NETWORK *Waitangi* OTAUTAHI

"Embedding Maori and Treaty Rights in our nation's constitution – what can each of us do?

A talk and conversation at the Network's AGM
Thursday 4th November (eve of Parihaka Day) 2010

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Speech Notes:

My talk began with nga mihimihi in acknowledgment of the korero whakatau, and thanks to the Network for the invitation to speak.

I then offered what I called "constitutional history" greetings to the lands and peoples of Otautahi and the South Island:

- Greetings to Te Waka a Maui – the cosmological foundation for our origins, and without which those of us in Te Ika a Maui would have no place to stand upon!
- Greetings to Te Waipounamu – the island of the pounamu that was a taonga for all tribes, and is now so for all peoples of this land and for many of our visitors.
- Greetings to the Middle Island – the name used by Captain Hobson when he declared British sovereignty by right of "discovery" on 21st May 1840; and the name used by Major Bunbury when he declared British sovereignty by Treaty "cession" on 19th June 1840.
- Greetings to New Munster – an alternative settler name for your island in the 19th century, including in the constitution of 1846.
- And greetings to the South Island. In 1907 the Lands and Survey Department decided that: "South Island will be adhered to in all cases."

As it turns out neither the South Island nor the North Island are "official names", a matter currently being dealt with by the NZ Geographic Board along with consultations about official alternative Maori names. See:

http://www.linz.govt.nz/placenames/about-geographic-board/nzgb-news-notices/2009/0421-alternative-maori-names/index.aspx

My constitutional history greetings continued with reference to the fact that the Electoral Act 1993, in section 35, provides for 16 South Island general electorate seats in the Parliament of New Zealand. Furthermore, that these South Island seats are 'entrenched' by section 268 so that the number of seats may not be tampered with other than by legislation supported by 75% of the members of Parliament. By comparison the provision for Maori electorate seats in section 45 may be amended or abolished by a one-vote majority at any time (and without any consultation with Maori voters).

Having identified the protection for South Island seats in our current constitutional arrangements, I turned to what constitutional status might be appropriate for Te Tiriti o Waitangi. My focus would be on Te Tiriti o Waitangi as signed in various locations in Te Waipounamu, rather than on "principles of the Treaty of Waitangi".

So, where does Te Tiriti o Waitangi fit in? Different answers could be and are given to that question depending on one's perspective; and depending on how one's perspective is shaped by various factors such as te ao Maori, history, contemporary political rhetoric, norms of constitutional law, etc.

My focus was on constitutional law and statements about the Treaty or Te Tiriti such as:

- "the founding document of New Zealand"
- "a constitutional document"
- "simply the most important document in New Zealand's history"
- "essential to the foundation of New Zealand"
- "part of the fabric of New Zealand society"
- "of the greatest constitutional importance to New Zealand".

And yet, despite these high sounding phrases from judges, lawyers and government officials, when 'push comes to shove' it is often (indeed usually) the case that the Treaty loses out to other legal principles.

"The Treaty stands", wrote Sir Robin Cooke (President of the Court of Appeal) in 1992, because "a nation cannot cast itself adrift from its own foundations." Yet this important sounding statement appears in the *Sealord case* when the court refused to provide any remedy for hapu/iwi who had not consented to the Sealord Deed – even though their customary, statutory and Treaty entitlements were all being explicitly extinguished without their consent. The Treaty was overridden by a principle that the courts would not interfere with what the Cabinet [the Executive] wished to put in a Bill that would be presented to Parliament [the Legislature]. The "separation of powers" doctrine trumped Treaty rights.

I would translate Sir Robin's statement to read:
"The Treaty stands, except when it doesn't."
That is not very impressive or high-sounding, is it? But it is more correct.

There are countless examples of "The Treaty stands, except when it doesn't" in the history of Aotearoa New Zealand. This has become especially clear to us since the foreshore and seabed court decision in 2003, the Hikoi Takutai Moana and the Foreshore and Seabed Act 2004.

Is that how things should remain: "The Treaty stands, except when it doesn't."

For a long time I believed that time was on the side of those who are seeking to enhance the legal, moral and spiritual standing of Te Tiriti o Waitangi. Population demographics pointed to an increasing Maori population, there was uneven but incremental progress in various forms of Treaty recognition and Treaty-compliant thinking, and there was a steady advance in the significance of Maori contributions in politics and economics. A full recognition of Te Tiriti was bound to come one day – sooner or later.

But the demographics are changing, and they are moving very much towards a multicultural perspective (without specific regard to Te Tiriti) rather than a bicultural perspective in which tangata whenua and tangata tiriti negotiate constitutional relationships for the future.

