

CHAPTER 1

THE CLAIM AND THE PRINCIPLES OF THE TREATY OF WAITANGI

1.1 INTRODUCTION

This chapter contains:

- ▶ brief summaries of the claim and the Crown's response;
- ▶ an outline of the parties' Treaty arguments; and
- ▶ a discussion of the principles of the Treaty of Waitangi that the Tribunal considers to be relevant to the claim.

This information is presented in the opening chapter to assist readers to consider the evidence (outlined in some detail in chapters 2 and 3) within the framework provided by the Treaty principles. Chapter 4 contains both the Tribunal's assessment of the parties' evidence in light of those principles and our recommendations.

1.2 SUMMARY OF THE CLAIM

The claim, which was brought by Mohi Moses Huirama Osborne and Te Aroha Emma Adams, concerns the closure, on 3 October 1999, of a sole-charge primary school at Mokai. Both claimants are sole parents of children who attended the school before its closure. They were also members of the school's last board of trustees. (The amended statement of claim is set out in appendix 1.)

From 1994, the school provided a bilingual education to its pupils. At the time of the school's closure, and for an unknown period before that, all the pupils at the school were Maori. Since 1994, enrolment figures have been mostly in the range of 10 to 18 students, with a high of 24 and a low of four. In the three school terms of 1999 before its closure, enrolments at Mokai Primary School ranged from six to nine students. In 1997 and 1998, enrolments were consistently higher, ranging from nine to 24 students.

The Mokai village, matua marae (Pakaketaiari) and the school are situated some 30 kilometres from Taupo, in the vicinity of Atiamuri. The larger area of the seven hapu of Mokai is within the boundaries of both Ngati Tuwharetoa and Ngati Raukawa. The hapu are Ngati Te Kohera, Ngati Wairangi, Ngati Whaita, Ngati Haa, Ngati Moekino, Ngati Parekaawa, and Ngati Tarakaiahi.

Formal notice of the ministerial decision to close Mokai Primary School was published on 1 July 1999. The claim was submitted to the Waitangi Tribunal at the end of that month. At the same time, proceedings were filed in the High Court in an effort to obtain rapid judicial relief from the closure decision. Those proceedings, heard on 1 October 1999, were unsuccessful. The claimants then pursued their application to the Waitangi Tribunal for an urgent hearing of this claim. That application, heard on 21 October 1999, was granted.

The Tribunal heard claimant evidence on 23, 24, and 25 November 1999 and Crown evidence and closing submissions from counsel on 13, 14, and 17 January 2000. The entire hearing took place at Pakaketaiari Marae at Mokai. Further information about the hearing is supplied in appendix II.

The claimants contested the reasons for the ministerial decision to close Mokai Primary School. That decision was based in large part on seven unfavourable reviews of the school conducted by the Education Review Office (ERO) between 1991 and mid-1998. The claimants also contested the adequacy of the Ministry of Education's consultation with the school community during the nearly four-year period, commencing in November 1995, that was spanned by the closure process. They contended that the Crown did not give sufficient consideration to the school's importance to the children and the wider community of Mokai, nor to the efforts made by the school since late 1996 to improve the quality of education it was providing.

Those matters, it was said, are vital to the very identity of the people of Mokai and involve the taonga of te reo and matauranga Maori (Maori language and knowledge), which are protected by the Treaty of Waitangi. Had the Crown given due consideration to its Treaty responsibilities, the claimants argued, the Minister and Ministry of Education would have explored options, other than closure, that could have preserved and strengthened the unique and valuable opportunity that the school provided for Mokai children to be educated in their own community. This was not done, the claimants contended, with the result that the decision to close the school, and the consultation process that preceded it, breached the Crown's responsibilities under the Treaty of Waitangi.

1.3 SUMMARY OF THE CROWN'S RESPONSE

The Crown responded that the policy framework and its manner of implementing the Education Act 1989, which governs the operations of State schools, are consistent with its Treaty rights and responsibilities. In particular, the national system by which ERO measures schools' performance provides reliable assessments of the quality of education delivered by any school, including schools that teach bilingually.

