking current in some political quarters. Parliament is the highest court in the land and it has the power, indeed the obligation to revisit these matters before making any far reaching constitutional changes which may affect the peace and good governance of New Zealand. It is to be hoped that the work of the committee will confront these issues before making any recommendations to Parliament.

4. Economic considerations

The New Zealand economy rests on a narrow base largely dependant on its primary industries to pay its way in the world. Any constitutional change which makes it more complicated for business to function profitably will have an immediate impact on our terms of trade, and therefore our standard of living.

If the constitution is changed in such a way that any minority group is allowed what may well become vetoes on economic growth (as is very likely under the new Seabed and Foreshore arrangements) business competitiveness and individual wealth of New Zealanders will suffer. It matters not that this comes about by a moratorium on development imposed by the minority, or by "rent" extracted by that minority as the price of development the result is the same; unwarranted costs and less competitiveness. To allow this sort of economic privilege will also give rise to social resentment in the majority.

5. Legal considerations

As mentioned above much of the current debate about the place of Maori people in the constitutional arrangements of New Zealand arises not from determinations of the elected representatives of the people but from judgments of the courts. It is therefore crucially necessary that the committee revisit the more important of these judgments and decide for itself whether they represent conclusions which are relevant to a debate about the Constitution of New Zealand in the twenty first century.

In doing so the Committee should satisfy itself firstly: Whether the views of the various judges are simply that, personal views of individual judges, or represent the law developed having regard to the doctrine of precedent (binding on all judges); and secondly against the background of doctrine of the separation of powers enjoyed by the judiciary on the one hand and Parliament on the other.

⁴⁷ Clearly not the great proportion of Maoris because of the feudal nature of the society, in which ownership and tribal power was vested in the few. There is also the problem of whether or not Maori society ever practiced or understood ownership of property in the way which was common in the British Legal system of the day

The source of the current debate about the place of the Treaty of Waitangi as a constitutional instrument with a place in New Zealand law is The decision of the Court of Appeal in *New Zealand Maori Council v Attorney General*.⁴⁸ The decision in the case was in a sense a foregone conclusion because s 9 of The State Owned Enterprises Act 1986 required the Crown to have regard to the principles of the Treaty of Waitangi, and the Court both at first instance and on appeal so ruled.

What is more contentious and for which there was no prior authority is the exposition by the Court of what comprises the principles of The Treaty. They are referred to in the long title to the Treaty of Waitangi Act⁴⁹ above but no attempt is made in the Act to define what the principles are.

It is against this uncertain background that the Court of Appeal essayed its own definitions of those principles. Cook P said at pg. 663 that:

differences between the texts (sic The Treaty) and the shades of meaning do not matter for the purpose of this case. What matters is the spirit...the Treaty needs to be seen as an embryo rather than a fully developed and integrated set of ideas.

His Honour then went on to make the crucial determination that the:

*treaty signified a partnership between races and it is in this context that the answer to the present case is to be found.*⁵⁰

From this analogy Cook P then extrapolated the well understood common law requirement that partners must act toward each other:

with the utmost good faith which is a characteristic obligation of partnership.

Richardson J defined the Treaty as:

a solemn compact between two identified parties The Crown and The Maori....that basis of the compact requires the Crown to act reasonably and in good faith....an obligation of honour,

and:

There is one paramount principle...that the compact between the Crown and the Maori called for the protection by the crown of both Maori interests and British interests and rested on the premise that each party would act reasonably and in good faith towards the other within their respective spheres. That is I think reflected both in the nature of the treaty and its terms

⁴⁸ [1987] 1 NZLR 641

⁴⁹ See also at the time of the judgment: The Environment Act 1986 and the Conservation Act 1987

⁵⁰ Pg. 664

... if the treaty was to be taken seriously by both parties each would have to act in good faith and reasonably towards the other

Somers J adopted the dicta of an earlier Court⁵¹:

The Crown is bound both by the common law of England and by its own solemn engagements to a full recognition of native proprietary right

His Honour considered that the principles of the Treaty:

*must be the same today as they were when it was signed in 1840*⁵²

and referred with approval to the instructions of Lord Normanby for the drawing up of the Treaty that:

all dealings with the aboriginals must be conducted ...on the principles of sincerity justice and good faith

And crucially

Each party owed the other a duty of good faith. It is the kind of duty which in civil law partners owe to each other

Casey J and Bisson J expressed similar views. The important point which emerges from the Courts careful analysis of what are the principles of the Treaty relevant to both the time it was signed and in 1986 is that the parties owed and continue to owe each other obligations of sincerity, justice and good faith. By way of analogy these are similar to the duties which partners in a commercial venture owe each other.⁵³

On any careful reading of the Maori Council case the Court did not decide as has become commonly supposed that Maori and non Maori were in partnership with each other, a partnership created by the Treaty, merely that the Crown and Maori owe each other duties which are akin to those owed by partners to a commercial transaction. In the context of a constitutional debate and in particular whether the Treaty is a constitutional document the distinction is fundamental.

In the result Maori and the Crown are not partners in any sense of the word. Indeed it is constitutionally impossible for the Crown to enter into a partnership with any of its subjects⁵⁴. The true position is that the Crown is sovereign but owes duties of justice and good faith to the Maori descendants of those who signed the treaty.

⁵¹ Nireaha Tamaki v Baker (1894)12 NZLR 483

⁵² Pg. 692

⁵³ But not exclusively so under The partnership act 1908 the also includes the obligation to act justly and faithfully to each other.

⁵⁴ Ministers of the crown and senior Government official regularly enter into joint undertakings with outside entities but they do so as servants of the crown and not qua The Crown.

Once this distinction is understood there can be no question of the sovereignty of the Crown in New Zealand represented by the Governor General and The New Zealand Parliament, being shared with any other person or entity. It is one and indivisible.

The Treaty has served its constitutional purpose in transferring sovereignty in New Zealand to the British Crown. That sovereignty has been exercised for the last 173 years both de jure and de facto. It may be that various Maori groups can establish some historic breaches of the Crown obligation to act towards them in good faith but that says nothing about the Treaty as a constitutional document.

Summary:

1. The collective common sense and tolerance of the majority is a crucial ingredient in the current constitutional mix. To endanger that unspoken tenet of New Zealand's unwritten constitutional arrangements will have unknowable social consequences none of them benign, and possible resulting in widespread social dislocation.
2. The Constitutional cake is finite. To increase the power of one group will diminish the rights of all other groups.
3. The creation of one privileged minority group with either powers of veto, or to extract rent from necessary economic developments will damage New Zealand international competitiveness, suppress wealth creation, and give rise to widespread social resentment.
4. In a constitutional context The Treaty has served its purpose by transferring Sovereignty over New Zealand to the British Crown. that is a fait accompli, and therefore that element of the treaty has expired and has no continuing force. The obligation of the Crown to act toward Maori with justice and good faith remains.
5. There is not, and never has been a constitutional partnership between the Crown and Maori people. The judgment in the Maori Council case has been misinterpreted. The point which all of their Honours were making in that case was that the Crown has ongoing duties to act justly and in good faith towards Maori people in ensuring that they are not dispossessed of any of the class of assets owned by them mentioned in the original treaty document. That is the overriding principle to be extracted from the wording of the treaty