

THE
PETROLEUM
REPORT

THE
PETROLEUM
REPORT

WAI 796

WAITANGI TRIBUNAL REPORT 2003



The cover design by Cliff Whiting invokes the signing of the Treaty of Waitangi and the consequent interwoven development of Maori and Pakeha history in New Zealand as it continuously unfolds in a pattern not yet completely known

A Waitangi Tribunal report

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ABBREVIATIONS

app	appendix
ca	Court of Appeal
ch	chapter
cl	clause
comp	compiler
doc	document
ed	edition, editor
ER	<i>English Reports</i>
HCA	High Court of Australia
inc	incorporated
J	justice (when used after a surname)
ltd	limited
NZLJ	<i>New Zealand Law Journal</i>
NZLR	<i>New Zealand Law Reports</i>
NZPD	<i>New Zealand Parliamentary Debates</i>
OPEC	Organisation of Petroleum Exporting Countries
P	president of the Court of Appeal (when used after a surname)
p, pp	page, pages
para	paragraph
PC	Privy Council
ROI	record of inquiry
s, ss	section, sections (of an Act)
SCR	<i>Supreme Court Reports</i> (Canada)
sec	section, sections (of a book, Tribunal report, etc)
UNSWLJ	<i>University of New South Wales Law Journal</i>
vol	volume

‘Wai’ is a prefix used with Waitangi Tribunal claim numbers

EDITORIAL NOTE

Unless otherwise stated, footnote references to claims, papers, and documents are to the record of inquiry, which is reproduced in the appendix.

To avoid confusion, where a website address (URL) breaks over a line, a hyphen has not been inserted to indicate that break.

The Honourable Parekura Horomia
Minister of Māori Affairs



The Waitangi Tribunal
110 Featherston Street
WELLINGTON

and

The Honourable Margaret Wilson
Minister in Charge of Treaty of Waitangi Negotiations

Parliament Buildings
WELLINGTON

19 May 2003

E ngā Minita, tēnā kōrua

Enclosed is The Petroleum Report, the outcome of an urgent hearing held in Wellington over four days from 16 to 19 October 2000. In the report, we address claims by Ngā Hapū o Ngā Ruahine of Taranaki and Ngāti Kahungunu of Hawke's Bay and Wairarapa in relation to their interests in the petroleum resource.

We had hoped to report earlier and regret that this has not proved possible. As it turned out, the receipt by the Tribunal earlier this month of a letter from your colleague the Associate Minister of Energy, Mr Duynhoven, caused us to change our priorities. We put other work aside to give you the benefit of the Tribunal's views on these claims, which bear directly on what we understand from Mr Duynhoven is your Government's intention to sell the Crown's interests in the Kupe licence. Because of the urgency created by this situation, we will be reporting in two stages. Part 2 of our report, which will be available soon, will deal with the regulatory framework and management regime since 1937.

At the hearing, it was common ground between the claimants and the Crown that, before 1937, land ownership carried with it legal rights to the petroleum in the land. However, the claimants argued that in the nineteenth century, and up to 1937, the Crown was implicated in many breaches of the Treaty whereby they lost most of their land and the petroleum that went with it. Then, in the Petroleum Act 1937, the Crown nationalised the petroleum resource, without paying compensation to landowners, and without making provision for the ongoing payment of royalties to them. This, the claimants said, was a further breach of the Treaty.

The question before us was whether, if Māori no longer have any subsisting legal ownership in the petroleum resource, an interest of any other kind remains.

Our inquiry led us to conclude that the expropriation of the pre-existing Māori rights to petroleum arose from a context riddled with breaches of the Treaty. The situation in Taranaki, for example, where most of the land was confiscated, will be well known to you.

We reached the view that, where legal rights to an important and valuable resource are lost or extinguished as a direct result of a Treaty breach, an interest of another kind is generated. We call this a ‘Treaty interest’.

When a Treaty interest arises, there will be a right to a remedy, and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right. Importantly, the Treaty interest creates entitlement to a remedy for that loss additional to any other entitlement to redress.

In relation to the loss of the petroleum resource under circumstances that breach the Treaty, we consider that separate redress is due to Māori. By ‘separate’, we mean additional to that made for historical land loss grievances, and relating to the loss of rights in the petroleum resource.

We consider that the claimants in these claims have a subsisting Treaty interest in the petroleum resource and that they are accordingly entitled to redress beyond that to which their historical land loss grievances entitle them.

Finally, we examine the reasoning underlying the Crown’s view that petroleum assets ought to be excluded from settlements. We conclude that this exclusion is in breach of the principles of the Treaty of Waitangi, and that the Crown’s remaining petroleum assets ought to be on the table in any settlement negotiations with affected claimants. Our conclusion in this regard has general application but applies with particular force in the case of Taranaki, for the reasons we have set out.

We conclude by recommending:

- ▶ that the Crown and affected Māori groups negotiate for the settlement of petroleum grievances; and
- ▶ that the Crown withhold from sale the Kupe petroleum mining licence until a rational policy has been developed to safeguard Māori interests, or until the petroleum claims are settled.

Heoi anō ēnei whakaaro o mātou mō te kaupapa i whakatakotoria ki mua i tō mātou aroaro. E tautoko ana i tērā rerenga kōrero kua whakawhārikitia ki roto ki ngā mahi ā te Karauna mō ngā kerēme. Ko mātou kei muri, ko te Karauna me te iwi Māori kei mua – ‘Ka tika ā muri, ka tika ā mua’.

Kāti, nāku noa



Acting Chairperson

CHAPTER 1

CLAIMANTS, CLAIMS, AND ISSUES

1.1 THE CLAIMANTS

1.1.1 Ngā Hapū o Ngā Ruahine (Wai 796 claimants)

In July 1999, the Waitangi Tribunal registered (as Wai 796) the claim of Tohepakanga Ngatai on behalf of all descendants of Ngā Hapū o Ngā Ruahine. The claim relates to the petroleum resources, including natural gas and condensate, located within the rohe of Ngā Hapū o Ngā Ruahine. Their traditional lands, as described in evidence to the Taranaki raupatu Tribunal and mapped in that Tribunal's 1996 report, were bounded by the mouth of the Taungatara Stream to the tip of Mount Taranaki, then to Tāriki and following the Whakaahurangi track to Araukuku, then following the Waihi Stream to its mouth, and from there northwards along the coast to the mouth of the Taungatara Stream.¹ For the purposes of the Wai 796 claim, the claimants describe the rohe of Ngā Hapū o Ngā Ruahine as also including 'the seabed and continental shelf adjacent to that [land] area without seaward boundary'.² Within those boundaries are two major gas-condensate fields: the onshore Kapuni field, discovered in 1959, and the offshore Kupe field, discovered in 1986.³

At the Tribunal hearing, the Wai 796 claimants were represented by Andrew Erueti, Deborah Edmunds, and Kim Bellingham.

1.1.2 Ngāti Kahungunu (Wai 852 claimants)

A claim made on behalf of Ngāti Kahungunu by William Blake of Wairoa, Toro Waaka of Napier, Marei Apatu of Hastings, and Murray Hemi of Masterton was registered by the Waitangi Tribunal in June 2000 as Wai 852. It relates to petroleum resources within the Ngāti Kahungunu rohe, which is described as:

the area on the east coast of the North Island in New Zealand stretching from Mahia Peninsula in the north to Cape Palliser and Lakes Onoke and Wairarapa in the south and inland to the shores of Lake Waikaremoana and to the Kaiweka, Kaimanawa, Ruahine, Tārarua

1. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), fig 4

2. Claim 1.1(a), para 2.1

3. Document A13, para 11; doc A29, paras 10–11

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and Rimataka Ranges to the west, including all riverbed, lakebed, foreshore and seabed areas within or adjacent to those areas.⁴

There is clear evidence of petroleum in the Ngāti Kahungunu rohe, and considerable exploration activity has taken place there since 1874. To date, the sole potentially commercial discovery in the area is the gas found in 1998 by the Kauhauroa 1 well, drilled onshore just north-east of Wairoa.⁵

At the Tribunal hearing, the Ngāti Kahungunu claimants were represented by Grant Powell and Sheena Te Pania.

1.1.3 Other claimants

The claims of a number of other claimant groups also raise issues relating to the Crown's ownership and management of petroleum. It was in June 2000, in the course of preparing for the urgent hearing of the Wai 796 claim, that the Tribunal gave leave for the Wai 852 claim to be joined and heard with the Wai 796 claim. At the same time, and in response to an indication from counsel for Wai 796 that other Taranaki whānui interests also wished to be joined and heard, the Tribunal directed that such interests would be heard as part of the Wai 796 case.⁶ Those procedural steps were consistent both with the imminence and limited duration of the proposed urgent hearing and with the Tribunal's view that the various petroleum claims were 'best dealt with at a generic level' and raised 'a national issue rather than a claimant specific issue.'⁷

Before the urgent hearing took place in October 2000, several claimant groups, and one other interested party, sought leave to appear at the hearing. In each case, the Tribunal granted leave to appear with a watching brief only.⁸ That limited the role of those parties in the hearing to that of observers with the ability to seek leave from the Tribunal to make oral or written submissions, or question witnesses, on particular points. The following parties attended the Tribunal hearing with a watching brief: Ngāti Rahiri (Wai 871), represented by Patrick O'Driscoll and Nigel Denny; Rongomaiwahine (Wai 716), represented by Leo Watson and Trina Dyll; Te Pakakohi (Wai 99), represented by Gerard Praat; Charles Cotter and Ngāti Kahungunu (Wai 201 and Wai 506), represented by Gerard Praat; and the Ngāti Ruanui me te Muru Raupatu Working Party, represented by David Tapsell and Damien Stone.

It remains only to mention that, in October 2000, during the week that the Tribunal conducted its urgent hearing of the Wai 796 and 852 claims, another Taranaki group, Ngāti Te

4. Claim 1.2(a), para 2

5. Document A29, paras 47–61

6. Paper 2.19, paras 4–5

7. Ibid, para 6

8. Papers 2.25, 2.29, 2.38

Whiri, filed its claim to petroleum with the Tribunal. Then in December 2000, Taranaki groups Ngā Mahanga and Ngāti Tairi filed their petroleum claim. These claims were registered by the Tribunal in March 2001 as Wai 890 and Wai 891 on the stated expectation that the petroleum issues they raised would be resolved by this Tribunal's inquiry into and report on the Wai 796 and Wai 852 claims.⁹

1.2 URGENT HEARING GRANTED

In December 1999, Ngā Hapū o Ngā Ruahine applied for an urgent hearing of their Wai 796 claim.¹⁰ At a judicial conference to hear the application on 1 May 2000, Mr Erueti submitted that an urgent hearing was needed for two main reasons. First, he highlighted the conflict between Māori Treaty claims to petroleum, which the Taranaki Tribunal had left open for future consideration, and the Crown's Treaty settlements policy, which excludes petroleum resources as a means of redress. That conflict was now in need of urgent attention from the Tribunal, it was said. This was because some Taranaki claimant groups had recently accepted the Crown's position by signing settlement heads of agreement which, if concluded, would create an adverse precedent for Māori groups that wished to proceed with their Treaty-based petroleum claims and, if successful, negotiate settlements involving petroleum resources. Secondly, Mr Erueti submitted that there had been suggestions that the Crown was about to divest itself of its 11 per cent non-contributory interest in the Kupe field offshore from Taranaki, which, if correct, would remove any chance that claimant groups could negotiate for that interest's use in Treaty settlements.¹¹

The Crown opposed the application for an urgent Tribunal hearing. In brief, Crown counsel Helen Carrad submitted that the Crown's longstanding policy concerning petroleum resources was consistent with its Treaty responsibilities and did not cause significant prejudice to claimant groups. With regard to the Kupe licence, Ms Carrad advised that the Government of the day had not considered selling the Crown's interest and that no sale was imminent. Further, it was argued, the Crown interest in that licence was a particularly unsuitable asset for use as redress for Treaty grievances.¹²

The Waitangi Tribunal member who heard the application, Joanne Morris, granted urgency to the petroleum claims on the grounds that the claimants 'are, or are likely to be, prejudicially affected to a significant extent by current or pending Crown actions or policies' and that the claimants 'are ready to proceed with an urgent hearing'.¹³ While finding no merit in the claimants' concerns about the Crown selling its Kupe interest, Ms Morris

9. Papers 2.42, 2.44

10. Paper 2.4

11. Paper 2.7

12. Paper 2.8

13. Paper 2.9, p 6

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concluded that four elements of the situation combined to pose the risk of significant prejudice to the claimants. These were the undetermined Treaty issues concerning petroleum; the Wai 796 claimants' position on those issues; the Crown's settlement policy regarding petroleum; and the existence of heads of agreement with other Taranaki claimant groups. The resulting situation, it was said, 'is such as to preclude Ngā Hapū o Ngā Ruahine from concluding a settlement with the Crown on terms that will effect a reconciliation between the parties and . . . this constitutes a significant prejudice to the claimants'.¹⁴

At the time urgency was granted, Ms Morris advised that the Tribunal would conduct the urgent hearing and report its findings and any recommendations 'as soon as is reasonably practicable', which, it was estimated, would be a period of six months. We sincerely regret that, as a result of numerous competing demands for Tribunal resources since late 2000, the estimation of the reporting time for the petroleum claims has proven to be inaccurate.

1.3 THE PRE-HEARING PROCESS

Shortly after urgency was granted to the petroleum claims, a Tribunal panel was constituted to hear them. It comprised Chief Judge Joseph V Williams (the deputy chairperson of the Tribunal), John Baird, John Clarke, and Joanne Morris.¹⁵ On 14 June 2000, Judge Williams and Ms Morris convened a conference of counsel and various Crown officials where an accelerated process was devised to move the claims to hearing. These were its salient features:

- ▶ Immediately after the conference, the Tribunal circulated a draft list of issues to be heard, which, after counsel's comments had been considered, were finalised by the Tribunal on 22 June 2000.
- ▶ All parties agreed to disclose their cases in their entirety, both evidence and legal submissions, prior to the commencement of the hearing, which was scheduled for mid-October 2000.
- ▶ To that end, a strictly timetabled 'discovery' process was set in place by which the full range of documents relevant to the issues would be made available to the Tribunal and parties by the end of September 2000. (A list of the large number of documents filed with the Tribunal as a result of this process is to be found in the record of documents, which is reproduced in the appendix to this report.)
- ▶ The Tribunal undertook to commission an independent expert witness to provide a report by late September 2000 (the scope of which was to be the subject of consultation with the parties) on the 'science' of the petroleum resource and an 'industry view' of the regulatory regime governing the resource.¹⁶

14. Paper 2.9, p 6

15. Paper 2.12

16. Paper 2.19

Early in September 2000, the Tribunal invited counsel to list their witnesses and estimate the amount of hearing time they needed for the presentation of their evidence and legal submissions. As a result of cooperation among counsel, and a teleconference involving the Tribunal, a clear timetable was established for the hearing.¹⁷

1.4 THE ISSUES

To aid readers' comprehension of the issues identified by the Tribunal as needing to be heard and determined, we first provide a general overview of both the broadly similar claims made by Ngā Hapū o Ngā Ruahine (Wai 796) and Ngāti Kahungunu (Wai 852) concerning a range of Crown conduct and legislation regarding the petroleum resource and the Crown's response to those claims.

In brief, both claimant groups assert that, in terms of customary law, Māori, as part of the natural world, have proprietary rights in the resources of their universe, including the petroleum within their lands. Those rights, they say, would have endured for as long as Māori retained ownership of their lands and would have entitled Māori to profit from any commercial exploitation of the resource beneath their lands. In fact, however, by 1937 – and indeed long before then for many hapū and iwi – Māori lost ownership of much of their traditional lands, often as a result of Crown acts and policies that have since been found to have been inconsistent with the principles of the Treaty of Waitangi. The result, the claimants say, is that, where Māori lost land by means that were in breach of Treaty principles, the accompanying loss of any petroleum within that land occurred by the same Treaty-breaching means. That situation, it is claimed, creates for the former Māori landowners a continuing Treaty-based interest in the petroleum resource.

The significance of 1937 is that it was the year in which petroleum in New Zealand was nationalised by the Petroleum Act. That Act extinguished all private landowners' pre-existing interests in petroleum and vested the ownership of the resource in the Crown. The claimants assert that the Petroleum Act was itself inconsistent with Treaty principles for extinguishing Māori ownership of petroleum beneath what little remained of their customary land base. The Crown's ownership of petroleum in New Zealand is now secured by the Crown Minerals Act 1991, another focus of the present claims. The claimants' additional concerns about the 1991 Act centre on its provision of a petroleum permitting and exploration regime that has, they say, too little regard for Māori interests in sites of traditional importance and, more generally, in environmental protection.