Further, the Crown's governance role requires it to assess the viability of a particular school as part of the national network of schools. Therefore, when a number of factors, including poor educational quality, call into question a school's viability and there are alternative schools available to the students, the Crown is justified in taking the steps set out in the Education Act that can result in the school's

closure. The consultation that is required as part of that process, coupled with the Crown's awareness of its Treaty responsibilities, means that if the Education Act's steps are followed, as they were in relation to Mokai Primary School, no breach of the Crown's Treaty duties can be established.

1.4 THE PARTIES' TREATY ARGUMENTS

1.4.1 Kawanatanga: the Crown's authority to govern

(1) The claimants' position

The claimants' position is that the Crown's right of governance is qualified by the responsibilities that flow from the Treaty partnership, yet the Crown's dealings with the Mokai school community did not take proper account of those further responsibilities. It is notable that the claimants accepted that the exercise of the Crown's authority to govern could lead to a decision to close Mokai Primary School. However, it was said, such a decision would be within the Crown's authority only if it were made with due attention to the totality of the Treaty's meaning:

The claimants are not saying that the Crown could never close Mokai Primary School. The claimants have to accept that closure was an exercise of governance or kawanatanga which the Crown was entitled to take but only if in doing so the Crown gave due recognition [to] and considered its Treaty partner's guarantees, rights and the principles of the Treaty.¹

Accordingly, the claimants' argument about the ambit of the Crown's right of governance in relation to Mokai Primary School depends on their further arguments about the protection that is afforded by those Treaty principles that elaborate the guarantee to Maori, recorded in article 2 of the Treaty, of 'tino rangatiratanga o o ratou taonga katoa'.

(2) The Crown's position

The Crown's position is that, both generally and in relation to Mokai Primary School, its policies and conduct under the Education Act 1989 represent a legitimate exercise of kawanatanga. It was emphasised that the Crown's right of governance cannot be made subject to unreasonable restrictions as a result of the interpretation of other Treaty principles. In particular, it was said, the other principles are not intended to shackle the responsibility of a duly elected government to govern in the interests of all New Zealanders.² Instead, as the Judicial Committee of the Privy Council has stated, the relationship envisaged by the Treaty:

should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required

1. Document A29, para 3.20

2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 665–666 (the 'Lands case') (cited in doc A30, para 15)

in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances.³

For the purposes of the claim, Crown counsel summarised the essence of the Treaty's agreement in terms that emphasised the grant of British citizenship to Maori and the Crown's promise to protect taonga:

Article 1 of the Treaty expressed the cession of sovereignty. It gave to the Crown absolutely the rights of 'complete government', or kawanatanga, in exchange for the grant of British citizenship (Article 3) and the protection of the taonga of Maori (Article 2). Article 1 gave to the Crown 'forever' the authority to govern. As Richardson J stated in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (the Lands case) at p 682, adopting the words of Sir Hugh Kawharu:

'Maori acceptance of the first article in the Treaty gave the Crown sufficient authority to set about making and administering laws and regulations and eventually to establish constitutional government in New Zealand.'⁴

The broad implications for State schools of the Crown's view of its kawanatanga were then described in this way:

the Ministry of Education must exercise its responsibilities towards all State schools. It must ensure that all schools are providing education of the appropriate quality in accordance with the statutory requirements, and that in each case there is justification for the expenditure of limited government resources.⁵

The Crown interpreted the claimants' Treaty arguments to mean that all Maori have the right to insist upon a certain type of education wherever they might be located throughout the country. One consequence of this would be that the Crown could never exercise its governance in such a way as to close Mokai school against the wishes of the community, even if there were serious concerns about the quality of education being delivered by the school and about the school's viability. Despite claimant counsel's express denial that this was the claimants' position (quoted in section 1.4.1(1)), Crown counsel said in her closing submissions that the claimants:

assert that Article 2 of the Treaty supports an argument that a community such as that at Mokai has an absolute right (by virtue of the Treaty and not for any educational or social policy reasons) to receive a State education which accommodates that community's interests in the taonga of the Maori language and traditional knowledge and customs, disregarding all other considerations. They further assert that that right extends to delivery of that education in the context of the particular identity and place of that community.⁶

3. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC) (the 'Broadcasting Assets case') (cited in doc A30, para 16)

