**IN THE WAITANGI TRIBUNAL**

**Wai 1200 #1.1.43(c)**

**Wai 275 #1.1(c)**

**IN THE MATTER** of the Treaty of Waitangi Act 1975

**AND**

**IN THE MATTER** of claims in the Central North Island Inquiry (WAI 1200)

**AND**

**IN THE MATTER** of the claim by Te Ariki Morehu and Neville Nepia **(WAI 275)** and Peretini Nuku Tawa and Awhimate Awhimate **(WAI 334)** for and on behalf of Ngati Makino

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# AMENDED PARTICLARISED STATEMENT OF CLAIM FOR NGATI MAKINO

## DATED THE 1st DAY OF NOVEMBER 2004

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## Claimants

## 1.0 THIS CLAIM:-

**1.1** Is brought by Mr Te Ariki Morehu and Neville Nepia and Peretini Tawa and Awhimate Awhimate for and on behalf of Ngati Makino and its constituent whanau and hapu. The claimants are Maori and are descendants of Ngati Makino and file this claim with the Waitangi Tribunal pursuant to the provisions of the Treaty of Waitangi Act 1975.

**1.2** Is in respect of losses both general, cultural, spiritual, and economic suffered by Ngati Makino iwi and hapu.

**1.3** Is brought as a result of breaches of the Crown of Te Tiriti o Waitangi ('The Treaty') and its principles as a consequence of the imposition of laws policies practices and actions of the Crown that were introduced contrary to Te Tiriti o Waitangi and its principles.

# 2.0 AREA

**2.1** As Tangata Whenua, the claimants lay claim to everything which has been taken from them more particularly described in the maps of the Ngati Makino Claim area attached herewith marked as **Appendix A**.

**2.2** They assert the absolute right to take care of their Taonga - its spaces, places and varied and diverse faces; in accordance with their obligations of kaihakitanga the natural responsibility to care for the dimensions of their universe is implicit and, like caring for one's elders, they assert that the obligation is hereditary.

**2.3** To understand this they rely on their traditional baselines which give rise to a specific and unique way in which they perceive the world that embraces them.

**2.4** They rely on their ancestors' view of the area which they lay claim to which is more particularly described below. Through this traditional view the claimants assert a common baseline from which derives their caregiver roles both as hapu and individuals which emphasises the innate connection of their environment to their universe, to their whakapapa lineage, their wairua base, and to their natural responsibilities as Kaitiaki of the dominion of Ngati Makino and its surrounds.

| | |
|---|---|
| **TE AHO TAKETAKE** | **The Baseline** |
| **PAPATUANUKU** | **The Land** |
| **TE WAO-TU-NUI-A-TANE** | **The Forest** |
| **WAIPUNA ARIKI** | **The lakes and waterways** |
| **TE AHI TAMOU - NGA NGAWHA** | **Geothermal Activity** |
| **TE AHI TAMOU - NGA MAUNGA PUIA** | **The Volcanoes** |
| **TE HA O RANGINUI** | **Air** |
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# 3.0 PRELIMINARY MATTERS

**3.1** The Tribunal has required the Claimants, on behalf of Ngati Makino, to file a particularised statement of claim for the purposes of the Central North Island Inquiry of the Waitangi Tribunal. The particulars set out in this statement of claim are provided in response to the Tribunal's request, subject to the following provisos:

a) The particulars are to assist with the Tribunal process by identifying issues at an early stage so as to enable the Crown to respond to the claims in a detailed and meaningful manner. However, the particulars are not and cannot be a complete statement of the grievance of Ngati Makino;

b) The provision of particulars does not affect the Crown's obligation to fully disclose in good faith all information relating to its dealings with Ngati Makino, nor does it affect the Tribunal's inquisitional role as a Commission of Inquiry;

c) Ngati Makino consider that the Crown has a duty to participate on a good faith basis in this process. An objective of the particulars is to enable the Crown to identify at the outset those claims that it considers are legitimate, so as to avoid unnecessary argument. The claimants assisted by the peoples of Ngati Makino have identified the particulars included in this statement of claim in good faith on the understanding that the Crown, as its Treaty partner, will act also in good faith in recognising such claims;

d) The provision of particulars does not in any way alter the position held by the claimants and the peoples of Ngati Makino that emphasizes the illegitimacy of the Crown's presumption of sovereignty over the peoples and lands of Ngati Makino; nor the wrongful confiscation of their lands following acts of war and cultural genocide;

e) As such, the paragraphs that follow provide particulars of Crown acts, omissions, practices, and the resultant breaches of the natural rights of Ngati Makino as encapsulated by the principles of the Treaty. While each encroachment onto these rights is in itself representative of a deeply felt grievance, the cumulative effect of these encroachments is perhaps of more significance. These continuous and repeated breaches by and on behalf of the Crown and its continuing failure to honour obligations and duties has compounded the detrimental impacts that Ngati Makino and other of their tribal kin have had to contend with over time;

f) The particulars, while by no means exhaustive, highlight the continual and repeated attempts by the Crown to encroach on and diminish Te Tino Rangatiratanga o Ngati Makino and their Mana Taketake over all matters in their dominion, tangible and intangible, guaranteed by Te Tiriti o Waitangi. As such they will provide a flavour of the manner in which the Crown acted.

# 4.0 TE KEREME - THE CLAIM

**4.1** Ngati Makino's claim falls into two different Tribunal Inquiry Districts:

a) The Eastern Bay of Plenty District; and

b) The Central North Island (CNI) District

**4.2** This statement of claim sets out Ngati Makino's claim as it relates to both districts. Although the Tribunal has already heard Ngati Makino's claim as it relates to the Eastern Bay of Plenty District, this statement of claim incorporates and expands on the statement of claim Ngati Makino filed in that Inquiry. This is because the consequences and effects of the Crown's breaches of the Treaty of Waitangi on Ngati Makino in both districts cannot be simply divided and analysed according to the inquiry district in which the breaches principally occurred.

**4.3** The claim relates to:

a) the Crown invasion of the Bay of Plenty and the subsequent confiscation of Ngati Makino lands and resources pursuant to the New Zealand Settlements Act 1863 and its amendments;

b) the unfair and manipulate operations of the Compensation Court which saw Ngati Makino lands and resources wrongfully awarded to other tribal interests;

c) the confiscation and alienation of lands and resources of Ngati Makino by the imposition and operation of the Native Land Court and its successors;

d) the loss of land through the wrongful imposition of survey liens including portions of the Whakarewa; Tahunaroa; Otamarakau, and Waitahanui blocks;

e) Crown purchasing activities in the territories of Ngati Makino with particular reference to the Whakarewa; Otamarakau Waitahanui and Tahunaroa areas;

f) the continuing colonisation in the modern context of the peoples of Ngati Makino by the process of privatisation and the sell down of crown assets; and

g) other actions or omissions by the Crown that were and remain in breach of the principles of the Treaty of Waitangi.

**4.4** The Claimants say that they are or are likely to be prejudicially affected by the Ordinances, Acts, Regulations, Proclamations, Notices and other Statutory Instruments, and the policies, practices, acts or omissions of the Crown, the particulars of which are set out in this Statement of Claim.

**4.5** The Claimants further claim that all of the Acts, Regulations, Orders, policies, practices and actions taken, omitted or adopted by or on behalf of the Crown referred to are and remain inconsistent with the terms and principles of the Treaty of Waitangi.

# 5.0 PRINCIPLES OF THE TREATY

**5.1** Without limiting the Treaty the Claimants assert that the following are principles of the Treaty each of which they say is relevant to the present claim.

## Property

**5.2** A fundamental principle of the treaty is the protection and preservation of Maori property and taonga: *[New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, PC, 517].

## Custom

**5.3** A fundamental principle of the Treaty is the preservation of Maori custom including an ongoing distinctive existence as a people albeit adapting as time passed and the combined society developed [*Taiaroa v Minister of Justice* (unreported HC Wgn CP 99/94, decision McGechan J, 29 August 1994 at p69)].

**5.4** Flowing from these two principles are the further principles:

a) Maori were and are to be protected not only in the possession of their property but in their right to control such property in accordance with their own customs and having regard to their own cultural preferences [*Motunui-Waitara Report 2 ed.* 1989 p51] and

b) to have protected their tino rangatiratanga being the full authority, status and prestige with regard to Maori possessions and interests: [*Manakau Report*, p67].

c) The preservation for Maori of their customary title [*Te Runanganui O Te Ika Whenua Inc. Soc. V Attorney-General* [1994] 2 NZLR 20, CA 24: *Orakei Report* p135].

d) The requirement on the Crown to take active steps to ensure that Maori have and retain full exclusive and undisturbed possession of their culture [*Orakei Report*, p135].

## Good Government

**5.5** A fundamental principle of the treaty is that Maori are entitled to the benefit of good government. Such good government should exhibit itself in at least the following ways:

a) Equal treatment by the law and by all Governmental Agencies (except to the extent necessary to redress past injustices and the results of that in which event more favourable treatment is appropriate). [Note the Labour Government Statement of 1989 – Principle ©].

b) Matters affecting Maori land should be determined by Maori who should be permitted to maintain their own way of reaching agreements. [*Taranaki Report* pp281–282]

c) Conditions that would enable Maori, despite settlement, not only to survive but to progress because of it [*Muriwhenua Fishing Report*, p194].

d) Maori would be and are now entitled to peace and law and order. [*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 CA at 715 per Bisson J].

e) Protection of particular Maori interests. [*Manukau Report*, p69].

f) A duty not to use any powers of compulsory acquisition of Maori land or resources without first consulting those Maori affected and without negotiating genuinely with them as to the purchase or, at least, paying proper compensation. [*The Ngati Rangiteaorere Report* pp47–48;

*Te Runanganui O Te Ika Whenua Inc Soc v Attorney –General* [1994] 2 NZLR 20, CA at 24].

g) An inability to avoid the Crown's obligations by any delegation of the Crown's duties under the Treaty. [*Motunui-Waitara Report and the Manukau Report*, p73].

## Fiduciary Duty

**5.6** A fundamental principle of the treaty is that the Crown owes a fiduciary duty of good faith to Maori [*Te Runanga O Wharekauri Rekohu Inc. v Attorney-General* [1993] 2 NZLR 301, CA 305–306].

**5.7** Such duty includes the obligations:

a) To use any right of pre-exemption to protect Maori from excess purchases, and not to use it to stifle competition for Maori land so as to deprive Maori of a fair price;

b) The duty not to use other unfair means when dealing with Maori;

c) The obligation to abide by the Christian and traditional Maori values the treaty emphasised [*The Te Roroa Report*, p30].

## Economic Protection

**5.8** Flowing out of the foregoing is the fundamental principle that the Crown owes a duty to protect preserve and promote the economic position of Maori. This includes:

a) A duty on the Crown to ensure that Maori were and are left with sufficient land and other resources for their maintenance and support and livelihood and that each hapu maintained sufficient endowment for its foreseen needs [*Orakei Report*, p147].

b) Such endowment is not just an endowment sufficient to survive but sufficient to profit and to prosper and includes the facility to fully exploit such land and resources [*Muriwhenua Fishing Report*, p194].

c) Maori have a right to develop and expand such resources using modern technologies and are not to be consigned to those technologies known at the time of the Treaty: [*Muriwhenua Fishing Report*, p220; *Ngai Tahu Sea Fisheries Report*, pp253–254].

d) The Crown does not take advantage of the poverty of Maori, created at least in part by the Crown, to acquire land from Maori which Maori are selling just so the Maori can buy food to survive.

## Overriding Principles

**5.9** An overarching principle of the Treaty is that the Crown should deal with Maori in an honourable and good faith way (the means), and should ensure the protection and prosperity of Maori as a people including their economic, physical, spiritual and cultural well being (the ends).

**5.10** Another overarching principle of the Treaty is that the Crown should remedy past breaches in all but very special circumstances [*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, CA, 664-665].

# 6.0 EARLY CONTACT AND THE MARGINALISATION OF TINO RANGATIRATANGA

## Breach

**6.1** The ad-hoc manner in which the Treaty of Waitangi has been incorporated into New Zealand's constitutional framework has resulted in the denial of the fundamental right of self-determination for the peoples of Ngati Makino and a total usurpation of their sovereignty. The protection of such rights, it is purported, is guaranteed by the principles of Te Tiriti O Waitangi.

**6.2** The repeated attempts to undermine these rights and avoid the obligations created of them, is tantamount to cultural genocide amounting to a systematic and relentless attack on Te Tino Rangatiratana o Ngati Makino that persists into the present.

**6.3** Such acts have consistently violated the rights, humanity and dignity of Ngati Makino inflicting measures contrary to their interests by imposing practices and polices that have caused excessive injustice and brutality. The claimants accuse the Crown of committing these acts with the intention to deny and usurp the Tino Rangatiratanga o Ngati Makino.

## Facts

a) The British Government set out on the path to the Treaty of Waitangi decades before its signing in 1840.[1] In 1814 and again in 1819, Macquarie, the then Governor of New South Wales, commissioned clergymen as Justices of the Peace, in order to help preserve peace in New Zealand.[2]

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[1] Joseph *Constitutional and Administrative Law in New Zealand 2nd ed* (Wellington, Brookers, 2001) at pp32-36

b) Macquarie justified this effective extension of jurisdiction into New Zealand by relying on a 1786 Order in Council that annexed islands adjacent to Australia.[3]

c) Imperial statutes of 1817, 1823, and 1828 each extended the jurisdiction of New South Wales Courts to enable them to punish crimes committed in New Zealand and also provided for a British Resident in New Zealand.[4]

d) James Busby arrived as British Resident to New Zealand in 1833.[5] Busby was charged with protecting Maori and settlers with the authority of law, but he had no means of enforcing this authority and was famously described as a "man 'o' war without guns".[6]

e) Busby attempted to introduce a form of institutional government among Maori.[7] At an assembly of chiefs he held at Waitangi a national flag was chosen, under which New Zealand built and registered ships sailed.[8]

f) Busby arranged a Declaration of Independence to be signed at a second meeting of chiefs in 1835.[9]

g) The Declaration of Independence provides an important context for the signing of the Treaty of Waitangi in 1840.[10] In the Declaration, the assembly of chiefs, under the collective title of the Confederation of the United Tribes of New Zealand, asked the British Government to recognise the country's independence and to extend Crown protection.[11] The Declaration also provided for an annual congress of chiefs to act as a

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[2] Owens, "New Zealand Before Annexation" in Rice (ed) *The Oxford History of New Zealand 2nd ed* (Auckland, Oxford University Press, 1992) at 42
[3] See Joseph Ibid p35
[4] Ibid
[5] See Owens, Supra n 2 at 42
[6] See Joseph, Supra n 1 at 35
[7] Walker, R. Ka Whawhai Tonu Matou – Struggle Without End (Auckland, Penguin, 1990) at 88
[8] Ibid
[9] Declaration of Independence 1835
[10] See Walker, Supra n 7
[11] Declaration of Independence 1835

national governmental body.[12] It is said that one of the elders from Ngati Rangiwewehi was a signatory to the Declaration of Independence.[13]

h) On 13 August 1839, Hobson was commissioned as Her Majesty's consul in New Zealand.[14] Hobson was then appointed Lieutenant-Governor in and over the parts of New Zealand for which the Crown acquired sovereignty on 30 July 1839.[15]

i) On 19 January 1840, Governor Gipps of New South Wales issued three proclamations, retrospectively dated 14 January 1840.[16]

j) The first extended the boundaries of New South Wales to include any part of New Zealand that might be acquired.[17]

k) The second and third proclamations announced that Hobson had been sworn in and that Her Majesty would not recognise title to land bought directly from Maori after 14 January 1840.[18]

l) In the following months the Treaty was taken around the country and signed at gatherings similar to that at Waitangi.[19]

m) Eventually 540 signatures were collected although there were some conspicuous absences.[20]

n) On 21 May 1840, Hobson proclaimed sovereignty over the North Island on the basis of the Treaty and sovereignty over the South Island by virtue of discovery.[21]

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[12] Ibid
[13] Oral Communication by Hiko Hohepa
[14] See Joseph, Supra n 1 at 36
[15] Ibid
[16] Ibid at 37
[17] See Joseph *Constitutional and Administrative Law in New Zealand 2nd ed* (Wellington, Brookers, 2001) p37
[18] Ibid
[19] See Walker *Ka Whawhai Tonu Matou – Struggle Without End* (Auckland, Penguin, 1990) pp96 and 97
[20] Ibid
[21] Ibid

o) Later the Colonial Office rules ruled that British sovereignty over the whole of New Zealand was absolute, and that even tribes who had not signed it were bound by its terms, but the question of substantive sovereignty in Rotoehu and Lake Rotoiti and the Bay of Plenty remained unresolved.[22]

p) No attempt was made to obtain an informed consent to what was proposed by The Treaty of Waitangi from Ngati Makino.[23]

q) Ngati Makino have never consented in deed or voice to having their rights of Tino Rangatiratanga affected or influenced by the Treaty.[24]

r) No iwi, hapu group, or individual signed the Treaty for, on behalf, or indeed with any intention of including Ngati Makino within its parameters.[25]

s) The Crown in an effort to diminish and undermine Te Tino Rangatiratanga o Ngati Makino have unceasingly manipulated the use of the Treaty of Waitangi and institutions purportedly established pursuant to its promises.

t) Ngati Makino who claim their descent from their ancestor Waitaha-a-Hei have traditionally occupied the area between the Rotoehu and Lake Rotoiti Lakes and the Bay of Plenty Coast.[26] Ngati Makino had existed outside the main areas of European interest and influence with their main economic activity consisting of cultivating kumara, potato and maize; gathering kaimoana and mahingakai; and collecting and trading flax with a scattering of Europeans residents on the coast.[27]

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[22] O'Malley, V. The Crown and Te Arawa, c.1840-1910. November, 1995. p21
[23] Traditional evidence supplied by the claimants
[24] Ibid
[25] Traditional evidence to be provided
[26] David Alexander "19th Century Crown Purchases of Ngati Makino Lands" Doc G-4 Wai 46/275 p5

u) Before the 1840's the interior of the region occupied by the peoples of Arawa was relatively untouched by direct contact with the outside world, but nevertheless was greatly affected by the "musket wars" of the 1820's and advent of trade and settlement on the coast.[28]

v) Edward Shortland, who was appointed a Protector of Aborigines (one of four in the North Island at that time) was the first Crown official to be resident in the Arawa District. He had a house built for himself at Maketu, which he occupied in March 1843.[29] While he was stationed at Maketu he became aware of the complexity of customary relationships in the area in particular of the occupation of interests versus the mana of those who gave the right to occupy.[30]

w) There were three principal Ngati Makino leaders who played a significant role in managing Ngati Makino/Crown Relations during this period through the 1860's and into the 1870's. They were Rota Rangihoro, Te Mapu Te Amotu and Te Puehu. Rota was appointed as one of two Native assessors at Maketu in the late 1850's, Te Mapu Amotu was appointed President of the Runanga at Rotoiti in Governor Grey's system of Maori governance and Te Puehu was recognised as one of the principal Rangatira during the critical period of the 1860's because he lived on the coastal plains of Otamarakau and did not deny tribal allegiances with kin who resisted the Crowns invasion of their tribal territories.