This is very obvious in the first year classes I teach at the University of Auckland. In round figures about 15% of the class will be of Maori descent, up to 10% of various Pacific origins, about 30% (and rising) of various origins from Asia, and about 45% (and declining) of Pakeha New Zealanders. These figures are indicative of a future New Zealand in which Pakeha will be a minority ethnic or cultural group. In my youth questions were sometimes asked about whether there were any "full-blooded Maori" in the country – whatever "full-blooded" might mean. In his 2007 'State of the Nation' contribution Glen Colquhoun playfully wondered who will be the last "full-blooded Pakeha" and perhaps that she or he might come from Christchurch [!!]: See: http://www.trc.org.nz/state

Be that as it may (and people at the AGM assured me that Christchurch is about as multicultural as Auckland), there are issues which need to be completed by my generation of Pakeha – we who are the dominant power-holders at the present time. Maori-Pakeha issues have featured largely in national politics in 2010: the Declaration of the Rights of Indigenous Peoples [UNDRIP]; Treaty of Waitangi historical settlements, or non-settlements (as with Ngai Tuhoe of Te Urewera); Whanau Ora; Maori representation in the new Auckland Council; prisons and their possible re-privatisation; Police and Operation 8; etc. These are the type of issues that people of my generation of Pakeha have been involved in for a long time – indeed, as Glen Colquhoun observed, we are the first generation of New Zealanders comfortable with the label 'Pakeha' as an identity. In my own case – a 1946 'baby-boomer' – more than 35 years of my adult life has included participation in the marches and land occupations from 1975 and involvement with anti-racism issues. The positions I took in the 1970s were once denigrated in almost all quarters, and yet now I am a 'respected' academic. I, and many others, have been on a journey to try to answer Sir Eddie Durie's apt question: "When will the settlers settle?"

The constitutional status of Te Tiriti o Waitangi is not a new issue. I remember Matiu Rata (of the Labour Party and Te Hahi Ratana, and later of the Mana Motuhake Party) in the 1970s calling for the "ratification of the Treaty". I was present when a large hui convened at Ngaruawahia by Te Runanga Whakawhaungatanga o nga Hahi o Aotearoa in 1984 proclaimed that Te Tiriti "is the constitution' protecting mana whenua, mana wairua and mana tangata. Each year my students learn of the resolution of the Hirangi hui in 1995 which insisted that Te Tiriti o Waitangi (not the principles of the Treaty) is a constitutional covenant for Aotearoa New Zealand.

But every time the constitutional status issue is raised Pakeha power-holders back away and put it in the 'too-hard basket'. That happened after the 1985 White Paper of Geoffrey Palmer (then Christchurch MP and Deputy Prime Minister) on a Bill of Rights for New Zealand with the Treaty as 'supreme law'. It happened again in the Constitutional Arrangements Select Committee Report of 2005 instigated by Peter Dunne.

It seems to be assumed of our constitution that 'if it ain't broke, then don't fix it'. But it is broke. The Foreshore and Seabed Act 2004 made that crystal clear. But for many the constitutional status issue certainly is still 'too hard' and that is clear – again in relation to the foreshore and seabed – with the current Takutai Moana Bill 2010.

If our current generation of leaders cannot deal clearly and constructively with the place of Te Tiriti in our constitution, then it is possible or probable that the changing demographics I mentioned above will ensure the issue is never properly addressed. Many of my non-Pakeha students speak and write of their desire for 'one law', 'one citizenship' and 'no exceptions'. They view Maori not as tangata whenua but as a disadvantaged minority, and they view the responsibility for dealing with that disadvantage (if it must be discussed at all) to be the task of the 'English' and not of themselves. Maori students on their other hand, like their leaders, on the whole focus more and more on the constitutional status issues.

In 2010 there have been three major examples of Maori leadership promoting the urgency of constitutional reform based on Te Tiriti:

- The plank of the National/Maori Party confidence and supply agreement from 2008 was finally implemented in the government's constitutional reform proposals (decided upon shortly after the AGM): http://www.beehive.govt.nz/release/announcement-constitutional-review
- Annette Sykes put significant emphasis on constitutional reform in her Bruce Jesson Memorial Lecture a week before the AGM – a copy of which I attach to these Speech Notes.
- The Waitangi Tribunal met at Waitangi itself for the first time in its history this year and the sole focus of the first four weeks of hearings by claimants and the Crown concerned He Whakaputanga o te Rangatiratanga o Nu Tireni 1835, Te Tiriti o Waitangi 1840 and their constitutional connections. Members of your Network have been alerted to the evidence presented to those hearings by Professor Patu Hohepa and Moana Jackson. I would also mention the importance of evidence by Professor Dame Anne Salmond.

Our fellow citizens can no longer claim ignorance of the importance of these issues, but what are the steps we must take to ensure that the conversations take place that need to take place? The educational work of networks like this will be of crucial importance. Every opportunity needs to be taken to listen and to speak for Te Tiriti-informed conversations at all levels of our communities.

When you were invited to attend this AGM I made it clear that at the end of my talk we should turn not to questions for the speaker, but to comments on solutions for the future of our nation coming from you, the attenders.

What are your answers to my questions? How can we support each other to achieve our aims?

Concluding thanks.