

M. P. K. SORRENSON

# KO TE WHENUA TE UTU LAND IS THE PRICE

ESSAYS ON MAORI HISTORY, LAND AND POLITICS

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M. P. K. Sorrenson (Ngati Pukenga, Pakeha) is one of New Zealand's most important living historians. He began as a junior lecturer in the University of Auckland history department in 1958, and completed a DPhil at Oxford and further research in East Africa, before returning to Auckland in 1964. He taught there for the next 31 years. He was president of CARE in the 1970s, sat on the council of the New Zealand Historic Places Trust for a decade and was a leading member of the Waitangi Tribunal for 25 years. He is author or editor of numerous books on African and New Zealand history, including *Maori Origins and Migrations: The Genesis of some Pakeha Myths and Legends* (AUP/OUP, 1979) and the three-volume work *Na To Hoa Aroha, From Your Dear Friend: The Correspondence between Sir Apirana Ngata and Sir Peter Buck, 1925–1950* (AUP, 1986, 1987, 1988), both of which have just been launched as ebooks by Auckland University Press.

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“There are essentially two histories of Aotearoa. First, a long Maori history, beginning with their Pacific origins, continuing through their arrival in Aotearoa and intensifying with the arrival of Pakeha, those strangers who were very different from the tangata maori, the ordinary people. And secondly, there has been a history of Pakeha colonisation and take-over of Aotearoa, not always taking much note of the tangata whenua, the people of the land, but never able to totally ignore them. The two histories have been repeatedly stitched together . . . .”

For more than half a century, Keith Sorrenson – one of New Zealand’s leading historians and himself of mixed Maori and Pakeha descent – has dived deeper than anyone into the story of two peoples in New Zealand. In this new book, Sorrenson brings together his major writing from the last 56 years into a powerful whole – covering topics from the origins of Maori (and Pakeha ideas about those origins), through land purchases and the King Movement of the nineteenth century, and on to twentieth-century politics and the new history of the Waitangi Tribunal. Throughout his career, Sorrenson has been concerned with the international context for New Zealand history while also attempting to understand and explain Maori conceptions and Pakeha ideas from the inside. And he has been determined to tell the real story of Maori losses of land and their political responses as, in the face of Pakeha colonisation, they became a minority in their own country. *Ko te Whenua te Utu / Land is the Price* is a powerful history of Maori and Pakeha in New Zealand.

## Towards a Radical Reinterpretation of New Zealand History: The Role of the Waitangi Tribunal



Until recently, most commentators have relied on the English language text of the Treaty of Waitangi. According to this the Māori chiefs transferred their sovereignty to the Queen of England, were guaranteed the possession of their lands, forests, fisheries, and other properties, yielded a right of pre-emption to the Crown to purchase their land, and were granted royal protection and the rights and privileges of British subjects. New Zealanders have generally assumed that these provisions of the Treaty have been upheld. The Treaty has been seen as a fundamental instrument of a broader policy — of bringing Māori and their lands within the compass of British (and in due course colonial-made) law; a policy of assimilating the Māori, thereby making one people, according to Hobson's well-known dictum, 'he iwi tahi tatou.' That saga has formed a central theme of most Pākehā versions of New Zealand history.

But, we need to remember that the Treaty of Waitangi was written in two languages, English and Māori. With the exception of the English language text signed by 39 Māori at Manukau and at Waikato Heads — often subsequently regarded as the 'official' version — all of the copies signed by Māori were in their language. Māori people have usually regarded this as the real and binding version of the Treaty. Its meaning to them has been very different from the

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meaning Pākehā have taken from the English version. Some of the key concepts in the English text, like sovereignty, could not easily be rendered into Māori. The translators fell back on transliteration, with sovereignty rendered as 'kāwanatanga', or governorship. That concept was not unknown to Māori since it had been used in translations of the scriptures and in reference to the British governor of New South Wales. Under the Treaty, kāwanatanga was to be exercised by a new governor in New Zealand. According to the preamble, he was to protect the Māori and their property from Europeans now colonising the country. However, the power and autonomy of the chiefs — their 'rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga' (their chieftainship over their lands, their homes and other treasures) — was expressly preserved in the second article of the Treaty. To the Māori chiefs who signed the Treaty, that rangatiratanga was far more than a guarantee of their possession of land and other properties; it was also a guarantee of their autonomy and authority, above all their mana, as chiefs; even, in some recent interpretations,<sup>1</sup> a guarantee of Māori sovereignty. Such Māori views of the Treaty have been frequently voiced at Māori gatherings since 1840, have sometimes found their way into the written record, and have been increasingly noticed by historians and lawyers over recent years.