In broad terms, the Crown's response to the claims is to deny that any of its conduct or legislation that directly affects petroleum has been or is inconsistent with Treaty principles.

17. Paper 2.34; memorandum of consent, 10 October 2000

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While the Crown acknowledges that Māori had a customary right to petroleum where the resource was part of their land and that, before 1937, there were Treaty-breaching acquisitions of Māori land, it submits that the Petroleum Act 1937 extinguished all Māori rights in petroleum in a manner that was consistent with the principles of the Treaty. Further, the Crown submits, the Crown Minerals Act 1991 is also consistent with Treaty principles.

It was in June 2000, after the Tribunal had studied the claimants' statements of claim, the arguments of claimant and Crown counsel about urgency, and their comments on a draft statement of issues, that it finalised the issues to be determined in the hearing of the petroleum claims. The Tribunal stated those issues as follows:

1. With regard to land that Maori owned at any time before 1937, what was the nature of the Maori interest in petroleum? In particular:
 - (a) did the interest extend to the right to economic benefit from the exploitation of the petroleum resource?
 - (b) what was/were the source/sources of the interest?
 - (c) were there any circumstances in which the interest could exist independently of surface ownership?
 - (d) how could that interest be alienated in accordance with Treaty principle?
2. With regard to the 1937 Petroleum Act:
 - (a) what effect did it have on the Maori interest referred to in 1. above?
 - (b) was there an overriding national interest rendering that effect reasonably necessary?
 - (c) was the effect consistent with Treaty principle?
3. (a) How has the Crown dealt with any Maori interests in petroleum since 1937:
 - (i) when developing and implementing the modern regulatory framework governing the resource (including provision of access to Maori land for petroleum prospecting, exploration and production purposes)?
 - (ii) when developing and implementing its modern Treaty settlements policy?
 - (iii) when developing and implementing its policies with regard to the Crown's participation in petroleum licences?
 - (iv) when entering into and proposing to exit from its non participatory interest in the Kupe licence?
- (b) Have those dealings since 1937 been consistent with Treaty principle?
4. If the Crown has acted inconsistently with the principles of the Treaty of Waitangi and prejudice to the claimants is established, what can now be done to remedy the situation (in light of the nature of the petroleum resource, the regulatory regime, the petroleum industry and the Crown's remaining interest in that industry)?¹⁸

18. Paper 2.19, app A

1.5 THE HEARING

The hearing was held at the Novotel Hotel in Wellington over the four days from 16 to 19 October 2000. In addition to lengthy legal submissions made by claimant and Crown counsel on the issues, the following witnesses presented evidence: Richard Boast and Marylinda (Mere) Brooks for the Wai 796 claimants; Sue Wolff for the Wai 852 claimants; Evelyn Cole, Dr John Yeabsley, Professor Gary Hawke, and Andrew Hampton for the Crown; and Geoffrey Logan for the Tribunal.

1.6 THIS REPORT

This is the first part of the Tribunal's report on the petroleum issues identified in section 1.4 above. It deals with the majority of those issues but puts to one side for now those that focus on:

- ▶ the nature of the regulatory framework for petroleum since 1937, including, in particular, the opportunities it provides for Māori participation in the management of the resource; and
- ▶ the process by which the Crown has devised that regulatory framework.

We will address those issues in the second part of our petroleum report, which will be issued as soon as the Tribunal can complete it.

The reason for dividing our report into two parts is that, at the start of May 2003, the Crown advised the Tribunal and Ngā Hapū o Ngā Ruahine of its decision to sell its interest in the Kupe petroleum mining licence.¹⁹ Should the decision be carried into effect, that Crown asset would be unavailable for use in any Treaty settlement, contrary to the claim made by Ngā Hapū o Ngā Ruahine. The Tribunal is aware that its report on the petroleum claims was expected before this time and that, by now, neither the Crown nor the claimants can be expected to refrain from activity relevant to those claims while awaiting our report. Therefore, we resolved to make available as quickly as possible that part of our report on the petroleum claims that deals with the issues relevant to the Crown's interests in the Kupe licence.

In chapters 2 to 4, we provide contextual information about the development and regulation of petroleum exploration and extraction in New Zealand.

Chapter 2 presents an overview of the petroleum industry in New Zealand, with particular focus on the Taranaki and East Coast districts of the North Island. Chapter 3 explains the common law that regulated rights in petroleum in New Zealand before 1937. Chapter 4 describes the circumstances surrounding the Petroleum Act 1937, which nationalised petroleum. Reference is made to the debates that occurred during its passage through Parliament;

19. Associate Minister of Energy to director, Waitangi Tribunal, 28 April 2003

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in particular, the expressions of opposition voiced by Sir Apirana Ngata and others for reasons that were based on the guarantees made to Māori in the Treaty of Waitangi.

In chapter 5, we embark upon our analysis of these claims and set out our approach to the relevant principles and law.

Chapter 5 examines both the legal interest of Māori in the petroleum resource prior to 1937 and how that interest was affected by land loss. We examine the various means by which Māori land was typically alienated and the assessments of the Waitangi Tribunal and the Crown as to whether those means of alienation were compliant with the principles of the Treaty. We then assess the Petroleum Act 1937 for its consistency with Treaty principles.

Chapter 6 considers whether there are circumstances in which Māori now have a 'Treaty interest' in petroleum supporting their claims to receive separate redress for the loss of legal rights in the resource. We answer 'yes', and we conclude by considering what the recognition of that Treaty interest might mean for the claimants.

CHAPTER 2

PETROLEUM EXPLORATION AND PRODUCTION IN NEW ZEALAND

2.1 THE GEOLOGICAL REQUIREMENTS

There are eight large sedimentary basins in New Zealand with the fundamental geological requirements for petroleum.

Five co-existing characteristics are required for petroleum to be produced and to accumulate. The first requirement is 'source', or 'reservoir' rock, laid down by the sedimentary process, which contains the carbonaceous material, usually biogenic in origin, on which chemical processes act to produce the necessary hydrocarbon molecules. Those rocks must be buried at sufficient depth to create the pressure and heat necessary to generate that chemical reaction. The petroleum, the density of which is lower than water, must then be able to migrate through the sediment column until it seeps to the surface, or encounters a trap (some form of geological impediment which prevents it from moving further upwards). In its simplest form, this means reservoir rock, which holds the petroleum, sealed by a rock layer through which the oil cannot migrate. It is a common misperception that oil lies in a large liquid pool in some type of underground cave. Rather, it is held in the spaces between the individual grains that comprise the reservoir rock, much as liquid is held in a sponge.¹

By the mid-nineteenth century, geologists could predict with some accuracy what might lie underneath the sedimentary rocks on the surface, but drilling technology enabled only the tapping of deposits lying at shallow depths. Exploration was guided by natural seepages until the 1920s, when growing military requirements spurred scientifically oriented exploration, but it was another 30 years before new technology enabled prospectors to drill deep exploratory holes to 'see' beneath the surface. Although some of the earliest wells in the Western history of oil exploration were drilled in New Zealand in locations where oil seepages occurred, commercially significant finds were not made until these later technological innovations allowed deep offshore exploration and mining in the 1950 and 1960s.

Even today, oil exploration is a difficult business. Although technological advances such as geophysical survey (seismic and aeromagnetic) have greatly improved the chances of discovery, there is no sure way of establishing whether oil exists in a given location other than by

1. Document A37, pp 3–4

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drilling, and this, too, remains far from a simple matter. Even a few metres one way or the other can mean the difference between success and failure, and problems are increased when dealing with the seabed, or deep-lying deposits. Difficulties of prediction and drilling are also exacerbated by New Zealand's geological complexity, characterised by faulting and folding of the subsurface strata, and residual tectonic stresses.² None the less, a number of significant discoveries of oil and gas have been made over the last 30 years.

2.2 MATAURANGA MĀORI AND PETROLEUM

Oil and gas often manifests its presence by seeping to the surface, as is the case at Taranaki and on the East Coast. These sites were known to local Māori, and the phenomenon was integrated in their cosmology, as was their usual cultural practice. Within mātauranga, no distinction was made between man and nature. In this instance, that connectedness was expressed in the stories of the relationships of tupua to the minerals. Māori in Taranaki believed, for example, that Seal Rock, a submerged reef off the coast, had once been an island of bituminous matter, which had been ignited by a supernatural agency and had burnt to below sea-level. Ernest Deffenbach, the German naturalist who visited the area in 1839, noted the existence of a local legend that an atua had drowned and was still 'undergoing decomposition' at a spot where there were strong emissions of sulphuric hydrogen gas.³ Ngāti Kahungunu and the East Coast tribes also interpreted the existence of petroleum resources in terms of tupua, linked by descent connections with the people of the area. The inflammable gas vent on the northern East Coast was named in relation to Te Ahi-o-te-Atua ('the fire of the gods').⁴ Takirangi Smith gave evidence of the long-standing local relationship to the Wairarapa gas seepages, named Te Ahi o Taiwhetuki and regarded as tapu, as coming from within the earth.⁵ It is this understanding of the nature of petroleum – its place within local whakapapa relationships with the land and linking with atua – that underlies the claim of some Ngāti Kahungunu claimants that all petroleum and natural gas are taonga as well as natural incidents of the land – a matter that is dealt with later in this report.

Whether oil is to be regarded as taonga or not, it is certain that Māori knew of its existence and knew that it was combustible. They lacked the technological knowledge to extract and exploit the resource, but also any immediate cultural imperative to do so.

2. Document A37, p 5

3. Cited in JD Henry, *Oil Fields of New Zealand: With Some Critical Notes on the Colonial Situation of To-day* (London: JD Henry, 1911), p 9

4. Document A5(a), p 89

5. Documents A2, A23, A25

2.3 WESTERN KNOWLEDGE OF PETROLEUM TECHNOLOGY

It should be remembered that the technology to exploit petroleum was a relatively recent development within Western society as well. The Chinese had used oil drilling technologies for many centuries, but the West relied on whale and vegetable oils until the early nineteenth century, when coal and natural gases first began to be used for public lighting. It was not until 1847 that bottled 'rock oil' was commercially produced as a machinery lubricant, and the 1850s before Canadian chemists discovered how to refine kerosene for use in lamps. The first commercial oil well went into production – in the American state of Pennsylvania – in 1859, only six years before the first attempts were made in New Zealand to tap the country's petroleum deposits. Thereafter, petroleum products were increasingly demanded by urban, industrial, and military expansion, and by the early twentieth century petroleum was regarded as a 'strategic' resource, thus giving impetus both to exploration activity and to Government regulation and eventual expropriation.

2.4 EARLY EXPLORATION INITIATIVES IN NEW ZEALAND

Settlers brought early knowledge of chemistry and drilling techniques to New Zealand, with the first attempt to sink a well being undertaken near the Moturoa seeps in 1865. A local politician, EM Smith, collected samples and sent them to the Birmingham Chemical Association for analysis. On positive results being reported, a four-man syndicate was formed and application made to the Taranaki Provincial Council for a lease of 50 acres of land at Moturoa for the purpose of boring for and recovering petroleum. A well was drilled, and a simple bailing method used. Oil and gas were found a few months later, but equipment failure and a lack of technological capacity to bore to sufficient depth resulted in the collapse of this first venture. Similar enterprises followed, however, and they met with enough success to sustain both the intermittent ongoing extraction of oil from the Moturoa field and wider exploration in the region.⁶

Interest in the oil prospects of Taranaki was revived in the 1880s, largely as a result of the impetus of the newly formed Mines Department and its geological survey of the surface. A favourable report in 1889 by Henry Gordon, an inspecting engineer for the department, was followed by a resurgence in exploration activity. The most successful of these ventures was the New Zealand Petroleum and Iron Syndicate, which was formed in 1889 to work a 21-year lease of some 230 acres of coastal land granted by the New Plymouth Harbour Board. Oil was found at an estimated output of 160 gallons a day, but the loss of the boring equipment again forced the abandonment of the well.⁷

6. Document A5(b), p 27

7. Ibid, p 29

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By 1900, 11 wells had been drilled in the Taranaki region, and the first commercial strike followed six years later when the Taranaki Petroleum Company's Moturoa (Birthday) well blew out considerable quantities of oil. The well went into commercial production and a small speculative boom followed. The value of the shares of the Taranaki Petroleum Company went from £5 to £55, and the company earned a Government bonus of £2500 when the first 250,000 gallons were produced. Since there was no local refinery (the first was built at Moturoa in 1913), the crude oil was used as a fuel in steamers and locomotives.⁸

2.5 GROWING INTEREST IN OIL EXPLORATION

The Moturoa find helped to sustain interest in the oil resources of Taranaki at a time when Empire, the importance of the British navy in securing trade routes, and an increasing dependence on heavy oil generally loomed large in the minds of New Zealanders. An era of geological survey and intensive prospecting followed the First World War, but large-scale discoveries in South America, the United States of America, and the Middle East distracted overseas capital from New Zealand, while the worldwide depression further dampened activity until strategic considerations again became paramount. Another 24 wells had been drilled in New Zealand by 1955, but early results remained disappointing.

Although hydrocarbon shows were common, no well penetrated the Kapuni group resource until 1959, when Shell BP and Todd Consortium discovered the field. Another 10 years of development drilling followed, and the Kapuni field went into commercial production in 1970. Three further deep wildcat wells were drilled onshore without success, although hydrocarbons encountered at Mangahewa 1 were to prove significant nearly 30 years later when Fletcher Challenger Energy began developing the onshore gasfield.⁹

2.6 OFFSHORE EXPLORATION

Offshore exploration followed the Continental Shelf Act 1964, which established the legal basis for the Crown's control of resources adjacent to but outside the territorial limit. The first offshore concessions were granted the next year and Shell BP, Todd Consortium, and other companies began utilising seismic surveys to locate possible oil- or gas-bearing structures under the seabed. At that stage, virtually nothing was known of the size and distribution of the sedimentary basin in the large portion of the New Zealand continental block that lies under the sea, but companies rapidly assembled offshore licences covering vast tracts to evaluate the geology. Nearly four times the New Zealand landmass had been leased within

8. Document A5(a), pp 91–92

9. Document A2(h), p 36

four years of the Act being passed.¹⁰ The giant Maui gas-condensate field was discovered in 1969 when Shell BP Todd sank its third well. The Kupe 1 well, located at the southern limit of the consortium's offshore licence, had gas shows, but it missed the Kupe South gas-condensate field, which in 1986 was found outside the consortium's licence boundary.

There was a steep decline in both on- and offshore exploration activity in the middle 1970s owing to a mix of international and domestic factors. These included the OPEC oil crisis, changes in the licensing system, the introduction of a special levy on any oil produced on top of the royalties already established, and the establishment of the Crown-owned Petroleum Corporation of New Zealand (Exploration) Limited (Petrocorp), which was issued six block exploration licences covering most of the Taranaki peninsula and all the best prospects in the country. Petrocorp made several discoveries, including the first major commercial oilfield in New Zealand at McKee 2 in the Kapuni group sands, before its licence expired in 1987. Other finds included the Tariki and Ahuroa gas-condensate fields, the Waihapa-Ngaere field, gas condensate in Kapuni sands, and the small onshore fields at Stratford and Kaimiro, also located in Kapuni sands.

Petrocorp's success altered perceptions of the nature of hydrocarbon plays and the focus in exploration shifted to shallow targets. Tricentrol's Moki 1 struck oil in 1983, New Zealand Oil and Gas Limited found hydrocarbons offshore at the Kupe South 1 well in 1986, and oil was discovered by Arco at Kora 1 in 1988. Other discoveries followed in the early 1990s, including the establishment of the small Ngatoro oilfield by New Zealand Oil and Gas and the discovery of the Pohokura and Mangahewa (gas-condensate) and Rimu (oil) fields. Exploration interest in the Taranaki region, both on- and offshore, remains high. The area is almost fully covered by permits, and interest is sustained by continuing technological advancements which allow for greater exploration of the deep-water basin off the coast.

2.7 EXPLORATION ON THE EAST COAST

The other basin with a sustained, although more intermittent, history of exploration is the East Coast. This comprises an area of some 120,000 square kilometres with common geological and petroleum systems elements rather than a single basin. This region extends from East Cape to Kaikōura, and about half the area, comprising the Raukūmara Peninsula, Hawke's Bay, Wairarapa, and Marlborough, is onshore.