**The Adaptation of Pakeha Law**

"The extent of real British authority in New Zealand in 1844 and 1845 was, compared to the notional sovereignty proclaimed over the entire country, very limited. Even as Treaty signatures were being sought in

[27] David Armstrong Ngati Makino and the Crown: 1880-1960 p4
[28] Alan Ward " Ngati Pikiao Land s Loss of Tribal Ownership and Control" p13
[29] David Alexander " 19th Century Crown Purchases of Ngati Makino Lands" Doc G – 4 Wai 46/275 p7
[30] Ibid p14

1840, officials played down the tiny Government's willingness or ability to settle disputes between Maori. On the sole occasion when the Crown's military protection was actually sought by Maori in this period – by one party to a Tauranga dispute in May 1840 – Bunbury responded that Hobson:

> *desired rather to mediate between them, and and only in cases of extreme emergency would you be prevailed upon to act in any other manner; but if your arbitration was applied for, I had no doubt but that the custom of their country would be complied with, by your insisting on a compensation being made to the party injured, by the party offending.*[31]

x) The limits of the Governor's powers of arbitration – and its ability to protect Pakeha, let alone Maori – were drawn into sharp relief in 1842, in the Bay of Plenty, when a serious conflict arose between Ngai Te Rangi and the people of Maketu. During the course of this dispute two boats belonging to Pakeha were stolen, thus requiring the intervention of the authorities.

y) Willoughby Shortland, the acting Governor (Hobson having died), was inclined to send in the 80th Regiment (less impressive a force than the name suggested) to keep the peace, but there were grave risks in this.

z) Chief Protector Clarke urged moderation as he feared war would be, "totally subversive of the good understanding hitherto preserved between Her Majesty's Government and the native tribes." In his view the introduction of real British authority would need to be a gradual affair, a view shared by other Protectors, such as Edward Shortland. This was certainly in accord with the views of rangatira, such as Tohi Te Ururangi of Maketu, who drew attention to the fact that he had not signed the

[31] Bunbury to Hobson, 14 May 1840. GBPP 1841 (311), pp103-104

Treaty, and strongly asserted that the Government had no right to unilaterally interfere in Maori matters.[32]

aa) In addition to matters of practical policy, questions were raised around the legality of Crown intervention in such disputes. Attorney-General Swainson and Chief Justice Martin argued during this period that British sovereignty was incomplete, and that a prerequisite of asserting sovereignty had to be the "free and intelligent" consent of the Maori people demonstrated by their assent to the Treaty of Waitangi. Consequently those who had not signed the Treaty and thereby had not formally accepted the Queen's authority could not be considered British subjects and were outside the legal limits of British sovereignty.[33] Ngati Makino was not a signatory to the Treaty.

bb) Given the doubts of senior officials and the questionable legality of the use of military force, Shortland sent Protectors Shortland (his brother) and George Clarke Jr to find a way to settle the dispute at Maketu peacefully. Nonetheless, as he informed his Colonial Office superiors, he would, for political purposes, continue to maintain the fiction that all Maori were subject to British law, but rather than coercion he would rely upon "moral suasion," as the Protectors had recommended, and the application of a, "firm and consistent line of conduct". Nor could he attempt to complete the cession of sovereignty by obtaining further signatures, as this would only confirm that the sovereignty proclaimed in 1840 was, in fact, incomplete. The fact that Maori had actually only ceded kawanatanga, a concept far less well defined than sovereignty, was ignored.

cc) Despite the Crown trumpeting the protection it intended to bring to Maori when it was seeking their signatures to the Treaty in 1840, Protector Clarke, in 1842, told those at Maketu that the Governor would

[32] 'How Te Heu Heu Rejected the Treaty of Waitangi, Also Te Arawa and Ngai Te Rangi'. Elsdon Best papers. MS papers 0072-36. Alexander Turnbull Library. See also, IA 1/1842/2214. National Archives
[33] Orange, C., *The Treaty of Waitangi*, Wellington, 1992, p110

not interfere militarily in their "warlike quarrels". However, when they "meddled with Europeans, he should step in".

dd) Maori appeared satisfied with this and agreed to return the boats and goods to their Pakeha owners. They then asked that the Governor send one of his officers to live amongst them, to whom they could refer cases concerning, "lands and property taken, married women who have been seduced, also men clan-fighting, also the cursing of heads, also the native tapu".[34]

ee) Legislative changes reflective of FitzRoy's work were formalised in the 1844 Native Exemption Ordinance, legislation which was also raised with a wider group of rangatira attending a hui with the Governor, after the massive hakari hosted by Tainui at Remuera in May 1844.

ff) Rangatira were to be closely involved in the administration of the ordinance:

i) where a dispute was between Maori, two rangatira of the injured party's hapu had to bring information against the alleged offender before any summons could be issued by a magistrate, and such summons was to be delivered to two rangatira of the alleged offender's hapu for them to execute; or

ii) where a Maori and a Pakeha were involved in a dispute, any summons was also to proceed through two rangatira via the local Protector of Aborigines. The rangatira were to be paid for the serving of summonses or the execution of warrants. A £20 bond could also be paid allowing an accused Maori to remain at large until called for trial.

[34] Ward, Alan, *Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand.* Auckland University Press, Auckland, 1974, p81

gg) In essence, the ordinance attempted to include important chiefs in the justice of the colony, and it further incorporated the Maori traditional concept such as utu or compensation as punishment for criminal offences (other than rape or murder), with part of the payment to go to the victim.

hh) In connection with the concept of utu, the ordinance stipulated that no Maori could be imprisoned for a civil offence, such as theft, debt, or breach of contract.[35] The inclusion of utu was at the especial request of Maori and, Clarke reported, gave, "very general satisfaction to the intelligent chiefs".[36]

ii) FitzRoy noted when addressing an 1844 Maori hui about the ordinance, that it was devised to be, "less at variance with those habits and customs, which, in your present circumstances, cannot be at once laid aside and discarded."[37] That is, the ordinance was to be temporary and it was not so much an acknowledgement that the existing law was unjust, but that it was not appropriate to the circumstances in which Maori and Pakeha found themselves at that time. While the ordinance has recently been dismissed by the Crown as no more than a "temporary concession" and in no way representative of "an acknowledgement of Maori authority,"[38] it should be noted that Clarke himself informed Maori that, "by this law, you the Chiefs will be raised to the position of chiefs."[39] However dubious the assumptions behind that statement, it is clear that customary chiefly authority was to be bolstered by the law, reflecting the Crown's desire to acknowledge that authority to some extent and to work through the Maori leadership.

jj) Clarke's "condensed translation" of the ordinance went on to indulge in some semantic contortions, by which he claimed that under the "old law"

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[35] Ward, Alan, *Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand.* Auckland University Press, Auckland, 1974, p66, and *Auckland Times*, 16 July 1844
[36] Cited in Ward, p67
[37] *Southern Cross*, 23 March 1844
[38] Loveridge, Donald M., 'Ngati Whatua and the Crown – The First Quarter-Century: An Appraisal of the Wyatt Report', A Report for the Crown Law Office, April 2001. WAI 674. Doc #O4, p88
[39] Clarke letter of 30 August 1844. Cited in Loveridge, loc cit

(presumably customary law), "there was no reality in your chieftainship, it consisted merely of the name of 'chief'."[40] It seems odd then, that Maori rangatiratanga was sufficiently 'real' to be acknowledged and preserved in the Treaty of Waitangi. Despite the Crown's view, Clarke's emphasis on the role of rangatira under the 1844 Native Exemption Ordinance makes it rather difficult to escape the obvious conclusion that the ordinance was indeed an acknowledgement of chiefly authority, and of the necessity of drawing on that authority in the administration of justice to both races.

kk) Moreover, such an acknowledgement was maintained in subsequent legislation (the 1846 Resident Magistrates Ordinance), and was also later a feature of Governor Grey's 'new institutions' of the 1860s, which ostensibly empowered runanga and included chiefly whakawa (judges, or 'assessors'). While Grey's intentions were clearly assimilationist, as indeed were FitzRoy's, this was, of course, not how the 1844 ordinance was presented to Maori. The acknowledgement of the role of rangatira within the justice system was surely no more than had been promised under the partnership offered under the Treaty.

ll) FitzRoy himself was clear on the link between the Treaty and the need to treat Maori fairly, writing in reference to the 1844 legislation suggested that:

> *Much, very much, may be effected by rigid justice; – the natives having the practical as well as theoretical privileges of British subjects, when those privileges are favourable to them; but being allowed the full consideration due to ignorance and their peculiar habits when brought under the arm of English law. This may sound too much like undue partiality: it is in strict accordance, however, with the Treaty of Waitangi, and – it may be added – with truly equitable conduct.*[41]

[40] Ibid
[41] FitzRoy, p55

mm) That is, Maori views about justice and the enforcement of the law were being accommodated, and rangatira were to be actively and positively involved. This was not only in accord with the Treaty but in accord with basic fairness.

nn) At another level, it should be remembered that FitzRoy's meetings with Maori at Government House in March 1844, were amongst many such hui held with them throughout his tenure, for the Governor wished to impress upon them that:

> *My object and intention is to act in the most friendly and just manner towards you – I have no unkind, no unjust object in view... my object is to act towards you in a fatherly manner – and I would rather leave the country than act contrary to those principles, which I came out here to support – those principles being to act towards you as your father and your friend.*[42]

**The Erosion of Tino Rangatiratanga**

oo) The application of the ordinance was adhoc and inconsistent. Contrary to the assertions of Fitzroy, Protector Forsaith at the other end of the island said that the Native Exemption Ordinance 1844 was created out of the desire to bring Maori to "yield a ready obedience to the laws and customs of England".[43]

pp) The Ordinance 1844 incorporated a number of Maori perspectives, norms and values into the British Justice System with the active involvement of Maori leadership, by providing that in crimes between Maori, British intervention was dependant on Maori request:[44]

[42] *Southern Cross*, 23 March 1844
[43] Preamble

*And whereas this end may more speedily and peaceably be attained by the gradual than by the immediate and indiscriminate enforcement of the said laws, so that in the course of time, the force of ancient usages being weakened and the nature and administration of our laws being understood, the native population may in all cases seek and willingly submit to the application of the same.*[45]

qq) The perception by settlers of 'inequalities in the law'[46] led to the Ordinance being replaced with the Resident Magistrates Courts Ordinance 1846 which confirmed concessions in the law to cases involving Maori only.

**Resident Magistrates Courts Ordinance 1846**

The Resident Magistrates Ordinance aimed to simplify and expedite the administration of justice and facilitate the adaption of justice of both races.[47]

rr) Resident Magistrates were provided with summary jurisdiction over Maori and non-Maori. In disputes involving solely Maori, two chiefs were appointed as Native Assessors who made the final decision with the Magistrate only intervening in cases of disagreement.[48]

ss) Despite the protests of Parliamentary Members, Kapa, Taipua and Parata, the Resident Magistrates system was repealed by the Magistrates Court Act 1893 and the Resident Magistrate was replaced with that of Stipendiary Magistrate who possessed strictly judicial functions.[49]

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[44] Study Paper No 9 p19
[45] Supra n 43
[46] RA Joeseph *Colonial Biculturalism? The Recognition & Denial of Maori Custom in the Colonial & Post-Colonial Legal System of Aotearoa/New Zealand* (Paper presented for Te Matahauariki Research Institute, University of Waikato FRST Project, 1998) 5
[47] Resident Magistrates Courts Ordinance, Preamble
[48] Supra n 44
[49] Hansard (2 October 1893), 910–912

tt) New Zealand Constitution Act 1852:

Section 71 of the New Zealand Constitution Act 1852 provides:

> *"[W]hereas it may be expedient that the laws, customs, and usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principle of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed:*
>
> *It shall be lawful for Her Majesty ... from time to time to make provision for the purposes aforesaid, any repugnancy of any such native laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.*

uu) This provision enabled the Queen by Order in Council to set apart districts in New Zealand in which the laws and customs of Maori were to be observed in governing the relations with Maori. This was an unequivocal acceptance that Maori law and custom were paramount and could only be overridden in circumstances that conflicted with the "principles of humanity", regardless of their repugnancy to English Law.[50]

vv) This section was repealed by the Constitution Act 1986 never having been used. No districts were set apart in terms of the act, despite the

[50] Cameron J. Plural Justice, Equality and Sovereignty in New Zealand (unpublished paper for the Law Commission, 22 October 1997) 48

efforts of various Maori groups including the Kingitanga, Kauhanganui, and Kotahitanga movements to have the provisions implemented.[51]

ww) Three other ordinances were introduced in 1844 that also attempted to incorporate Maori into the framework of British justice, and amend laws that worked against their rights and interests. The Unsworn Testimony Ordinance dispensed with the need for the Christian oath, making it possible for non-Christian Maori to give evidence in court (and to appear as plaintiffs against Pakeha).

xx) The Jurors Ordinance made it possible to appoint competent Maori to juries in cases when either the plaintiff or defendant was Maori (although in practice this simply did not occur due to settler resistance).

yy) Finally the Cattle Trespass Ordinance (1842) was amended to allow claims for damages not only to cultivations which were fenced but to those which were unfenced also. This latter amendment placed the onus upon run-holders (predominantly Pakeha) to fence in their cattle, rather than on gardeners (predominantly Maori) to fence the cattle out of their cultivations.[52]

zz) These ordinances, which made allowances for Maori, brought angry protests from the settler community, with the Native Exemption Ordinance picked out for its supposed show of governmental weakness. Unable to conceive of a colony where power was shared, a substantial and vociferous faction of settlers saw these Ordinances as a sign of weakness on the part of the Governor. This settler pressure – particularly in the Company town of Wellington, still chafing at the insistence of Protector Clarke to properly fulfil his duties at the cost of settling the Company's claims – may explain why Forsaith simply refused to utilise the new law at Maungaroa in 1845. Moreover, he had his own

[51] [51] RA Joeseph *Colonial Biculturalism? The Recognition & Denial of Maori Custom in the Colonial & Post-Colonial Legal System of Aotearoa/New Zealand* (Paper presented for Te Matahauariki Research Institute, University of Waikato FRST Project, 1998) 2

experience at Te Kopuru to draw upon and certainly seems to have learned well the lesson taught him there.

aaa) On the other hand, Chief Protector Clarke thought the 1844 legislation wise as, "we have been so apprehensive lest any portion of the executive power should pass into their hands, that our firmest [Maori] friends have been shaken in their confidence in our *ultimate* intentions".[53]

bbb) Later the Colonial Office rules ruled that British sovereignty over the whole of New Zealand was absolute, and that even tribes who had not signed it were bound by its terms, but the question of substantive sovereignty in Rotoehu and Lake Rotoiti and the Bay of Plenty remained unresolved.[54]

ccc) In September 1845 Chapman reported that 400 Rotoehu and Lake Rotoiti Maori had recently visited Tauranga on a peacemaking mission. He reported that the mission was largely successful, except in the matter of Motiti Island, which was still a matter of much contention between the parties and remained unresolved. The political relationship between the Crown and Maori was also a matter of debate at this hui. As Chapman stated:

> *"Shades of Native jealousy were exhibited at this meeting relative to the Queen's sovereignty. A few of the Christian Natives warmly urged upon the necessity of it as until then no laws could be enforced, no order continued, no peace certain. Others were in much doubt as to whether it would not prove, if acceded to, their ruin as an independent people. Others angrily opposed it. One said you (the Christian party) are continually calling upon us to acknowledge one head; Christ. Let Him be the head of the Church, as you say, but we want no other head, we want no-one*

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[52] Ward, pp66-67
[53] Op cit, p68. Emphasis in original
[54] Vincent O'Malley " *The Crown and Te Arawa, c.1840-1910.* November, 1995." p21

*over us. This speech was much approved...*" (Micro-MS-Coll4-035. CMS. ATL. Docs. p111).

ddd) It is clear from the Maori text of Te Tiriti o Waitangi that the rangatira signatories anticipated that they were ceding something less than total sovereignty while retaining tino rangatiratanga.[55]

eee) Subsequent ordinances and Acts were created aimed at 'consensually' suppressing Maori custom:

> *many objectionable customs might be gotten rid of, the good sense ... being guided by [a] British Magistrate. We advert particularly to such usages as those mentioned ... of Taumau (or betrothal); of making Taua upon the innocent relatives of an offender; of punishing the imaginary crime of witchcraft; and of Tapu. These need nothing to their abolition but the general consent of Maori themselves – and, this once obtained, acts of violence attempted by individuals in pursuance of such customs might be repressed and punished.*[56]

**Komiti Nui**

fff) One of the most important attempts by Arawa to maintain tribal or inter-tribal control of their land was to press for greater recognition of the committees that had been established in the late 1870's notably the Komiti nui based at Rotoehu and Lake Rotoiti. It comprised about sixty men (not all meeting at the one time) selected from the various hapu and whose task was to include holding enquiries into intersecting claims, with a view to their ratification by the Native Land Court.[57]

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[55] Treaty of Waitangi, Articles I and II (Maori text) (Treaty of Waitangi Act 1975, Schedule 1) or see translations in Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland, Oxford University Press, 1989) p317

[56] Stafford/Gore Browne, May 6 1857, *App JHR* 1858, E-5

ggg) The Komiti worked hard through 1879 and 1880 with the support of local officials such as the Resident Magistrate at Tauranga, H W Brabant.[58]

hhh) Panels of rangatira sat as judges to hear applications from various claimant groups, and won widespread recognition among the tribes of Arawa. But efforts by the Komiti leaders to get their activities and findings officially recognised in Wellington met little success.[59]

iii) Maori dissatisfaction with the Native Committees Act 1883 was aired with John Balance from 1884 to early 1886 including meetings at various Arawa centres in February 1885. The bills submitted to Parliament by Maori members reflected some Maori wishes, including authority for Maori committees both to determine the customary ownership and to control alienations of land.

jjj) However once ownership was determined discussion focussed on 'block committees' rather than 'tribal committees'.

kkk) The Native Lands Administration Act 1886 did not give Maori committees power to determine title; they remained essentially in the position of advising or assisting the court.[60]

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[57] Alan Ward "Ngati Pikiao Lands:Loss of Tribal Ownership and Control"pp51-54
[58] Ibid
[59] Ibid
[60] Ibid

# 7.0 RAUPATU

## Breach

**7.1** The Crown, without justification and in breach of the principles of the Treaty of Waitangi, waged war in lands of the peoples of Ngati Makino and their constituent whanau and hapu, taking lives, inflicting major emotional suffering and trauma; and destroying property within which the peoples of Ngati Makino and their constituent whanau and hapu held interests.

## Particulars

**7.2** The Crown conducted a military campaign in the Bay of Plenty which destroyed lands and settlements in which the peoples of Ngati Makino and their constituent whanau and hapu had held interests and embarked on a series of military operations within their lands and adjoining lands causing loss of life and property and breaching the promise of peace intended to be preserved by the Treaty of Waitangi.

**7.3** Without permission or just cause the Crown illegally occupied and constructed military encampments over lands which the peoples of Ngati Makino had interests.

**7.4** In breach of the guarantees of Te Tiriti o Waitangi the Crown, since 1866 and continuing to the present day, has failed to acknowledge the wrongful confiscation of Ngati Makino lands and resources and has failed to return any Ngati Makino land to Ngati Makino and has failed to grant any compensation or redress to Ngati Makino for the confiscation of Ngati Makino lands and resources despite having granted compensation and redress for confiscation to other tribes.

# Facts

a) Ngati Makino were not signatories to the Treaty of Waitangi, and prior to the crown's invasions in the 1860s, Ngati Makino was largely beyond the bounds of British control. Ngati Makino exercised complete authority over their lands, forests, fisheries, taonga and other resources in accordance with their tikanga. Contact with Europeans within Ngati Makino was limited.

b) Prior to 1865, some Ngati Makino were profitably engaged in trade and some were prepared to try Grey's runanga system.

c) In early September 1865, the Crown ordered the dispatch of a military expedition to Opotiki to apprehend the killers of Volkner (at Opotiki in March 1865) and Fulloon (at Whakatane in July 1865).[61]

d) Two proclamations appeared in the New Zealand Gazette of 5 September 1865, but were not notified to Ngati Makino prior to or following the landing of Crown troops at Opotiki on 8 September 1865.[62]

e) The 'Proclamation of Peace', dated 2 September 1865, proclaimed the end of the war that had begun in 1863 in Taranaki and which had extended to Waikato, Tauranga and Whanganui. It pardoned all those tribes who had been in arms against the Crown and stated that no further lands would be taken 'on account of the present War'. It stated that an expedition was being sent to Opotiki to arrest the murderers of Volkner and Fulloon, whom the Governor urged be given up, and warned that those tribes who concealed the murderers would have a part of their lands confiscated as payment for the relatives of the deceased and for military settlement.[63]

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[61] David Alexander " 19th Century Purchase of Ngati Makino Lands" p23
[62] Ibid
[63] Ibid

f) A second proclamation, dated 4 September 1865, declared martial law in the Whakatane and Opotiki districts and again stated that a military force was being sent to capture Volkner and Fulloon's killers. The killers, and anyone who assisted them, were to be subject to court martial. Martial law was not lifted in the eastern Bay of Plenty until January 1867, even though Governor Grey had reported the area to be peaceful as early as March 1866.[64]

g) Following the landing at Opotiki, Crown troops patrolled the area between Opotiki and Whakatane and carried out a series of military engagements throughout the Opotiki district. This involved the killing of people, the destruction of kainga and pa sites, the destruction of cultivations and other food supplies and the seizure of property. The Crown's actions have been described as following a 'scorched earth' policy.[65] The actions of the expeditionary force contravened the aim of the expedition, which was to apprehend specific individual murderers: the Crown forces punished whole communities while they were ostensibly looking for individual murderers. Ngati Makino did not engage with the Crown troops at this point.

h) On 9 October 1865 the Outlying Districts Police Act was enacted to give effect to the proclamations of September 1865. This provided for the confiscation of lands from tribes to pay for policing the district if local Maori failed to bring the fugitives to justice. Although the Crown did not use this provision in the eastern Bay of Plenty, the Act was another example of the Crown policy of imposing collective responsibility on Maori for the acts of individuals and the Crown's underlying strategy of confiscating land for settlement.

i) Resistance led to the Bay of Plenty land confiscations in January 1866.