4. Document A30, para 12

5. Ibid, para 21

6. Ibid, para 10

Before Crown counsel read that passage from her submissions, she acknowledged that claimant counsel had expressly denied that the claimants were asserting ‘an absolute right for Maori to have an education at the place of their choice’. In response, she stated, ‘it is difficult for the Crown to see that the case for Mokai is inherently different from any other place where there may be a Maori community’.⁷

1.4.2 The principle of partnership

(1) *The claimants’ position*

Claimant counsel summarised the Treaty principle of partnership as requiring:

the Treaty partners to act reasonably and with the utmost good faith towards one another. The parties owe each other co-operation and in cases where there are Treaty implications a responsibility to make informed decisions which will require some consultation.⁸

It was plain that the claimants regarded the partnership principle as providing the relevant standard for assessing the sufficiency of the consultation undertaken by the Ministry of Education in the school closure process. As well, this principle underpinned the claimants’ argument that, by closing the school, the Crown gave insufficient attention to the importance of Maori language and knowledge to Mokai identity and autonomy and so failed to protect taonga. In his closing submissions, claimant counsel referred to the education quality and school viability issues that were considered by the Minister and asked:

where was the consideration by the Crown of the effect of closure upon the autonomy of its Treaty partner? The Crown possessed knowledge of the importance of this school as a focal point for this community and the close links between the school and marae. The Crown was possessed of knowledge that the school had a focus on bilingual education and was teaching te reo Maori. The Crown was possessed of knowledge that the school placed emphasis on local history, local heritage and local tikanga.

... Nowhere is there evidence that these factors were considered by the Crown.⁹

By relying on the Treaty principle of partnership, the claimants made plain their view that the school community is a Maori community exercising tino rangatiratanga that can expect the Crown, in the exercise of its kawanatanga, to take reasonable steps to respect and protect its interests. However, throughout the claimants’ submissions and evidence, there were few express references to the tino rangatiratanga of Mokai. Instead, claimant counsel and most witnesses described the values and relationships that unite the Mokai people as ‘the Mokai identity and autonomy’ or, more emotively, their ‘Mokaitanga’. It is the Tribunal’s understanding that this terminology was preferred for the very reason that it draws attention to the particular community involved in the claim. Occasionally, claimant counsel made it explicit that the tino

7. Second hearing, tape 13A

8. Document A29, para 3.38 (citing the Lands case)

9. Ibid, paras 3.22–3.23

rangatiratanga of the Mokai hapu is central to the claim. For example, in closing submissions, he stated:

If the Crown's case is that the appointment of a Commissioner would have impacted upon the tino rangatiratanga of Mokai where does that then leave the decision to close [the school]? Closure in that sense completely removes the tino rangatiratanga of the Mokai community, which it is submitted the Treaty principles do not permit.¹⁰

The claimants' accounts of Mokai tino rangatiratanga are returned to in connection with their arguments about the Treaty principle of active protection of taonga. The point of note for present purposes is that the claimants' reliance on the Treaty principle of partnership assumes a relationship between the Crown and the Mokai community, in their interactions concerning Mokai Primary School, in which not only the Crown's kawanatanga but also the community's tino rangatiratanga is relevant.

(2) *The Crown's position*

The Crown's response did not acknowledge that the Treaty principle of partnership is directly relevant to the claim. Instead, Crown counsel submitted that the consultation required by section 154 of the Education Act 1989 (as part of the school closure process) depends on the same basic features as are required by that Treaty principle, and that these were complied with.¹¹ More generally, the Crown submitted that the principles of the Treaty 'colour the interpretation' of the Education Act.¹² The High Court decision in *Barton-Prescott v Director-General of Social Welfare* was relied on in this regard – in particular, a passage from the judgment of Justices Gallen and Goddard where their Honours expressed the view that 'all Acts dealing with the status, future and control of children are to be interpreted' in this way.¹³

1.4.3 The Crown's duty actively to protect taonga

(1) *The claimants' position*

The claimants acknowledged 'the Crown's commitment to Maori education and in particular te reo Maori and matauranga Maori' but claimed that, by closing Mokai Primary School, the Crown failed to protect those taonga.¹⁴ It was made very plain that the claimants' understanding of the interdependent relationship between the people of Mokai and the taonga of te reo and matauranga Maori is critical to this claim. Claimant counsel, using the claimants' terminology, explained the relationship in these words:

What the claimants are asserting is that they have a distinct local Maori identity and autonomy, that is, their Mokaitanga. Mokaitanga is defined by its history, its tikanga, its

10. Document A29, para 3.53

11. Document A30, para 130

12. Ibid, para 63

13. *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179, 184

14. Document A29, para 4.6

whakapapa links, its marae. Interwoven through the Mokai identity is te reo Maori and matauranga Maori, central components not only of Maori culture but also of all local Maori identities.¹⁵

The school, it was said, played a vital role in preserving and strengthening the Mokai identity, 'including all its various components in particular its tikanga, matauranga and reo particular to this area'.¹⁶ Therefore, it was submitted, when the Crown considered closing the school, it needed to take into account far more than the fact that the school was teaching bilingually:

The point is not solely confined to the teaching in Maori. It is that Maori was being taught at Mokai Primary School together with local Maori tikanga and matauranga which assists this community in the retention of their local identity and autonomy, their Mokaitanga.¹⁷

While claimant counsel did not expressly invoke the Treaty principle of tino rangatiratanga, claimant witnesses' accounts showed that Mokai tino rangatiratanga is central to their understanding that the Crown's closure of the school was in breach of Treaty principles. For example, Mere Wall, the last chairperson of the school board, gave this overview of the claim:

This isn't really just about education. This is about who we are. Our identity. This is about our whole being, our wairua, our tinana, our tikanga, our kawa. . . . And it is time for us to stand up, as we are doing, and reclaim that. . . . It comes from an inbuiltness to strive and to fight for who we are. You take away a man's identity, he has no face. You move these tamariki out of Mokai, they have no face. They are faceless out in the world. You keep them here, you give them solid roots and solid foundations, as they go out to the world and they can face them with a face. So that when people ask them, 'Ko wai koe?' 'Ae ko au,' and [they] say who they are with pride and with dignity.¹⁸

Koti Te Hiko explained the claim in this way:

I believe that if we are to retain the ahi ka or Mokaitanga then we need to educate our tamariki here in Mokai. Te ahi ka is within us when we are born but it must be nurtured within Mokai for it to survive. As the future kaumatua and kuia of Mokai the tamariki must walk alongside their parents and grandparents to learn the ways and responsibilities of the people. With the marae being so close there is a natural flow and interaction between what we sometimes call the triangle, this being the marae, the Mokai village and the school.¹⁹

In support of the claimants' understanding that the principles of the Treaty of Waitangi required these matters to be considered by the Crown before it could close the school, claimant counsel referred to the evidence given by the Ministry of

15. Ibid, para 3.34

16. Ibid, para 3.18

17. Ibid, para 3.28

18. First hearing, tape 9A

19. Document A10, para 5

Education's group manager Maori, Rawiri Brell. When explaining the Ministry's vision for improving the quality of education delivered to Maori children, Mr Brell stated:

Under this kaupapa, the formal and informal processes of the marae and the integration of this with education, are critical to the formal process of education. The marae can exist and has done so without the education system, but the programme of education from early childhood to tertiary is enhanced if integrated with the dynamics of the marae. Relying simply on the education sector to achieve this is not as effective as the integration of all parts of the education sector into the life of the marae.²⁰

Mr Brell then said that it is not the sole responsibility of a school to provide te reo Maori or knowledge in tikanga Maori. Rather, there is a point at which 'the responsibility to provide intimate local tikanga must be given over to the community'.²¹ Expressly accepting the validity of this point, the claimants' position was summarised as being that 'in this particular setting, the school was together with the marae' serving the objectives referred to by Mr Brell; namely, of integrating the formal processes of education with the processes of the marae.²²

As a result, for the claimants, the matter at the heart of the claim is whether the Crown, by its decision to close Mokai Primary School and the process by which that was achieved, actively protected 'local Maori identity/autonomy, te reo Maori and matauranga Maori'.²³ It was submitted that the Crown's approach was 'narrow' for not considering the interdependence of these fundamental matters.²⁴