The fact that there are two histories of the Treaty of Waitangi, stemming from the English and Māori texts, is a sure reminder that Hobson's hope that the Treaty would facilitate the formation of one people has not been realised. Because of the determined efforts of the Māori people to resist assimilation and preserve their identity, the Treaty has become the basis, rather, for the coexistence of two peoples within one nation.

The recent attention of historians and lawyers to the Māori text of the Treaty has provided an academic background to attempts by successive Governments to give better recognition to the promises of the Treaty. Ruth Ross's seminal essay, 'The Treaty of Waitangi: Texts and Interpretations', published in 1972,<sup>2</sup> was the first significant analysis of the two texts of the Treaty, and of the role of Henry Williams in devising a Māori text and persuading the Māori chiefs assembled at Waitangi to accept it. D. F. McKenzie has taken the process of textual analysis much further.<sup>3</sup> Claudia Orange's published doctoral thesis<sup>4</sup> also considerably elaborates the textual studies, while making the fullest examination yet of the signings of the Treaty, at Waitangi and elsewhere, and of its continuing significance for both races in subsequent New Zealand history. She has done more than any other historian to recover that submerged Māori history of the Treaty which has hitherto existed largely in oral tradition.

Such work of historians has been paralleled by that of lawyers. Until recently it was common for academic lawyers to reiterate court judgments on the Treaty, stemming from that of Chief Justice Prendergast in 1877 to the effect that it was a nullity. In 1934 H. F. von Haast summed up the prevailing view by arguing that the Treaty was not cognisable in international law and was only applicable in domestic law in so far as certain provisions had been adopted in local statutes.<sup>5</sup> Von Haast's views were generally accepted by lawyers — and by historians like James Rutherford<sup>6</sup> — until the late 1960s. Then a new generation of academic lawyers, including F. M. Auburn,<sup>7</sup> W. A. McKean,<sup>8</sup> P. G. McHugh<sup>9</sup> and D. V. Williams,<sup>10</sup> inspired by changing interpretations of international law and important decisions in the courts, especially in North America, began to chip away at the established doctrine. In consequence, the Treaty has been resuscitated: it has been deemed cognisable in the colonial law of the time, like similar treaties in other British territories. Like the historians, the lawyers have not been content to rely on the English language text. They have drawn attention to recent judgments in North American courts where assenting parties of treaties have been required to pay attention to the indigenous language texts, and the promises made by the British Crown when the treaties were negotiated. Accordingly, the way has been paved for radical new interpretations of the Treaty of Waitangi and its role in New Zealand history.

The Waitangi Tribunal, as constituted by The Treaty of Waitangi Act 1975 and its amendment of 1985, has been given a vital role in that reinterpretation. Both pieces of legislation, it should be noted, were passed by Labour Governments and sponsored by Māori Ministers of Māori Affairs: the first Act by Matiu Rata and the amendment by Koro Wetere. The preamble of the 1975 Act noted that the English and Māori texts of the Treaty differed from one another, and section 5 required the Tribunal to have regard to both texts. Moreover, for the purposes of the Act, the Tribunal was to have 'exclusive authority' to determine the meaning and effect of the Treaty as embodied in the two texts, and to decide issues raised by the differences between them. Section 6 of the Act allowed 'any Māori' to submit a claim to the Tribunal on the grounds that he [*sic*] was 'prejudicially affected' by any Act, regulations, or Order in Council, or any policy or practice of the Crown, currently in force or proposed, which were inconsistent with the principles of the Treaty. This section had some important limitations. No Pākehā could submit a claim. Although subsection 1 did allow Māori claims against any legislation, policy, or practice currently in force, subsection 6 specifically excluded from the Tribunal's jurisdiction 'anything done or omitted before the commencement of this Act'. Moreover, the Tribunal itself had no

power of remedy; if it considered a claim to be well founded it could merely recommend that the Crown compensate for or remove the prejudice. Section 7 allowed the Tribunal to refuse to investigate any claim that was deemed trivial, frivolous, or vexatious, or for which there was an adequate remedy elsewhere. Section 8 required the Tribunal to ascertain whether any draft legislation referred to it was contrary to the principles of the Treaty.