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[64] Ibid
[65]

j) The Order-in-Council/Proclamation of 17 January 1866 (as subsequently amended by Order of 1 September 1866) purported to confiscate certain lands, estates, forests, fisheries and other properties of the Ngati Makino in the Bay of Plenty more particularly described as " commencing at the mouth of the Waitahanui River, Bay of Plenty and running due south to the Tarawera River..."[66] This was amended in September 1866 to a point not so far inland, the western boundary then being described as commencing at the mouth of the Waitahanui River, Bay of Plenty and running due south for a distance of twenty miles".[67]

k) The use of a line south from Otamarakau as the confiscation boundary almost certainly had its origin in the understanding of officials of the time that such a line was a convenient territorial boundary for Maori administration purposes. The Bay of Plenty Native District created under Grey's Maori administration arrangement in 1862 had been divided into two to form the Tauranga Native District and the new Bay of Plenty Native District in 1864.[68]

l) On 17 January 1866 the Crown proclaimed the confiscation of approximately 448,000 acres of eastern Bay of Plenty lands, under the provisions of the New Zealand Settlements Act 1863 (extended by the provisions of the New Zealand Settlements Amendment and Continuance Act 1865). The order in council was published in the New Zealand Gazette on 18 January 1866.

m) The confiscation was "punitive and without lawful cause," and was undertaken despite the Crown's September 1865 proclamation of peace and the absence of any rebellion by Ngati Makino. It was instead undertaken in order to "take the wealth and break the autonomy of the people," and to establish and maintain the Crown's authority. In 1864, the British Secretary of State for Colonies had raised objections to the

[66] New Zealand Gazette 1866 p17. The notice was also apparently published in Maori in the Kahiti of 7 February 1866
[67] New Zealand Gazette pp347-348

Crown's policy of land confiscation and the New Zealand Settlements Acts.

n) In November 1865, the prisoners suspected of involvement in the killings of Volkner and Fulloon were tried at Opotiki by court martial. On 23 December 1865 the Attorney-General ruled that the courts martial process was illegal in New Zealand. The prisoners were brought to trial in the Supreme Court at Auckland in March-April 1866. None of the men charged with murder or accessory to murder were of Ngati Makino. The murders of Volkner and Fulloon were, at law, not considered to be acts of rebellion.

o) The confiscation boundary cuts through what is today legally recognised as Ngati Makino territory. The choice of boundary represented a sweeping sledgehammer statement by the Government, which caught up 'rebel' and 'loyalist' alike.

p) In June 1866 the Under Secretary of the Native Department, Rolleston advised the Civil Commissioner in Tauranga that as payment for their military services, Arawa would be permitted to occupy lands as far east as the Awa o te Atua River.

q) In October 1866 Te Pere and others of Rotoiti wrote to the Government asking that the western boundary of the confiscated lands "be taken back to Te Awa o te Atua".[69]

[68] David Alexander " 19th Century Crown Purchases of Ngati Makino Lands" pp24-26
[69] Te Pere and others to Governor 23 October 1866. as cited in David Alexander Doc G-4 Wai 46/275 p26

# 8.0 THE COMPENSATION COURT

## Breach

**8.1** The Compensation Court in breach of the Treaty of Waitangi:

a) operated in an unjust and unfair manner;

b) actively sought and acted on unproven allegations that Ngati Makino were rebels;

c) failed to assess customary interests in land;

d) failed to ensure that no Ngati Makino land was confiscated; and

e) failed to ensure that Ngati Makino were compensated for any land that was confiscated.

## Facts

a) In 1866 and 1867 the Crown established the Compensation Court, which operated in an unjust and unfair manner and which was ultimately improperly influenced by the Crown. The Crown failed to assess customary interests in land, failed to ensure that Ngati Makino land was not confiscated and failed to ensure that Ngati Makino were compensated for land that was confiscated.

b) In establishing the Compensation Court, the Crown imposed tenurial reform, individualisation of collective land rights, a new litigious and combative process which was alien to Tikanga Maori, and which resulted in the redistribution of Ngati Makino lands without reference to the wishes or interests of Ngati Makino and its constituent whanau and hapu.

c) The Government called for claims to the confiscated land in March 1866. But it was not until 19 months later that a claim was lodged. One

constraint on the Compensation Court was that it could only award land to those who were not classed as having been in rebellion.

d) The Crown failed to provide Ngati Makino with an adequate period of notice for lodging claims to the Compensation Court or to ensure that affected parties were properly notified around the process of such investigations and as a consequence claims were mistakenly lodged with the Native Land Court rather than the Compensation Court. As a consequence it was not until October 1867 that Rota Rangihoro and others made application to the Compensation Court for the lands at Whakarewa between the confiscation boundary, the Tarawera River and Te Awa o Te Atua.[70]

e) Crown official Clarke was clearly involved in the processing of the application which was wrongfully lodged in the name of Ngati Pikiao even though subsequent evidence lead in the hearings themselves was that the block claimed was Waitaha (Ngati Makino).[71]

f) The Crown failed to provide statutory guidelines on how the Compensation Court should be constituted and operated. Instead, rules for operation of the Compensation Court were gazetted on 20 June 1866 and 16 September 1867.

g) John Wilson was appointed a Special Commissioner to deal with the Bay of Plenty confiscated lands. His role was to push ahead with military settlement, and to identify and negotiate areas to be awarded to Maori. Under a separate appointment as Crown Agent, Wilson was also responsible for representing the Crown at the Compensation court hearings, and steering the out of court arrangements he had made through the Compensation Court.[72]

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[70]. David Alexander"19th Century Crown Purchases of Ngati Makino Lands" Wai 46/275, doc G-4 p20
[71] Ibid p15
[72] Ibid p30

h) The Compensation Court also comprised Crown officials such as Major William Mair, Colonel Lyon and T H Smith, all of whom had had been involved in the military campaign and were biased or had the appearance of bias. The Compensation Court could not maintain the appearance of impartiality. In most cases the Court accepted Crown Agent Wilson's word as to who was or was not a rebel.

i) The Compensation Court to consider claims concerning the Bay of Plenty confiscation commenced sitting in April 1867. In July 1867 the hearing of all Awa-o-te-Atua claims was held over until December 1867. Rota Rangihoro, Taihorangi and Te Mapu Te Amotu lodged a claim on 29 October 1867 to the Compensation Court for all lands:

> *Ki Waitahanui haere tonu i te rohe o te whenua kua tangohia e te Kawana, ko tetahi rohe. Kei te Akau haere tonu i te tahataha moana o te Awa–o-te-atua. Ko etahi wahi kei to takiwa o Tarawera Awa.*[73]

j) Ngati Makino's claims were eventually heard by the Compensation Court (Judge William Mair) in December 1867. The hearings took place while the Crown was continuing its military campaign in the Bay of Plenty region.

k) Under the compensation provisions of the New Zealand Settlements Act 1863, the onus fell on Maori to prove to the Compensation Court that they had not been in rebellion, while the Crown was not required to prove that Maori were in rebellion. Given the intimate whakapapa connections of Te Puehu the principal Rangatira at the time in the Otamarakau areas of the Ngati Makino lands to his kin of Ngati Hikakino he did not give evidence, probably because he may have been regarded as in rebellion.[74] The evidence given however by the applicants

[73] Application to Compensation Court, 19 October 1867. Opotiki Compensation Papers Box 3/4
[74] David Alexander "19th Century Crown Purchases of Ngati Makino Lands" Wai 46/275 Doc G-4 p33

focused around the rights and claims of Te Puehu, who was the chief occupant of the disputed land.[75]

l) The Compensation Court wrongly awarded the claims of Ngati Makino to Ngati Pikiao and wrongly construed some Ngati Makino rangatira to be rebels. Judgement was given to Ngati Pikiao without explanation for the decision. All land named in the claim by Rota Rangihoro from west of a line running from a pohutukawa tree at the entrance of Whakarewa river direct to Otitapu was awarded. Shortly after the Compensation Court had made its awards of land to the west of Tarawera River, Te Mapu Te Amotu wrote to the Government to say that he was dissatisfied with the decision of the "... court in respect of certain lands near Te Awa o te Atua".[76]

m) The Crown was able to pre-empt the Court's powers as, under the New Zealand Settlements Act 1863 and its amendments, because the entire district had been deemed to be taken for the purpose of military settlement, the consent of the Crown was required before the Court could return any land to Maori. The Crown could have abandoned its claim to Ngati Makino confiscated lands under section 6 of the New Zealand Settlements Amendment and Continuance Act 1865 but did not do so. The Crown did abandon its claims to confiscated lands elsewhere in the confiscation district.

n) Under the Friendly Natives' Contracts Confirmation Act 1866, Crown Agent Wilson was given the power to negotiate and settle compensation claims of 'loyalists' outside of the Compensation Court proceedings. Wilson did not investigate the extent to which claimant hapu were involved in the eastern Bay of Plenty conflicts. His determinations on this issue were 'arbitrary', and hapu did not always get back the land they had traditionally occupied, receiving instead the land of other hapu.

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[75] Ibid p33

[76] David Alexander "19th Century Crown Purchases of Ngati Makino Lands" p35

o) In June 1867, before the Compensation Court had heard the claim to the land, John Wilson, the Crown Agent responsible for overseeing the distribution of the confiscated land, said that 87,000 acres to the west of the Tarawera River had or would be 'given' to Arawa.[77]

p) In October 1867, the Crown passed the Confiscated Lands Act 1867, retrospectively granting itself the power to make reserves for 'loyal' Maori and surrendered 'rebels' in the eastern Bay of Plenty.

q) The Crown acted illegally and prejudicially in reallocating land after confiscation. No reparation was made for these acts. In reallocating land at a time of unrest, some hapu were prejudicially affected.

r) The Crown's refusal to return confiscated lands to Ngati Makino deprived them of the means to sustain themselves, resulting in poverty and dependency on the Crown.

**Crown's Failure to Compensate for Confiscation**

s) The Crown has failed to acknowledge the wrongful confiscation of Ngati Makino land; has failed to return any Ngati Makino land to Ngati Makino control and authority; and has failed to grant any compensation or redress to Ngati Makino for the confiscation and redistribution of Ngati Makino lands and resources despite having granted compensation and redress for confiscation to other tribes. This conduct continues to the present day where despite Crown assurances following preliminary findings in the Eastern Bay of Plenty Inquiry that they will deal with Ngati Makino in good faith to negotiate settlement, negotiations have stalled for almost 2 years without reasonable cause and matters remain unresolved.

[77] Ibid p34

t) The Crown failed to develop a proper process to correctly identify those Te Arawa hapu rightfully entitled to the allotment of interests.

u) The Crown refused to return the reserves to their rightful owners, which led to the impoverishment of Ngati Makino and its constituent whanau and hapu.

v) The Sim Commission in 1927 was unable to shed any light on the reasons for the Compensations courts decision.[78]

w) The Sim Commission wrongly branded some Ngati Makino rangatira as rebels. The commission wrongly concluded that, with the exception of Whakatohea, the confiscation of lands from eastern Bay of Plenty tribes had not been excessive or unjust.

[78] Ibid pp33-37

# 9.0 TE KOOTI TANGO WHENUA – THE LAND TAKING COURT

## Breach

**9.1** The Crown breached the Treaty of Waitangi by facilitating the fragmentation and alienation of Ngati Makino lands through the Native Land Court. The Crown established the Native Land Court:

a) For the purpose of applying Pakeha concepts of land tenure;

b) With the practice of applying Pakeha rules of procedure;

c) With the practice of applying Pakeha concepts of succession; and

d) With the effect of taking away from Maori self determination of matters affecting their own land.

All contrary to:

i) Maori custom;

ii) Tino rangatiratanga; and

iii) Tikanga and the principles of what is tikanga.

## Particulars

### The Native Land Acts

**9.2** The Crown enacted the Native Land Acts for the primary purpose of defeating chiefly authority and the traditional iwi and hapu system of land tenure and management in order to facilitate the alienation of Maori land for the purpose of colonisation.

**9.3** The Native Land Acts wrongly provided that customary title could only be recognised by way of individual interests in land and failed to provide for land to be held corporately by iwi or hapu in accordance with Maori custom.

**9.4** The Native Land Acts imposed unnecessary cost burdens on Maori which inevitably lead to the alienation of land.

## Imposition of Native Land Court on Ngati Makino

**9.5** The Crown imposed the Native Land Court system on Ngati Makino contrary to Ngati Makino's express wish that their lands not be subject to the jurisdiction of the Native Land Court.

**9.6** Consequently, Ngati Makino were forced to participate in the Native Land Court process and lost land as a result of wrong determinations of the Native Land Court, the imposition of court and survey costs and the individualisation of title.

**9.7** Between 1872 and 1896 Ngati Makino and Arawa steadfastly opposed the operation of the Native Land Court and sales, leases, surveys and roading within the Ngati Makino rohe.[79]

**9.8** Between 1875 and 1896 the Native Land Court determined title to the following blocks situated within the Ngati Makino rohe; Waitahanui; Tahunaroa; Whakarewa and Otamarakau.

## Crown Strategy of "Conquest by Purchase" and Improper Influence on the Native Land Court

**9.9** Between 1872 and 1896 the Crown implemented a strategy of "conquest by purchase" of Ngati Makino in order to defeat Ngati Makino's opposition to the Native Land Court, sales, leases, surveys and roads. As part of this strategy the Crown entered into agreements with Maori other than Ngati Makino for the purchase and lease of land within the Ngati Makino rohe, paid advances

[79] Judith Binney 'Encircled Lands' Part 2 pp271/284

("tamana") in respect of such agreements, encouraged Maori to enter into leases with settlers prior to title being investigated by the Native Land Court, and encouraged Maori to undertake surveys and apply to the Native Land Court for title in respect of land within the Ngati Makino rohe.[80]

**9.10** The Crown suspended the operation of the Native Land Court in the Central North Island and Bay of Plenty between 1873 and 1878 by Section 4 of the Native Land Act 1867 in order to force Maori to treat with the Crown only in respect of possible leases and sales and to shut out private purchasers and lessees.

**9.11** The Crown's strategy forced Ngati Makino to participate in the Native Land Court against their wishes as both claimant and counter claimant in order to protect their lands.

**9.12** Between 1872 and 1896 the Crown agents' strategy improperly influenced the outcome of title determinations by the Native Land Court.

## Native Land Court Process Unfair and Prejudicial

**9.13** The Native Land Court's process was unfair and prejudicial to Ngati Makino:

a) The Native Land Court comprised judges who had insufficient training and experience and were biased against some Ngati Makino rangatira.

b) The Native Land Court imposed a complex adversarial process without providing proper representation for Ngati Makino in respect of any of their appearances.

c) The Native Land Court failed to give adequate notice of hearings to Ngati Makino.

[80] Judith Binney 'Encircled Lands' Part 1 pp295/299

d) The Native Land Court hearings were invariably held at inconvenient venues and at inconvenient times of the year which impeded the ability of Ngati Makino to fully participate in hearings.

e) The Native Land Court failed to adequately investigate and grant applications for rehearing by Ngati Makino.

## Native Land Court Decisions Contrary to Evidence and Law

**9.14** The Crown failed to ensure that the Native Land Court made correct determinations of customary interests in Ngati Makino land.

**9.15** The Native Land Court's decisions were at times contrary to the weight of evidence presented to the Court which supported Ngati Makino interests.

**9.16** The Native Land Court's decisions were at times contrary to the correct approach to determining customary interests.

**9.17** The Native Land Court recognised fee simple interests only in land and failed to recognise lesser interests in land such as usufructuary rights and licences as a result of which the Native Land Court elevated the claimed interests of other Maori in Ngati Makino land from usufructuary rights or licences into fee simple interests.

**9.18** As a result of the Crown's military campaign against Ngati Makino kin and the confiscation of vast tracts of land in the Eastern Bay of Plenty, Ngati Makino were prejudiced when presenting evidence to the Native Land Court as at times they could not establish a continuous occupation of the land because of the desire to minimize relationships between those branded rebels and as such other iwi loyal to the Crown were able to assert sole occupancy of the land or otherwise assert some ascendancy of entitelment.

**9.19** The Native Land Court wrongly favoured loyalist iwi who embraced the Native Land Court process and the Crown's agenda of settlement. In particular

the Native Land Court favoured iwi who initiated surveys and applications to the Court and who had treated with the Crown by way of leases and sales.

## Costs of Native Land Court Process

**9.20** The Native Land Court gave rise to substantial costs to Ngati Makino resulting in the loss of Ngati Makino land.

**9.21** The Native Land Court imposed substantial Court costs on Ngati Makino whether or not they were willing participants in the Court process.[81]

**9.22** The Native Land Court required an unnecessarily high standard of surveys and imposed survey costs on Ngati Makino. Ngati Makino did not need land surveyed as they did not intend selling land and only sought confirmation of their title.

**9.23** The Native Land Court arbitrarily assessed low values of Ngati Makino land for the purpose of defining Crown interests in Ngati Makino land in lieu of survey liens.

## Effect of Individualisation of Title

**9.24** The individualisation of Ngati Makino land resulted in the fragmentation of ownership, the unnecessary partition of land and prevented the traditional iwi or hapu system of land tenure and management. This typically resulted in uneconomic land holdings which were either impractical to develop or which were ultimately alienated.

## Inadequate Safeguards

**9.25** The Crown failed to implement adequate safeguards to protect hapu and iwi from the actions of a minority of owners.

**9.26** The Crown failed to implement adequate safeguards to protect hapu and iwi from loss of land through fraud.

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[81] Fraser pp162-163

## Crown's Failure to Remedy Errors of the Native Land Court Process

**9.27** The Crown failed to take steps within its powers, whether by legislation or otherwise, to remedy errors of the Native Land Court which had caused prejudice to Ngati Makino.

# Facts

### Determining Ownership of the Whakarewa Block

a) The Compensation Courts Awards of confiscated territories to Ngati Pikiao was followed up by establishing a list of owners of the block. 153 members of the hapu were named, of whom seven chiefs were appointed as trustees; Rota Rangihoro; Te Mapu Te Amotu; Te Puehu Taihorangi; Wiremu Matene; Pokiha Taranui; Hapeta Te Pakiura and Ranapia Rangihawariro.[82]

b) The Government was advised of this list in 1872, and it was subsequently notified in the Gazette in 1874.

c) The manner in which the list was drawn up was the subject of criticism at the time and in later considerations in the Native Land Court.

d) Rewiri Manuariki related that:

> .... *The award was made to Ngati Pikiao tribe and long afterwards Mr Wilson (the Crown Agent) came to Maketu and asked for names of Trustees.... Wilson said you must put in 7 names, trustees to keep back government 'mana'.*[83]

while Mair reported on another occasion that someone else Pere had prepared the list of names for the Compensation Court.[84]

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[82] David Alexander "19th Century Crown Purchases of Ngati Makino Lands" Doc g-4 Wai 46/275 p38
[83] Ibid p38
[84] Ibid p38

e) Ereatara Rangihor said in 1893 that the list was drawn up some years after the Compensation Court awarded the land to Ngati Pikiao. What was clear was that the list of names was much criticised by the owners. In 1875 Mitchell and Davis crown purchasing agents, reporting on the leasing of the block noted that there was "no dispute (concerning the lease) excepting that chiefs declare Pokiha and other names should not be in the trust".[85]

f) When the block was being purchased in the early 1880's the disquiet continued with allegations that some prominent chiefs who should have been included were not in the list.[86] The reason stated by Rota at the time being that those names that were put forward were 'loyal' and that others of Ngati Makino who were 'rebels' did not have their names put in the list at the insistence of the government.

> *"... None of Ngati Makino – not one - who joined the rebellion were put in, only those who remained loyal. Rota and Te Mapu wished to put in Rirituku and some others, but the officers of the Crown would not allow it".*[87]

g) The failure to include in the list of owners a number of persons who were entitled to be included highlights the inherent unfairness and bias of the process in favour of those labelled loyalists.

h) Many people incorrectly left out were Ngati Makino.[88] Ngati Makino were disadvantaged by the Crown's inclusion of members of Ngati Pikiao who did not have any customary rights to the lands and resources in question. Te Pokiha Taranui of Ngati Te Takinga was one said by Ngati Makino to be without traditional right to the land, yet it was

[85] Cross-examination of Ereatara Rangihoro re partition of Tahunaroa3, 14 September 1893
[86] Ibid in evidence concerning the purchase of Whakarewa
[87] David Alexander "19th Century Crown Purchases of Ngati Makino Lands" Doc G-4 Wai 46/275 p40
[88] Ibid p41

Te Pokiha who was later to play the leading role in the sale of the block to the Crown.

i) The award to Ngati Pikiao became in effect the balance land in that part of the confiscation district. Other awards were made to various Arawa and associated tribes in recognition of their military service during the 1865-1867 period; these awards were for lands to the east of the Whakarewa block, between it and the Tarawera.

j) A road was surveyed along the coast through the block. Once the survey was completed it was then possible to issue a crown grant for it, in fulfilment of the award by the Compensation Court. A grant issued in the names of the seven chiefs in trust for Ngati Pikiao hapu under the legal description Lot 63 Parish of Matata River whose area was calculated to be 36,260 acres, although the block is more better known as the Whakarewa Block.

k) The Crown declined to take the alternative option open to it of taking the Whakarewa Block out of the Confiscated lands, so that it became customary land and could then be dealt with by the Native land Court. There were no restrictions placed on the trustees to prevent them from alienating the block.

l) The Grant was over a piece of land which could be regarded as disputed border land. The Crown chose to come in over the top and largely circumvent a dispute between Maori and award the land to those that it favoured. The Crown Grant was issued on the Crown's terms with the title excluding the coastal road, which was surveyed and retained by the Crown. There is no evidence that this was done with the consent of Ngati Makino rightful or with the knowledge even of the wrongful Ngati Pikiao owners.[89]

[89] Ibid pp40-43

**Chaytor's Lease**

m) In 1868, the year following the Crown Grant to Ngati Pikiao of the Whakarewa Block efforts were made by John Chaytor who hailed originally from southern Marlborough to lease the land. 1868 was a period where the Crown had set to one side its right of pre-emption, thus allowing the Maori owners of land to be approached directly by private individuals and their agents.

n) In April 1868 a lease of Waitahanui was purported to have been drawn up between Chaytor and Ngati Makino.[90] The lease was in Maori and was made with Ngati Pikiao rather than with Ngati Makino.[91]

o) The lease was for a total of 27 years from the whole of Ngati Pikiao of the land lying between the confiscation lien to the east and the Pongakawa River to the west and between the sea coast on the north and the watershed north of the lakes on the southern boundary conditional on Ngati Pikiao passing the land through the court and securing a Certificate of Title, with a total rental of 10,300. The terms of the lease included the right for timber resources to be shared between the owners and the lessee, and the exclusion of the sacred maunga Matawhaura and other kainga and cultivations at Peru from the land affected by lease which were however to be fenced by the owners.

p) The terms of the lease were consistent with the legal requirements of the time but the requirement that the land be fully surveyed before it could be dealt with by the Land Court was an onerous burden for the owners which involved not only high costs but time delays, both factors which worked to the owners disadvantage.