The East Coast region has more oil and gas seeps than elsewhere in New Zealand. We should not be surprised, therefore, that the phenomenon was known to Māori, as testified to by claimant witnesses Takirangi Smith, Bill Blake, and Murray Hemopo. It follows too that it attracted the attention of European prospectors from the 1880s onwards.

10. Document A5(a), p 94

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The Poverty Bay Petroleum and Kerosene Company Limited, a syndicate formed in Gisborne by two explorers from Taranaki's Moturoa field, was the first to show interest in the East Coast area. Two separate wells were sunk at Waitangi Hill in 1874 and 1875, but, while there were indications of high-pressure gas and oil, the company folded under financial difficulties the following year. A new company, South Pacific Petroleum, which formed with the help of Sydney interests, also sank its first wells at Waitangi Hill, with one producing enough oil to cart downhill and sell at Gisborne. A new site on the Waingaromia valley floor was tried in 1884 and oil was encountered, producing between 20 and 50 barrels per day. In late 1887, escaping gas was ignited by the boilers and the wooden rig burned down. The rig was rebuilt, but investors had lost confidence and the company closed in 1890. However, Waingaromia remains the most productive oil well drilled in the East Coast basin to date.¹¹

Other companies were also operating in the area during the late nineteenth century. The Southern Cross Petroleum Company drilled seven wells at Rotokautuku, near Ruatoria, between 1881 and 1888. Oil was struck in 1887, 270 barrels being produced in the first month before the drilling rods became stuck because of swelling ground and blow outs. The Minerva Petroleum Company, which was based in Gisborne, explored the area near Whatatutu in the late 1880s. As had the Southern Cross Company, it found shows of the high-gravity oil used for kerosene lighting rather than the waxy crude of Taranaki. It will be seen in the following chapter that at least some of this exploration and drilling activity took place on Māori land leased from the owners in return for a 5 per cent royalty.

It was the Taranaki success at the Birthday well, and the mapping work of the New Zealand Geological Survey, that prompted the next wave of exploration in the East Coast. Between 1909 and 1912, five wells were drilled in the district – at Waitangi, the Totangi oil seeps, and the mud volcano deposits at Waihīrere, Mangaone, and Waipātiki. New Zealand Oilfields Limited was the most committed company in the area, sinking three wells, but the Gisborne Oil Company, the Kotuku Oilfields Syndicate, and Mangaone Oilfields Limited were also active.

Most of the early exploration of the East Coast area had been undertaken by small companies and syndicates, but after the First World War, larger companies – Taranaki Oilfields Limited, New Zealand Petroleum, and Shell BP Todd – began to take interest in the region. Taranaki Oilfields became the most active explorer in the area in the late 1920s following a substantial geological mapping programme covering huge tracts of country recently stripped of bush for pastoral farming. This work constituted a substantial advance on previous geological knowledge (despite its shortcomings in terms of macrofossil sequences), but the problem was the same then as now: despite widespread signs of oil and wet gas seeps all over the district, there was but no easy way of locating payable accumulations.

11. Document A5(c), pp 21–22

As in Taranaki, the first seismic surveys resulted in further drilling activity in the late 1950s and 1960s – by Shell BP Todd at Mangaone and Ruakituri and by New Zealand Aquitaine Petroleum at Ōpoutama, Taradale, and Rakaiaia. This activity continued into the following decade, when further wells were drilled near the Waitangi and Rotokautuku seeps and in the southern Hawke's Bay. Offshore exploration began in the 1970s when Shell Todd relinquished its onshore interests and entered a joint venture with Aquitaine. An extensive marine seismic survey was undertaken before drilling Hawke Bay 1, the first offshore well to be sunk in the region, which found significant gas shows. A new phase began with an onshore seismic survey by Petrocorp in 1984, which was followed by the drilling of Rere 1. In 1998, a find near Wairoa, by Westech Energy-Orion Exploration, stimulated further interest and resulted in two other moderately sized discoveries in the area.

2.8 EXPLORATION IN OTHER AREAS

The other basins of New Zealand also have a history of low-level exploratory drilling, most notably at Kotuku on the West Coast where petroleum was discovered when a gold mine was sunk in 1867. The first lease for petroleum exploration was undertaken 30 years later and various enterprises followed, including, in 1910, the first investment in New Zealand exploration by a large overseas oil company (the British Imperial Oil Company Limited).¹² A low level of exploration continues in the Northland, West Coast, Canterbury, and Southland basins.

2.9 THE INDUSTRY IN NEW ZEALAND TODAY

New Zealand's oil resource is currently worth some \$1 billion per annum to the producer, while gas generates revenue of some \$450 million. A portion of this sum is, however, swallowed by operational costs (\$200 million per annum for oil) and by reinvestment in exploration, drilling, and the development of facilities. In relative terms, this makes the value of New Zealand petroleum modest, and both reserves and production are extremely small on the international scale. Oil in New Zealand comprises just over 0.01 per cent of the world's estimated recoverable reserves, its annual production some 0.05 per cent of the total. The figures pertaining to gas constitute a slightly larger proportion of the world total but are on a similarly modest scale. Nor does New Zealand's ratio of reserves to production compare favourably, because it is anticipated that known reserves will be exhausted within the next 10 years.¹³

12. Document A5(b), p 31

13. Document A37, p 13

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None of this would seem to make New Zealand an especially attractive proposition for producers, but the reserves are also underexplored. Even in Taranaki, where exploration activity has been greatest, only 360 wells have been drilled, as compared with the thousands sunk in some areas overseas. Clearly, there is potential not only in the Taranaki basin but also in the other basins, especially the East Coast, as evidenced by the current levels of exploration drilling activity in that region.

In the meantime, domestic production provides for 33 per cent and 28 per cent of New Zealand's oil and gas needs respectively, and, although the local petroleum industry is small by world standards, it is generally considered robust.¹⁴

Current activity may also be assessed by the number of licences and companies in operation. There were 50 licences active in June 2000 covering an area of 168,168 square kilometres and comprising most of New Zealand's inshore and offshore prospecting areas. These licences were held by a total of 39 companies, ranging from major international companies such as Conoco (UK) Limited (with a net area of 27,692 square kilometres) to large-scale New Zealand-based concerns such as Fletcher Challenge Energy and Todd Energy Limited (with licences covering 2169 square kilometres and 5834 square kilometres respectively) to small domestic companies such as Geosphere Exploration Limited (34 km²) and Ngāti Te Whiti Hapū Society Incorporated (2 km²).¹⁵

2.10 DIRECT CROWN INVESTMENT IN THE PETROLEUM INDUSTRY

The Government has been involved in the petroleum industry at two different levels: in terms of regulation and management, eventuating in appropriation of the resource itself in 1937, and in intermittent direct investment in oil exploration and development, generally in conjunction with legislative enactment.

Until the 1950s, Government involvement in the petroleum industry was confined to paying bonuses for payable discoveries and creating a management system of exploration, production, and downstream processing that was attractive to overseas companies. Direct Government investment began only after the discovery of the Kapuni and Maui gas fields, and as a result of a greater awareness of the need for energy self-sufficiency following the oil shocks of 1967 and 1973 and the imperative to institute a practical development programme.¹⁶ The Natural Gas Corporation was established to provide facilities for the processing, transmission, and distribution. The Crown also took a 50 per cent interest in the Maui field to provide a catalyst for its development, along the policy lines advocated by the Maui White Paper. This joint venture was a foundation element of what came to be known as the

14. Document A37, p 15

15. Ibid, pp 9, 37–38

16. Document A4(e), p 399

'think big' era. The Ministry of Energy Act 1977 gave the Minister of Energy wide powers to carry on any business relating to the exploration industry. As noted above, the Minister granted a number of licences to himself under section 36 of the Petroleum Act 1937 (inserted into the Ministry of Energy Act under section 3). In the following year, Petrocorp was incorporated, with shares held by the Ministers of Finance and Energy. The six licences held by the Minister of Energy, along with the Government's 50 per cent interest in the Maui gas joint venture, were then transferred to it. By the arrangements effected under the 1977 Act, Petrocorp contributed 40 per cent of the cost of the exploration programme with a 51 per cent interest in any commercial discovery.

2.11 CROWN WITHDRAWAL FROM DIRECT INVESTMENT

Petrocorp was a short-lived exercise in direct Crown participation in and ownership of exploration and recovery activity. The election of the fourth Labour Government resulted in the Crown's withdrawal from the Taranaki-based petroleum industry in line with its general policy of divesting itself of commercial activities. The Minister of Energy took back direct control of the licences in 1984. Policy was changed in 1985. Between 1977 and 1985, the Crown participated in licences by taking a 40 per cent contributory interest together with an 11 per cent carried interest. After the policy change, the Crown continued its 11 per cent carried interest but reduced its maximum contributory interest from 40 per cent to 15 per cent.¹⁷ This regime did not last long. The following year, the Government announced that it would make no new investment in the oil industry and would sell its existing interests. Petrocorp was listed on the stock exchange in 1987, with 30 per cent of the shares held by the public and Brierley Investments. This was followed by the sale of the remaining 70 per cent of the shares to Fletcher Challenge in 1988 for \$801.1 million.¹⁸ Other Crown interests in the oil industry were sold over the next three years: the Natural Gas Corporation, Methanex, the New Zealand Refining Company, the Synfuel plant, and New Zealand Liquid Fuel Investments, as well as any residual shares in producing oilfields at Maui, Ngaere, Waihapa, Tariki, and Ahuroa. All that now remains directly within the Crown's hands is an 11 per cent interest in the Kupe field, and the Government has recently indicated that this is to be sold.¹⁹

This sale of a State-owned enterprise did not pass without objection from Māori. In *Love v Attorney-General* in 1988, the Taranaki raupatu claimants sought an injunction to prevent the Crown from disposing of its shares.²⁰ The claimants argued that their claim relating to tribal lands was then before the Waitangi Tribunal and, further, that they were likely to

17. Document A38, para 2.1.2

18. Document A29(a), p 24

19. Document A37, p 24; associate Minister of Energy to director, Waitangi Tribunal, 28 April 2003

20. *Love v Attorney-General* unreported, 17 March 1988, Ellis J, High Court, Wellington, CP135/88

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obtain both a finding in their favour on the loss of that land and a recommendation that they be granted compensation. They also maintained that they were 'likely to receive recognition that their rights include rights to petroleum gas and other minerals beneath the surface of the land as being a natural incident and consequence of the rights guaranteed to them under the Treaty of Waitangi'.²¹ The Crown opposed the application, which was ultimately refused by the court on the ground that the relevant legislation – the Ministry of Energy Act 1977 and the Finance Act 1982 – did not refer to the Treaty of Waitangi. The decision, which was legally orthodox, was not appealed.

21. Document A12, p 93

CHAPTER 3

ENGLISH COMMON LAW AND THE OWNERSHIP OF PETROLEUM

3.1 THE COMMON LAW

Before the New Zealand Government passed legislation in 1937 creating the Crown's right to petroleum, ownership of that resource was determined by the common law. Two distinct bodies of law relating to the ownership of natural resources are relevant here. One relates to minerals and is summarised by the maxim *ad coelum et ad inferos*; the other, relating to underground water, is expressed within the doctrine of capture.

3.1.1 *Ad coelum et ad inferos*

Under common law, minerals generally belonged to the owner of the land in accordance with the maxim *cuius est solum eius est usque ad coelum et ad inferos* ('to whom belongs the soil it is his, even to Heaven, and to the middle of the earth'). Dating back to thirteenth-century Europe, this rule had become accepted doctrine in English law by the sixteenth century, and has been applied consistently by the New Zealand courts in determining the ownership of natural resources.¹ Minerals as an attribute of the land likewise belonged to the landowner. When the land was conveyed so, too, were the subsurface resources unless surface and mineral rights were deliberately and explicitly separated in the instrument of conveyance. The only exceptions to this rule, until the twentieth century, were gold and silver, which, as the 'most excellent products of the soil', were deemed to remain subject to the ownership of the Crown as the 'most excellent person in the realm' – an understanding which was formalised in the *Case of Mines* in 1567.² Since the 1930s, however, the *ad coelum et ad inferos* rule has been abrogated in New Zealand in respect of minerals deemed to be of particular importance. These include petroleum.

3.1.2 The doctrine of capture

The doctrine of capture is also pertinent to a consideration of the ownership of petroleum under common law. Petroleum, rather than remaining in situ like metals or coal, migrates,

1. Document A12, pp 23–24

2. *Case of Mines* (1568) 77 ER 472

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flowing towards areas of low pressure such as drill sites.³ Arguably, legal understandings developed with reference to underground migratory resources such as groundwater and underground brine might apply also to petroleum. Under the common law, a landowner is unable to prevent a neighbour from draining the waters from under his or her land, providing that the means of abstraction (pumps and drills) remain within the neighbour's property.

The question had not arisen in the New Zealand courts before 1937, and it is unclear whether the doctrine of capture applied to petroleum here when the Government's nationalisation of the resource made the issue pertinent to the question of the rights of permit holders, authorised by the Crown, rather than to the question of ownership per se.

Until 1937, the legal understanding of petroleum ownership in New Zealand was developing in accordance with the common law understanding of the ownership of subsurface minerals in general. Questions of migration and capture were not uppermost in the minds of legislators and administrators. Petroleum was treated as the property of the owner of the land and was governed by the ordinary property laws. When the land was sold, so too was the petroleum and any other subsurface resources.

3.2 OIL LEASES

It was possible also for landowners to alienate petroleum to another party. The usual arrangement in New Zealand, as in the United States, was for landowners and oil companies to enter into 'oil leases' for a term of years. The first arrangement of this nature in New Zealand was an 1865 lease of land by the Taranaki Provincial Council; the land had been acquired as a result of the confiscation process and was leased to a privately syndicated company for the specific purpose of extracting oil. This practice continued into the 1930s. How many of these leases were granted is unknown, but it is clear that such arrangements went unquestioned, and were relatively common.

These pre-existing arrangements were an obstacle to any Government move towards nationalisation or regulation. On the very first step towards the setting up of a special regulatory regime for petroleum in 1911, it was pointed out that the Kotuku Oilfields Syndicate had 'obtained options over considerable areas of private land, and [had] covenanted therein to pay to the freeholders a royalty on all the oil produced'.⁴ When the question of the Government's capacity to control the exploitation of petroleum was again under consideration in 1927, the district land registrar at New Plymouth reported to the Under-Secretary of Mines that 'quite a number of oil leases or grants to bore [had] in the past been granted in the district'. The longest of these would expire in 1936, clearing the way for the Government to

3. Document A12, pp 24–25

4. Sir John Findlay, 26 October 1911, NZPD, 1911, vol 156, p 1109

nationalise the resource with a minimum amount of complication.⁵ Far less common than leasing for a term of years was the separate registration of petroleum title as a result of the outright sale of that resource by the owner of the land. There is evidence, however, that such arrangements were possible and the transfer of permanent title to the petroleum duly registered.⁶

3.3 THE BEGINNING OF REGULATORY CONTROLS

The increase in exploration activity in the 1880s and the growing interest in mining in general resulted in the imposition of regulatory controls on petroleum exploration and recovery, but for 50 years the common law was left untouched. Initially, statutory law dealt with petroleum like any other mineral. No reference was made to its migratory quality, nor to any assertion of untrammelled Crown ownership of all such resources. Section 3 of the Mining Amendment Act 1892 amended the definition of 'mineral' to include 'petroleum and all other mineral oils', bringing petroleum exploration and recovery into the same licensing regime as that for hard minerals. But these provisions applied only to Crown lands. Royalties for petroleum were also established, as for hard minerals at the 'pit mouth'. These were set at the rate of 2 per cent to 4 per cent, but again this provision applied only to resources recovered on Crown land, and private landowners such as Ngāti Porou on the East Coast remained free to reach their own arrangements with regard to the payment of a portion of the value of any oil produced on their property. That basic understanding was repeated in legislative amendments in 1898, 1905, and 1908.