(2) The Crown's position

The Crown accepts that Maori language and culture are taonga of Maori and that the State education system has a role to play in carrying out its duty actively to protect those taonga. Its position is that the Crown's duty is fulfilled by the provision of a statutory framework under which the taonga may be protected and by the existing and developing strategies by which it supports communities' initiatives to implement the protection in ways that suit them.²⁵

Crown witnesses were far from complacent about the education system's present ability to close the gap between the attainments of Maori and non-Maori pupils. In particular, Mr Brell acknowledged that there is a long way to travel to achieve the goal of an education system that provides 'a high quality of education to Maori'. That education, he elaborated, would equip 'all young people with the skills, knowledge and confidence to live successful lives' and would ensure that children 'are confident in their own identity, culture and language'.²⁶

Crown counsel stated in closing submissions:

20. Document A20, para 30

21. Ibid, para 31

22. Document A29, para 3.17

23. Ibid, para 3.13

24. Ibid, para 3.24

25. Document A30, paras 23, 24

26. Document A20, para 19

the Crown has . . . identified many areas for improvement in the delivery of education to Maori. It has acknowledged the discrepancies in educational achievement between Maori and non-Maori students, and has taken significant initiatives for overcoming those discrepancies. As Rawiri Brell's model suggests, the answer lies to a significant extent in ensuring that Maori students obtain an education characterised by the high quality of its programmes in the curriculum as a whole, and by the application of those standards to the delivery of education in te reo Maori and tikanga.²⁷

Despite the claimants' emphasis on the interdependence of the matters, the Crown's submissions did not acknowledge or address the relevance of the Mokai community's tino rangatiratanga to the Crown's duty to protect the taonga of Maori language and knowledge. Instead, when defending the Minister's knowledge of the effect that the closure of Mokai school would have on the community, Crown counsel stated:

[claimant] counsel did not indicate what considerations are specifically regarded as relevant for the community, as distinct from those relevant to the children and their whanau. In this context, it is important to note that in the field of primary education ultimately it is the best interests of the children that must be given priority. Therefore, consideration was given to the distance the children could have to travel to attend the alternative schools and of any costs to the whanau for that travel.²⁸

1.4.4 Article 3: the rights of British citizenship

The claimants did not rely on article 3 of the Treaty at all. The Crown, however, submitted that, in modern-day terms, article 3 guarantees Maori 'equality of access to the benefits, rights and privileges of all citizens'.²⁹ That State primary education is regarded by the Crown as one such right is apparent from counsel's next statements, which summarise the tenor of the evidence given by several Crown witnesses:

All citizens are entitled to a quality, state-funded primary education. However, equality of education does not mean that all students must receive precisely the same education. The State education system is well equipped to accommodate Maori language and culture within the framework of curriculum delivery and to deliver that education.

In addition, total immersion education and bilingual teaching are expressly supported: the first through the provisions for Kura Kaupapa Maori education (s 155 of the Act); the second through initiatives such as Maori Language Resourcing, the provision of curriculum and teaching materials in Maori language, and dedicated training for teachers working in the sphere of Maori education.³⁰

27. Document A30, para 66

28. Ibid, para 44 (as amended orally at hearing)

29. Ibid, para 46

30. Ibid, paras 47–48 (as amended orally at hearing)

1.5 THE TREATY PRINCIPLES RELEVANT TO THE CLAIM

1.5.1 Introduction

The contrast between the claimants' and Crown's positions signals the existence of fundamental differences in their understandings of the Treaty principles. We consider that the source of these differences is the parties' quite separate understandings of the relevance to the claim of article 2 of the Treaty of Waitangi, by which the Crown promised Maori tino rangatiratanga o o ratou taonga katoa as part of the exchange for the grant of kawanatanga.

Stated baldly, the claimants' view is that the Crown has overreached the limits of its kawanatanga by an attitude and actions that have failed to recognise the interdependence of Mokai tino rangatiratanga and the taonga of te reo and matauranga Maori. The Crown's view is that its kawanatanga justifies its protection of the taonga of Maori language and knowledge by means that do not pay particular attention to the Mokai community's assertions of a unique identity and autonomy. From the Tribunal's perspective, the result of the fundamental difference in the parties' approaches to the Treaty of Waitangi meant that, despite the care with which they assembled and presented their evidence, they 'talked past each other' during the hearing to a significant degree.