[90] Ibid p44
[91] Ibid p44

q) Charles Davis arranged (largely through Rota Rangihoro's group) for Henry Mitchell to survey the Otamarakau block (some 90,000) acres for Chaytor's lease. Although Chaytor paid for the first half-year's rent on the lease in April 1968, he did not make any further rental payments pending progress with the land title investigation process of the Native Land Court. The only protections of the Crown, as a quid pro quo for unleashing private purchasers on the Maori owners consisted primarily of the Native Land Court's investigation of title of the land.

r) A sitting of the court to have been held at Tauranga on the 7th April 1869 was postponed on account of the unsettled state of parts of the country. The block eventually came before the court at Maketu in 1870-1871. It was nearly three years from the date the lease was signed, following which the land was surveyed, before the Native Land Court sat to hear the application. Three years of rent was foregone by the process set up by the Crown.

s) Ngati Makino rangatira Rota Rangihoro was actively dissuaded from making complaints about the delay to the government.[92]

**Survey of the Lease Block**

t) During 1869 Charles Davis arranged with a surveyor, Henry Mitchell to carry out a survey of the Otamarakau Block leased by Chaytor.

u) The surveyors used as survey stations a number of sites in the Otamarakau area; Te Pare; Otari, Matamanu, Ruataniwha and Manawahe. In its original form Mitchell's survey was only of the outer boundaries, with the topography, streams and bushline within the block merely sketched in. The difference between the sketched line of the Waitahanui River and the subsequently surveyed line of the river is apparent.

[92] Ibid p48

v) Up to the year 1871, Mitchell himself had observed that the various attempts by the Judges of the Native Land Court to investigate the titles of land at Maketu, Rotoehu and Lake Rotoiti singly failed, and the proceedings of the Arawa's were of so violent a character as to preclude the possibility of further action being taken in their country. It prompted too the transfer of the court from Maketu, Rotoehu and Lake Rotoiti to Tauranga in the hope that the spirit of turbulence in regard to Arawa land matters would be subdued but even at Tauranga Sir Donald McClean was compelled to order the closing of the Court and the withdrawal from the district of all surveyors.[93]

w) The Court sat in Tauranga during December 1870 and January 1871 to hear the Otamarakau case, among others. On 6 December 1870 Wiremu Kingi Whareauahi and others laid a claim to the block that could not proceed because the applicants did not have a survey plan to support their case. Rota Rangihoro and his party agreed to admit Wiremu to their claim but their claim did not come on for hearing until 28 December 1870. Rangihoro sought orders granting that part of the land surveyed by Mitchell which lay outside the confiscation boundary be made to himself and six other persons. Te Mapu Te Amotu; Te Rirituku Puehu; Pita Haroa; Mita Te Rangituakoha; Rewiri Manuariki and Te Matangi.

x) There were counterclaims from Ngati Whakaue, Ngati Kuhu (a hapu of Ngati Awa and Ngati Whakahemo. During the hearing Rota Rangihoro was represented amongst others by Charles Davis and Abraham Warbrick who had both acted for Chaytor in 1868.

y) The substantive hearing was held on the morning of 19 January 1971 and much of the evidence led for the claimants centred around rights of customary ownership by virture of descent from the ancestor Waitaha-a-Hei and the fact that Ngati Makino had occupied and

[93] Ibid. pp48-50

cultivated at Otamarakau pa. An undisputed fact that was largely to carry the case in Ngati Makino's favour.

z) There were a number of irregularities in the way the case was conducted administratively:

i) The judge adjourned the case after lunch on the first day abruptly after receiving a communication from the Native Minister stating that a serious disturbance was existing in Maketu between two principal sections of Arawa arising out of a judgement of the Native Lands Court quite unrelated to the present applications;

ii) The judge adjourned the case sine die when it was clear that the land under dispute was to have been awarded to the Waitaha descendants who had sought time to bring a list of names of owners to the court after the luncheon break;

iii) As a result of Crown intervention via the communiqué from the Native Minister Ngati Makino were prevented from having title to at least the undisputed portions granted to them, the lease registered, and regular payments made to them; and

iv) As it turned out the delay lasted for seven years and the matters were unable to be progressed during that time.

**Survey Costs**

aa) Mitchell initially charged 937-10-0d for the survey of the 90,000 acres. However this appears to have been reduced to 750-12-4d by September 1870 as a result of intervention by the Inspector of Surveys.

bb) The Maori owners who owed Mitchell this amount were not in a position to pay him, so Mitchell arranged with Chaytor to assign to him the

account owing. Chaytor agreed to pay Mitchell an advance of 150 with the balance when the land passed through the Native Land Court (less an amount of 50 per cent of the finally determined survey cost).

cc) The cost of the survey was then owed by the Maori owners to Chaytor and this was duly notified by Chaytor to the Native Land Court in June 1871. Chaytor also varied the lease so that a proportion of the debt was subtracted each year, over a ten year period, from the rental monies due to the owners.

dd) When the Crown purchased the Waitahanui portion of Otamarakau in 1873-1874 it agreed to pay the costs owing for survey of the Otamarakau Block on the condition that it be reimbursed out of the Waitahanui purchase monies. These costs were assessed at 458-8-6d. by the Inspector of Surveys who reviewed the full survey cost downwards of the original survey of the 90,000 from 750-12-4d to 722. This was apportioned between the Otamarakau and Whakarewa blocks probably on the basis of length of survey lines required so that 458-8-6d was chargeable against Otamarakau and 263-11-6d was chargeable against Whakarewa.

ee) As a result of the dealings between the Crown and Chaytor, the debt on the survey owed by the Maori owners became owed to the Crown rather than to Mitchell and/or Chaytor. There is no record that this change was discussed with the Maori owners.[94]

ff) With the land court shut down, the lease could not be completed and the debt formed part of the Crown's negotiations for the Waitahanui portion of Otamarakau block and for the lease of Whakarewa.[95]

gg) The owners requested quite reasonably, that they not be required to repay the debt until the land was leased and earning revenue.[96] But leases

[94] David Alexander pp59-62
[95] Alan Ward p37

could not be concluded quickly, and the survey debt constituted an effective pressure on Maori to sell land.

**The Native Land Court 1878**

hh) The Court adjournment in January 1871 resulted in no further Court hearings on Otamarakau until 1878. In part this was contributed to by the fact the Crown prevented the Court from sitting in the Bay of Plenty district from August 1873 to February 1877.

ii) In 1873 the Armed Constabulary had to disarm a Maori taua and order the surveyors off a particular block land. Partly for these reasons and partly because the government wanted to control the land trade in the Bay of Plenty and central North Island, McLean suspended the Native Land Acts on these Districts.

jj) During this period the Inspector of Surveys discovered that part of the Otamarakau Block was in the confiscation district and the overlapping area was accordingly separately defined on the plan and named Whakarewa with an area of 33,585 aces. However the Crown grant of the area was 36,260 acres and the difference in area 2675 acres is significant. It was the greater figure which was to be used in calculations around the later sale of the block.

kk) During this period the Crown also provisionally acquired part of the Otamarakau block.

ll) The Court in 1878 decided to award Otamarakau to the descendants of Waitaha-a-Hei, by ancestral right and occupation resumed after 1836, to the exclusion of Ngati Whakaue and Ngati Pukeko. The Court gave opportunity for the various Waitaha hapu to be declared owners of the

[96] Ibid

whole block, but this was not acceptable to the claimants, who wanted closer subdivision.

mm) Following further evidence the hapu Ngati Whakahemo was awarded Pukehina, the north-west portion of Otamarakau. The balance, mainly Ngati Makino land, was divided into Waitahanui (the portion considered sold to the Crown in 1873 following negotiations over the survey costs for Chaytor's negotiation) and Tahunaroa, which was to be retained by the owners for their future needs.

nn) Resolution of matters involved a consideration of a number of factors including:

i) Confusion over the lists of names to be entered into the grants;

ii) Confusion about the entitlement of those who had received payments from the Crown agents about 1873;

iii) Concern around the prominent men labelled as rebels who had not previously been recognised;

iv) Issues around the 10 names submitted by Rota Rangihoro as trustees for Ngati Pikiao; and

v) Intentions by some owners at least to continue negotiations with Chaytor over a lease.

oo) The discussions which went on for about eight days involved most of the owners with Tahunaroa being awarded to just 10 owners as individuals rather than as trustees for all the owners and 76 names being entered as owners for Waitahanui.

# 10.0 CROWN PURCHASING

## Breach

**10.1** The system of Crown purchasing was unfair to Ngati Makino and in breach of the principles of the Treaty in that:

a) The Crown used various methods to privilege itself in comparison to private purchasers, thus depriving Ngati Makino of the opportunity to sell at market values;

b) The Crown used various techniques designed to force Ngati Makino into selling land, such as payment of tamana and withholding rental payments on leases;

c) The Crown took advantage of Ngati Makino poverty during the later nineteenth century to buy large areas of land cheaply and to the detriment of Ngati Makino; and

d) The Crown failed to establish adequate protection mechanisms or alternatively ignored or circumvented those that did exist.

## Particulars

**10.2** Substantial areas of blocks awarded to Ngati Makino by the Native Land Court were subsequently purchased by the Crown.

**10.3** The Crown acquired substantial areas of Otamarakau; Waitahanui; Tahunaroa; Whakarewa and other blocks within Ngati Makino rohe.

**10.4** Crown purchasing was carried out under a variety of legal devices which placed the Crown in a monopoly position to the disadvantage of Ngati Makino. The Crown used these devices to drive down prices and buy land from Ngati Makino at less than market values.

**10.5** Crown purchasing devices which operated disadvantageously to Ngati Makino included:

a) The use of proclamations to bar private parties from dealing with the land under s 2 of the Native Land Purchases Act 1877 and other enactments;

b) The payment of tamana, also known as 'groundbaiting';

c) Leasing land from Ngati Makino and vesting monopoly purchasing rights on the Crown as a term of the lease;

d) Suspending the operation of the Native Lands Acts in the Taupo and Bay of Plenty districts between 1873 and 1877 under s 4 of the Native Land Act 1877 and s 6 of the Native Land Act 1873 while at the same time requiring Ngati Makino to obtain title to the block in the Native Land Court as a condition for the payment of rent; and

e) Reimposing Crown pre-emption on the entire country by s 117 of the Native Land Court Act 1894.

**10.6** The Crown refused to pay rentals on blocks subject to leases before the Native Land Court had awarded titles to the blocks but allowed its agent to pay advances to individuals. These advances were then charged against the leased blocks. While these advances helped allay costs associated with the Native Land Court process in the short term they had serious long-term implications for the recipients who had to sell land in order to repay the Crown.

**10.7** The Crown used tactics of arranging leases with Ngati Makino which were then used as a device to pressure Ngati Makino into land-selling. The Crown's failure to pay the rent on a regular basis, and its whittling away of the rental through charging of advances and survey costs against the land forced the majority of the block's owners to sell their interests to the Crown.

**10.8** The Crown's ability to purchase individual interests in Maori land operated to the disadvantage of Ngati Makino. Treating the title-holders as absolute owners whose individual interests could be purchased on a piecemeal basis fostered divisions within communities and undermined traditional social structures.

**10.9** The partitioning process as used by the Crown operated to the disadvantage of Ngati Makino by allowing individuals to sell land, causing community divisions and facilitating alienation of land to the Crown.

**10.10** Crown protection mechanisms were either inadequate or not utilised by the Crown.

**10.11** The Crown had no fair and reliable system of valuation in place at the time of its land transactions with Ngati Makino and this was to the disadvantage of Ngati Makino. Valuation for Crown purchasing was conducted by government land purchase officers without any means of independent review. There was no procedure for obtaining independent valuations from the Valuation Department until 1905.

**10.12** Although earlier statutes imposed restrictions on the alienation of some blocks of investigated land, the Crown exempted itself from these controls by s 14 of the Native Land Purchase Act 1892 and s 52 of the Native Land Court Act 1894.

# Facts

a) In 1873 McClean secured an effective return to Crown pre-emption in the Ngati Makino territories and negotiation for land prior to the land titles being judicially determined effectively reverted to the Crown's prior 1862 practices.

b) C O Davis and Henry Mitchell were commissioned to negotiate for land in the region, on behalf of the Crown, under provisions for the Public Works and Immigration Act.

c) Although Mitchell and Davis began work in mid 1873 their contract with the crown was not agreed with McLean until October 1873.

d) John Wilson, the former special commissioner who had made a number of arrangements for the confiscated land, was also engaged by the crown to undertake land purchasing. When Mitchell and Davis became aware of this they sought a monopoly of right to negotiate for and on behalf of the Crown in the Maketu territories given their knowledge of their area and previous dealings such as the Chaytor lease. As a result of their requests, Wilson was instructed not to interfere in any way with Mitchell and Davis's work.

e) The modus operandi of Mitchell and Davis was set out in a memorandum concerning the Kaikokopu Block and included:

   i) The securing of every available block of land by the making of preliminary agreement with, and paying deposits to, sections of the recognised owners;

   ii) Title would be elucidated to each block by organising a series of public meetings, the time and place to be fixed by the various contending claimants themselves; and

   iii) If necessary chiefs and assessors would be called in to assist in any disputes that may arise around the process of purchase.

f) Mitchell and Davis pursued a strategy of paying deposits to as many groups as possible, over as much of the district as possible, in order to tie

up the land for the crown against any future resumption of private purchase.[97]

g) They negotiated with Maori owners and private dealers to pay out the latter and convert the private transactions into Crown transactions.[98]

h) The two agents conducted a series of meetings mostly at hapu level and negotiated mainly for lease of the land rather than purchase. Mitchell and Davis's correspondence reveals that they saw leasing as the prelude to eventual purchase of the land. So too did the Minister of Native Affiars of the time, Daniel Pollen, who told the Legislative Council in 1874:

> *"It was perfectly well known that, in dealing with Native land, the first step was the lease, and that obtained, the freehold inevitably followed in time".*[99]

i) Mitchell and Davis were in 1876 to report that they were well received by Te Arawa, even though the Government was not offering as much money for land as private buyers.

**Waitahanui**

j) An agreement was said to have been reached with Ngati Pikiao in September 1873 (before Mitchell and Davis had reached agreement with McLean on the terms and conditions of their employment by the Crown) for the sale of Waitahanui (said to contain 30,000 acres) for £2,500. No signed documentation marking this purchase agreement has been found.

k) On 2 August 1875 following survey by a surveyor named McGregor of the portion to be sold, a deed of sale was signed for the surveyed area for

[97] Alan Ward p37
[98] Rose p34

the block, 27,776 acres at a price of £4,000. Of this sum, £1500 was apparently for survey and incidental expenses. £4000 for 27,776 acres calculates out at 2/10 ½ d.

l) There were a number of irregularities with the deed that was first submitted to Wellington. Three persons referred to in it had not signed it so the deed was returned so that their signatures could be obtained.

m) The Crown agents Mitchell and Davis, used survey debts and threatened demands for their redemption as the means of persuading the owners to enter into negotiations.

n) The crown agents were aggressive in the use of survey costs in Maketu to induce sales. In 1878 Davis, who by this time was acting as an agent for Chaytor again, told the Native Land Court about the commencement of the negotiations he and Mitchell conducted with Ngati Pikiao for Waitahanui in August 1873. Davis testified that:

> *I mentioned to them that they were hard pressed on account of survey charges, and advised them to consider the matter.*

o) Davis went on to explain that interest was accumulating on the debt.

p) In 1881 Ereatara Rangihoro testified to a Royal Commission investigating Chaytor's claim to Otamarakau, of which Waitahanui was a portion. He discussed Davis' and Mitchell's methods of negotiation telling the inquiry that:

> *The survey lien was urged upon us as a reason why we should sell to Govt.*

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[99] New Zealand Parliamentary Debates, vol 16 p209 cited in Rose p44

q) The following graphs set out a schedule of payments for survey fees received by Mitchell in the Central North Island during this period out of the consideration agreed to by Maori and is followed by a further graph showing what percentage of the purchase price such fees accounted as:

| Payments for Private Survey Debts out of Consideration Money Agreed with Maori | | |
|---|---|---|
| **Surveyor** | Sub Totals of Payments (£) | Total Payments to Each Surveyor (£) |
| A. C. Turner paid on account of future advances to Ngati Whakaue | | 400[377] |
| Cussens paid out of Kaikokopu deposits | | 481 |
| Henry Mitchell's Maketu Claims paid out of deposit on Paengaroa block | 360 | |
| Henry Mitchell's Otamarakau claims outside confiscation line paid out of deposit on Otamarakau block | 458 | |
| Henry Mitchell's Otamarakau claims inside confiscation line paid out of deposit on Otamarakau block | 263 | |
| Henry Mitchell paid out of Tauhara Middle deposit | 736 | |
| Henry Mitchell paid out of Tauhara North Deposit | 70 | |
| Henry Mitchell paid out of Taharua deposits for Tauhara South | 230 | |
| Henry Mitchell paid out of Taharua deposits for Taharua | 200 | 2,317 |
| Eric Goldsmith paid out of Te Puke deposit | 100 | |
| Eric Goldsmith paid out of Rangiuru deposit | 150 | 250 |
| Maori labour | | 21 |
| Walter Hallett paid out of Runanga 2 advances | 98 | |
| Walter Hallett paid out of Wharetoto rent | 250 | |
| Walter Hallett paid out of rent for Runanga 1 in 1879 | 50 | 398[378] |
| Total | | 3,867[379] |

| Private Survey Costs Paid out of Government Purchase Money as a Percentage of Total Consideration | | | |
|---|---|---|---|
| **Block** | **Amount Paid for Private Surveys (£)** | **Consideration in First Deed (£)** | **Survey Costs as Percentage of Consideration** |
| Kaikokopu | 481 | 1,350 | 36 |
| Waitahanui | 721 | 5,000 | 14 |
| Tauhara Middle | 736 | 1,150 | 64 |
| Tauhara North | 70 | 370 | 19 |
| Taharua[382] | 430 | 1,000 | 43 |
| Te Puke | 177 | 4,000 | 4 |
| Rangiuru | 150 | 1,300 | 12 |
| **Totals** | **2,705**[383] | **14,170**[384] | **19** |

r) Davis and Mitchell were normally content to enter into leasing arrangements but in the case of Waitahanui a sale and purchase agreement was reached, after the debt for Mitchell's survey had been pointed out to the owners. Mitchell was anxious to be reimbursed and applied additional pressure to get the owners to agree to a sale.

s) Mitchell and Davis were also entitled to an increased commission if they succeeded in purchasing rather than leasing land.

t) All territories from Bay of Plenty to Taupo were withdrawn by Proclamation from the operation of the Native Lands Act and the Land Purchase officers were instructed not to recognise any of the negotiations began on behalf of private persons prior to that time.

u) Chaytor's old transactions regarding Otamarakau was therefore treated as void by the Land Purchase officers yet Mitchell still pressed for survey fees some of which were due to him from the Chaytor lease proposal for

surveying services he had provided, to be paid and accounted for as part of purchase arrangements.

v) The initial willingness of the owners to drop their asking price from £4200 down to £2500 adds to the impression of pressure being applied at the time.

w) The Crown agents resumed negotiations for Waitahanui, but insisted that the survey costs (the source of the original Crown payment) also extend to Tahunaroa and Pukehina, an approach not forseen by owners when they were dividing Otamarakau and drawing up lists of names.

x) Over the next few years advances continued to be paid to individuals against the agreed £4000 pound purchase price for Waitahanui.

y) As a result of complaints about the crown agents actions in a Te Puke negotiation, in May 1876, Davis and Mitchell were advised that their services would no longer be required after 30 June.

z) In March 1878 the Crown published a notice in the New Zealand Gazette advising that because Government money had been paid on the Waitahanui portion of the Otamarakau Block, it had a prior interest.[100]

aa) The effect of the notice was that no one else was entitled to acquire or purchase and interest in Waitahanui.

bb) Not all of the named owners were in agreement that the block should be sold. In April 1882 Hema Te Tua sought a further subdivision between Rota's group (the sellers since 1873) and the non-sellers.

cc) The Crown then applied to the court for a definition of its interest in Waitahanui.