This regime came under challenge as imperial concerns deepened and in line with the general trend towards the regulation of the mining industry. Government control of exploration and development expanded in the following years, although it stopped well short of the complete nationalisation of the resource. There was a growing recognition that management systems for hard minerals were not entirely workable in the case of petroleum. Accordingly, the Mining Amendment Act 1911 set up a partially independent regime for petroleum and oil by removing them from the statutory definition of 'minerals'. The Governor was, however, still empowered to declare, by Order in Council, any of the provisions of the principal Act to apply, should the need arise. The Act also stated that, where the landowners had consented to the issue of a prospecting licence after the Act had come into force, compensation would not be payable in respect of the value of any oil or natural gas recovered from the land.⁷

A few years later, the Mining Act 1914 pointed to the Crown's increasing awareness of the strategic significance of oil. This legislation gave the Government a priority right of

5. Document A12, p 35

6. Ibid, pp 35–36

7. Mining Amendment Act 1911, s 2(1), (2)

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purchase in times of emergency, as well as the capacity to take over the management of the entire operation of production in the event of war. The Mining Amendment Act 1919 extended the licensing regime to lands within private ownership (including those in customary title), but it still did not make any claim of Crown ownership of the resource itself. Nor was this basic adherence to the *ad coelum et ad inferos* rule disturbed by the consolidating Act of 1926. As of then, neither the vesting of the right to exploit petroleum in the Crown nor the outright nationalisation of the resource had been contemplated in New Zealand, despite steps towards the control of all oil exploration, including that conducted on private land.⁸

3.4 THE 1927 BILL

A further extension of the rights of the State (and of licensees authorised by the State) at the expense of private property interests was proposed the following year. The intention was to attract investors who were otherwise ‘much hampered in making individual agreements with thousands of settlers’ by empowering the Government to proclaim lands open to exploration without the consent of the owners.⁹ The grant of a licence conferred a right of access, and there was no requirement for the recipient to obtain permission from the owner of the surface to enter his or her land or to pay ground rent. Royalties, however, were still to go to the owner of the fee simple of the land and were set at a maximum of 10 per cent in the event of a payable oil discovery. These moneys (after deductions for administrative and other charges) would be paid into the appropriate fund in the case of Crown land, or into the Consolidated Fund in the case of private lands where the Crown had retained property in the minerals in them. Otherwise, they were to go to the landowner. In the case of Māori land, however, such royalties were to be paid to the Native Trustee for the owners, or other persons beneficially entitled to revenues from such land, whether it was freehold or still in customary title.¹⁰ The 1927 Bill also repeated the 1914 provisions for Crown priority of purchase in times of emergency or war, notwithstanding any contracts already in existence.

Opinion was divided over the Bill. There was general approval of its security intentions and grounding in the notion of imperial defence, but there was also criticism for the interference with the private rights of landowners, the overriding of existing contractual arrangements, the level at which the royalty had been set, the obligations imposed upon licensees, and the discretionary authority given to politicians. For their part, Māori disliked the trust provision. Sir Apirana Ngata requested that the Bill be referred to the Native Affairs Committee, which reported that this clause should be amended to ‘provide for payment to

8. Document A32, p 22

9. Joseph Coates, 20 October 1927, NZPD, 1927, vol 215, p 124

10. Document A12, p 52

such person or body as the Native Land Court may direct'.¹¹ The Bill failed partly because of these objections and partly because a worldwide glut of oil and the onset of the Depression created a context in which there was little urgency to promote oil exploration in New Zealand.¹² That attitude changed over the next 20 years, however, as a result of the deterioration in the international climate.

11. Ibid, p 55

12. Document A4(e), p 385

CHAPTER 4

THE PETROLEUM ACT 1937

4.1 INTRODUCTION

Thus, the understanding at 1937 was that the owners of the surface of the land also owned all to be found on or under it. There was no statutory assertion of Crown ownership of petroleum and mineral gases ‘wherever they might lie’. The Crown had property in petroleum found under Crown lands just as private landowners did in minerals, including petroleum, in the lands owned by them. The Crown’s statutory powers with regard to oil were concerned with issues of management rather than ownership, and applied until 1919 only to land within its ownership. Even after 1919, statute prohibited only prospecting on private land without the appropriate licence issued by the Minister of Mines.¹ Although the migratory nature of oil complicated the issue of ownership, the doctrine of capture did not alter the basic understanding that only those with rights in the surface could have rights in the resources beneath them. Oil belonged to any landowner who took control and possession of it on his or her land.

The Petroleum Act 1937 changed this legal understanding. It shifted the determination of ownership from the common law to statute and expropriated the resource to the Crown. Under section 3(1) of the Act, all petroleum in its natural condition ‘on or below the surface of any land within the territorial limits of New Zealand’ was declared to be the property of the Crown regardless of the ownership of the land. ‘Land’ included land covered by water, the foreshore, and the seabed to the outer limits of the territorial sea. Royalties of ‘not less than 5 percent’ were to go to the Crown, and compensation was to be paid only for damage to the surface of the soil, not in respect of the loss of the petroleum itself.

The Bill was passed over the opposition of Māori, although, in a climate building to war, their position was essentially a moderate one. Māori objected not to the Crown taking control of a strategic resource but to the failure either to compensate them for the loss of their rights in petroleum, which, as a natural feature of the land, they saw as protected under the Treaty of Waitangi, or, alternatively, to make provision for their ongoing interest in the form of a right in the royalties.

1. Mining Amendment Act 1919, s 15

It is the position of the claimants today that the Government was in breach of the Treaty when it thus expropriated Māori rights in petroleum and, most particularly, by its failure to pay royalties over the advice both of officials within the Native Department and of Māori themselves. The Crown does not accept that allegation, arguing that it acted in good faith in passing the Petroleum Act, that all private property interests in that resource were nationalised, not just those of Māori, and that the 1937 Government took adequate account of the implications of the Treaty of Waitangi in that legislation. The Crown argues, further, that compensation for loss of petroleum is not now warranted – and by implication was not at the time – because ‘nationalisation was effected for the national good and was and remains justifiable in Treaty terms’.²

The next section of this report summarises the historical record of the discussions and debates around the passage of the Petroleum Act in 1937. The issues for the Tribunal to examine in this context are the nature of the Crown’s consideration of its Treaty obligations in the formulation of legislation, the arguments that were advanced in its justification and their validity, and the advice and alternatives that were available to the Government at that time. Of particular note in this context are Sir Apirana Ngata’s detailed observations and criticisms of the Petroleum Bill.

4.2 THE PASSAGE OF THE PETROLEUM BILL

It is certainly true that the provisions of the Bill were justified within the thinking of the 1937 Government. Four major grounds were argued: the national interest, the British precedent, the migratory character of oil, and the ‘equal treatment’ of Māori and Pākehā. The validity of these arguments was, however, challenged in the initial drafting of the Bill, in the committee stage, and in its ultimate passage through the House, where it sparked a major debate on the meaning of the Treaty of Waitangi.

Although this was a Labour Government measure, it is clear that the grounds for nationalising the resource were largely based on considerations of economic and strategic interests rather than socialism. The Act followed the precedent of British legislation, which had been passed by the Conservatives, not a Labour Government. Identical measures passed by the Victorian and Western Australian Governments, followed by New Zealand within the next three years, reflected the deterioration of international relations in this period.

Since the turn of the century, there had been a growing appreciation of the strategic importance of a secure oil supply. Not only were the navies on which New Zealand relied for

2. Document A35, pp 7–8

protection dependent on oil technology, so too was the country's own internal transport system. This concern was the starting point for the Government's explanations in public meetings, and in Parliament, of its intention to nationalise the resource. That the transport system was 'very largely governed by the quantities of oil and petrol we have' and that 'in the event of hostilities abroad our oil supply would be cut off almost immediately' was a repeated theme.³

The Tribunal accepts that strategic concerns were undoubtedly genuine given the worrying signs of Japanese and German expansionism, but we note that the Government added to the sense of emergency, appealing strongly to the 'national/imperial interest' and asking for the Petroleum Bill to be passed under urgency. The Opposition was persuaded to allow the measure to proceed to the second reading without division, and the Bill was ultimately passed without the question of the Māori right to receive royalties as a consequence of protections under the Treaty being finally settled.

There was, in fact, general consensus that it was vitally important to explore the possibilities of securing a domestic oil supply, and this was seen as best done by experienced and large-scale companies of friendly powers. Although the Government announced that it was willing, if need be, to undertake exploration itself, the primary intention was to smooth the path for investment by the major overseas companies. The Minister of Mines, Patrick Webb, told the House:

My main concern is to pass legislation that will enable us to step out and use every effort we can to ascertain if we have oil in payable quantities here. We want to remove every obstacle and give private enterprise the right to come here, with all its technical knowledge and most modern plant, in order to join with us in endeavouring to liberate oil that may exist under the crust.⁴

Over the preceding decade, discussions with Shell Transport and Trading, the Anglo-Persian Oil Company Limited (later to become British Petroleum), and Taranaki (NZ) Oil Fields (which was seeking to establish a new company linked with Australian and American interests), had indicated that a single ownership regime and the capacity to grant licences on an extensive scale were desirable conditions for overseas investment.⁵ The 1937 legislation gave the companies exactly what they had been demanding: a nationalised resource and a single management regime with large-scale, long-term leases. These leases were set as covering 200 square miles for five years in the case of exploration, and at 100 square miles for terms of 42 years for actual production. Ground rents were established at £10 per annum per square mile, and royalties at 5 per cent.

3. See 'Petroleum Bill', 6 December 1937, NZPD, 1937, vol 249, p 1054; doc A12, p 60

4. Patrick Webb, 6 December 1937, NZPD, 1937, vol 249, p 1039

5. See doc A4(e), pp 382–386

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4.3 CONSIDERATION OF A MĀORI INTEREST

What consideration was given to the possibility of a Māori interest in petroleum and the Crown's obligations under the Treaty in the design of the 1937 legislation? There had been clear signals to the Government from the initial drafting of the Bill that Māori would oppose it. Richard Boast pointed to early criticisms by Native Department officials when the draft legislation was referred to them for comment by the the Mines Department. GP Shepherd, an official who was later to become the under-secretary, was in little doubt that the Bill was in contravention of the Treaty of Waitangi. He advised that to 'declare any ingredient of the land to be the property of the Crown without payment [was] contrary to the spirit and letter of the Treaty'. His objections centred upon the question of royalties:

As a matter of policy one cannot object to the Government organising and controlling the search for and working of petroleum deposits in the public interest but the royalties and other fees payable in respect of petroleum which may be won from Native land should be paid to the Native owners of the lands affected.⁶

This advice was unwelcome to the under-secretary of the Mines Department, who objected that:

To provide for the payment of royalties and other fees to Native land owners would very dangerously undermine the chief principles of the Bill which . . . has already been recognised in British law. Unless the same principles are established in New Zealand it appears almost certain that no major attempt will be made by private enterprise to discover petroleum.⁷

The matter was referred back to Shepherd's superior (ON Campbell) with a reminder that:

The importance of petroleum and its products is now so great in both our national and Empire economy and also has such a tremendous bearing on the question of defence, that it should be obvious that no opportunity should be lost in attempting to develop a local oil industry.⁸

Campbell would seem to have taken the hint. He supported his officer's conclusion that the Bill was contrary to the 'spirit and letter' of the Treaty, but, at the same time, he advised that whether the Treaty was to be observed 'to the full' – or was to be departed from, given the factors of 'national importance' – was a matter for the Government to decide.⁹ That the legislation was in breach of article 2 was clear, but Campbell also pointed the Mines

6. Document A12, p 63

7. Ibid

8. Ibid

9. Ibid, p 64

Department towards the argument on which the Government was ultimately to rely: namely, that ‘the Maori [was] being treated identically with the Pakehas in the matter’.¹⁰

This was the line of reasoning subsequently adopted by the Solicitor-General, Henry Cornish, to whom the Mines Department referred the issue. After discussions with officials from both departments, Cornish reached the conclusion that the Bill was not in contravention of the Treaty, advising that the vesting of petroleum in the Crown was within the competence of the New Zealand Legislature and the Bill did not transgress the Treaty because ‘it propose[d] to take from the Native owners no more than from the Europeans’.¹¹ He gave the Government a clear go-ahead:

I have . . . no hesitation in saying that the Legislature may proceed with such a Bill without exposing itself to any legitimate criticism based on the promises of the Treaty of Waitangi. I may observe that legislation almost identical in its terms to that proposed to be enacted as far as this clause (3) is concerned has been passed in Great Britain, Victoria and West Australia.¹²

This equation of the ‘spirit and letter of the Treaty’ with a simple duty not to discriminate – and of the United Kingdom with New Zealand – was later challenged by Sir Apirana Ngata and others, but without success.

There was unanimous support both in the House and more widely for this general appeal to security and economic interest, but not on whether all the provisions contained in the legislation were required to give effect to these goals. As noted earlier, Māori shared in the wider endorsement, and their challenge was not to the intention to nationalise the resource but to the failure to pay landowners compensation for their loss of property rights under the common law and the Treaty. That challenge was led by East Coast Māori, who objected that they had been dealing with oil companies over the exploration of their lands for more than 50 years. In their eyes, this provision represented the direct loss of a property right under agreements negotiated from the 1880s onwards, which provided for the payment to the Māori landowners of a 5 per cent ‘royalty’ on crude oil.¹³

Their concerns were first voiced before the goldfields and mines select committee. The Tribunal did not have the opportunity to examine the evidence heard by that committee, but it is apparent that Ngāti Porou witnesses objected to the loss of rights which they had historically enjoyed. According to Ngata, they became ‘very hot under the collar’ about the matter.¹⁴ The depth of this feeling was expressed in a haka composed in protest and translated by Ngata:

10. Ibid

11. Ibid

12. Document A12, p 64

13. Sir Apirana Ngata, 6 December 1937, NZPD, 1937, vol 249, p 1041

14. Ibid

Mr Webb, Sir!
It has fallen, it has collapsed,
The Treaty of Waitangi!
It is perhaps the work of the Labour Government
Which has altered the Laws
Which has absorbed all our money,
Which is confiscating our lands!
And so I weep. Aue! Alas!

The disturbing news of the measure for developing petroleum
Has penetrated to the remote East Coast.
I was repelled from Wellington!
I was rejected from Wellington!
And I sat me down in bewilderment
And I stood and gazed out in pained wonder
And asked, 'Has the Prime Minister of New Zealand broken his word?'
'And where is he now?'

Mr Webb Sir, with your followers and your show companies
You have kicked over the Treaty of Waitangi.
You have lifted your foot against the Treaty of Waitangi
And thrust it from the lions' den at Wellington
Or maybe suspended it on the House of Laws as a bandage for blood-
stained brows!
Thou boiled head!

Is it that you Mr Webb
Will say to the Maori
Go back empty handed!
Ask and you shall not receive!
Knock and I shall turn my back on you!
*Alas! Alas!*¹⁵

The reasoning of the Solicitor-General was also expanded upon before the native affairs committee, where he explained his views on the Bill and the Treaty. But in Ngata's eyes, the grounds of Cornish's decision, as he explained them, were essentially flawed. Ngata told the House in the subsequent debates that Cornish had placed some weight on Māori's ignorance of oil when they had signed the Treaty. It was Ngata's view, however, that petroleum, like other resources, had to be treated as an attribute of the land and that Cornish's reasoning denied Māori the benefits anticipated by them when they signed the Treaty.

15. Document A12, pp 66–67; see also *Auckland Star*, 15 June 1938

These arguments met with no success. Various amendments to the Bill were proposed in the native affairs committee – the removal of native land from the ambit of the Act and the receipt by Māori of 50 per cent of royalties – but these were defeated and it is clear that, at a time when the oil companies' cooperation was seen as vital to security, much more weight was being placed on their interests. While the Bill was to be substantially amended in the goldfields and mines select committee, the provisions of concern to Māori remained unchanged.