Our own analysis of the relevant Treaty principles has been assisted by the statements of the courts and the Waitangi Tribunal in the wide range of situations in which the Treaty has now been discussed and applied. In particular, we have paid close attention to the Tribunal's 1998 report on the claim by Te Whanau o Waipareira because it provides an in-depth account of the matters on which there is a lack of accord between the parties to this claim, most particularly the nature of tino rangatiratanga and how the relationship between the Crown and Maori is to be approached in modern times.³¹ (The text of the Treaty of Waitangi, in English and Maori, is set out in appendix III.)

1.5.2 Kawanatanga

We observe first that the meaning of the Treaty principle of kawanatanga cannot be understood independently of the principles that, together with the principle of kawanatanga, elaborate the spirit and nature of the Treaty relationship. In shorthand form, the effect of the other Treaty principles on the Crown's right of governance may be said to require the Crown to exercise 'quality kawanatanga' or, more familiarly, 'good governance', where the meaning of 'quality' and 'good' is determined by the consistency of the Crown's governance with the entirety of the Treaty's principles.

1.5.3 Tino rangatiratanga

The essence of tino rangatiratanga is found in the reciprocal relationships that exist, between a group's leaders and supporters, for the purpose of maximising the group's

31. Waitangi Tribunal, *Te Whanau o Waipareira Report*, Wellington, GP Publications, 1998

interests. As was explained by the Tribunal in its report on the claim by Te Whanau o Waipareira, tino rangatiratanga describes a value that is basic to the Maori way of life and permeates the essence of being Maori:

In contrast to the way it is often interpreted today, to mean autonomy, sovereignty, authority, or control – that is, as the exercise of rights – . . . rangatiratanga also concerns responsibilities, duties, obligations, service, and accountability – the other side of the same coin. Further, both leaders and supporters are equally important in the exercise of rangatiratanga – leaders cannot act decisively, creatively, boldly – effectively – without the respect, loyalty, and trust of their community. Both leaders and supporters owe each other reciprocal rights and duties.

Rangatiratanga, then, is grounded in reciprocity: a reciprocity between rangatira and their community. . . . Their leadership focuses not on self-interest but on the survival of the community at a level of maximum advantage. . . . A relationship of rangatiratanga between leaders and members is how a Maori community defines itself; it gives a group a distinctly Maori character; it offers members a group identity and rights.³²

We agree with and adopt that analysis, which, we consider, reveals that the ‘Mokai identity/autonomy’ or ‘Mokaitanga’ referred to and explained by the claimants is another way of referring to their tino rangatiratanga. As will be seen in chapter 2, the claimants’ evidence was directed at demonstrating that the survival of the Mokai community depends on its children being ‘educated into’ the community and that this is a matter of such importance that the State education system should, wherever reasonably possible, be a vehicle for that learning. That is why claimant evidence did not separate the welfare of the children from the welfare of the community, nor the role of the school from the role of Mokai marae and village, which are also critical elements in the community’s survival. We agree that the education of Maori children into their own community is a responsibility of tino rangatiratanga, properly understood. We also recognise that the relationships and values of tino rangatiratanga are evident in the Mokai community.

A further aim of the claimant evidence was to show that te reo and matauranga Maori are the primary means by which the people of Mokai know and identify themselves. Quite simply, for the people of Mokai – as for the people of other traditionally organised Maori communities – te reo and matauranga are concerned primarily with the resources – human, material, and spiritual – of their own past, present, and future. Accordingly, any suggestion that the primary value of those taonga can be found elsewhere effectively denies Mokai people their own identity.

This is why, when Mrs Wall spoke of giving the children of Mokai a face, we understood her to mean that the children’s confidence to manage their lives is best developed within their own community through learning about and taking pride in who they are. When Mr Te Hiko spoke of preserving te ahi ka of Mokai, we understood him to mean that the source of Mokai people’s belonging, which is

32. Ibid, pp 25–26

founded on whakapapa connections that are maintained over time, can be conveyed only by those living on their ancestral land and through their own knowledge of the world. That knowledge encompasses not only contemporary knowledge but also matauranga tupuna, the understanding and application of tikanga, history, creativity, and whakapapa that is specific to particular whare wananga, hapu, and rohe.