[100] David Alexander p101

**Tahunaroa**

dd) Partly because a portion of the survey costs for Otamarakau had been laid against Tahunaroa, the Crown proclaimed that block as being under negotiation (notwithstanding that it had been created for Maori owners' own use when Waitahanui had been split from Otamarakau).

ee) The Crown agents purchased, severally, the signatures of three of the 10 named owners, plus that of Te Pokiha Taranui, a non-owner in terms of the land court title, but a leading rangatira of Ngati Pikiao. The Crown then applied to the Court for a definition of its interests in the block. The Crown was awarded 6519 which it paid for in 1883.

ff) At the request of Rirituku Te Puehu, the court subdivided from the remainder of Tahunaroa a 3000 acre block in his name, to be sold to Chaytor in redempteion of their outstanding interests. The sale was completed one month after the award.

gg) The balance of Tahunaroa was awarded to 10 named owners, two at least of whom were apparently nominees of Te Puehu and Rota Rangihoro rather than members of Ngati Makino proper.

hh) When fresh surveys disclosed an error in the original 1875 survey, the Crown approached the 'leading natives' for additional land in rectification; they agreed to sell a further 2461 acres, leaving only 8590 acres (Tahunaroa 3) for the tribe.[101]

ii) A further rectification of survey related to 76 acres known as Waewaehikitia block. As late as 1921 this was vested by the court in the original ten grantees of Tahunaroa, still as absolute owners.

[101] David Alexander pp160-85

jj) It was not until a petition was taken to Parliament to get an Order in Council to treat the ten as trustees that the status of the ownership altered, whereupon 76 owners were defined by the Court.

**Whakarewa**

kk) Whakarewa was a block awarded to Ngati Pikiao in the confiscation boundary following decisions of the Compensation Court which was subsequently leased to the Crown.

ll) The lease to the Crown was completed in 1879 and soon after Crown agent Young reported that a number of natives were exceedingly anxious to dispose of the block to the Crown, as they are continually disputing amongst themselves in relation to ownership.

mm) The disputes around ownership can be traced to the original award and the distinction between those considered as traditional owners and those who were included largely by virture of their military service on behalf of the Crown in the 1860's.

nn) A further complaint around the management of the lease related to the failure on the part of the seven named trustees to distribute the rent among the other owners.

oo) Pokiha Taranui defended his right to the rents on the basis that he had not fought with the Crown and on the basis of his efforts to limit the extension of the confiscation line. Furthermore the other 146 owners in the Compensation Court's list were people he had not known, nor been aware that he was meant to distribute rent to them.

pp) The problem was further exacerbated by the fact that advances had been made by the Crown to some of the seven in anticipation of rent, which was thus already absorbed.

qq) The inadequate legal and administrative processes in place highlight how disputes emanating from the management of leases and the non distribution of rent (which might have been resolved) escalated so that some of the owners wanted to sell, take their share of the money and be done with the land.

rr) The Native Minister in 1880 added to the pressure by withholding further rents until a proper division had been agreed and authorised the government agents to negotiate for the freehold.

ss) Major Mair, a comrade-in-arms of Te Pokiha, led the negotiations for the Crown, arguing that the easiest way to resolve division was to sell the land.

tt) The land was eventually sold although a number of prominent leaders not recognised by the Compensation Court were admitted into ownership and a 1000 acre reserve created for non-sellers. A further small reserve of 112 acres had been requested by Te Puehu before his death, a request sustained by his son, and agreed to by Ngati Pikiao because the family had their houses and cultivations there.

uu) The sale was duly arranged by 1885.

vv) Elsewhere in Arawa territory particularly south of Rotoura, where land was contested between major tribal groupings, the Crown did not press to complete purchases where it had made deposits for the leasehold but wrote off the money and abandoned the negotiations.

ww) By 1881 the Crown had purchased some 327,000 acres in the Bay of Plenty and leased 36,000 acres (mainly in Whakarewa).

xx) By the use of the 1877-1878 legislation the Crown was treating their deposits as a lien on the land, which it wanted redeemed in freehold,

rather than through ongoing payment of rent. To reinforce their pressure the government ceased paying instalments of rent on some blocks where initial payments of rent had been made, such as Whakarewa, on the basis that titles were disputed and had first to be cleared through the Native Land Court.

yy) The Government land purchase agents clearly had an unsettling effect on Arawa. The Crown exploited the loyalty of some Arawa to advance its own land purchasing ends. An unwillingness to sell became implicitly regarded as being disloyal to the Crown.

zz) By the end of 1900 in the Whakarewa, Tahunaroa and Waitahanui blocks, only 4 percent of the area of those blocks remained in Maori ownership at 1900.[102]

aaa) Those lands that remained in the hands of the owners by the end of the 19th Century included the:

i) 112 acre reserve for Rirituku Te Puehu's family in Whakarewa Block, the 1000 acre reserve in the north west corner of Whakarewa Block (Waihi South Block);

ii) Waewaehikitia Block of nearly 76 acres;

iii) Tahunaroa 3A of 300 acres;

iv) the five wahi tapu or kainga reserves set aside in the Crown's purchase of Tahunaroa Block (three of which were in Tahunaroa and two of which were in Waitahanui);

v) the Otamarakau Block of 1550 acres in the Waitahanui Block; and

[102] David Alexander "19th Century Crown Purchases of Ngati Makino lands" Doc #G4 Wai46/275 p3

vi) further wahi tapu sites in the Rotoehu Forest reserved in 1986.

bbb) Land transfers affecting these blocks during the twentieth century included lands taken for roads in 1913, 1940 and 1959; lands taken for Railways in 1916 and 1923, lands declared Public Road in 1934 and lands taken for Survey adjustments in 1942, 1961, 1967 and 1987.[103]

ccc) Putting the 19th and 20th Century losses together shows the overall losses. The area remaining represents 0.63 of 1percent of the three original blocks.

[103] David Alexander "Ngati Makino Lands during the 20th Century" Doc M1 Wai46/275 pp1-12

| BLOCK | ORIGINAL AREA<br>acs r p | AREA REMAINING<br>acs r p |
|---|---|---|
| Whakarewa (excluding Lot 63A & Waihi South Reserves) | 35148 0 0 | Nil |
| Tahunaroa (excluding Waewaehikitia Reserve, Tahunaroa 3A, & Wahi Tapu Reserves) | 20187 0 6 | Nil |
| Waitahanui (excluding Otamarakau Reserves) | 26636 0 0 | Nil |
| Lot 63A | 112 0 0 | Nil |
| Waihi South | 1000 0 0 | 51 1 5.8 |
| Waewaehikitia | 75 1 34 | 56 3 33 |
| Tahunaroa 3A | 300 0 0 | Nil |
| Wahi Tapu Reserves | 84 2 0 | 108 0 21 |
| Otamarakau | 1550 0 0 | 322 0 13.8 |
| TOTAL | 85092 0 0<br>(34435.5100 ha) | 539 1 33.6<br>(218.3117 ha) |

# 11.0 FORESTS

## Breach

**11.1** In breach of Te Tiriti o Waitangi, the Crown undermined the rangatiratanga of Ngati Makino and pursued objectives of purported national importance:

a) to gain under Crown control the largest virgin indigenous forest left;

b) to control the harvesting of remaining indigenous timber to avoid the collapse of the timber market and the beginning of a timber famine;

c) to develop an exotic state afforestation programme to give a permanent supply of timber for domestic and export use; and

d) to withdraw from the industry when Government involvement creates economic inefficiencies.

**11.2** To facilitate the acquisition of land for European settlement and in breach of its obligations to protect Maori in possession of their resources and their rights to control such property in accordance with their own customs and having regard to their own cultural preferences, the Crown has:

a) allowed its land purchasing programme to interfere with the economic development of Maori;

b) inhibited Maori in their ability to maintain their own way of reaching agreements by undermining commercial agreements that had been entered into by Maori for timber and forestry development; and

c) inhibited and restricted the development of the forestry industry which led to the diminishment and waste of Maori timber resources.

**11.3** The Crown manipulated the hopes and aspirations of Maori, utilizing their impoverishment as a tool to ensure their continued participation within the developing forestry industry, marginalizing traditional communities through inustrialisation.

# Facts

a) The portion of the Rotoehu Forest lying outside the confiscation boundary falls within the blocks of land lying to the south of Otamarakau known as Waitahanui and Tahunaroa.

b) Ownership of those blocks was determined by sittings of the Native Land Court in 1870-71 and 1878 with a final decision being given on 19 June 1878. By that decision the Court decided that Waitaha, a hapu of Te Arawa, was entitled to ownership of the Waitahanui and Tahunaroa blocks.

c) The lands were the subject of land purchase arrangements which induced sales to the Crown and or it agents following the imposition of survey liens and incidental costs, which were harsh and oppressive. Such lands now form the basis of the Rotoehu Forest which is managed pursuant to the Crown Forest Assets Act.

d) The development of a state exotic afforestation and processing programme on the level that it was undertaken in the Central North Island not surprisingly came to affect the tangata whenua who were living there. Despite the encouragement of Maori into the forestry workforce, there was a continuing reluctance to acknowledge their skills and potential.[104]

[104] Walzl 610

e) Workers were brought to Kaingaroa from overseas. The idea was to bring skilled forestry workers to Kaingaroa as it was believed that this level of skill was not available in New Zealand.[105]

f) When they came, it was often the Maori bush workers who had to show the foreigners how to work the machinery being used.[106]

g) Despite this, when the Canadians arrived, they were given new houses that were fully furnished and even stocked with food.[107]

h) Both Maori and Pakeha workers noted this differential treatment with some resentment. Within a matter of four or five years, however, almost all of the Canadian workers had left forestry.[108]

i) The afforestation, from humble beginnings, grew in size to become the largest man made forest. With that resource in place, from the 1950s, a regional infrastructure was put in place to harness the resource to the greatest potential possible.[109]

j) A second wave of afforestation cemented this industry in place.[110]

k) Then, after 85 years of State involvement in developing this industry, of putting all that was necessary in place – trees, roads, railways, towns, people – the Crown withdrew from the industry.[111]

l) Whilst the industry was being constructed by the Crown as required, so too the tangata whenua of the Central North Island were being re-formed for participation as a major platform of the industry.[112]

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[105] Walzl 610
[106] Walzl 610
[107] Walzl 610
[108] Walzl 610
[109] Walzl 914
[110] Ibid
[111] Ibid

m) By the time of the 1980s restructuring, this reformation had been completed. Pre-industrial workers had been industrialised. New communities had been created. Maori lands had been utilised as the forest industry demanded. Landscapes had been terra-formed. A new society had been created.[113]

n) For the tangata whenua, this had been achieved with a measure of coercion and cooperation. For those whose lands had been acquired under questionable processes in the nineteenth or early twentieth century and later used for forestry or those whose land had been taken or purchased for forestry, there had been a painful experience to go through. For others, their turangawaewae had been transformed as forestry or mill towns, had grown up amongst their midst bringing irreparable changes and a number of hitherto unexperienced problems.[114]

o) Communities not in the midst of a forest but within the proximity of forestry operations, often experienced unexpected environmental degredation and other impacts.[115]

p) In some cases, Central North Island Maori were encouraged, (some would say forced), by government policy to leave their homes and resettle in new environments. The cost of doing so was to lose connections with their homelands. For others, there were few other options than to participate in the new rising industries as previous land loss, insufficiency of productive land or absence of capital had rendered other options unfeasible.[116]

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[112] Ibid
[113] Ibid
[114] Ibid
[115] Ibid
[116] Ibid

q) Those who hesitated to do so were encouraged by the promise of an industry being developed that would provide jobs for life for themselves and their descendants.[117]

r) Such a promise, made by prominent men of business and government, and reiterated by countless officials, was sufficiently strong to bring about participation on a large scale.[118]

s) A social contract was struck. In return for participation a good wage was paid, good work conditions were given (at different places and different times), a standard of living was raised and a lifestyle was secured. Participants were given a sense of continuity as three or four generations of whanau worked in the forestry. Young men were given a sense of achievement and pride in their work and their own prowess at the job.[119]

t) Communities grew up in the knowledge that they were participating in something from which the whole country benefited. In return for the promise of work without end, participation was to occur without protest or complaint, despite the hard work, the demands of an industrialsed work regime, the sometimes gruelling conditions, the social upheavals of living in new environment, the encounter with racial discrimination and the accumulating health risks that resulted for some in early deaths.[120]

u) The presence of a social contract was well understood in that tangata whenua "[had] co-operated with the pakeha government for generations to lease or sell and then to work the forestry lands."[121]

v) The Crown called on the tangata whenua to participate in the furtherance of the national interest and in the expectation of the receipt of benefits for themselves. The tangata whenua participated as requested despite the

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[117] Ibid
[118] Ibid
[119] Ibid
[120] Ibid
[121] Ibid

fact that for many a wide range of expected and unanticipated costs were experienced. Whilst McLennan's succinct summary is correct, what had occurred in the Central North Island between the Crown and the tangata whenua was more than a social contract, however, as the people with whom this agreement was made were Treaty partners.[122]

w) During the forestry restructuring, Treaty issues were recognised in respect of the transfer of forestry assets as a means of satisfying Treaty claims. However, the removal of more than 1,500 persons from employment in the Central North Island, 80% or more of whom were Maori, who had gone through a massive social and economic transformation to ensure their participation as requested by the Crown, was not viewed as a Treaty issue.[123]

x) For the Government to take this view during the 1980s restructuring created inconsistencies in advice. In the case of the rights of residents of Kaiangaroa, the Department of Maori Affairs declared that because of the high percentage of residents that were Maori (75%) and the high numbers among them who were tangata whenua, any decisions made had to take into account Treaty issues.[124]

y) On this basis, the residents were eventually able to gain concessions towards their viewpoint. This same line of thinking could easily have been applied to the whole restructuring process. Had the restructuring of an entire workforce, many of whom were Maori, been viewed as a Treaty issue then possibly increased community or iwi funds could have been made available, (instead of individual entitlements only), greater consultation might have been required and possibly a more gentle and even sympathetic implementation process brought into being – one that was less destructive of communities.

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[122] Ibid
[123] Ibid
[124] Ibid

# 12.0 ENVIRONMENT AND NATURAL HERITAGE

## Breach

**12.1** The Crown usurped Ngati Makino's rangatiratanga over its taonga and therefore its intellectual and cultural property, and in so doing failed to have regard for the impact of mismanagement of such on Ngati Makino, causing damage to the whenua and taonga of the hapu and thus acting in breach of the Treaty.

**12.2** The introduction of Western concepts of land tenure severed the link that Ngati Makino had with their taiao. Thus the Crown failed to honour its obligations under Article 2 of the Treaty of Waitangi in terms of good faith.

**12.3** The Crown failed to protect Lake Rotoehu and Lake Rotoiti from the effects of pollution and so has breached the principle of active protection in relation to Ngati Makino.

**12.4** The pollution of lands and waters of Ngati Makino has resulted in the loss of tikanga and wairua in the area, demonstrating the Crown's dishonour of principles of active protection stemming from the Treaty of Waitangi.

**12.5** The Crown failed to honour its obligation of active protection, guaranteed by Article 2 of the Treaty of Waitangi, by neglecting to prevent the introduction of brown and rainbow trout into Lake Rotoehu and Lake Rotoiti.

## Particulars

**12.6** The Crown mismanaged Ngati Makino's domain, its flora and fauna, and other resources and failed to protect and preserve them, without due regard for the customary use of such resources by Ngati Makino, without due regard for the cultural significance of those resources, without due regard for the impact of such mismanagement on Ngati Makino, and without due regard for their customary ownership and kaitiakitanga over their domain.

**12.7** Western concepts of whenua, individualized in nature, destroyed the necessary boundaries of tikanga Maori and undermined the relationship that Ngati Makino have with their rohe.

**12.8** Subsequent redefinitions of 'whenua' into Eurocentric 'land' concepts worked on the mental and spiritual environments of Ngati Makino, such that these latter definitions have gained ascendancy in the minds of Ngati Makino.

**12.9** Crown legislative and administrative edifices were often invoked inequitably and illegally through several Crown mechanisms to rend whenua from its true framework.

**12.10** Such administrative and legislative regimes were imposed with little, and sometimes no, consultation. As a consequence, Ngati Makino were often denied access to their traditional fishing grounds and sites of power, having instead to contend with pollution and discharge into Lake Rotoehu and Lake Rotoiti.

**12.11** Widespread devastation to areas of special importance occurred, often with the result that the ancestral domiciles of tipua and taniwha, themselves vital to the wellbeing of Ngati Makino were polluted. This has in turn adversely affected the mana to be wielded by the various whanau of Ngati Makino.

**12.12** Reciprocal obligations owed to other iwi have been undermined through the destruction of the environment and the assumption of ownership by the Crown of surrounding whenua.

**12.13** The Crown has neglected to properly provide for Ngati Makino's access to their flora and fauna for medicinal purposes and has failed to protect their intellectual and cultural property rights.

**12.14** The Crown allowed for the introduction of trout into Lake Rotoehu and Lake Rotoiti without the consent of Ngati Makino.

**12.15** The introduction of such foreign species has upset the homeostasis, both physical and spiritual, of Lake Rotoehu and Lake Rotoiti.

**12.16** Supplies of indigenous fish were greatly reduced by the introduction of trout, causing imbalance to the lake as well as restricting Ngati Makino's rights to utilize their resources.

# Facts

a) Trout was introduced into the Arawa lakes in the 1880s. The introduction of this foreign species caused a decline in the indigenous fresh water food supply namely inanga, toi toi, koura and kakahi.[125]

b) As the traditional food sources slowly diminished Maori began to supplement their catches with the new fish trout. However the Crown imposed trout fishing licences and in 1908 Manihera Tumatahi was fined five pounds for fishing without a license.[126]

[125] Tania Thompson, 'Rotoehu and Lake Rotoiti Lakes Research', March 1993, p8
[126] Tania Thompson, 'Rotoehu and Lake Rotoiti lakes Research', March 1993, p 8

# 13.0 PUBLIC WORKS TAKINGS AND SCENIC PRESERVATION

## Breach

**13.1** The Public Works Legislation 1928 and 1981 prejudicially affected and continue to prejudicially affect the claimants and Maori in general, and are inconsistent with the principles of Treaty of Waitangi.

## Particulars

**13.2** The Crown, in breach of the Principles of the Treaty, failed to provide any or adequate assistance to Maori in undertaking tourist ventures, and further provided unequal and therefore discriminatory assistance to non-Maori or non-Tribal tourist operators.

**13.3** The Crown, in breach of the Treaty, further introduced the power to take scenic land under Public Works legislation, and introduced the Scenery Preservation Act 1903, both to enable the acquisition of scenic sites per se, against the wishes of the owners. Those sites were operated in conjunction with Maori tourist ventures and/or had high touristic or intrinsic value.

**13.4** Neither Public Works Acts required the Crown to take into account the principles of the Treaty of Waitangi in exercising their powers under the Acts.

**13.5** The 1928 Act failed to make it compulsory that the Crown make reasonable efforts to negotiate the acquisition of land before exercising its powers of compulsory acquisition.

**13.6** The 1928 Act allowed the Crown to exercise its powers of compulsory acquisition without serving prior notice of Maori land which did not have a Land Transfer Office title.

**13.7** Neither Act required the Crown to take into account the special cultural significance of Maori land to its owners in deciding whether to compulsorily acquire land.

**13.8** The 1991 Act failed to make provision for the Crown to negotiate to acquire an interest in land less freehold for public works and neither legislation made such provision for compulsory acquisitions.

**13.9** The 1928 Act failed to make any provision for land acquired under the Act for public works to be offered back to the original owner or their successors once it was no longer required for that public work.

**13.10** The 1981 Act failed to require the Crown to take special account of the cultural significance of what was Maori land before it was acquired in exercising its discretion as to whether it should be offered back to the original owner or their successors once it was surplus.

**13.11** Neither Act required the Crown to take into account the cultural significance of Maori land to its owners in assessing compensation and in particular did not require it to consider an exchange of comparable land as a priority in assessing compensation options.

**13.12** The 1981 Act in providing under the offer back provisions for surplus land that the previous owners or their successors were required to pay market value for the land unfairly prejudiced multiple owners of Maori land who would be likely to have difficulty in co-ordinating the repurchase of the land.