In part, the Government's resistance to a Māori claim to royalties derived from its fear of the implications in terms of private land ownership generally, and in part from a genuine reluctance to admit the principle that the treatment of the two different races might be different under law. Following the return of the Bill from committee, a major debate on its impact on Treaty rights ensued and extended over three days. Again, Ngata led the attack, positioning himself – and Māori – carefully on the issue. He emphasised that Māori did not dispute the larger goal of the defence of the Empire expressed within the measure. Ngata continued that, 'as a good New Zealander', he responded to the appeal of the Minister of Mines that no difficulty should be placed in the way of capital investment but that, 'as a representative of [his] people', he was critical of the Government's intention to claim royalties from any petroleum extracted.¹⁶ He argued that, if it had been proposed that, in order to encourage exploration, all the returns from any oil discovered should go to the private company holding the duly licensed right, then he would not have objected but that 'when the Government coolly appropriates a proportion that would otherwise go to the private landowner that is going too far'.¹⁷ He questioned what the Crown did to 'deserve' the 5 per cent, and he also pointed to evidence that such a step was unnecessary to attract the interest of the companies, citing the opinion of Sir Colin Fraser, a representative of the petroleum industry, who had testified in committee that the question of who should receive royalties was of no concern to oil interests. Ngata also drew attention to the alternative model of ownership provided by the United States, where the right of indigenous peoples to receive royalties from oil discovered under their land was recognised:

It is true that the Red Indians were not treated well by the Americans, but it looks as though providence has stepped in, for on the lands to which the Americans had driven the aborigines – the Red Indians – oil has been struck, and I am told that the Red Indians get great revenues from their royalties, because the oil was not purloined by the Government of the United States of America in the manner proposed in this Bill.¹⁸

The Crown's witness, Professor Gary Hawke, while defending the decision of the Labour Government to nationalise petroleum, confirmed that the oil companies did not care about

16. Sir Apirana Ngata, 6 December 1937, NZPD, 1937, vol 249, pp 1040–1041

17. Ibid

18. Ibid, p 1045

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whether the royalties were to be retained by the Government or ultimately distributed among the landowners. But he also saw the question as an international one in which 'New Zealand discussion was an adaptation to local circumstances'.¹⁹ Oil companies did not wish to repeat the United States experience, and the New Zealand Government was already predisposed to follow the British example, where 'a combination of technical difficulties of identifying appropriate beneficiaries and doubts about the boundaries of ownership' had prevailed over the rights of private property.²⁰ Professor Hawke concluded that the decision not to pay out royalties represented a middle position and a recognition that, 'while regrettable compromises were involved, the simplest solution was the best available'.²¹

4.4 THE TREATY AND PETROLEUM IN 1937

Where does this argument leave the Treaty? For Ngata, the issue came back to respect for property rights in the land, which he described as 'sacred since 1840'. In his view, the Bill violated the guarantees of the Treaty to respect Māori ownership of all resources of the land and rights which they had been accustomed to enjoy under the law. He drew a parallel to Māori rights in lake beds, which had gained specific recognition at Rotorua and Taupo, arguing that that same recognition (and payment for the extinguishment of right) should apply in the case of petroleum and oil. He stressed that Māori on the East Coast were used to thinking of oil as something within their disposal, and he warned the House that:

If oil should be struck on the East Coast, honourable gentlemen will have, session after session, Maoris coming here and praying for compensation for their rights. They will be praying for compensation for rights confiscated. They have been doing that for the last seventy years with respect to other rights, and in regard to oil rights they will come down session after session and ask for some recognition of the rights that have been taken away by the Crown, supposedly in the public interest.²²

The Government's position at the time was that the question of the Treaty promises had been fully considered and that the Bill was not in violation of them. Relying on the Solicitor-General's opinion, Webb pointed to article 3 and the concomitant argument that there should be only one law in the country. He told the House that:

there is not a member of the Government who would not go to the furthestest possible limit to protect every right the Maori possesses. We feel that in the past the Maori has not had the protection that he was entitled to. I think honorable members will admit that, whenever a

19. Document A32, p 22

20. Ibid

21. Ibid, p 25

22. Sir Apirana Ngata, 6 December 1937, NZPD, 1937, vol 249, p 1044

question of interfering with the rights of the Maoris has cropped up in this House, I have been one of the first to be on the side of the Maoris . . . But to suggest . . . that we should have two laws in this country, one being for the pakehas and one for the Maoris, is foreign to the national character of the people of New Zealand.²³

Webb went on to argue that the Government was fulfilling guarantees that Māori would enjoy ‘all the rights and privileges of British subjects’, stating that ‘We are doing the same. The Maori is on the same footing as the pakeha in this respect.’²⁴ These arguments were reiterated by other Government members of the House and, in the Legislative Council, by the leader, Mark Fagan.²⁵

The Opposition attacked the basis of these assertions. Ngata questioned the reality of ‘one law’, pointing out that there were all sorts of special laws for Māori with regard to liquor licensing, land taxation, and investigation of title. He argued that Māori still required certain protections, but, more importantly, he queried why Māori rights should necessarily be subject to ‘public interest’. The legitimacy of the assumption that the public interest must prevail was all the more questionable, in Ngata’s view, when the importance of the Crown’s claim to royalties to the issue of attracting private capital was in doubt.²⁶

The leader of the Opposition, Gordon Coates, also attacked the assertion that the Act did not break Treaty guarantees:

In my opinion, the interpretation of the Treaty of Waitangi gives to the Maori people the complete right to everything that is below the surface of the land and everything above it. I do not think the Minister of Mines would willingly offend the Native population, but this legislation does, in my opinion, entirely ignore the individual rights of the Maoris.²⁷

Coates argued that it was the understanding of Māori that should determine their rights under the Treaty:

It does not matter what one may write on the subject, what counts is what the Maoris have passed down by word of mouth from generation to generation; and what the Maori understands to be the Treaty of Waitangi is what I believe to be the correct interpretation.²⁸

The question of whether petroleum had been specifically discussed was also irrelevant – the central point was that Māori understood that what lay under the surface of their lands belonged to them.²⁹

23. Patrick Webb, 6 December 1937, NZPD, 1937, vol 249, p 1038

24. Ibid

25. Mark Fagan, 10 December 1937, NZPD, 1937, vol 249, pp 1230–1231, 1236

26. Sir Apirana Ngata, 6 December 1937, NZPD, 1937, vol 249, pp 1042–1043

27. Joseph Coates, 6 December 1937, NZPD, 1937, vol 249, p 1064

28. Ibid, p 1063

29. Ibid

William Bodkin, the member for Central Otago, agreed. Māori had ‘full ownership as recognized by common law’, and ‘That right of ownership was definitely guaranteed him by the Treaty of Waitangi’. It might be incumbent upon the State to ensure that petrol was made available ‘to the people of New Zealand and to the Empire’, but ‘no one [could] suggest that it [was] not possible to do that and still preserve the rights of the Maoris’.³⁰

Criticism of the Bill on the ground that it breached the Crown’s Treaty obligations crossed party lines. Labour’s member for Southern Māori, Eruera Tirakatene, argued that the Māori representatives, when they asked for the right to royalties, were ‘not claiming anything but a recognition of our rights under the Treaty of Waitangi’. Those rights were encompassed by the guarantees of undisturbed possession of their lands and petroleum as one of the ‘other properties that can be associated with fisheries, forests, lands, and so on’. He quoted the Treaty in full and emphasised that Māori looked upon that document as their ‘one line of defence in retaining their rights and privileges’. In his view, the Petroleum Bill was in line with a history of legislation superseding the Treaty and breaching that protection.³¹ Rangi Mawhete also supported this general conclusion in his speech before the Legislative Council. He too recited the Treaty and argued that oil, ‘naturally being a product of the same land’, was ‘part and parcel of the land’ and that protections under article 2 must apply.³²

4.5 TO WHOM DOES OIL BELONG – THE LANDOWNER OR THE STATE?

The assertion that the Crown’s appropriation of the resource was a taking of private property that required compensation was countered by the argument that petroleum was a migratory resource, more akin to water than to coal, and that it could not be claimed by the surface owner until it was recovered. In this view, petroleum in situ, unlike hard minerals, could not be said to be ‘owned’ by the surface owner pursuant to the *ad coelum et ad inferos* maxim. Thus, Webb argued before the House that no property loss was involved:

We are not interfering with the mineral rights of the landowner. Oil is of a migratory nature. It would be very hard to domicile it under any particular spot. Oil is in a different category from coal or other minerals. This Bill does not in any way interfere with the freehold or the private ownership of minerals that are contained in the different leases.³³

This line of argument had been initially raised in the British Parliament and was cited in the New Zealand debate:

30. William Bodkin, 6 December 1937, NZPD, 1937, vol 249, p 1049

31. Eruera Tirakatene, 6 December 1937, NZPD, 1937, vol 249, pp 1071–1073

32. Rangi Mawhete, 10 December 1937, NZPD, 1937, vol 249, p 1232

33. Patrick Webb, 6 December 1937, NZPD, 1937, vol 249, pp 1038–1039

To whom does oil belong? Does it belong simply to the freeholder on whose surface the drill first made its penetration, or does it belong to all the land owners who have oil under their properties? At the present time no one is able to say . . .

The Government . . . have come to the conclusion that there is no possibility of assessing these innumerable rights, if they exist. In the first place we hold that these rights, if they exist at all, are purely imaginary and have no practical value and never have had any practical value. The only method by which these multifarious rights can be brought into some sort of businesslike uniformity is by vesting the rights in the Crown.

A similar position was argued by Professor Hawke on behalf of the Crown: namely, that there was genuine confusion about how the law viewed the ownership of petroleum and, 'the common law being uncertain,' that 'statutory provisions for petroleum could plausibly be understood as clarifying ownership rights rather than infringing' them.³⁴ In Professor Hawke's view, the question had been debated since 1917 with the result that 'informed public opinion' had settled on a 'broad consensus that nationalisation without compensation for any rights to royalties was appropriate'.³⁵

Richard Boast, appearing on behalf of the claimants, took a different approach. He argued that it is not possible to know exactly how the New Zealand law would have developed if the resource had not been nationalised, but that the practice had been evolving along a line 'similar to that of the United States, based on the doctrine of capture'. By implication, the courts would have worked out the matter in due course and the interference of the Government was not a prerequisite to the settling of the issue or to the successful development of an oil industry.³⁶

The impact of the migratory character of oil on the issue of ownership was debated at some length at the time. The argument that legislation was required to clarify conflicting interpretations of the law left the way open to the counter argument that the *ad coelum et ad inferos* principle was the only sure one and should be allowed to operate. Coates adopted this line of reasoning, and he argued that questions of the ownership of petroleum arising between neighbouring owners of the surface lands were for the courts to resolve and were not a reason for denying rights in that resource to all owners of the surface.

While the Government made much of that fact that it was following British precedent, Opposition members pointed out that the situations in the two countries were not identical. Oil had never been discovered in commercial quantities in the United Kingdom, which made assertions that no private interest was lost more credible there than in New Zealand, where a number of strikes had taken place.³⁷

34. Document A32, p 26

35. Ibid, p 31

36. Ibid, p 34

37. William Endean, 6 December 1937, NZPD, 1937, vol 249, pp 1055–1056; Joseph Coates, 6 December 1937, NZPD, 1937, vol 249, pp 1061–1062

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Nor, of course, had a treaty been signed with the indigenous inhabitants in the United Kingdom. Coates emphasised the point:

In our country we have two races and, whether we like it or not, the division is clear-cut. Moreover, it is recognized by a treaty that was entered into in 1840, which gave to one of the races, at any rate, certain rights.

Under the Treaty of Waitangi, and according to what has been passed down from generation to generation, the Maori believes that what is under the surface of his land is his.³⁸

4.6 THE QUESTION OF ROYALTIES LEFT OPEN

Despite these criticisms, the Bill proceeded to the second stage of the session without division. The Government approached the Opposition members and won their agreement to withdraw an amendment to provide for the payment of a proportion of the royalties to all the owners of the land (not just Māori). Webb appealed to the House to let the Bill go through and to 'get the drills working'. To delay, he argued, would be a 'national, if not an Empire disaster'. Domestic differences could be fixed up later in the 'cooler moments of the next session'. The Bill thus proceeded on the understanding that the question of royalties was 'still open' and that the Minister of Mines would meet representatives of all Māori iwi interested in the possibility of oil being discovered under their land.³⁹

All agreed that the resource should be controlled by the Government and that the payment of royalties was appropriate, but there remained no agreement on the question of who should receive them, whether landowners should be compensated for loss of property, nor whether Māori were entitled to special consideration under the Treaty. The discussion on the division of royalties took place on the tabling of the mines statement in March 1938. The same arguments were made, but neither the Government nor the Opposition was prepared to concede the right of Māori landowners to receive them exclusively. Ultimately, both parties insisted on a consistency of treatment for both types of landowner. The Government stood on the principle of one law for all and insisted that no breach of obligations under the Treaty had been committed if Māori and Pākehā both lost their common law rights and both benefited as part of the general populace. The Opposition meanwhile insisted on the common law rights of all landowners and was not prepared to accede to Māori demands without gaining a similar acknowledgement of the right of Pākehā landowners to receive royalties for oil found in their property.

38. Joseph Coates, 6 December 1937, NZPD, 1937, vol 249, p 1063

39. See Michael Savage, 9 December 1937, NZPD, 1937, vol 249, p 1175; Sir Apirana Ngata, 9 December 1937, NZPD, 1937, vol 249, p 1176; Patrick Webb, 9 December 1937, NZPD, 1937, vol 249, p 1177

For both parties – except their Māori members – article 2 protections under the Treaty ranked far behind the question of individual property rights, and that question was itself secondary to the necessity of getting exploration underway. Māori thus received only a political promise. Tirakatene, despite his reservations about the measure, believed that the Opposition was using the Treaty as a means of ‘getting pakeha in as well’, and he was unwilling to go against his party, which had made significant moves to ensure equality of State provision for Māori. He told the House that he was satisfied with the assurance of the Minister that the Government would be willing to meet with Māori to negotiate ‘some measure of payment to them, according to the quantity of petroleum extracted’ in the event of oil being found on their land.⁴⁰ Debate then moved on to a more general discussion of the rights of the individual vis-à-vis the socialist state, after which the Bill passed without amendment. In the minds of Māori representatives, however, the issue of royalties was left unresolved.

4.7 THE LEGACY OF THE PETROLEUM ACT 1937

In the meantime, the notion of Crown ownership has become entrenched, although the ‘strategic significance’ giving rise to it has shifted to economic rather than military grounds. A series of amending Acts were passed – in 1955, 1962, 1975, and 1980 – but these dealt with licensing, management, and development issues, or the calculation of royalties, and left the questions of ownership and the allocation of royalties untouched.

The Continental Shelf Act 1964, which dealt with the issue of mineral resources under the seabed, outside but adjacent to New Zealand’s territorial limit, also preserved the principle of exclusive Crown rights to petroleum but was more ambivalent on the issue of outright ownership. The Act implemented the Geneva convention, to which New Zealand had been a signatory in 1958, recognising State control over access to subsurface resources on and under the continental shelf adjacent to, but beyond, the internationally accepted 12-mile territorial limit. The Act vested the right to ‘explore for and exploit’ minerals in the Crown and applied the relevant provisions of the Petroleum Act 1937 to any petroleum under the seabed and subsoil of the shelf. This empowered the Government to grant applications by oil companies, which had already shown interest in the area, or to prevent such activity. However, the Act specifically excluded section 3 of the 1937 legislation, which declared all petroleum within the territorial limits of New Zealand to be the property of the Crown, regardless of the ownership of the land itself.

The current legislation, the Crown Minerals Act 1991, effectively restates the 1937 legislation, which it superseded. Section 10 declares that:

40. Eruera Tirakatene, NZPD, 1938, vol 250, p 78

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Notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, lease, or other instrument of title, all petroleum, gold, silver, and uranium existing in its natural condition in land (whether or not the land has been alienated from the Crown) shall be the property of the Crown.

The Act thus entrenches the previous statutory expropriation. Royalties are not set but may be required by the Minister (under section 34) and would still go to the Crown. In contrast to other minerals, which the owner of the surface land is free to mine once resource consent has been obtained, exploration for and the mining of petroleum, gold, silver, and uranium always require a mining permit from the Crown.

Nor does the owner of the surface have an absolute right of veto over mining in the case of oil, although the new legislation does represent a departure from the situation pertaining in 1937, giving the landowner more control of access than under the old Act. In contrast to earlier arrangements, a licence or permit under the Crown Minerals Act provides no automatic rights of access for oil exploration, and the landowner and explorer have to enter into separate arrangements. Māori are, however, unable to exercise an absolute veto to exploration on their land in the case of petroleum. This is not the case with other Crown-owned minerals, where Māori land has been specifically excluded (under section 66(1)(b)) from the elaborate Order in Council and arbitration procedure enabling permit holders to challenge a landowner's refusal of access.⁴¹ The regime for petroleum remains different, reflecting continuing perceptions of its strategic value. There are some absolutely protected categories of land (under section 55(2)), but these do not include Māori land. Instead, the Act provides for a process of compulsory arbitration in the event that an access agreement cannot be reached, and it explicitly requires (under section 70) that the arbitrator grant access to the explorer even though conditions may be attached. Thus, Māori remain unable to prevent petroleum drilling on their land. A similar distinction also remains with regard to the seabed. Petroleum prospecting and mining outside the territorial limits is controlled by the Crown Minerals Act 1991 (under the third schedule), while the control of hard minerals is exercised under the Continental Shelf Act 1964.

It is to be noted also that the Petroleum Act 1937 contained no reference to the Treaty of Waitangi, although the Crown Minerals Act 1991 does. Section 4 of the current legislation provides that all persons exercising powers under its authority 'shall have regard to the principles of the Treaty of Waitangi'. It is clear, however, that this provision is not intended to challenge the status quo regarding ownership or to restrict the Crown's title to those resources specifically preserved under section 10.