In interpreting the meaning, principles and effect of the Treaty, the Tribunal could hardly confine itself to the two texts. It had to examine the contemporary intellectual climate to assess what was in the minds of the men who made, negotiated and signed the Treaty. That in turn required an investigation of the historical traditions of both sides: on the British side some centuries of jurisprudence and colonial policy; on the Māori side orally recorded traditions of lore and custom. There was no way of avoiding such historical analysis, despite the limitation in the Act excluding actions or omissions of the Crown before 1975.

The Tribunal was to consist of three persons: the Chief Judge of the Māori Land Court, who was to be chairman, and two others appointed by the Governor-General, one on the recommendation of the Minister of Justice, the other (who was to be a Māori) on the recommendation of the Minister of Māori Affairs. The original appointees were Chief Judge Kenneth Gillanders Scott, L. H. Southwick, an Auckland QC, and as Māori representative, Sir Graham Latimer, chairman of the New Zealand Māori Council. Their first full hearing concerned the claim of Joseph Hawke and others of the Ngāti Whātua tribe of Orakei to fishing rights in the Waitemata Harbour.<sup>11</sup> Ironically, the tangata whenua of Tamaki Makaurau, whose tribal territory was now reduced to a tiny fragment of the metropolitan area of greater Auckland, were obliged to meet the Tribunal in the unfamiliar surroundings of the ballroom of Auckland's plush Intercontinental Hotel. Hawke lost the claim, though he subsequently lodged a new one that concentrated on the loss of land at Bastion Point. In 1980, on the retirement of Judge Scott, E. T. J. Durie was appointed Chief Judge of the Māori Land Court — the first Māori to hold that position — and became chairman of the Tribunal. In 1984 Paul Temm, another Auckland QC, replaced Southwick. Judge Durie transformed the Tribunal, both in procedure — henceforth it met on the marae of the claimants, and observed their kawa in its hearings — and in its philosophical approach to the issues.

It is not possible in a short essay to review all the findings of the Tribunal in the ten years of its existence under the 1975 Act. In any case several claims were either dismissed or withdrawn before the Tribunal completed its hearing, and need no further discussion. I shall examine four claims — Motunui, Kaituna,



Manukau, and Te Reo Māori — all of them presided over by Judge Durie. And I shall use the Tribunal's findings to illustrate its role in interpreting — and reinterpreting — the Treaty and its place in New Zealand history.

The Motunui claim was lodged by Aila Taylor on behalf of Te Atiawa of Taranaki, who held that they were or would be prejudicially affected by the discharge of sewage and industrial waste (coming mainly from the proposed Motunui Syngas plant) on to their traditional fishing grounds and reefs at Waitara. Such pollution was said to be inconsistent with the principles of the Treaty of Waitangi. The Tribunal reported its findings in March 1983, upholding the claimants' case.<sup>12</sup>

Before setting out its findings on the specifics of the Motunui claim, the Tribunal made some important statements on the interpretation of the Treaty, based largely on a memorandum submitted by the Department of Māori Affairs. On the question of a possible conflict between the two texts, the memorandum quoted Lord McNair's text, *The Law of Treaties*, to the effect that 'in the absence of a provision to the contrary neither text is superior to the other', but that it was permissible to interpret one text by reference to the other. However, the memorandum went on to argue that 'should any question arise of which text should prevail, the Māori text should be treated as the prime reference' since this was the text signed by most of the chiefs. The Tribunal made no comment. Nevertheless, it did decide that it was not obliged by statute, nor the precedents of international law, nor Māori tradition, to confine itself to a literal interpretation of the texts of the Treaty. It cited from the Māori Affairs memorandum a paper by I. M. Sinclair, who argued that if the language of treaties was ambiguous or obscure (which was certainly the case with the Treaty of Waitangi) recourse could be had to 'extraneous means of interpretation such as consideration of surrounding circumstances'. Furthermore, treaties were to be interpreted 'with reference to their declared or apparent objects and purposes'; and even 'the subsequent conduct and practice of the parties in relation to the treaty'.<sup>13</sup> Finally, the Māori Affairs memorandum cited decisions of the United States Supreme Court to the effect that treaties made with Indian tribes were to be construed 'in the sense which they would naturally be understood by the Indians'.<sup>14</sup>

All of this argument was relevant to the interpretation of the two texts of the Treaty of Waitangi. It was accepted by the Tribunal 'from the standpoint of European legal concepts', and as being consistent with a Māori approach to the Treaty, which 'would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty

transcends the sum total of its component written words and puts narrow or literal interpretations out of place.<sup>15</sup>