# Facts

a) In 1910 the Waitangi Scenic Reserve of 34 acres was taken under the Public Works Act.[127]

b) In 1911 73 acres was taken for scenery preservation from Rotoiti 6 and 7.

[127] This and the following examples are from LHAD, Public Works Takings

c) In 1921 a further area of over 1,016 acres was taken from blocks surrounding Lake Rotoiti, including a 506 acre purchase from Rotoiti 6 & 7C.

d) In 1911 52 acres was taken from Part Tautara for scenery preservation under the Scenery Preservation Act 1908, the Scenery Preservation Amendment Act 1910 and the Public Works Act 1908.

e) In 1932 over 3132 acres was taken from around Lake Okataina and Waione.

# 14.0 GEOTHERMAL RESOURCES

## Breach

**14.1** The Crown in breach of the principles of the Treaty failed to provide, protect and allow for the interests of Ngati Makino in the geothermal springs and resources within Ngati Makino's domain.

**14.2** The Crown in breach of the principles of the Treaty failed to recognise and respect the rangatiratanga and kaitiakitanga of Ngati Makino over their geothermal springs and resources.

## Particulars

**14.3** The Crown failed to uphold Ngati Makino's customary ownership of the geothermal resources within their domain.

**14.4** The Crown trespassed on and exploited Ngati Makino's geothermal resources without due regard for the spiritual significance of the resources to Ngati Makino, without consulting them, without payment, and without due regard for their customary ownership and kaitiakitanga over the resources.

**14.5** No redress or adequate redress has been provided by the Crown to recognise Ngati Makino's customary ownership and kaitiakitanga over their geothermal resources and no compensation or adequate compensation has been provided in recognition of the Crown's interference with those rights.

## Facts

a) The geothermal resources of Ngati Makino are a taonga of the hapu. This includes both the surface manifestations of their geothermal resources and the sub-surface components within their traditional boundaries.

b) As Stout and Ngata noted in their initial report on Te Arawa land in Rotorua County, the Crown had been the primary purchaser, using its monopoly under the Thermal Springs District Act to purchase "in all the blocks containing hot or mineral springs".[128]

c) The Geothermal Energy Act 1953 vested the sole right to use and control geothermal resources in the Crown and continue these rights under s354(1)(a) of the Resource Mangement Act 1991.

d) The loss to Ngati Makino of the geothermal resources means that Ngati Makino have not been able to develop the economic potential of such resources.

e) The geothermal resources within a hapu/iwi's mana whenua is a taonga to that iwi/hapu. That iwi/hapu have rangatiratanga over those geothermal resources and act as kaitiaki of them.[129]

f) The Crown has a duty to actively protect Maori's respective interests in both the benefit and enjoyment of their geothermal resources as their taonga and the mana or authority to exercise control over them.[130]

g) The value to be attached to geothermal resources as a taonga is essentially a matter for those who have rangatiratanga over the resource to determine. Such value is not confined to, or restricted by, traditional uses of the taonga. It will include present day usage and such potential usage as may be thought appropriate by those having rangatiratanga over the taonga.[131]

h) The Crown's right to manage or oversee the management of geothermal resources in the wider public interest must be constrained so as to ensure that Maori's interests in their respective taonga is preserved in

[128] Rose p322
[129] Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993, Chapter 5
[130] Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993, Chapter 5

accordance with their wishes. There does not appear to be any exceptional circumstances or overriding public interest which would justify any other conclusion which might leave it open for Maori's interest in their taonga to be harmed or rendered ineffectual.[132]

i) Maori's interest in the resource is not confined by traditional or pre-Treaty technology or needs, but in appropriate cases includes the development of the resource for economic benefit and by modern technology.[133]

j) The Crown should not impose a system of royalties or resource rentals and take benefit from the utilisation of geothermal resources without first determining and giving appropriate effect to the interests of those who have rangatiratanga over the resources.[134]

[131] Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993, Chapter 5
[132] Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993, Chapter 5
[133] Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993, Chapter 5
[134] Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993, Chapter 5

# 15.0 TEARING AT THE SOCIO ECONOMIC TAPESTRIES OF NGATI MAKINO

***E kore te uku e piri ki te rino, ka whitikia e te ra ka ngahoro***

***The reconstruction of Maori is unnatural***

***Their whakapapa remains while all else falls away***

*"...You Brought us your civilization, and you decimated our ranks with strange diseases and modern armaments. You supplied us with firearms, and when in the lust for war we had slain almost half the flower of our race (and a few of yours), you punished us as rebels and confiscated our lands. You gave us the bible and you broke its precepts. You taught us ethics and you had no scruples in your transactions with us. You gave us alcohol and then punished us and gave us an evil name for using it. Our fathers desired to be civilized, but because of your inconsistencies they abandoned your teaching and opposed it with their hearts' blood. We retrograded, and the gap between us widened. You have to make up the ground lost by the bad example of your fathers: we have had to overcome the distrust and suspicion engendered in the hearts of ours and transmitted to us, ere we could once more tape up the broken thread of progress".*[135]

## Breach

**15.1** In breach of the very fundamental underpinnings of Te Tiriti o Waitangi, the Crown levelled a sustained attack on the Tino Rangatiratanga o Ngati Makino by:

a) assaulting and eroding the very social fabric of Ngati Makino's Society, in order to break the peoples and force them into a state of dependency; and then

[135] Statement by the Arawa Chiefs Te Neara, Mita Taupopoki, Auoha, Werehiko, Te Wheoro and Rangiri August 1907 The New Zealand Herald. August 26 1907

b) manufacturing and entrenching the poverty that flowed within Ngati Makino, constricting them in their ability to develop in the Crown's re-engineered world of racial superiority; and

c) having chained Ngati Makino in the shackles of poverty, the Crown then failed to take action to ameliorate or remedy the state of affairs that they constructed.

# Particulars

## The Imposition of Superiority and the Creation of Dependency

**15.2** In breach of Te Tiriti o Waitangi, the Crown imposed a relationship of dominance and subservience as they created the situation where the social and economic position of Ngati Makino had been undermined to such an extent that they and their individual members were not able to resist the intentions of the Crown as:

a) the Government undertook strategies to erode Maori self sufficiency and to destroy, by stealth and by arms, the capacity of Maori to manage their own properties and to determine rights within them;

b) representative institutions were introduced in without effective provision for Maori representation; and

c) Maori custom, law, and institutions were judged by those who did not know them; and the judgments were wrong. The right of Maori to make their own decisions about who controlled the disposition of land and the nature of the interests held was negated.

**15.3** Systemic dependency was created by the Crown through the imposition of superiority that fractured the cornerstones of Ngati Makino's identity. The Crown accomplished this by:

a) the disparaging condemnation of Ngati Makino;

b) the invasion of Te Rohe o Ngati Makino and the atrocities committed therein;

c) the unlawful and unjust confiscation of Ngati Makino whenua;

d) the exclusion of the minds and voices of Ngati Makino in the determination of their destinies;

e) the fragmentation and individualisation of the connections that held Ngati Makino and those to whom they relate together; and

f) the erosion and suppression of the esteemed institutions of Ngati Makino.

**15.4** Contrary to Te Tino Rangatiratanga o Ngati Makino and to the detriment of their social and economic capacity, the Crown breached Te Tiriti o Waitangi by:

a) legislating to legitimise the confiscation of Ngati Makino lands and then unlawfully and improperly utilising the confiscation legislation;

b) introducing and developing a system of Tenure reform that resulted in land loss, disinheritance and social dislocation, marked by internal disputes, loss of control and authority, and the dispersal of the peoples;

c) using mechanisms such as Native Land Court, the Compensation Court and the Sim Commission to rule on narrow questions of custom when there were better ways of resolving substantive issues of justice; and

d) mismanaging and altering the environment of Ngati Makino thereby destroying and depriving nga hapu traditional sustenance and practices.

**15.5** The Crown's failure to actively protect the land base of Ngati Makino created further breaches of Te Tiriti by essentially eroding the identity of the peoples

diminishing their ability to manaaki tangata, which was the glue, or incentive to being part of a collective tribal consciousness.

**15.6** When it excluded the peoples of Ngati Makino from their lands and taonga, the Crown breached Te Tiriti as it tore apart the maze of biotic relationships that the land and the people relied upon for life.

**15.7** The Crown has failed in its duty to ensure fairness for all by suppressing and attempting to erase Nga Tikanga o Ngati Makino contrary to the Treaty understanding that Maori would have laws to protect them and their world as much from each other as from anyone else.

**15.8** The Crown's deliberate intervention was aimed at, and indeed caused the destruction of traditional leadership and the dislocation of social relationships between hapu and whanau who lost their rights and the ability to exercise rangatiratanga over their traditional lands, wahi tapu, and resources.

**15.9** The Crown having caused or contributed to this damage failed to take action to ameliorate or remedy this state of affairs.

**15.10** In breach of the Crown's obligations to actively protect the Tino Rangatiratanga o Ngati Makino, the Crown facilitated the introduction and development of a legal system that devalued and subordinated their histories and traditions.

**15.11** In breach of Te Tiriti o Waitangi and contrary to Te Tino Rangatiratanga o Ngati Makino, the Crown has openly and unilaterally imposed Settler law and Western constitutional principles upon the peoples of Ngati Makino and their dominions to provide active assistance to colonisation by opening up the lands of Maori for settlers.

**15.12** In Breach of Te Tiriti o Waitangi, and contrary to Te Tino Rangatiratanga o Ngati Makino the Crown has:

a) introduced and developed a system of common law that has fundamentally impacted upon the way in which New Zealand has conceived of itself as a historical and constitutional society;[136]

b) maintained and relied upon common law systems, that have denigrated and subordinated the traditional histories of the peoples of Ngati Makino, placing premium on the introduced colonial past, be it custom and usage or the precedent value of case law;[137]

c) facilitated the transformation of the common law to fit into a positivised legal framework that imposed and maintained the endurance of legal principles that were foreign to Ngati Makino;[138] and

d) distanced justice from Maori and their traditional communities as the language of the positivized common law, fixated on the doctrine of precedent became a specialized rather than a general language of discourse.[139]

**15.13** In breach of Te Tiriti, and contrary to Ngati Makino custom and tikanga, the Crown facilitated and maintained its imposed and systematic process of assimilation, actively pursuing the commodification and fragmentation of connections existing between Ngati Makino, their whanau, their hapu and their whenua, dislocating the peoples of Ngati Makino from their identity, from their ukaipo.

**15.14** In breach of Te Tiriti, the Crown's policy of pursuing the individualization of title has acted towards the corrosion of the Tino Rangatiratanga o Ngati Makino.[140]

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[136] McHugh, "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" 52 Univ. of Toronto L.J. 69, 73
[137] McHugh, "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" 52 Univ. of Toronto L.J. 69, 73
[138] McHugh, "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" 52 Univ. of Toronto L.J. 69, 73
[139] McHugh, "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" 52 Univ. of Toronto L.J. 69, 73
[140] Williams, 1999, p99.

**15.15** In the passage of the Land Court legislation, the Crown denied the Tino Rangatiratanga o Ngati Makino by refusing to acknowledge the obligations of reciprocity between Treaty partners.

**15.16** The Crown failed in their duties of active protection affecting Crown policies towards Maori and their interests in tribal lands. On the contrary, settler law and constitutional principles were openly and unilaterally imposed upon Maori and their land. The Crown's explicit policy was to provide active assistance to colonisation by opening up the lands of Maori for settlers.

**15.17** In breach of the Treaty the Crown has failed in their obligation to actively protect and indeed have facilitated the corrosion of Nga Taonga o Ngati Makino including:

a) Maori historical and contemporary knowledge systems; and

b) Maori cultural practices, especially tohunga, rongoa, education, the suppression of religious customs and Te Reo Maori.

**15.18** The Crown, in breach of Te Tiriti, and contrary to Ngati Makino custom and tikanga, and in breach of their Te Tino Rangatiratanga, imposed an assimilative education policy framework that sought to:

a) disconnect the Ngati Makino mind from its traditional and philosophical baselines;

b) break the collective and communal way of life and thought of Ngati Makino; and

c) erode the ability of Ngati Makino to speak nga reo o Ngati Makino.

**15.19** In breach of the Treaty the Crown manufactured and entrenched cycles of poverty within Ngati Makino territories and domains by:

a) failing to actively protect the interests and taonga of Ngati Makino;

b) failing to act honourably, reasonably, sincerely and on the basis of justice, and utmost good faith towards them;

c) treating Ngati Makino in a prejudicial manner and acquiring their resources for its own benefit; and

d) utilised the impoverishment of Ngati Makino to further erode their potential for social and economic development.

**15.20** In breach of the obligations of fairness and good faith, the Crown based the distribution of the factors of social and economic development such as finance and employment in a way that favoured relegated tangata whenua to an underclass of the developing society.

**15.21** In Breach of Te Tiriti, the Crown did not intervene, though it knew of the position, could have intervened and should have in terms of Te Tiriti obligation.

# Facts

### The Disparaging Condemnation of Ngati Makino

a) Ngati Makino had existed outside the main areas of European interest and influence with their main economic activity consisting of cultivating kumara, potato and maize; gathering kaimoana and mahingakai; and collecting and trading flax with a scattering of Europeans resident on the coast.[141]

[141] David Armstrong Ngati Makino and the Crown: 1880- 1960 p4

b) Before the 1840"s the interior of the region occupied by the peoples of Arawa was relatively untouched by direct contact with the outside world, but nevertheless was greatly affected by the "musket wars" of the 1820's and advent of trade and settlement on the coast.[142]

c) In early 1862 T. H. Smith was sent to Arawa districts to explain Grey's runanga system. Smith encountered Ngati Pikiao in large numbers at Rotoiti, where they were engaged in building a flour mill. They were in agreement that a runanga should be formed. Reference was made to land ceded to the government in 1850 for a hospital and the tribe indicated they wished to see a hospital built and a doctor appointed.[143]

d) Smith was authorised to spend 100 on a school at Rotorua and erect a hospital there using Maori labour. He was also authorised to spend 750 on a road between Maketu and Rotorua. This had an immediate benefit, for in 1861 and 1862 the Arawa tribes were engaged in building roads across their land.[144]

e) Arawa economic activity was clearly disrupted by the wars, making all road work all the more important. Resident magistrate noted that the population of the district (about 2,000) had recently suffered badly through an epidemic fever which had decimated them. Nesbit thought this was due to a previous shortage of food, which had now been alleviated through the employment of many by the government on roads and other public works. Scrofula was commonly blamed on poor sanitary conditions.

f) Matters improved primarily through participation in developments in the flax industry, with Maketu, as the place between Matata to the south and Tauranga to the north growing to meet the new developments. By 1872 Maketu possessed a large Maori population, and was a hive of activity

[142] Alan Ward " Ngati Pikiao Land s Loss of Tribal Ownership and Control" p 13
[143] Ibid pp 4-5

boasting two hotels, a Native School, a telegraph office, stores and a church. A flax mill operated well at Waihi.[145]

g) In December 1873 Donald McLean met Ngati Pikiao at Te Awahou who requested more road works, ploughs and other agricultural implements. In May 1874 the Civil Commissioner of Tauranga reported that a good harvest had been obtained, and that Maori were purchasing agricultural implements. Harvests might have been doubled, he added were it not for the Compensation Court, which distracted people's attention from their economic pursuits.

h) Mechanisms such as the Komiti Nui, formal and visible expressions of Te Arawa capacity to self-govern, were targeted by the government as hostile entities, as it actively sought to undercut Te Arawa unity and undermine support of its leadership.

i) Individual negotiations and bribery were examples of the divide and rule tactics applied by the Crown, manipulating and embittering relationships, reversing tribal control over lands and resources and driving conflict into Ngati Makino.

j) On 22 January 1882, a paper by Alfred K Newman, which was supported by the government, containing a lengthy discussion on prevalent diseases and an analysis of statistics on death rates was read to the Wellington Philosophical Society. This paper stated:

> *Taking all things into consideration, the disappearance of the race is scarcely subject for much regret. They are dying out in a quick, easy way, and are being supplanted by a superior race.*[146]

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[144] Ibid
[145] **IBID P 6**
[146] Belich, p299. Cited by Williams, *Crown Policy Affecting Maori Knowledge Systems And Cultural Practices* (2001) Wai 262 #K3, 24

k) Sir George Bowen, the Governor who served as the founding President of the Institute, stated that the Institute was 'founded and endowed by the wisdom and liberality of the Colonial Legislature' pursuant to the New Zealand Institute Act 1867, a public Act of Parliament.[147]

**Confiscation**

l) After the dislocation caused by the wars Arawa and Maketu Maori in particular experienced rising fortunes. Maketu where the bulk of the land remained in Maori ownership, became a busy port and appoint of embarkation for tourists visiting the thermal districts. Local Maori exported agricultural produce from the port and benefited from the tourist trade and a programme of public works.

m) New boundaries were created however causing severe conflict with neighbouring tribes and over important relationships such as mana whenua.

n) Relationships and connections were maintained and mana was shared throughout their rohe through freedom of movement that allowed many to participate in the sustaining of rangatiratanga.

o) This freedom of movement, and hence the mana of Ngati Makino rangatira was trampled through confiscation and the subsequent military activity and then as a consequence of a period of extensive land purchasing by the Crown and third parties, and increasing incursions into the way of life of the peoples of Ngati Makino who had to defend their claims to land increasingly through court processes.

[147] G Bowen, 'Inaugural Address (4 August 1868)', *Transactions and Proceeding of the New Zealand Institute*, vol 1, 1868, Wellington, Government Printer, 1875, p 9. Section 3 of the 1867 Act empowered the Governor in Council to appoint and pay the salary of the Superintendent of the Geological Survey. Section 14 stipulated that general current expenses were to be provided for in the annual estimates laid before the House of Representatives. Cited in Wai 262 #K3 (2001) p24

p) When crops were destroyed by flood or natural calamities the marginalisation of the people and their consequent inability to cope with these setbacks was further evidenced.

q) During the 1880's and 1890's the crown's agents tended to see Maori as the authors of their own misfortune in this regard; calling them lazy or improvident and accusing them of wasting time at Land Court hearings.

r) By 1907 only Ngati Pikiao, of all the Arawa tribes, possessed land in excess of that required for their immediate use, and this land was largely unavailable for utilisation because of the 1881 Thermal Springs Act and the unsatisfactory state of Maori titles.

**Exclusion from Determination of Destiny**

s) The exercise of political power at the national level effectively disenfranchised the Maori as their voices were silenced by the Pakeha political majority.[148]

t) The enactment of the 1852 Constitution Act, which turned New Zealand into a self-governing colony, initially excluded Maori from participation within the national and local political mechanisms of New Zealand. Maori were therefore kept out of the framing of laws the Crown imposed upon them.[149]

u) The constitutional transitions following the enactment of the New Zealand Constitution Act 1852 saw the transfer of governmental power from Crown appointed officials to responsible ministers drawn from the settler controlled General Assembly. These constitutional re-arrangements were carried out without consultation with Maori and

[148] Murton pp965, 981
[149] Murton Ch 1, p40

they were of considerable importance for the future nature of the relationship between the Crown and Maori.[150]

v) In the 1860s, legislators '*deliberately set about to destroy*' Maori tribal society.[151]

w) Early policy and legislation, much of it with direct impacts, was developed and passed with little consideration of the impacts on Maori.[152]

x) For example, the Native Rights Act 1865 was passed without even the slightest semblance of consultation with Maori iwi and hapu, whose ways of life were so soon to be turned upside down by the Native Land Court.[153] This Act explicitly expressed that it was:

> *An Act in response to doubts about whether the colonial courts have jurisdiction in all cases touching the persons and property of the Maori people.*

y) It was necessary to be a rate payer to vote in county elections until the 1940s, and most Maori did not qualify because they did not individually own property.[154]

z) In the debate on the Native Land Rating Act of 1904, James Carroll pointed out that Maori were unrepresented on local bodies, and that when roads and bridges were laid out, large blocks owned by Maori were carefully ignored because settlers did not want to increase the value of the land that they might someday wish to purchase or lease.[155]

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[150] Wai 262 #K3, 37
[151] Wai 894 # C3 p11
[152] Draft Murton, Ch 1, p42
[153] Wai 894 # C3 p6
[154] Draft Murton, 39/03/04, Ch 1, p42
[155] Williams, John A., *Politics of the New Zealand Maori. Protest and Cooperation, 1891-1909*, Seattle: University of Washington Press, 1969, p125

aa) The Act placed a tax on Maori communal land, and to avoid charges of 'taxation without representation', one Maori owner out of each 25 was to be placed on the voting rolls of local bodies.[156] Issues relating to rating (without representation) have been dealt with in other reports,[157] but these do not say much about representation, and having a voice in local body affairs.