41. See doc A12, p 92

CHAPTER 5

THE LEGAL INTEREST OF MĀORI IN THE PETROLEUM RESOURCE

5.1 INTRODUCTION

In chapters 5 and 6, we distinguish between two kinds of interest in the petroleum resource: a legal interest and what we refer to as a Treaty interest. This chapter focuses on legal interests, which comprise rights recognised and enforceable by the law of the day. In New Zealand, since the passing of the Petroleum Act 1937 the Crown has generally been recognised as being the legal owner of petroleum because the Act extinguished the private ownership rights in the resource that had previously been recognised by the law.¹ At the hearing of the present claims, Crown counsel accepted that, before 1937, Māori customary law and English common law provided that the ownership of land carried with it the ownership of whatever was in the land, including petroleum.

The lawfulness of the Petroleum Act 1937, and its profound impact on the private ownership of petroleum, is beyond question. The Waitangi Tribunal's jurisdiction, however, requires us to measure Crown conduct and Acts of Parliament against the standard provided by the principles of the Treaty of Waitangi. If we were to find that the Petroleum Act was inconsistent with those principles, the result would be that in 1937 the Act lawfully, but in breach of the Treaty, expropriated the legal ownership interest of Māori in petroleum contained within the land that they owned at that time. But, as is well known, Māori had lost ownership of the great majority of their lands by 1937 – mostly long before 1937 – and often by means that the Waitangi Tribunal has found to be inconsistent with Treaty principles. For its part, the Crown has acknowledged that a number of the ways by which Māori land was acquired since 1840 were inconsistent with its Treaty obligations to Māori.

The question before us is whether, if Māori no longer have any subsisting legal ownership interest in the petroleum resource, an interest of any other sort remains.

In this chapter and the next, we see that the expropriation of the pre-existing Māori rights to petroleum arose from a context that is riddled with breaches of the Treaty. We are satisfied that, in this situation, where legal rights to an important and valuable resource were lost or

1. Claimant counsel argued before us that, although section 3 of the Petroleum Act 1937 purported to arrogate to the Crown full legal title to the petroleum resource, it was not effective in doing so. This argument is founded in the common law doctrine of aboriginal title, and it is for the courts to respond to it. We express no view on the matter, and in this report we speak of the Petroleum Act as if it did effect the extinguishment of all private rights to petroleum. Our doing so should not, however, be taken as a dismissal of the aboriginal title arguments.

extinguished as a direct result of a Treaty breach, an interest of another kind is generated. We call this a ‘Treaty interest’.

A Treaty interest arises whenever legal rights are lost by means that are inconsistent with Treaty principles. It carries with it a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right. Perhaps most importantly, the Treaty interest creates an entitlement to a remedy for that loss additional to any other entitlement to redress.

5.2 MĀORI CUSTOMARY LAW

It is not disputed that there was a Māori customary interest in petroleum. At the hearing, the Crown accepted at the outset that such an interest existed as a corollary of Māori customary ownership of land containing petroleum:

There is a good argument for a collective Māori interest (hapu/iwi) in petroleum prior to the confiscations of the 1860s, Crown purchases and the granting of land titles through the Native Land Court and subsequent alienations commencing in the 19th Century.²

The Crown also accepted that the Māori customary interest in petroleum included a right to exploit the resource for economic gain: ‘It is accepted that had ownership of land by iwi and hapu persisted it is difficult to see why pre 1937 there would not have been a right to benefit from exploitation of the petroleum resource.’³

Thus, the Crown accepted that there was no need for Māori to prove that they actually used petroleum before or after the time of the Treaty, either for commercial or for non-commercial purposes: it was sufficient that Māori could claim customary title to the surface of the land above the resource.

Clearly, these acknowledgements by the Crown were properly made. The approach accords with customary rights jurisprudence developed in Canada; for example, in the landmark case of *Delgamuukw v British Columbia*.⁴ There, Chief Justice Lamer of the Canadian Supreme Court applied the following principle:

The exclusive right to use the land is not restricted to the right to engage in activities which are aspects of aboriginal practices, customs and traditions integral to the claimant group’s distinctive aboriginal culture. Canadian jurisprudence on aboriginal title frames the ‘right to occupy and possess’ in broad terms and, significantly, is not qualified by the restriction that use be tied to practice, custom or tradition. The nature of the Indian

2. Document A35, para 16

3. Ibid, para 42

4. *Delgamuukw v British Columbia* [1997] 3 SCR 1010

interest in reserve land which has been found to be the same as the interest in tribal lands is very broad and incorporates present-day needs. Finally, aboriginal title encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation. Such a use is certainly not a traditional one.⁵

The Australian jurisprudence is far more conservative on these questions. In the High Court of Australia's recent decision in *Western Australia v Ward*, it was held (by Justices Beaumont and Vondoussa) that, since there was no evidence of any traditional aboriginal law, custom, or use relating to petroleum either in the state or (formerly) the territory, no relevant title right or interest to petroleum could be established.⁶ For our part, we prefer the Canadian approach; it is the approach that better accords with Treaty principle in New Zealand. In particular, it gives substance to the guarantee of equality in article 3, as we discuss in section 5.4.

While they agreed that a substantive Māori interest in petroleum did exist prior to 1937, the claimants and the Crown disagreed on most other aspects of the claim. They disagreed on whether petroleum is separately protected by article 2 as a taonga or whether it is protected as part of the guarantee of te tino rangatiratanga over land. They disagreed on whether and in what circumstances the alienation of land extinguishes all Māori interests in petroleum, and they disagreed on whether the general expropriation of petroleum in 1937 breached the Treaty in so far as it affected Māori. We deal with these issues in turn.

5.3 PETROLEUM – PART OF THE LAND OR SEPARATE TAONGA?

The essence of the Crown's argument was that any Māori legal rights in petroleum existed only by virtue of Māori title to the surface of the land that contained the resource. The Māori interest in this respect was no different to the interest of any other landowner, as provided by the applicable principles of English, and later New Zealand, common law. Therefore, in the Crown's submission, the Māori interest in petroleum remained for as long as Māori held title to the land in which it was contained. Once Māori title was transferred to the Crown or to private parties, the petroleum interest that went along with it was also transferred. It followed that, unless rights to petroleum were expressly or by necessary implication reserved from sale or acquisition, the Māori interest in the petroleum was extinguished upon the transfer. By this reasoning, our focus, according to the Crown, should not be the Petroleum Act 1937 and the nationalisation of petroleum rights; rather, it should be the various acquisitions and transactions by which the Crown and private parties acquired title to the vast bulk of what were formerly the Taranaki and Ngāti Kahungunu tribal estates.

5. Ibid, see paras 117–119, 121–122, 127

6. *Western Australia v Ward* [2002] HCA 28 (8 August 2002)

In light of the Crown's acknowledgement that, before 1937, rights to petroleum within land accompanied title to the land itself, counsel for Ngā Ruahine did not pursue the contention that petroleum was itself a taonga protected directly by article 2 of the Treaty.⁷ That stance would have opened up for argument the possibility that petroleum rights could be retained by Māori notwithstanding the transfer of surface title into non-Māori hands – a kind of non-territorial aboriginal right to petroleum.⁸ However, counsel for Ngāti Kahungunu did pursue the taonga argument.

On our view of the matter, it is unnecessary to resolve this issue, and we think it wise not to venture our own view in any final way. But we can indicate that we found the argument advanced to be unpersuasive. The evidential basis for the proposition that petroleum is a taonga showed that it was known in pre-colonial times and used for lighting, as a beacon, and for dyeing. The name for surface seepages was korohū, a dialect word for steam.⁹ The evidence of Takirangi Smith identified certain Wairarapa traditions about gas seepages referred to as Te Ahi o Taiwhetuki.¹⁰ Mr Smith said:

Any emission which comes from the ground through any aperture, fissure, hole or opening is a taonga. This is because our tipuna defined the earth as papatuanuku and the place within the earth as Rarohenga. The presence of emissions at surface level were/are regarded culturally as tapu having come from Rarohenga, also named by our tipuna as an area of Te Pō.¹¹

There is no question that these traditions are of long standing. Surface manifestations described as Te Ahi o Taiwhetuki are in a sense tapu – probably in the same sense that Papatuanuku or whenua may be said to be tapu. Indeed, the evidence was that emissions are taonga because they are identified with Papatuanuku – that is, they carry the same tapu as the land itself. Does that make petroleum or oil and gas in situ a taonga within the meaning of article 2 of the Treaty? Is that underlying resource something 'highly prized' by the ancestors, to use the formulation adopted by this Tribunal in the Te Reo Māori claim?¹² Though the term has a number of other more mundane meanings, successive carefully reasoned reports of the Tribunal over many years now have come to treat 'taonga', as used in the Treaty, as a tangible or intangible item or matter of special cultural significance. We adopt the same approach here.

Although in cases such as the present there is always a balance to be struck, we have some difficulty accepting that the relatively generalised traditions in respect of surface

7. Document A48, para 48

8. P McHugh, *The Māori Magna Carta* (Oxford: Oxford University Press, 1991), pp 132–133

9. Document A25, paras 16, 20

10. Document A23, para 8

11. *Ibid*, para 5

12. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed (Wellington: Brooker's Ltd, 1993), p 7

manifestations of oil and gas are sufficient to show that oil and gas are themselves taonga within the contemplation of the Treaty, separate from the land as a taonga. It seems to us that this leap should not be made without the backing of stronger and more detailed kōrero or traditions about the separate nature of these resources and their place in the histories and tikanga of these iwi. We tend, albeit tentatively, to the view that the evidence we had was insufficient to justify that leap. And, rather more importantly, we think that the answer to the case is to be found elsewhere.

5.4 RIGHTS TO PETROLEUM AN INCIDENT OF TITLE TO LAND

We prefer to treat the Māori customary interest in petroleum as an incident of the ownership of the land surface. Apart from the relative lack of detailed evidence to support the alternative taonga-based approach, there are other good grounds for our preference.

First, the approach is consistent with the equality guarantee in article 3. That is, if the common law of New Zealand recognised that non-Māori landowners had an interest in sub-surface petroleum as an incident of their title to land – and it appears that it did¹³ – then Māori landowners were entitled at least to equal treatment under the law. We note that this point applies whether the Māori title was customary or had been converted to a Māori freehold title under the Native Lands Acts.

5.5 A RIGHT TO DEVELOPMENT

Alternatively, the Māori interest in petroleum may be conceptualised as a development right – a right to exploit a resource not extensively used in traditional times for new purposes not contemplated in those times.

The Waitangi Tribunal found that a right to development existed in both the *Ngai Tahu Sea Fisheries Report 1992* and the *Report on the Muriwhenua Fishing Claim*. The Ngāi Tahu Tribunal said: ‘It is common ground between the claimants, the Crown and the fishing industry that inherent in the Treaty of Waitangi is a right to development.’¹⁴

The Muriwhenua Tribunal put the matter this way:

An opinion that Maori fishing rights must be limited to the use of the canoes and fibres of yesteryear ignores that the Treaty was also a bargain.

It leads to the rejoinder that if settlement was agreed to on the basis of what was known, non-Maori also must be limited to their catch capabilities at 1840.

13. Document A12, p 32

14. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 253

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Maori no longer fish from canoes but nor do non-Maori use wooden sailing boats. Nylon lines and nets, radar and echo sounders were unknown to either party at the time. Both had the right to acquire new gear, to adopt technologies developed in other countries and to learn from each other.

The Treaty offered a better life for both parties. A rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty.¹⁵

Sir Apirana Ngata captured the essential element of fairness inherent in the right to development when addressing the 1937 Bill in Parliament. The question was asked whether Māori knew that there was oil under their lands when they signed the Treaty. The answer, said Ngata, was:

No. Nor did they know that there was gold or coal under their land, or that the timber which grew on their lands had a greater value than for making canoes and carvings for their houses, and so on. Is the argument now, that, because the poor savage was ignorant in 1840 of the things that have been made possible by the pakeha, he is to have no benefit or advantage from them to-day? If so, it will not hold water.¹⁶

The argument did not hold water in 1937, and it does not fare better now.

5.6 WHAT IF LAND TITLE HAD BEEN LOST?

We therefore find, as accepted by the Crown, that, prior to the nationalisation of petroleum by the 1937 Act, there was a Māori legal interest in petroleum inherent in land ownership, whether it was Māori customary land or Māori freehold land.

However, as we have observed already, by 1937 very little land remained in Māori ownership; most of the lands of the Taranaki peoples and of Ngāti Kahungunu had been acquired by the Crown or by private parties. The exception according to counsel for Ngāti Kahungunu was the Wairoa district, where land in Māori title remained a relatively significant proportion of landholdings in the district at the time.¹⁷

We move now to focus on the various means by which Māori lost their land prior to 1937. That is because, without a specific reservation of petroleum or mineral rights, any Māori interest in those resources was lost when the land was sold or otherwise alienated. In most cases, there was no such reservation, and Māori legal rights in petroleum went with the land when it was taken or sold. Our next question is, therefore, whether those alienations were consistent with the principles of the Treaty.

15. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 234

16. Sir Apirana Ngata, 6 December 1937, NZPD, 1937, vol 249, p 1044

17. Document A22, paras 11–25

5.7 PETROLEUM AND THE ACQUISITION OF TITLE TO LAND

Most alienations of land from Māori owners fall into one or other of the following categories:

- ▶ pre-Treaty transactions;
- ▶ pre-1865 Crown purchases;
- ▶ raupatu;
- ▶ Crown acquisitions facilitated by Native Land Court processes;
- ▶ takings under public works legislation; and
- ▶ takings for survey liens.

The Tribunal has considered these categories of land loss in a number of reports, and the Crown and claimants have negotiated settlements in most categories. These settlements have contained acknowledgements by the Crown of Treaty breaches.

This report is not the place to attempt to assess the consistency with Treaty principles of land acquisitions in the rohe of the claimants. In respect of the Taranaki peoples, the task has already been undertaken by another Tribunal and largely reported upon in the *Taranaki Report* of 1996.¹⁸

With respect to land acquisition in the rohe of Ngāti Kahungunu, the position is more complex, and no analysis could be attempted here. The Tribunal's reports in respect of the Mōhaka River and Whanganui-ā-Orotu inquiries address some of the issues.¹⁹ A comprehensive analysis of Māori land loss in northern Hawke's Bay (between the Mōhaka and Tūtaekuri Rivers) will be available by the end of this year in the report of the Tribunal inquiring into the Mōhaka ki Ahuriri district. Tribunals inquiring into the Wairarapa ki Tararua and Wairoa districts will also report within the next two or three years. It is not for us to pre-empt any of the findings of those Tribunals, whose work is in train.

Rather, what we seek to do is to set out in broad terms the categories into which most Māori land loss falls, recording in respect of each category the findings of the Tribunal and what is known about the position of the Crown.

We do this for two reasons: first, to support our conclusion that it is likely that the reasons for most of the claimants' land loss implicate the Crown in breaches of the Treaty and, secondly, to establish a Treaty principle framework for considering how Māori interests in petroleum ought to be factored into the inquiries and negotiations surrounding land loss in the claimants' rohe. We think that it will be possible to predict with reasonable accuracy the circumstances in which the loss by Māori of title to land gives rise to an ongoing Māori Treaty interest in the petroleum lying beneath.

18. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996)

19. Waitangi Tribunal, *The Mohaka River Report 1992* (Wellington: Brooker and Friend Ltd, 1992); Waitangi Tribunal, *Tē Whanganui-a-Orotu Report 1995* (Wellington: Brooker's Ltd, 1995)

5.7.1 Crown acknowledgements

The Crown's most recent formal articulation of its policy relating to the negotiation and settlement of Treaty of Waitangi claims is a comprehensive guide put out by the Office of Treaty Settlements. It is entitled *Ka Tika ā Muri, Ka Tika ā Mua – Healing the Past, Building a Future*.²⁰ The 'key settlement policies' are set out in part 1. The second key settlement policy is as follows:

The Crown is ready to negotiate most claims involving raupatu, pre-1865 Crown purchases, subsequent Crown purchases and/or breaches arising from the operations and impact of the Native land laws.²¹

The position is amplified in part 2 in these terms:

Crown readiness to negotiate

Because the Crown acknowledges that widespread breaches of the Treaty and its principles are likely to have occurred, it is willing, if claimant groups wish, to negotiate settlements of claims that include purchases before 1865, confiscation, and the operation and impact of the Native land laws after 1865. Claimants who want to negotiate to settle such claims do not need to go through Waitangi Tribunal hearings or provide detailed research on each and every Crown action or omission that they consider breached the Treaty and its principles. However, they do need to show the link between the Crown's acts or omissions and the harm to their tūpuna (ancestors).²²

These statements show an acceptance by the Crown that acquisition of land by the stated means – purchases before 1865, confiscation, and by the operation of Native Land Court processes after 1865 – is likely to have occurred in breach of the principles of the Treaty. The Crown's specific response in settlement terms will depend on the individual circumstances of settling parties.