The Treaty was not to be regarded as simply a tract for its time, a 'Maori Magna Carta'. 'It was not intended to merely fossilise a status quo, but to provide direction for future growth and development.' It was to be 'the foundation for a developing social contract'. That contract was not what Hobson had hoped, the formation of one people, but rather the coexistence of two peoples within a single nation. 'The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. . . . It established the regime not for uni-culturalism, but for bi-culturalism.' The Tribunal concluded that the Treaty was '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.'<sup>16</sup>

Although these findings of the Tribunal represent the collective view of its members, there is little doubt that the new chairman, Judge Durie, had a powerful influence in the formulation of that view. In two later lectures on the work of the Tribunal he made similar points. He told a Wellington District Law Society Seminar in September 1986 that 'we can read into the Treaty what we might modernly call the heads of agreement for a bi-cultural development in partnership.'<sup>17</sup> He went on to discuss the novel procedures — particularly respect for marae protocol — that the Tribunal had adopted, and added that the Tribunal had 'regard not only to civil law, but to Maori customary or ancestral law as well.'<sup>18</sup> Overseas this interplay of civil and customary law was common, and customary law held status within the legal systems, in contrast to New Zealand where there had been a steady determination of Governments to apply one law to Māori and Pākehā alike. Lecturing to a race relations class at Auckland University, Judge Durie said that 'as a constitutional document it [the Treaty] must be always speaking. To speak in our time it must be stripped of its old law clothing, and . . . its essential body exposed to view.'<sup>19</sup>

With such general comments in mind, it is useful to examine the Tribunal's interpretation of specific guarantees in the Treaty in relation to the Motunui claim. Like most of the other claims before the Tribunal, Motunui was more concerned with fishing rights than land; as Judge Durie put it later, 'the first Maori claims to the Tribunal came from the sea as though the land was no longer theirs.'<sup>20</sup>

Māori fisheries were specifically protected in the English but not the Māori text of the Treaty. The few Māori who signed the English text at Manukau and Waikato Heads should have been informed of the guarantee, but with the

official publication of this text in 1869 and on numerous subsequent occasions, Māori people generally became aware of it. They made many unsuccessful petitions to Parliament and appeals to the courts for the guarantee to be upheld. It is therefore not surprising that they also appealed to the Waitangi Tribunal, more especially as their traditional fishing resources were threatened by recent economic developments.

In looking at Te Atiawa's claim to the Waitara fishing grounds, the Tribunal accepted their view that these were indeed part of their tribal taonga, their tribal 'treasure troves'.<sup>21</sup> Moreover, the Tribunal argued that the Māori people had retained control over their fisheries by virtue of 'te tino rangatiratanga' in the second article of the Māori text of the Treaty. In the English version of this article 'rangatiratanga' had been interpreted as possession, but the Tribunal argued that 'te tino rangatiratanga' could be taken to mean 'the highest chieftainship' or, indeed, 'the sovereignty [*sic*] of their lands', and that the 'Maori text of the Treaty would have conveyed to the Maori people that . . . they were to be protected not only in the possession of their fishing grounds but in the mana to control them . . . in accordance with their own customs'.<sup>22</sup>

The Tribunal's interpretation of the guarantees in the second article of the Treaty had radical implications, since it struck at the very heart of the long-standing Pākehā doctrine that the transfer of sovereignty in Article 1 provided the foundation for one system of law, British law. Nevertheless, the Tribunal's final recommendations on the Motunui case were mild and conciliatory. It drew attention to the long title and preamble of the 1975 Act, which referred to its responsibility to make recommendations for the 'practical application of the Treaty'. Indeed the Tribunal concluded that it was 'not inconsistent with the spirit and intention of the Treaty . . . that the Crown and the Maori people affected should . . . agree to alter the incidence of the strict terms of the Treaty in order to seek acceptable practical solutions'.<sup>23</sup> In this respect Te Atiawa had agreed to seek a workable compromise. The immediate result was the suspension of the proposed effluent outfall off Motunui, but more than five years later a compromise solution that involved land-based treatment and a new outfall at Waitara had only just emerged. It was likely to take four years to complete.<sup>24</sup>

The Kaituna claim was lodged by Sir Charles Bennett and others of the Ngāti Pikiao tribe against the proposal of the Rotorua City Corporation to divert treated sewage from Lake Rotorua into the Kaituna river. Once again the Tribunal's findings included a lengthy discussion on the Treaty. Much of this was based on memoranda submitted by two academics: by Professor Hugh Kawharu, then Head of Māori Studies and Anthropology at Auckland

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