**Bulldozing Mechanisms of the Court**

**The Imposition of the Common Law**

bb) The imposition of the common law supplanted and acted to erase those of Maori as the application of more than one legal system within one jurisdiction was alien to the common law:

> *the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.*[158]

cc) Though Courts did not have the power to consider the validity of legislation they accepted the responsibility to ensure that statutes are properly enacted:[159]

dd) In 1877 the Chief Justice denied the Maori tribe any juridical status whatsoever which meant that Maori were to be considered as individuals

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[156] Ibid p125

[157] Bennion, Tom, 'The History of Rating in Te Urewera', Draft report commissioned by the Crown Forestry Rental Trust, 2001; Cleaver, Philip, 'Urewera Roading', Draft report commissioned by the Crown Forestry Rental Trust, 2001; Oliver, Stephen, 'The Ruatoki Report', Draft report commissioned by the Waitangi Tribunal, 2001; Bassett, Heather and Kay, Richard, 'Ruatahuna: Land Ownership and Administration c. 1896-1990', Report commissioned by the Waitangi Tribunal, 2001

[158] *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045 per Lord Mansfield, CJ (KB), following Coke J in the *Case of the Postnati* (1608)

[159] *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045

and their form of political association - the tribe - no more than a mere collection of individuals.[160]

ee) This status as individuals and its necessary concomitant, British subjecthood (conferred by Article 3 of the Treaty) was later implicitly denied as relations between Crown and Maori were:

> *'to be regarded as acts of State, and therefore are not examinable by any Court'.*[161]

ff) In the eyes of the common law, Maori therefore had neither the status of sovereign tribes (or at least recognized political entities) nor of individuals with the rights of British subjects.[162]

gg) The Chief Justice therefore held that:

> *'in the case of primitive barbarians, the supreme executive Government ... of necessity must be the sole arbiter of its own justice'.*[163]

hh) The common law denied Maori any original or subsisting juridical status, and their relations with the Crown, including any 'rights' they might hold, were judicially recognized as being at the absolute discretion of the Crown.[164]

ii) The Crown permitted the application of common law regimes such as the ad medium filum aquae principle has affected the ownership and usage of

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[160] *Wi Parata v. The Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) 72 (S.C.)
[161] *Wi Parata v. The Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) 72 (S.C.), 79
[162] *Parata v. The Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) 72 (S.C.)
[163] *Parata v. The Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) 72 (S.C.), 78
[164] This position was taken in other cases during the late nineteenth century, though *Wi Parata* remains the benchmark case: *Ani Kanara* v. *Mair* (1885), 4 N.Z.L.R. 216 (S.C.); *Moore* v. *Meredith* (1889), 8 N.Z.L.R. 160 (C.A.); *Nireaha Tamaki* v *Baker* (1894), 12 N.Z.L.R. 483 (S.C.), esp. at 488 *per* Richmond J.; *Aitken* v. *Swindley* (1897), 15 N.Z.L.R. 517 (S.C.); *Chalmers* v. *Busby* (1897), 16 N.Z.L.R. 287 (S.C.); *Teira Te Paea and others* v. *Roera Tareha and others* (1896), 15 N.Z.L.R. 91 (C.A.) at 114 *per* Edwards J

rivers as the alienation of Maori land has also meant the alienation of the adjoining riverbed.[165]

jj) The application of such rules in New Zealand is contradictory to and therefore supplanted the Maori traditional connections and jurisprudential structures based on Maori memories which see them and their entire environment as one.[166]

kk) The Crown failed to remedy any prejudice caused by the application of such rules.[167]

**The Fragmentation of Ngati Makino**

**Shattering the Collective**

ll) The Crown confronted Maori with Western methodologies for the occupation of land who were subjected to pressure to sell land for settlers.[168]

mm) The tactics used to secure a show of acquiescence pitted one Maori against another, causing internecine warfare.[169]

nn) The Crown introduced and established a regime of freehold ownership and the individualisation of the associated rights which was hostile to relational property regimes and antithetical to that of Maori.[170]

oo) This introduced regime involved the vesting of rights (exclusive use, benefit, control, transfer, reversion, identification) to the total resources of defined blocks in specified proprietors, independent of kin or community ties but subject to the state's right to control or limit use (for

[165] Doig, #A75, p65
[166] Doig, #A75, p63
[167] Doig, #A75, section 3.1.2; Ika Whenua Rivers Report, 1998, p92
[168] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* Ch 12.2
[169] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* Ch 12.2

example, legislation on resource management, scenic preservation, etc).[171]

pp) The formal introduction of this regime facilitated the entrenchment of colonial perceptions of Maori that land that was not "used as in Britain" as wasteland and available for conversion.[172]

qq) The Crown denigrated the esteemed institutions of Maori by failing for the most part to acknowledge Maori society's different, set of institutional arrangements to use and control land and resources.[173]

rr) Maori, including Ngati Makino were offered no choice but to engage with the court process,[174] which contained protections that proved to be substantively ineffectual.[175]

ss) Maori customs and traditional connections to their whenua were commodified as they were converted to negotiable pieces of paper that could be bought or sold.[176]

tt) This process had major economic implications, as individual interests that were retained fragmented into uneconomic and/or inaccessible parcels, which would be compounded by the introduced laws of succession.[177]

uu) During Native land Court hearings most of the affected iwi would be relocated for sometimes up to seven weeks.[178]

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[170] Draft Murton, 39/03/04, Ch 1, p32
[171] Draft Murton, Ch 1, p32
[172] Draft Murton, Ch 1, p32
[173] Draft Murton, Ch 1, p33
[174] Wai 894 # C3, p14
[175] Wai 894 # C3, pp15–25
[176] Draft Murton, Ch 1, p33
[177] Draft Murton, Ch 1, p33
[178] Murton p266

vv) The individualization of title, coupled with the right of alienation, impacted on group hapu governance as the jurisdiction of traditional leadership structures no longer had jurisdiction over the rights of its members, nor did individuals have many customary options left in how they could exercise their rights.[179]

ww) Arawa initially resisted the incursions of the Land Court and were opposed to land sales. However by the late 1860's government surveyors began to survey roads and certain Arawa chiefs were encouraged to submit some land for survey and investigation by the Court on the basis that these activities would not lead to sale.[180]

xx) The matter of Court costs and survey charges became an increasingly troublesome issue, however and disputes arose between competing claimants, notably at Maketu where the potential for conflict caused a lengthy postponement of cases involving Ngati Makino.[181]

yy) As Arawa learnt, the processes of the Land Court also allowed any clever schemer to promote a claim and thus draw whole iwi and hapu into the expensive Court process and land sales which inevitably followed.[182]

zz) This practice was exacerbated by the presence of Crown land purchase agents who made a practice of advancing payments to individuals.

aaa) The protacted sittings of the Court which continued for much of the 1880's meant that a large Maori population was living constantly in Rotorua township which continued to be a haven for the storekeepers profiting from the court sittings and purchase activities and were a hotbed of disease.[183]

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[179] Draft Murton, Ch 1, p37
[180] David Armstrong Ngati Makino and the Crown 1880 -1960 p 44
[181] Ibid p 73
[182] Ibid p 73
[183] Ibid p 55

bbb) From an early date Arawa took the view that land matters should be determined amongst themselves with the Court merely confirming decisions thus arrived at. The formation of the Great Committee of Rotorua and the Committee to Nurse the Law of Ngati Pikiao are examples of this.[184]

ccc) These committees were powerless, however in the face of increasing encroachments of land purchase agents and the Court. They had no legal sanction, and if a single individual submitted an application to the Court their authority might be undermined. Later boycotts failed for the same reason; if Maori decided not to attend the court the nett result would be that their names did not appear on the title.

ddd) By 1900 Ngati Makino had been divested of 95 percent of their land and those who could claim some interest in Ngati Pikiao or other land through whakapapa were hindered like their relatives by these factors.

**Denigration of Esteemed Intitutions**

eee) The Crown legislated to reduce impediments to the government's ongoing commitment to assimilationist policies that would undermine Maori collectivity. With great forcefulness, the premier Richard Seddon, during debates on the 1900 Maori Councils legislation stated:

> *It is this communal life, this non-subdivision of land, and the communal titles which force them into idleness, carelessness, and neglect.*[185]

fff) The profound negative effects of the Land Court and land sales on all aspects of Maori culture and society have been documented by M P Sorrenson and others. Sorrenson blames Maori population decline

[184] Ibid p 73
[185] Wai 262 #K3 48

in the 1870's and 1880's on individualisation of title and detribalisation of tribal society through the mechanism of the Land Court, and the physical effects of the Court itself.[186]

ggg) Claimants had to travel, sometimes for long distances to attend Court sittings. Cash advances were made by purchasing agents or the local storekeeper or publican would supply goods on credit which were later to become a charge on the land. When sittings were arranged all blocks were gazetted together with no indication when each would be heard. Frequently two or three hundred blocks were gazetted and all Maori interested had to arrive on the opening day but many had to wait several weeks before their case was heard. Cases were adjourned for Ngati Makino abruptly without being settled, others were advertised and not heard.

hhh) In 1885 the Member of Parliament for Whanganui told the House:

> *" I believe we could not find a more ingenious method of destroying the whole of the Maori race than by these [Land ] courts. The natives come from the villages in the interior, and have to hang about for months in our centres of population... They are brought into contact with the lowest classes of society and are exposed to temptation, and the result is that a great number contract diseases and die.... Some little time ago I was taking a ride through the interior and I was perfectly astonished at hearing that a subject of conversation at each hapu I visited was the number of natives dying in consequence of attendance at the Native Land Court at Wanganui. That has always appeared to me to be a disgrace to the colony".*[187]

iii) Arawa opposition to the Court occurred within a wider national context – the Maori Parliaments, the Kotahitanga, and general boycott movements.

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[186] David Armstrong " Ngati Makino and the Crown: 1880 -1960" p 56
[187] NZPD. August 5 1885.

Arawa chiefs particularly those from Ngati Makino and Ngati Pikiao took an active role in these movements nationally and in the Bay of Plenty.[188]

jjj) By April 1879 a Great Committee of Rotorua had been constituted to assume jurisdiction over the extensive lands of the Arawa Tribe. In late 1879 Ngati Pikiao attempted to institute similar controls within their own territory.[189] Like the Great Committee it had no legal sanction and was powerless to resist the inexorable march of individualisation and land sales.[190]

**Education – Dislocating the Mind**

**Erosion of Te Reo o Ngati Makino**

kkk) The enactment of the Education Ordinance 1847 required the mission schools to provide instructions to Maori in the English language.[191] Section 3 of the 1847 Education Ordinance read:

> *In every school to be established or supported by Public Funds, under the provisions of this Ordinance, Religious Education, Industrial training, and instruction in the English language, shall form a necessary part of the system to be pursued therein.*

lll) This Act:

> *marked the beginning of the policy of prohibiting the use of Maori in schools ... Maori language became the 'enemy', and generations of schoolchildren were chastised for speaking the language learnt at the mother's breast. Teachers were explicitly discouraged from learning to speak Maori themselves on the*

[188] David Armstrong " Ngati Makino and the Crown: 1880 -1960" p 51
[189] Ibid.
[190] Ibid

*grounds that it would lessen their efficiency as teachers of English. The Education Department declared total war on the Maori language.*[192]

mmm) Up until this stage, Missionary society schools that had operated from 1816 onwards, had carried out their tasks in the Maori language, expending great effort upon translation of religious texts into Maori.[193]

nnn) The significant rate of literacy among Maori was in the Maori language, the desire of which was an important feature of Maori life at the outset of colonial rule.[194]

ooo) The enactment of the Native Schools Act 1858, repeated the earlier Ordinance's explicit emphasis on English language instruction and on industrial training for pupils in state supported mission schools.[195]

ppp) In 1862 Wesleyan Superintendent and school inspector, Henry Taylor identified to Parliament "the state of communism in which all kinds of property are held" and the Maori language as two serious impediments to progress in 'carrying out the work of civilization among the aboriginal Native race, through the medium of schools'.[196] He stated that:

*The Native language itself is also another obstacle in the way of civilization. So long as it exists there is a barrier to the free and unrestrained intercourse which ought to exist between the two races. It shuts out the less civilized portion of the population from the benefits which intercourse with the more enlightened would*

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[191] Wai 262 #K3 35
[192] Biggs, *The Maori Language Past and Present*, p 75; Waitangi Tribunal, *Report of the Waitangi Tribunal on the (sic) Te Reo Maori Claim* [*Te Reo Maori Claim*], Wellington, Government Printer, 1986, p 74 cited in Wai 262 #K3, 142
[193] Wai 262 #K3 35
[194] Wai 262 #K3 35
[195] Wai 262 #K3 38
[196] H Taylor, 'Further Report on Native Schools in the Province of Auckland', AJHR, 1862, E-4, p35. Cited in Wai 262 #K3 38

*confer. The School-room alone has the power to break down this wall of partition between the two races. Too much attention cannot be devoted to this branch of Maori education.*[197]

qqq) Within debates on the Maori Schools Bill, most members of the House supported the principle that Maori communities should be required to formally request the establishment of a school and also that they should endow it with land, but that the language of instruction should definitely be English.[198]

rrr) The Native Schools Act 1867 allowed for the establishment of primary schools for Maori pupils, under the auspices of the Native Department, once the Maori parents had elected a management committee, provided a site, half the costs of construction and maintenance, one-quarter of the teachers salary, and the cost of the books. Their purpose was unabashedly assimilationish and were overwhelmingly Pakeha in cultural and linguistic terms.[199]

sss) Nevertheless thirteen such schools were in existence by 1870 one of them at Maketu. By 1872 another school had been built at Matata.

ttt) In 1872 the Resident Magistrate at Matata noted that if some land to grow food and accommodation for the students could be provided attendances would rise, for at present the children were forced to accompany their parents to Land Courts and on foraging expeditions. He also noted a great scarcity of food at Maketu which was also tending to reduce attendances there. By 1873 two more schools had been built at Tarawera and Rotoiti.[200]

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[197] H Taylor, 'Further Report on Native Schools in the Province of Auckland', AJHR, 1862, E-4, p35. Cited in Wai 262 #K3, 35
[198] Wai 262 #K3, 123
[199] David Armstrong " Ngati Makino and the Crown: 1880 -1960" p 169
[200] Ibid. pp169-170

uuu) Low average attendances were the result of periods of bouts of disease and illness and children continued to be taken out of school during seasonal work periods and when families were forced to travel afar in search of work in extractive industries like timber or the Thames gumfields.[201]

vvv) The enactment of the Native Schools Act 1867 further entrenched attitudes against educating in Te Reo[202] stipulating at Section 21 that:

> *No school shall receive any grant unless it is shown to the satisfaction of the Colonial Secretary by the report of the inspector or otherwise as the Colonial Secretary shall think fit that the English language and the ordinary subjects of primary English education are taught by a competent teacher and that the instruction is carried on in the English language as far as practicable.*

www) Notwithstanding the fact that many Maori communities passively resisted the onslaught of colonial education, the School Attendance Act 1894 made primary schooling compulsory for all children where they would have encountered unqualified support for the celebration of the relief of Mafeking, the surrender of Pretoria, the coronation of Edward VI, observance of Empire Day singing 'Soldiers of the King', 'God Save the King', later on the observance of Dominion Day, saluting the Union Jack, Empire lessons in class, etc.[203]

xxx) The Native Schools Code 1880 set out the framework for the establishment and administration of Native Schools and set the pattern for the role of Native schools as centres of influence for assimilation. Although schoolmasters were being appointed to serve in Maori

[201] Ibid 170
[202] Wai 262 #K3 38
[203] Wai 262 #K3 129

speaking communities no knowledge of Maori language was required.[204]

yyy) By 1892 the Minister of Education, required children to passing in English if they were to move from one standard to the next standard within a school.[205]

zzz) From 1930's what became a recurring pattern was the firm rejection by government ministers and officials of any Maori initiatives seeking to elevate the social and cultural status of Maori language by having it taught in primary schools and the supreme importance of English in primary schools was stressed time and again.[206]

aaaa) Right up until the 1950's a variety of punishments were used by teachers to enforce the Crown's English only policy.[207]

**Designating Maori Destiny**

bbbb) During the 1950s and 1960s Maori students attending secondary schools were generally directed into non-academic streams as their skills in English and mathematics were considered "poor".[208]

cccc) School certificate marks were scaled to give pass rates of 80% to students taking academic subjects and pass rates of around 40% to students taking non-academic subjects.[209]

**Dislocating the Spirit**

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[204] Wai 262 #K3 133
[205] Wai 262 #K3 134
[206] Wai 262 #K3 141
[207] Wai 262 #K3 pp153 and 156
[208] Murton pp243-244
[209] Murton pp243-244

dddd) By suppressing Tohunga and directing efforts to erode the traditional and philosophical baselines of Maori, the Crown acted contrary to its obligations to protect Nga Taonga o Ngati Makino including their knowledge and their rongoa, which led to a disruption of socio-cultural values and hence a weakening of the authority of Te Tino Rangatiratanga.

eeee) Contrary to guarantees of Tino Rangatiratanga, the Crown firmly rejected transmission of Maori knowledge as being in any way relevant to education of Maori and suppressed and discouraged Maori customs including adoption, marriage, and the holding of tangihanga.

**Tohunga Suppression**

ffff) The selective use of criminal law to convict and punish those whose actions might contravene the common law as embodied in New Zealand statutes served to undermine the mana of tohunga who had been targeted in this way.[210]

gggg) Prosecutions of tohunga began to be considered seriously in 1899 who were warned that if they practiced faith healing they would be the subject of attention from police constables.[211]

hhhh) Tohunga were charged with murder and manslaughter when they failed to cure diseases which Western medicine had no cure for such as pulmonary tuberculosis.[212]

iiii) Section 16(5) of the Maori Councils Act 1900 enabled councils to pass by-laws:

[210] Wai 262 #K3 193
[211] Wai 262 #K3 194
[212] Wai 262 #K3 195

*For regulating the proceedings of tohungas, and the punishment of fine of those (whether European or Maori) who practice upon the superstition or credulity of any Maori in connection with the treatment of any disease.*

jjjj) The Crown had delegated Councils the authority to sanction the diverse and important roles of tohunga as holders of traditional cultural knowledge, as experts in whakapapa, as tellers of oral history, as teachers in whare wananga as priests and shamans for the community's well-being condemning tohunga as a menace to Maori communities.[213]

kkkk) Regulations to license tohunga were formulated in requiring them to obtain licences from a council in order to practice. They could be fined up to £50 for practising without a licence.[214]

llll) The rising influence of the "bastard tohunga" Rua Kenana, who was baptised in the waters of the Waipaoa river by a leading Ringatu tohunga, Eria Raukura,[215] was at the forefront of policy formulation when Carroll introduced the Tohunga Suppression Bill.[216]

mmmm)Carrol stressed the 'effect of these tohungas is to paralyse the industries in which the Natives are engaged' as tohunga were perceived to stand in the way of individualistic work ethics.[217]

nnnn) The passage of legislation such as the Tohunga Suppression Act 1907 and its consequential suppression of rongoa Maori helped contribute to a perceived diminution of the value of medicinal flora and fauna, and thus made it more difficult for Te Iwi Maori to justify and apply specific protection and kaitiakitanga through the exercise of Tino Rangatiratanga in relation to flora and fauna.

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[213] Wai 262 #K3 195
[214] Wai 262 #K3 196
[215] Wai 262 #K3 194
[216] Wai 262 #K3 199
[217] Wai 262 #K3 191

oooo) Healers or religious leaders could no hold to the traditions of tohunga and their whare wananga of the past without running the risk of prosecution, which occurred on many occasions.[218]

pppp) The suppression continued with the enactment of the Maori Social and Economic Advancement Act 1945. It is worthy of noting that under this law, Jesus would have been deemed to be liable for a fine not exceeding £20.[219]

**Tangihanga**

qqqq) Resident Magistrates were attempting to curtail Maori attendance at tangihanga. In 1883, after pointing out the danger of spreading infection if a body was not buried at once without any gathering whatever, the Resident Magistrate at Opotiki then interrupted and unnecessarily rushed the traditional mourning ceremonies of Maori by threatening to send constables to ensure that bodies were buried immediately after death.[220]

rrrr) In 1912, section 18 of the Births and Deaths Registration Act interfered with the Maori grieving process. It imposed a compulsory registration requirement for all deaths requiring a post-mortem to be conducted to ascertain the cause of death, which in the case of Ngati Makino would take an exceptionally long time.[221]

ssss) In 1936 the government proposed even stricter regulation of tangihanga. Such regulation remains a source of clashes in culture.[222]

**Marriage**

[218] Wai 262 #K3 pp206-208
[219] Wai 262 #K3, 209
[220] Wai 262 #K3 44

tttt) Whanau and community had been disrupted by warfare and dislocation which impacted on the role, function and patterns of marriage. To Ngati Makino, marriages were important to the social continuity of the tribe, economic relationships, mana whenua and peace making.[223]

uuuu) The actions of the Crown pushed marriages that occurred outside of the purview of Ngati Makino control.[224]

vvvv) While the first Marriage Ordinance 1842 did not mention Maori,[225] the second marriage ordinance, passed in 1847,[226] exempted Maori from its application.

wwww) After setting out the requirements for a valid marriage and specifying that marriages might be solemnised by a minister of any Christian denomination, the Marriage Ordinance 1847 explicitly recognised the fact that Maori law and custom continued to apply at least to marriages between Maori:

> *Nothing herein contained shall apply to any marriage which may be contracted otherwise than according to the provisions of this Ordinance between two persons both of the Native race.*[227]

xxxx) Marriages according to Maori law were therefore outside the jurisdiction of the 1847 Ordinance while at the same time that they were recognisable in the courts as valid.