That, in turn, is part of why we understood claimant witnesses to be saying that their use of the Maori language clearly distinguishes who they are and to whom they belong. Indeed, Tuhuriwai Rangikataua said it directly when he recounted how he had learned the Maori language as an adult while living away from Mokai and was told by his kaumatua upon his return that his dialect was not that of his own people (see sec 2.3). Known as te mita – the life essence of the language, which serves as an identity marker – the local specificity of language derives from the differences between the human, material, and spiritual worlds of different Maori groups and is, in turn, an expression of each group’s identity.

This understanding of tino rangatiratanga, with its inevitable connections with the taonga of te reo and matauranga Maori, does not appear to be shared by the Crown. Throughout the hearing, Crown witnesses and counsel did not acknowledge the tino rangatiratanga of Mokai and referred to the taonga in terms that did not emphasise their ‘local dimension’. Crown counsel acknowledged the claimant’s view that ‘local knowledge and customs’ and ‘the community’s interests in the taonga’ are vital.³³ However, counsel’s choice of language served only to record the Crown’s awareness of the claimants’ understanding, not to endorse it. Further, the Ministry of Education’s explanation of matauranga Maori appears to reveal the view that it is part of the identity of iwi, rather than of hapu:

Matauranga Maori means Maori systems of knowledge and refer to the way in which Maori view things in a Maori world. *Matauranga Maori can vary from iwi to iwi*. It is generally accepted that teaching through Maori requires a foundation of matauranga Maori. The Ministry is aware of schools that are successfully implementing programmes using a foundation of matauranga Maori, eg Kura Kaupapa. [Emphasis added.]³⁴

We are confident that our understanding is in accord with the Treaty principle of tino rangatiratanga. Its essence, as stated in the report on the Waipareira claim, is that Maori communities are entitled to identify themselves, and to manage their affairs, in accordance with Maori custom and values.³⁵ In the words of that Tribunal, the principle is:

simply that Maori are guaranteed control of their own tikanga, including their social and political institutions and processes and, to the extent practicable and reasonable, they should fix their own policy and manage their own programmes.³⁶

33. Document A30, para 10

34. Document A25(1), p 23

35. *Te Whanau o Waipareira Report*, p 15

36. *Ibid*, p 26

We endorse that expression of the tino rangatiratanga principle and also agree with the Waipareira Tribunal's analysis of its consistency with the preamble in the Maori text of the Treaty and with historical opinion of Maori expectations at the time that the Treaty was signed.³⁷ Importantly, that Tribunal concluded that article 2 of the Treaty does not prescribe a finite list of objects over which the tino rangatiratanga of Maori groups would be respected but reflects an intention that it would generally be maintained:

We would not therefore read article 2 of the Treaty as circumscribing the operation of rangatiratanga but rather as reflective of it, and of the pervasiveness of rangatiratanga as a cultural norm. The principle now falls to be determined according to the new circumstances that apply in the late twentieth century.³⁸

In the present claim, the Crown suggested, by its brief submission on the modern-day meaning of article 3 of the Treaty (see sec 1.4.4), that State education is not a proper subject of the tino rangatiratanga of Maori groups, or, at least, of groups like Mokai. We note that the Crown's evidence of the existence and aims of iwi-based schooling improvement initiatives may demonstrate its recognition of iwi tino rangatiratanga and so of the need to balance Crown and iwi rights and responsibilities in the State education of Maori children. Whether or not that is so, the Crown's suggestion that State education is purely an article 3 'equal rights' matter was not given heavy emphasis in the claim, perhaps because the analogous argument (in relation to social and welfare services) was firmly rejected by the Waipareira Tribunal.

We also reject such an argument. Our recognition of the tino rangatiratanga of the Mokai community leads to the conclusion that the Treaty principle of tino rangatiratanga is relevant to the interactions between the Crown and the Mokai community over the State education of Mokai children. No other view is possible in light of the fact that those children are the recipients of State education and, as is acknowledged by the Crown, State education has an important role to play in the fulfilment of the Crown's duty actively to protect the taonga of Maori language and knowledge.