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[221] Wai 262 #K3 234
[222] Wai 262 #K3 238
[223] Murton p106
[224] Murton p106
[225] The Marriage Ordinance 1842 was one section long. It extended validity to future and retrospective marriages performed by any minister of any Christian denomination. This ordinance extended religious freedom by modifying the common law of England, which limited valid marriages to those performed by a properly ordained minister of the Church of England or the Roman Catholic Church
[226] Marriage Ordinance 1847 (NZ)
[227] Marriage Ordinance 1847 (NZ) s 44

yyyy) The passage of this section occurred between the New Zealand Government Act 1846 and the New Zealand Constitution Act 1852, both of which provided for districts in which Maori law and custom would be applied.

zzzz) Consistent with these Acts, the 1847 Ordinance extended the jurisdiction of the courts and marriage laws giving the power to assimilate Maori, into the colonial legal system, and the nation stating that it would come into operation with respect to marriages between Maori 'in such districts and at such times as the Governor shall by Proclamation from time to time appoint'.[228]

aaaaa) Section 44 of the 1847 Ordinance was unilaterally reproduced in the Marriage Act 1854 with only the addition of the word 'aboriginal' before 'race' at the end of the sentence, continuing the positioning of Maori law with respect to marriage.[229]

bbbbb) The section was again enacted without change in the Marriage Acts of 1880 and 1904.[230]

ccccc) Notwithstanding the explicit exclusion of Maori marriages from the jurisdiction of the Marriage Acts, the Courts in New Zealand refused to recognise them, the infamous Prendergast finding that as:

> *[t]he natives are British subjects, their relations to each other are governed by the laws of the land, and not by their usages, unless, and only so far as these laws have provided for the recognition of their usage.*[231]

[228] Marriage Ordinance 1847 (NZ) s 44
[229] Marriage Act 1854 (NZ) s 47
[230] Marriage Act 1880 (NZ) s 2; Marriage Act 1904 (NZ) s 2
[231] *Rira Peti v Ngaraihi Te Paku*

ddddd) Young women could be legally married at the age of 12 at the time.[232] European men were therefore not indictable for having carnal knowledge of a young woman between the ages of 12 and 16 if they were married to her under European law, but Maori men married according to Maori law to a young woman under the age of 16 were criminals.[233]

eeeee) Maori who were living together and were not married under the Marriage Act 1880 and were deemed to be living in a state of concubinage while Pakeha would be considered married at common law.[234]

fffff) Those within traditional Maori marriages were therefore viewed by the courts as in the category of people 'ostracized by the respectable members of the community'.[235]

ggggg) The intended assimilation of Maori marriages into the common law is reflected in the statement of Judge Chapman who stated:

> *If the Maori people were permitted to go back to Maori custom with respect to marriages, and to call those unions marriages, that might include polygamous marriages ... the Court does not recognise the so called marriages.*[236]

**Further Imposition of Social Imposter Structures – Dislocating Authority**

hhhhh) Throughout New Zealand's colonial history, the administration of 'native', later 'Maori', affairs has been vested in Crown agencies. It

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[232] See Robson J L 1954 New Zealand: *The Development of Its Laws and Constitution*, 320
[233] See *Rex v Kingi* (1909) 29 NZLR 371 where the Courts refusal to recognize a Wiremu Kingi's marriage to a Maori woman under the age of 16 in a formal Maori ceremony conducted by rangatira resulted in him being endicted for having carnal knowledge of a girl under the age of 16
[234] *Tutua Teone v Tipene*
[235] *Tutua Teone v Tipene*

was their role to define and shape the future for Maori in terms that were consistent with the economic, legal and political paradigm then prevailing in the colony.[237]

iiiii) The latest manifestation of these agencies, Te Puni Kokiri/the Ministry of Maori Development, serves the same function. The indigenisation of the Ministry's name and personnel, within the broader rhetorical embrace of partnership and biculturalism in the state sector, cannot change the political reality: a Crown agency continues to frame the direction that Maori are expected to pursue.

jjjjj) Te Puni Kokiri's public management regime explicitly states the political reality in that a Crown agency continues to frame the direction that Maori are expected to pursue .[238]

kkkkk) Te Puni Kokiri's annual Business Plan sets out the Strategic and Organisational Goals to be achieved through its funded Outputs.[239] These outputs are listed according to Output Classes purchased by the Responsible Minister (of Maori Affairs) and through contracts with other departments or agencies.[240]

lllll) According to its Statement of Intent in 2003: 'TPK understands that its roles and responsibilities in 2003 must ... be aligned to the policy intentions of the government of the day'.[241]

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[236] *Rex v Kingi* (1909) 29 NZLR 371, 372

[237] Alan Ward, A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand, Auckland University Press, Auckland, 1995; David V. Williams, 'Te Kooti Tango Whenua': The Native Land Court 1864-1909, Huia Publishers, Wellington, 1999

[238] Jonathan Boston, Public Management: The New Zealand Model, Oxford University Press, Auckland, 1996

[239] Te Puni Kokiri, Ministry of Maori Development (TPK), 'Statement of Intent 1 July 2003', E.4SI(03), 2003

[240] Preference for a focus on longer term qualitative outcomes rather than short term quantifiable outputs was articulated by Mason Durie, et al in *Maori Specific Outcomes and Indicators*, June 2002; but although the Statement of Intent issued in 2003 refers to outcomes these are still framed in terms of outputs purchased under the Public Finance Act 1989

[241] TPK, 'Statement of Intent'

## The Entrenchment of Poverty – Dislocating the Future

mmmmm) The social and economic difficulties which afflicted Ngati Makino included social and cultural damage, poverty, sickness, high mortality and economic marginalisation were a direct and indirect result of Crown policy and practice that took intentional and purposive steps to undermine Te Tino Rangatiratanga o Ngati Makino.

### Manufacture of Poverty

nnnnn) The Crown's manufacture of poverty within Ngati Makino was accomplished in a number of ways including the:

i) waging of war and the destruction of agriculture and property of Ngati Makino;

ii) confiscation of the most agriculturally suitable land, as well as the restrictions on access to traditional food sources;

iii) constrictions on Development;

iv) the silencing of the many voices of Ngati Makino; and

v) racist benefit regimes.

ooooo) During the latter part of the nineteenth century and into the twentieth century many observers blamed Maori for their chronic ill-health and the conditions which brought it about. The level of health services provided to Bay of Plenty Maori throughout this period seems patchy at best and suggests neglect.[242]

[242] David Armstrong " Ngati Makino and the Crown: 1880 -1960" p 159

ppppp) Health and government agencies seemed more concerned with cost than the health of the Maori people. This is in spite of the fact that Ngati Whakaue obtained a promise of free health care when they ceded the site of the township of Rotorua to the Crown in 1889 and had donated of the site for the Rotorua Hospitial.[243]

qqqqq) In 1922 Arawa had their rights to the lakes negotiated from under their feet for an annual payment of 6,000. Although this money was for the general benefit and welfare of Arawa, the Crown withdrew and sometimes ceased to subsidise health and other services on the basis that Arawa could now afford to supply those services themselves.

rrrrr) In March 1926 the Trust Board requested a government 1 for 1 subsidy to supply medical attendance for Maori resident between Te Puke and Matata. Peter Buck was rather diffident about supporting the application. Buck felt that the government should only support indigent Maori and in correspondence with the Board remarked that the Arawa currently receive free medical attendance, as a result of the 1881 agreement of approximately 890 per annum and if the Board's request was acceded to the governments liability would therefore be in his estimation 1,000 per year.

sssss) The Board was very disappointed as the matter was of some considerable importance to a large section of the Arawa tribe, commenting that the promise of free medical treatment at Rotorua was not free at all.[244]

ttttt) Housing conditions appear to have been sub-standard for a good many Bay of Plenty Maori during most of the early part of the twentieth century. In Sept 1935 the Mayor of Rotorua stated that local Maori were residing in shacks. This was supported by the 1936 census,

[243] Ibid pp 159-160
[244] David Armstrong " Ngati Makino and the Crown: 1880 -1960" p 142

which revealed that on a national basis up to 70 percent of Maori housing was inadequate.

uuuuu) By 1949 of the 30,000 state houses built, less than 100 had been occupied by Maori. In 1947 Prime Minister Fraser admitted that 50 per cent of Maori houses were sub-standard.[245]

vvvvv) In January 1936 a deputation from the Rotorua Borough Council met the Minister of Tourism and Health Resorts to discuss poor sanitation at the Whakarewarewa and Ohinemutu Maori villages commenting that the housing conditions of the natives was far from satisfactory.[246]

wwwww) Nothing appears to have eventuated as a result of these discussions and by 1947 no improvements had been made.[247]

xxxxx) In a 1938 survey of Maori housing conditions in the Waiariki District (which included the Bay of Plenty) it was noted that poverty and multiple ownership were a serious bar to the rapid prosecution of house-building.[248] The consequences of this was that there was a high incidence of typhoid, tuberculosis, infant mortality and other diseases of poverty.[249]

**Restrictions on Land Development**

yyyyy) Maori were denied the capacity to alienate property to anyone but the colonizing State who bought land cheaply and then sold it off land to settlers for vast profits. In this way, the Maori people effectively funded settlement.[250]

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[245] O'Malley p 27
[246] David Armstrong " Ngati Makino and the Crown: 1880 -1960" p 163- 164
[247] Ibid
[248] Ibid p 164
[249] Ibid p 168
[250] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* Ch 12.2

zzzzz) Maori, who were blocked in many cases from developing their lands because of the chaos of titles created by individualizing land legislation which made it almost impossible to access the same kind of assistance available to European settlers, were labelled as lazy and improvident.[251]

aaaaaa) From the 1870s the Crown imposed various legislative regimes that restricted the ability of Maori to finance economic development within the changing social environment.[252]

bbbbbb) Government funding, notably through the Advances to Settlers program, enabled aspirant small farmers to buy large estates and recently purchased Maori land.[253]

cccccc) The development potential of Settler farmers was further facilitated through Government contributions aimed at improving the organizational, quality control, marketing, and research capacities of the burgeoning industry.[254]

dddddd) Farmers were also paid a wage out of unemployment relief funds for the time they put into their farms.[255]

eeeeee) Despite the government's large economic injection into the farming industry to facilitate settler enrichment, there is no evidence that the Crown even contemplated creating any mechanisms to assist Maori to use the money from land sales after 1910.[256]

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[251] Ballara, Angela, *Proud to be White? A Survey of Pakeha Prejudice in New Zealand*, Auckland: Heinemann, 1986, p77. Cited in Draft Murton, Ch 1, 48
[252] Murton, pp515-519
[253] Murton, p479
[254] Murton, p480
[255] Murton, p741
[256] Murton, para 7.9, p583

ffffff) A development 'gap' had was created for Maori land[257] and there is no evidence that the Crown considered any form of assistance for Maori to ameliorate this prejudice.[258]

**Racist Economic Distribution**

gggggg) Those tangata whenua who were lucky enough to find employment building roads received lower pay rates than Pakeha.[259]

hhhhhh) The work for tangata whenua was intermittent as they were laid off while Pakeha retained steady employment.[260]

iiiiii) Where individual farm units were established, the occupiers were employed by the scheme. They did not receive any of the proceeds from sheep.

jjjjjj) The Crown's distribution of welfare was racist directing greater benefits to Pakeha than to Maori as is evidenced in the following table.[261]

[257] Murton, para 7.9, p584; para 8.5, p788
[258] Murton, para 7.9, p585
[259] Te Manawa o Te Ika (Part 2) 89
[260] Te Manawa o Te Ika: (Part 2), p90
[261] Murton p1275

**Table 65 Pension Benefits Paid to Maori**

| | Full Rate (per annum) | Rate to Maori (per annum) |
|---|---|---|
| **OLD AGE:** | | |
| 1923 | £45.10.0 | £26 or £32.10.0 according to circumstances |
| 1930 | Same as above | Same as above |
| 1935 | Same as above | Same as above |
| 1939 | £78 | £78 |
| **WIDOWS:** | | |
| 1923 | £52 with one dependent child plus £26 for each additional child | £39 with one dependent child plus £19.10.0 for each additional child |
| 1930 | Same as above | Same as above |
| 1935 | Same as above | Same as above |
| 1939 | £65 with one dependent child plus £26 for each additional child | £65 with one dependent child plus £26 for each additional child |

**Source:** 'Commissioner to Hon. E. T. Tirikatene', 16 October 1946. SS W2756 9/9/2. National Archives. Document Volume Q, pp. 45-46.

kkkkkk) Income and assets could lead to pensions being reduced. Under the legislation pensions could be reduced or not awarded on the basis of both income and assets. Before 1936, asset calculations for Maori were based on the value of land even when the land could not be sold or leased. Because of the difficulties the pensions administrators had with determining Maori assets and income, it became standard practice to reduce all Maori pensions unless the applicants could definitely prove they owned no land, and were living 'as Europeans'.[262]

llllll) Until 1944-5 the status of Maori widowers and Kaumatua and Kuia, including those of Ngati Makino descent, were relegated by the crown to a status below that of Pakeha who until then received substantially higher benefits.[263]

[262] Murton p1307
[263] Murton p1275

mmmmmm) In some instance, the Crown required Maori to work for unemployment relief when this was not required this of Pakeha.[264]

[264] Murton pp740 and 741

# 16.0 PREJUDICE TO THE CLAIMS

## Breach

**16.1** The actions and omissions of the Crown as particularised in this Statement of Claim and the Crown's subsequent actions and omissions as described above resulted in the social and economic destabilisation of Ngati Makino and as a result Ngati Makino have suffered prejudice and consequent loss.

**16.2** This prejudice included:

a) Damage to the social structures of the people;

b) Damage to the cultural taonga and traditions of the people;

c) Disruption of the existing tenurial regime based on Maori customary law;

d) Poverty, destruction of the economic base of the people, and economic marginalisation;

e) Poor health, sickness and high mortality;

f) Undermining of the political and cultural relationships of the people; and

g) Damage to the physical environment in which Ngati Makino had lived for hundreds of years.

**16.3** These social and economic difficulties were a direct and indirect result of Crown confiscation, purchasing and the operations of the Native Land Court and other Crown actions in the preceding and contemporary periods.

**16.4** The effects of the Crown intervention were the destruction of traditional leadership, the rights and ability to exercise rangatiratanga, the disruption of traditional balances of power in the area, dislocation of social relationships

between hapu and whanau, and the creation of intra hapu and whanau tensions and disputes.

**16.5** As a consequence of large scale acquisition of their lands as particularised above, Ngati Makino was dispossessed of their economic and sustaining resources, including the land, mahinga kai, birding, cultivation, gathering and fishing resources.

**16.6** As a result of Crown intervention Ngati Makino were dislocated from their traditional lands, wahi tapu, and resources and as consequence destabilised their traditional patterns of resource use, economic structures and societies and were hampered and/or prevented from economic utilisation and development of their remaining resources.

# 17.0 RELIEF

## Apologies

**17.1** The Claimants, wishing to achieve the removal of the prejudice inflicted upon Ngati Makino by the Crown, seek recommendations from the Waitangi Tribunal that the Crown make a full and comprehensive public apology for those actions and omissions that were in breach of the provisions and principles of the Treaty of Waitangi.

## Return of Land

**17.2** The Claimants seek recommendations from the Tribunal that pursuant to Sections 8A-8H(j) of the Treaty of Waitangi Act 1975 the Crown should return to the Claimants in a manner which appropriately recognises those hapu/whanau that have a direct interest in the land all relevant Crown land, together with any improvements thereon, including:

a) Reserved land and conservation land;

b) Land held by any State Owned Enterprise:

i) Land held by any institution under the Education Act 1989; and

ii) Land vested under the New Zealand Railway Corporation Restructuring Act 1990 or any interest in any such land and together with improvements thereon;

c) In particular the Crown should return and revest:

i) Whakarewa; Pukehina;Waitahanui;Tahunaroa and Otamarakau;

ii) Rotoehu; Matawhaura; Peru and Kaikokopu;

iii) And other lands of special significance to Ngati Makino;

d) Pursuant to Section 36 of the Crown Forest Assets Act 1989 ("The Act") the Claimants seek that the Tribunal recommend the Crown:

i) return all of the land comprised within the Rotoehu Forest which is within Ngati Makino rohe to iwi ownership;

ii) pays compensation in accordance with the First Schedule of the Act; and

iii) make such other remedies as the Tribunal considers appropriate;

e) Pursuant to Section 8A(2) of the Treaty of Waitangi Act 1975, the Tribunal make a binding recommendation that land within Schedule 1 subject to resumption provisions under the State Owned Enterprises (Treaty of Waitangi) Act 1988 be returned to the claimants.

## Compensation

**17.3** Pursuant to Section 6(3) of the Treaty of Waitangi Act 1975 the Claimants seek that the Tribunal recommend the Crown:

a) Compensate the Claimants for the prejudicial effects caused by the Crown's legislation, actions, omissions, policies and practices as identified in this Statement of Claim;

b) Compensate the claimants in respect of the disruption of the hapu and whanau; the social dislocation which has occurred as a consequence of legislation and government policy; and for the taking of measures dealing in social issues of unemployment and loss of mana; and for compensation by way of policies, practices and funding appropriate to restore the mana of the tribes; education and training of tribal members; and

c) make such other remedies as the Tribunal considers appropriate.

**17.4** Compensation be paid to the Claimants for the loss of their economic base and lands including accrued loss of earnings.

**17.5** Compensation be paid for all costs involved in relation to endeavours by the claimant's ancestors since the 1867 confiscation to recover possession of the lands claimed.

**17.6** Compensation be paid to Ngati Makino for the full costs of the preparation and presentation of this claim and the costs of recovering any land recommended to be returned or other costs incurred in securing the implementation of recommendations.

## Cultural Redress

**17.7** The Claimants seek recommendations from the Tribunal that the Crown:

a) Fully recognise the matauranga and traditional knowledge base of the claimants associated with their rongoa and other taonga be fully recognised and protect them as the cultural and intellectual property rights of the appropriate whanau and hapu;

b) Recognise Ngati Makino's special relationship with the coastline from Matata to Otamarakau;

c) Make provision for the participation of Ngati Makino on all statutory boards, authorities, agencies, companies and other Crown organisations that function within the claim area; and

d) Provide statutory, regulatory and other appropriate mechanisms and resources to enable tribal self regulation and governance for Ngati Makino within their tribal domain.

## Protection of and Return of Resources

**17.8** The Claimants seek recommendations from the Tribunal for:

a) the return and revesting of the Crown owned part of Lake Rotoma and Lake Rotoehu, together with other water bodies within the Ngati Makino rohe (including the bed, banks, and water in, under and adjacent to such water bodies) in the relevant whanau and hapu;

b) the return and revesting of harbour, foreshore, seabed and petroleum resources to Ngati Makino.

## Implementation of Crown's Kawanatanga Duties

**17.9** The Claimants seek recommendations from the Tribunal that:

a) The Crown should properly fulfil its duties under the Treaty to act as kaitiaki of Maori taonga and resources of Aoteroa by implementing legislation or other mechanisms to ensure the return of Lakes Rotoehu and Rotoma to their pristine state;

b) The Crown should assist and facilitate restoration of access to mahinga kai and to other forms of traditional food resources of importance to the claimant whanau and hapu.

## Other

**17.10** Any other recommendations the Tribunal thinks fit.

## Amendment

**17.11** Ngati Makino reserve the right to amend or add further to the claim as appropriate.

**DATED AT ROTORUA THIS 1st DAY OF NOVEMBER 2004**

| | |
|---|---|
| **ANNETTE SYKES** | **JASON POU** |

# APPENDIX A

**TO:** The Registrar, Waitangi Tribunal, Wellington

**AND TO:** The Crown Law Office

**AND TO:** Claimant Counsel for the Claimants involved in the Central North Island Waitangi Tribunal Claims Inquiry District

This **STATEMENT OF CLAIM** is filed by **JASON MILES POU** and **ANNETTE TE IMAIMA SYKES**, representatives for the Claimants, of the firm Rangitauira & Co.

The address for service on the abovenamed Claimants is the offices of Rangitauira & Co. Solicitors, Third Floor, Trust Bank Building, Hinemoa Street, Rotorua.

Documents for service on the abovenamed Claimants may be left at the address for service or may be:-

a) Posted to the solicitor at Rangitauira & Co, PO Box 1693 Rotorua; or

b) Left for the solicitor at the document exchange for direction to Rangitauira & Co at DX JP 30025 Rotorua; or

c) Transmitted to the solicitor by fax