1.5.4 Partnership

The question raised by the claim is how Mokai tino rangatiratanga should be respected by the Crown's exercise of governance in the arena of State education. In seeking to answer it, we have found further guidance in the Waipareira Tribunal's report.

The Tribunal in that claim approached the comparable question before it by observing that the perception of a partnership relationship between Maori and the Crown arises from historical evidence of Maori and Pakeha expectations at the time of the signing of the Treaty as well as from the Treaty's exchange of 'the gift of

37. Ibid

38. Ibid, p 27

kawanatanga’ for ‘protection and the guarantee of rangatiratanga in all its forms’.³⁹ Noting that a partnership is a relationship where one party is not subordinate to the other but where each must respect the other’s status and authority in all walks of life, the Tribunal then emphasised that the partnership established by the Treaty is ‘a relationship between the Crown and Maori generally’. This led it to criticise and reject what it saw as a tendency to regard the Treaty partnership in a narrower, more contractual, way – as if it describes ‘a relationship between the Crown and particular classes of Maori persons’. Explaining that this line of thinking does not arise from the courts’ or the Waitangi Tribunal’s interpretations of the Treaty, the Tribunal reconfirmed that the primary purpose of the partnership concept is to describe the way in which Maori and the Crown should relate to each other.⁴⁰

In exploring further how Maori and the Crown should relate in the multitude of situations in which they are interested in modern times, the Waipareira Tribunal considered very closely the nature of the protection that is promised by the Crown to Maori by the Treaty. It concluded that the protection embraces all of the things, including tino rangatiratanga, that are important to Maori life. We agree with this conclusion, and we cannot improve on that Tribunal’s explanation:

As was noted by the Tribunal in the *Muriwhenua Land Report*, it was stated when the Treaty was signed, in response to Maori questioning, that the Maori custom would be respected and protected. In article 3, the Crown’s protection applies in respect of ‘nga tikanga katoa’ – all customs and values – just as it did to those of British subjects; and the term ‘taonga’ in article 2 encompasses all those things which Maori consider important to their way of life, which rangatiratanga so clearly is. For so long as there is adherence to such fundamental values as rangatiratanga entails, Maori custom survives, although in a number of new institutions and forms, and is guaranteed Crown protection.⁴¹

1.5.5 Active protection of taonga

In the present claim, the Crown acknowledged that Maori language and knowledge are taonga of Maori and that the State education system has a role to play in discharging the Crown’s responsibility to protect them. Our understanding of those taonga has already been outlined (see sec 1.5.3). The result of our discussion is that the Treaty principles of tino rangatiratanga and active protection of taonga provide the foundation of the partnership between the Crown and Maori. Accordingly, they must always guide the Crown’s efforts to find a reasonable balance between its kawanatanga and the rights and responsibilities of Maori communities in each of the many modern situations in which Maori interests are involved.

What is reasonable will, of course, depend on all of the prevailing circumstances. Chapters 2 and 3 of this report present in some detail the claimants’ and the Crown’s views of the circumstances involved in their dealings over Mokai Primary School. It is

39. *Te Whanau o Waipareira Report*, p 27

40. *Ibid*, pp 28–29

41. *Ibid*, p 26

the Tribunal's task to assess, from the parties' evidence and within the framework provided by the Treaty principles, whether a reasonable balance was maintained in their dealings so that the Crown can rightly claim to have exercised 'good governance' in all the circumstances. Chapter 4 of this report contains our assessment of those matters.

Of particular relevance to the balancing task, we consider, is this passage from the 1990 Tribunal report on the radio frequencies claim:

The protection of tino rangatiratanga means that iwi and hapu must be able to express their autonomy in the maintenance and development of their language and their culture. This inevitably involves taking more time over the consultation process, but this may provide a refreshing experience and an opportunity to get it right the first time, in pragmatic terms.⁴²

Finally, we note that the Waipareira Tribunal observed that an important question in that claim, arising from the principle of protection, was whether the Crown policies and practices in issue there 'enhance the solidarity and integrity of Maori communities and empower the people, or whether they divide and rule them'.⁴³

42. Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies*, Wellington, Brooker and Friend Ltd, 1990, p 44

43. *Tē Whanau o Waipareira Report*, p 215