Less clear is the Crown's position on whether it accepts liability for Treaty breaches in respect of land loss through pre-Treaty negotiations, takings under public works legislation, and takings for survey liens. No acknowledgements in respect of these categories are contained in *Ka Tika ā Muri*, but that is not a complete answer. In respect of survey liens, for example, the Crown acknowledged in its settlement deed with Ngāti Awa that survey liens had contributed to land loss.²³ Likewise, in its settlement deed with Te Uri o Hau, there is an

20. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: Office of Treaty Settlements, [2002]). The references in the text of this report are to the second edition of the guide, which came out in 2002 (the first edition was published in 1999).

21. *Ka Tika ā Muri*, p 32

22. *Ibid*, p 42

23. *Deed of Settlement to Settle Ngāti Awa Historical Claims* (Wellington: Office of Treaty Settlements, 2003), cl 3.2E(a)(i)

acceptance of liability in relation to land sold prior to the Treaty.²⁴ The situation appears to be that the Crown is reserving its position on these matters, prefers not to set that out as a matter of policy, and in practice determines its stance on a case-by-case basis in negotiation with claimants.

5.7.2 Pre-Treaty transactions

There were well over a thousand transactions in Māori land by private individuals and companies before 1840. Many of them were in the Far North, and the Tribunal addressed the issues comprehensively in the *Muriwhenua Land Report 1997*.

In general, the European settlers considered they were buying freehold title. The Māori view of the transactions commonly had more to do with admitting Pākehā into their communities in the expectation of ongoing benefits and in a sense of joint-venture partnership in the development of the land. It is doubtful whether there was understanding or acceptance that sale meant the permanent relinquishment of rights in the land. For these early sales, therefore, there is a real issue as to whether there was a meeting of the minds between the parties as to what was being transacted. Without that common understanding, no valid sale can have taken place:

we find that the pre-Treaty transactions did not effect, and could not have effected, binding sales, and that the parties were not of sufficiently common mind for valid contracts to have formed. Maori contracted with Europeans on the basis of Maori law, which was the only law known to them and the only cognisable law in New Zealand before 1840. As a consequence, the pre-Treaty land transactions were not sales but at best conferred a personal right of occupation conditional upon acceptance of the norms and authority of the local Maori community as represented in the rangatira. The transactions imposed obligations on the settlers, of which the settlers ought reasonably to have been aware but which they did not generally fulfil.²⁵

The Muriwhenua land Tribunal also found that the Crown breached the Treaty in later confirming pre-Treaty transactions as though they were valid purchases. The Government of the day made insufficient inquiry into the pre-Treaty transactions to justify its treatment of them as sales: they were simply presumed to be, or were treated as, sales, without adequate inquiry into the Māori intent.²⁶ This was notwithstanding the undertakings that had been given in the Treaty debate at Waitangi in 1840 to investigate the preceding transactions and to return lands unjustly held.²⁷

24. Waitangi Tribunal, *The Kaipara Interim Report* (Wellington: Legislation Direct, 2002), p 4

25. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 392

26. Ibid, pp 109–110, 167, 173

27. Ibid, p 167

The Crown has yet to accept the invalidity of pre-1840 land sales. Even so, the Crown accepts that it had a Treaty responsibility at the time to protect for iwi and hapū a sufficient land base for their foreseeable needs.

5.7.3 Crown purchases pre-1865

Governor Grey's land-purchasing policy exploited the complexity of Māori land tenure whereby various hapū could have ownership rights in the same land.

There was much confusion over whether lesser resident 'chiefs' were bound by the transactional consent of 'overlord chiefs' in many regions. The Crown was able to buy large tracts of land by negotiating and making advance payments to certain chiefs, who sometimes represented wider community opinion but very often did not. Although Māori began to resist the sellers by setting up tribal rūnanga to stall the process, Crown purchasers never conceded that a deal had not occurred once one section of the owners had taken payment and signed a deed.

This process generated strong tensions within Māori society. Outbreaks of fighting resistance sometimes resulted; in particular, in Hawke's Bay and Taranaki in the 1850s. The land purchasers at this time would sometimes leave highly sensitive areas for a period, but they would keep negotiating in other areas, quite explicitly hoping that pressure and working through acquiescent chiefs would cause the resistance to crumble. Once they were confident that they had a deal with some influential leaders, they would try to push through a survey or make an announcement of the deal as a completed purchase, immediately putting the still resisting groups at a disadvantage. The resisters then felt obliged to participate for fear the land would be sold from under them.

The Crown's purchases between 1840 and 1865 were addressed comprehensively by the Tribunal in its *Ngai Tahu Report 1991*. In that report, the Tribunal said:

In their single-minded commitment to the purchase of Ngai Tahu's vast estate, the respective Crown purchase agents, with the connivance or clear endorsement of the various governors of the day, very largely ignored Ngai Tahu's rights as a Treaty partner. It is abundantly clear the odds were weighed so heavily against Ngai Tahu that, in the absence of a competent and committed officer appointed to advise and assist them, they stood no real chance of avoiding tribal disintegration, serious impoverishment and virtual landlessness.²⁸

In like vein, in the *Taranaki Report*, the Tribunal said, by way of summary:

28. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), p 838

The failure to negotiate with the Te Atiawa leadership for a settlement policy and land sharing process was denigrating of Te Atiawa tribal authority and contrary to the principles of the Treaty of Waitangi, by which that authority was to be respected. The prejudice to Te Atiawa was the loss of most of their land by processes that were not agreed on and over which they had no control and the relegation of Te Atiawa status from that of equals to that of supplicants. As a result, none of the acquisitions of land in north Taranaki can be seen as having been acquired consistently with the Treaty.

As sales, each of the transactions failed to satisfy one or more of certain minimum criteria relating to the prior determination of ownership, the determination of Maori consensus by Maori process, fairness of terms, certainty of subject-matter and consideration, and mutuality of understanding.²⁹

The Ngāi Tahu, Taranaki, and Muriwhenua land Tribunals all found fault with the Crown's failure to create sufficient reserves from the land sales transacted. In Taranaki:

Contrary to Treaty principles and the promises of governors, no or inadequate reserves were set aside for the support and future development of hapu. There is evidence that the Crown was aware of, but was not disposed to heed, the warnings of its own officials that, if proper allowance were made for all hapu, there would be little land left to buy, except in the bush, and that large block purchases of the type in fact effected would threaten the facility of Maori to maintain themselves and their institutions.³⁰

It was the same story in the north:

Where Maori expected their authority to continue as before, the Government, in asserting British rule, assumed that Maori authority, law, and land tenure should be replaced. Further, while both sides assumed that Maori should benefit from European settlement, there was no drive to reserve the land that Maori needed for that purpose. The result was the virtual exclusion of Maori from the central Muriwhenua bowl, and their marginalisation on the rims – politically, socially, and economically.³¹

In its settlement deed with Ngāi Tahu, the Crown acknowledged that its dealings with that iwi had fallen short of the Treaty standard, and it gave apologies in these terms:

The Crown acknowledges that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngāi Tahu in the purchases of Ngāi Tahu land.

29. Waitangi Tribunal, *The Taranaki Report*, pp 53, 54

30. Ibid

31. Waitangi Tribunal, *Muriwhenua Land Report*, p 205

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The Crown acknowledges that, in breach of Article Two of the Treaty, it failed to preserve and protect Ngāi Tahu's use and ownership of . . . their land and valued possessions . . .

The Crown . . . apologises unreservedly . . . for the suffering and hardship caused to Ngāi Tahu, and . . . acknowledges that such suffering, hardship and harmful effects resulted from its failures to honour its obligations to Ngāi Tahu under the deeds of purchase whereby it acquired Ngāi Tahu lands.³²

It follows that the Crown has acknowledged that there were serious shortcomings both in the policies underlying land purchasing in this period and in their implementation.

5.7.4 Raupatu

Following the land wars, the Government introduced the New Zealand Settlements Act 1863 authorising the confiscation of large areas of land where the Governor in Council was satisfied that any native tribe – or a considerable number of a section thereof – had been engaged in rebellion against Her Majesty's authority.³³ Confiscation was advocated as a way of punishing rebellion, of ensuring peace and security by military settlement, and of paying for the war by the selling off of surplus confiscated land.

Māori were divided into either loyal or rebel categories at the Government's discretion. In effect, 'rebels' were those who could not prove to the Crown's satisfaction that they were loyal. The label not only incorporated those tribes that had simply resisted the Crown's aggressive and illegal acts or had become involved more actively in engaging Crown forces but also included the relatives, hapū, or tribe of anyone who was not loyal, and people who owned land that the Government wanted.³⁴

The confiscations came with an undertaking that lands necessary for hapū survival would be returned without delay, but this promise was not always maintained.³⁵

Land that was passed back was returned under individualised Crown grants in place of customary tribal titles. The subsequent fragmentation of title and ownership made alienations more likely, undermined social order, jeopardised Māori authority and leadership, denigrated Māori autonomy or self-government, and expropriated the endowments to which hapū, as distinct from individuals, were entitled.³⁶

The Tribunal's main inquiry into raupatu was in Taranaki. In the preface to the *Taranaki Report*, the Tribunal quoted from a paper filed by the Crown, which recorded its view in these terms:

32. *Deed of Settlement: Te Rūnanga o Ngāi Tahu and Her Majesty the Queen* (Wellington: Office of Treaty Settlements, 1999), cl 2.1

33. See the New Zealand Settlements Act 1863, s 2

34. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 1, p 61

35. Waitangi Tribunal, *The Taranaki Report*, p 2

36. *Ibid*, p 3

- ▶ the Waitara purchase and the wars constituted an injustice and were therefore in breach of the principles of the Treaty of Waitangi;
- ▶ the confiscation of land, as it occurred in Taranaki, also constituted an injustice and was therefore in breach of the principles of the Treaty of Waitangi;
- ▶ confiscation had a severe impact upon the welfare, economy, and development of Taranaki iwi;
- ▶ in general terms, the delays in setting aside reserves contributed to the adverse effects of the confiscations; and
- ▶ events relating to the implementation of the confiscations leading to the invasion of Parihaka in 1881, the invasion itself, and its aftermath constituted a breach of the principles of the Treaty of Waitangi.³⁷

The Waitangi Tribunal also found that the confiscations did not conform to the requirements set out in the Settlements Act, and were thus unlawful, as well as being in breach of the Treaty.³⁸

Generally speaking, *raupatu* is accepted as the most flagrant kind of Treaty breach, and it raises a *prima facie* duty on the part of the Crown to provide redress. The breaches in respect of Taranaki were particularly grievous because of the quantity of land expropriated; the fact that conflict with the use of arms was spread not over a few months but over a staggering 40 years; and because the return of lands necessary for hapū survival was much longer delayed than in other districts.³⁹ The Tribunal in its introductory overview chapter simply concluded:

In effect, the whole of the Taranaki land was affected by processes prejudicial to Maori and inconsistent with the principles of the Treaty, and the tribal rights in respect of the whole of that land were wrongly taken away.⁴⁰

The Crown's acknowledgements and apologies in the Ngāti Tama and Ngāti Ruanui deeds of settlement described the Crown's acts as 'wrongful' (Ngāti Tama) and 'unconscionable' (Ngāti Ruanui). The Crown accepted that the consequences of those wrongful acts were profound and destructive, and included virtual landlessness and the undermining of society and economy.

5.7.5 Crown acquisition facilitated by Native Land Court processes

The purpose of the Native Lands Acts of 1862, 1865, and 1873 was to convert Māori customary rights in land into a form of title understood by and convenient to the settlers, and to

37. Ibid, p xi

38. Ibid, pp 126–127, 130, 133–134

39. Ibid, p 2

40. Ibid, p 15

authorise direct dealing between settlers and Māori for the land. The period 1865 to 1899 saw the transfer from Māori to Pākehā hands of the ownership and control of most of the land in the North Island. During that period, about 11 million acres were transferred to Pākehā ownership under the Native Land Court, two-thirds by Crown purchases and one-third by private purchases.⁴¹

Engaging with the Native Land Court processes was necessary for Māori in order to protect their interests. But the costs of doing so were high. Expenses associated with surveys, legal fees, court expenses, and with travelling to and living near the court, sometimes for long periods, became direct and indirect charges on the land. The debt traps associated with claiming or defending rights to land in this increasingly complex and confusing system contributed to the land's rapid alienation.⁴²

There is no doubt whatever that many Māori were willing sellers, engaging eagerly in the land trade and living well for short periods. Others were less willing and became caught in a sequence of debts. The habits and necessities of consumer spending and the cultural imperatives of hospitality caused many to grow dependent on advances on land sales, resulting in a steady erosion of the tribal patrimony.⁴³

In its 1987 *Report on the Orakei Claim*, the Tribunal commented extensively on legislation and policy pertaining to the Native Land Court. The Tribunal noted that, by 1890, the Legislature had passed a bewildering array of Acts:

From this legislative profusion five main policies emerge. Maori lands were to be 'individualised' by being vested in individuals. They could be divided (partitioned) amongst them. They could be freely alienated to anyone. Only land with particular significance could be made inalienable but any restrictions on alienation could be removed. Finally, as first provided for in 1870, no alienation was to be valid if it was contrary to equity and good conscience or if the alienor did not have sufficient other lands for his support.⁴⁴

The *Te Roroa Report 1992* discussed the role of the Native Land Court in destroying tribal structure:

'Native custom' as to land tenure is described by Professor IH Kawharu whereby 'The chief naturally *represents* and defends the rights of his people' (emphasis added). But the court's order vested the interests as tenants-in-common which conferred absolute title upon the named individuals. By ordering a memorial of ownership to ten persons in this manner the court released them from the necessity to perform their chiefly obligations. Yet in custom, these obligations were still recognised. The chief's customary obligations to his people were finally extinguished when the court made succession orders vesting his

41. Ward, p 67

42. Ibid, p 68

43. Ibid, p 72

44. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 44

land interests in all his children equally. The social structure of the hapu was buried with the chief. As Dr David Williams said, the court ‘was in the business of eradicating Maori customary land title rather than ascertaining it’. There is no doubt that this was understood by the court, and by the Crown who were aware of the court’s practices.⁴⁵

The negative consequences of the era ushered in by the Native Land Court practices in Hawke’s Bay were documented by the Tribunal in its *Te Whanganui-a-Orotu Report 1995*:

The [Native Land] court’s function was to investigate customary title, award certificates of title to not more than 10 named ‘owners’, and issue Crown grants. Direct purchasing by private individuals was re-instituted, and a new phase of extensive land purchases by private individuals as well as the Crown began in Hawke’s Bay.⁴⁶

The *Taranaki*, *Muriwhenua Land*, *Ngawha*, *Pouakani*, and *Mohaka River* reports noted the same adverse effects on landholdings and tribal structures in those districts.⁴⁷

In its deed of settlement with Ngāti Awa, the Crown acknowledged that the operation and impact of the native land laws, in particular the awarding of land to individual Māori rather than to iwi or hapū, made those lands more susceptible to partition, fragmentation, and alienation. This contributed to the further erosion of the traditional tribal structures based on the collective tribal custodianship of land. The Crown failed to take steps to protect those structures adequately, and this had a prejudicial effect on Māori and was a breach of the Treaty.⁴⁸

5.7.6 Takings under public works legislation

The Public Works Acts of 1864, 1870, 1876, 1882, 1894, and 1928 gave the Government legislative authority in war times to take both customary and Crown-granted Māori land for public works, often with minimal or no compensation.

In his Rangahaua Whānui report, Professor Alan Ward stated that it was widely understood, and freely admitted in Parliament by the Minister for Public Works in 1888, that Māori land was generally taken in preference to European land for public works, and for lesser rates of compensation.⁴⁹

45. Waitangi Tribunal, *The Te Roroa Report 1992* (Wellington: Brooker and Friend Ltd, 1992), pp 105–106. Professor Kawharu’s description of native custom is in his *Māori Land Tenure: Studies of a Changing Institution* (Oxford: Clarendon Press, 1977).

46. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, p 84

47. Waitangi Tribunal, *Taranaki Report*, pp 182–183, 277–286; Waitangi Tribunal, *Muriwhenua Land Report*, pp 275–276; Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p 22; Waitangi Tribunal, *The Pouakani Report 1993* (Wellington: Brooker’s Ltd, 1993), pp 63–67, 110, 183, 242; Waitangi Tribunal, *The Mohaka River Report 1992*, p 48

48. *Deed of Settlement to Settle Ngāti Awa Historical Claims*, cl 3.2E(b)

49. Ward, p 87; Edwin Mitchelson, 10 July 1888, NZPD, 1888, vol 61, p 609. The Public Works Act 1928 had weaker provisions for paying compensation for Māori land than for general land.

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In the *Te Maunga Railways Report* of 1994 and the *Turangi Township Report* 1995, the Waitangi Tribunal found that the compulsory acquisition of Māori land cuts across the guarantee of tino rangatiratanga in article 2 of the Treaty. This means that the compulsory acquisition of Māori land should be a last resort: ‘the only justification for taking land over the objections of the owners would be if the national interest were of such magnitude that the Crown would be justified in overriding its Treaty guarantees to Maori.’⁵⁰

Besides, in most cases, outright purchase is not required:

We also emphasise that we do not believe that the Crown needs to acquire the freehold in order to carry out public works on any land . . . there is no need to take the freehold by proclamation because there are alternative arrangements that can be negotiated. When land is no longer required for a public work then the lease, licence or other arrangement with the owners of the land can be terminated, and the return . . . can be more easily negotiated.⁵¹

The Public Works Act 1981 required the Crown for the first time to offer land back to its original owners once it was no longer required for the purpose for which it was taken. The reference in the quotation to the return being more easily negotiated if the freehold has not been acquired acknowledges the fact that, for many Māori, the current market price of land taken long ago precludes their buying the land back.

The Crown has not acknowledged that the taking of lands for public works is in itself a breach of the Treaty except in exceptional circumstances.

While redress was offered and accepted to settle both the *Te Maunga* and the *Tūrangi* claims, which concerned public works takings, in both cases it was circumstances attendant upon the Crown’s acquisition rather than the compulsory acquisition of the land per se that the Crown considered justified the settlements.

Similarly, in the Ngāti Awa deed of settlement, there is reference to the fact that land was compulsorily acquired under public works legislation when agreement between the tribes and the Crown could not be reached.⁵² However, there is no specific admission that this constituted a breach of the Treaty. The Crown’s apology to Ngāti Awa simply states that the cumulative effect of the Crown’s actions and omissions was such that the Crown failed to ensure sufficient land for the present and future needs of the tribe and that this was a breach of the Treaty.⁵³

We are somewhat surprised by the Crown’s unwillingness to accept that the compulsory acquisition of land for public works in most cases has been, and will be, in breach of the Treaty guarantee of te tino rangatiratanga. Given the extent of Māori land lost to public

50. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report* 1995 (Wellington: GP Publications, 1995), p 21

51. Waitangi Tribunal, *Te Maunga Railways Land Report* (Wellington: Brooker’s Ltd, 1994), p 81

52. *Deed of Settlement to Settle Ngāti Awa Historical Claims*, cl 3.2F(a)

53. *Ibid*, cl 3.2G(a)

works even in the twentieth century, when Māori landholdings had fallen to very low levels, and given the strength of Māori feeling on the issue, the Crown's approach seems ungenerous. It may be that the Crown wishes to preserve its ability to acquire Māori land compulsorily in the future unencumbered by an acceptance that to do so would breach the Treaty in all but exceptional circumstances. If that is indeed the Crown's position, it is greatly to be regretted.

5.7.7 Takings for survey liens

Surveys were part and parcel of land purchasing and the operation of the Native Lands Acts. Māori in general did not initiate surveys before 1865, but they were caught up with the expense and trouble if they wanted to assert or protect their interests in a land claim before the Native Land Court. Survey costs were usually a charge on the land, and all the owners had to bear their share, even if the survey had been initiated without their knowledge or consent.⁵⁴

Survey liens were the focus of the Waitangi Tribunal's *Pouakani Report 1993*:

The practice of charging Maori owners for all costs of survey, was established in Maori land legislation since the original Native Lands Acts of 1862 and 1865 which established the Native Land Court. Legislation in 1878 enabled the court to award land to surveyors in payment of survey costs, and legislation in 1880 enabled the court to order the sale of part of the land for payment of survey costs. The Native Land Court Act 1886 gave the court power to charge the land with money owing to the Crown or a private surveyor for survey costs.⁵⁵

Survey liens were inexorable. The costs of surveys were calculated and recalculated by the Survey Office. Then in due course they were granted as survey liens charged against the land by the Native Land Court, with apparently little consultation with the owners and little participation by the owners in the process.⁵⁶ Payment for surveys by these means contributed significantly to land loss in the late nineteenth century. As the Pouakani Tribunal said, 'We can only speculate on the frustration that tribal leaders felt at so much land slipping from their grasp to pay for surveys.'

In its settlement deed with Ngāti Awa, the Crown acknowledges that, following the vesting of title under native land laws, Māori land was further reduced by the taking of land for the payment of survey liens.⁵⁷

54. Ward, p 88

55. Waitangi Tribunal, *The Pouakani Report 1993*, pp 7–8

56. Ibid, p 215

57. *Deed of Settlement to Settle Ngāti Awa Historical Claims*, cl 3.2E(a)(i)

5.7.8 Conclusion

Thus, there were many circumstances in which the purchase of Māori title, or its acquisition by other means, breached the principles of the Treaty. Thousands of transactions by which Māori lost land fall into the categories listed above. The statistical data are not available to enable us to know for certain, of course, but we think it reasonable to posit that much, perhaps most, Māori land was lost in circumstances that were inconsistent with the principles of the Treaty. Certainly, the Tribunal's *Taranaki Report* is a basis for reaching such a conclusion in respect of that district. It is on these bases that we conclude that, prior to the passing of the Petroleum Act in 1937, a significant proportion of the petroleum interests that belonged to Māori were alienated in a manner that gives rise to a Māori Treaty interest.

We turn now to our consideration of the Petroleum Act, and how that Act impacted upon the legal and Treaty interest of Māori in the petroleum resource.

5.8 EXPROPRIATION PURSUANT TO THE PETROLEUM ACT 1937

As we have said, by 1937 most of the legal interests that Māori formerly had in petroleum had passed from them along with their land. With the legal rights gone, all that remained in most cases was a Treaty interest.

The Petroleum Act was enacted in 1937, as we have described. Section 3 provided:

(1) Notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, lease, or other instrument of title, all petroleum existing in its natural condition on or below the surface of any land within the territorial limits of New Zealand, whether the land has been alienated from the Crown or not, is hereby declared to be the property of the Crown.

(2) All alienations of land from the Crown made after the commencement of this Act, whether by way of sale or lease or otherwise, shall be deemed to be made subject to the reservation of all petroleum existing in its natural condition on or below the surface of the land, and subject to the provisions of this Act.

The claimants argued that this provision did not necessarily completely extinguish Māori common law rights in petroleum.⁵⁸ They did accept, however, that the practical effect of section 3 has been to preclude both the exercise of right by Māori over that resource and the receipt of benefits from those rights.⁵⁹ The Crown argued that section 3 effected an extinguishment.⁶⁰ It is sufficient for our purposes to find, as all the parties accepted, that the

58. Document A22, paras 11–25

59. Ibid, para 34

60. Document A35, para 52

practical effect of the legislation has been at least to prevent the exercise of any petroleum rights by Māori. It is clear that, to that extent at least, section 3 was expropriatory in its effect.

5.9 WAS THE EXPROPRIATION CONSISTENT WITH TREATY PRINCIPLE?

Was this expropriation consistent with Treaty principle? The Crown argued that in the circumstances it was. The essence of the Crown's argument was that the expropriation of petroleum in the national interest was a valid exercise of the Crown's sovereignty under article 1 of the Treaty. It did not require Māori consent provided the expropriation was undertaken:

- ▶ in good faith;
- ▶ with an informed understanding of Māori Treaty and other private interests to be affected; and
- ▶ conscientiously weighing those interests against the wider national interest.⁶¹

Applying that test, the Crown's main arguments were these:

- ▶ the decision was taken in good faith;
- ▶ the issues raised by Sir Apirana Ngata (to which we have referred in chapter 4) meant that the matter of Māori Treaty rights was extensively traversed among officials, Ministers, and parliamentarians;
- ▶ the Crown properly concluded that, notwithstanding those rights, the national interest at a time of pre-war economic and political uncertainty favoured expropriation;
- ▶ the implication of article 3 of the Treaty was not just that Māori had equal rights – in those difficult times, it also demanded equal contribution; and
- ▶ the expropriation was non-discriminatory, affecting Māori and non-Māori the same way: 'In the case of nationalisation all citizens were required to forgo a perpetual right to exploit any petroleum which might be located under their land as a contribution to the economic and strategic benefit of the country as a whole.'⁶²

It was central to the Crown's case that the decision to prefer the national interest over that of landowners, including Māori landowners, was a political decision. It was an exercise of balancing high-level policy considerations, and there is no role for the Tribunal in reviewing the decisions made:

In the Crown's submission the Treaty is not a vehicle, which can be used to dictate those kinds of choices. The nationalisation of petroleum reflects an assessment by the Government of the day of complex economic and social questions. The Treaty does enable testing those actions as to their good faith but it is disputed that the Crown need demonstrate 'exceptional circumstances' or 'last resort' or even 'reasonable necessity'. With respect, the

61. Ibid, paras 52–53

62. Ibid

testing of Parliament's judgment that nationalisation was 'necessary' is not one which even a multi-disciplined Commission of Inquiry can readily make. The Tribunal is charged to assess Crown action vis a vis Treaty principles. It is not charged to determine which political ideology on a wide-ranging spectrum of ideologies was or would have been the 'correct' one.⁶³

For their part, the claimants emphasised the importance of the Māori rights guaranteed by article 2 and the Crown's obligation to exercise its authority in a manner that actively protected that Māori interest. This meant, according to the claimants' argument, that expropriation should be a matter of last resort, not a mere weighing of factors in good faith.

We have carefully considered these arguments. The starting point in our view is the essential exchange in the Treaty. By its terms, Māori agreed to give up sufficient authority to enable the Crown to establish and operate a system of central government based on the English Westminster model. The Crown accepted that new authority and promised to exercise it so as to protect both the traditional authority of iwi and hapū – their tino rangatiratanga – and the resource rights of those communities. As this Tribunal said in the *Report on the Muriwhenua Fishing Claim*:

The cession of sovereignty or kawanatanga gives power to the Crown to legislate for all matters relating to 'peace and good order'; and that includes the right to make laws for conservation control. Resource protection is in the interests of all persons. Those laws may need to apply to all persons alike. The right so given however is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise a control. Sovereignty is limited by the rights reserved in article the second.⁶⁴

The Crown and claimants agreed in submissions before us that petroleum is one of the resources that the Crown solemnly promised to protect in exchange for the cession of governmental power.

A decision to override a guarantee in article 2 is a grave decision indeed. It is a decision to override fundamental rights guaranteed in the country's constituting document. It cannot be sufficient for the Crown merely to inform itself of the effect of that decision and proceed in good faith, as the Crown argued before us. That would reduce the effect of the Treaty to a mere procedural safeguard. The plain fact is that the Treaty is not a mere procedural safeguard – it guarantees substantive rights as well.

The Crown exercises its governmental power – its kawanatanga – as a partner and as a fiduciary. It follows that this power must be used to make good on article 2 and article 3 promises except in exceptional and clearly justifiable circumstances. To take any other approach would require us to conclude that the Crown is not a partner nor a fiduciary obliged by the

63. Document A35, para 67

64. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 232

terms of the Treaty to protect the interests of its Treaty partner to the fullest extent reasonably practicable. If this Tribunal were excluded from closely reviewing a Government decision to abrogate a Treaty guarantee, as the Crown argued, the Treaty would become little more than a dead letter.

5.10 THE COURTS' AND THE TRIBUNAL'S ROLE

It is true of course that the Government of the day is entitled to govern, and this involves pursuing legitimate policies in accordance with democratic principles. In the ordinary courts, this is an overriding principle – as it must be, for any other approach would challenge the sovereignty of Parliament itself. This Tribunal must also recognise the importance of the principle and accord it weight.

But our task is not the same as that of the courts. Our task is to interpret the principles of the Treaty for the purposes of our Act. We are not constrained in the way that the courts are when it comes to the practical application of Treaty principle. Section 6 of our Act specifically empowers us to review legislation validly enacted by New Zealand's Parliament. While the mainstream courts must necessarily be preoccupied with process, we are able to focus both on the quality of the process by which the rights were affected and on whether the process delivers the guarantees in the Treaty. A sound process that delivers outcomes inconsistent with Treaty guarantees may properly be challenged in our jurisdiction.

While the Treaty guarantees were not absolute, they were fundamental. Fundamental guarantees cannot be overridden, even by an informed government acting in good faith, except in exceptional circumstances.

5.11 AN ANALOGY WITH THE COURTS' JURISDICTION UNDER THE BILL OF RIGHTS ACT

The approach suggested here is analogous to that adopted with respect to the equally fundamental rights and freedoms provided for in the New Zealand Bill of Rights Act 1990.

According to section 5 of that Act, the rights and freedoms protected by it may be subject 'only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. In *Moonen v Film and Literature Board of Review*, a full court of the New Zealand Court of Appeal addressed the question of limitations on the freedom of expression guaranteed in section 14.⁶⁵ The court established a four-stage test:

In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s 5, it is desirable first to identify the objective which the legislature was

65. *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 (CA)

endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore the limitation involved must be justifiable in light of the objective.⁶⁶

That is, the statutory objective must be sound; the interference in the fundamental right must be proportionate to the objective; there must be a proper connection between the interference and the objective; and the limitation must be no more than is absolutely necessary.

These ideas are broadly familiar in Treaty jurisprudence. When faced with an expropriatory statute, the question for this Tribunal reduces to whether the expropriation was reasonably necessary or whether there was a reasonable alternative available which could have achieved the statutory objective without overriding the fundamental Treaty right. If some form of expropriation can be reasonably justified, the next question is what is the least interference necessary to achieve the policy objective of the statute. The cases around the New Zealand Bill of Rights Act demonstrate that these assessments are not an unwarranted interference in the right of the Government of the day to govern. Rather, they show that there are some rights and freedoms so fundamental to the wellbeing of a modern democracy that Parliament invites courts and tribunals of competent jurisdiction to review interference with them, even when that interference is statutory. Thus, as Justice Tipping stressed in *Moonen*: ‘The judiciary has not only the power but on occasion the duty to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights.’⁶⁷

We think it is now beyond argument that the Treaty of Waitangi also guarantees fundamental rights. It is the task of this Tribunal to review Government actions, including legislative actions, which may breach those fundamental rights. The Crown is incorrect when it says that the Tribunal lacks the expertise to deal with these matters. Like the courts in respect of guarantees of rights in the New Zealand Bill of Rights Act, the Waitangi Tribunal is specifically required to analyse Acts and actions of the Crown in relation to the Treaty guarantees, and for a broadly similar reason. In this country, a proper process of review of the Government’s compliance with the fundamental rights and interests contained in the Treaty of Waitangi is seen as crucial to the wellbeing of our particular brand of democracy.

66. *Moonen v Film and Literature Board of Review*, p 18

67. *Ibid*, p 17

5.12 WHAT WAS REASONABLY NECESSARY?

It follows that we do not shy away from inquiring into whether the Crown's decision to pass legislation expropriating Māori rights to petroleum was founded in reasoning that justified the abrogation of fundamental Treaty guarantees. And so we ask, Was the expropriation of petroleum rights justified in the circumstances and were the exigencies such that there were no reasonable alternatives?

The Crown advanced a number of policy reasons for the Government to have control of the petroleum supply. Professor Gary Hawke offered four reasons:

1. The need to secure and control oil for New Zealand's sea defence;
2. The contribution New Zealand felt it needed to make in the 1930s to fuel self sufficiency for Britain and the wider empire;
3. The need for a centrally rationalised system because of the strategic and economic importance of oil to New Zealand's domestic interests;
4. The cost of exploration and the risk involved were such that the regime had to be simple, accessible and attractive to the large international oil companies with sufficient capital to exploit the resource.⁶⁸

As Ngata conceded in debates in the House at the time, it was hard to oppose a central, rationalised system:

Sir, this is not an easy Bill to oppose. The Minister has appealed for the support of all the public men in New Zealand, and has advanced reasons which were advanced in the Old Country and in Australia for facilities to be provided which might lead to the discovery of this very essential commodity in the Empire. There are reasons with which no one can quarrel.⁶⁹

Ngata none the less bitterly opposed the complete expropriation of all rights and benefits from Māori owners, particularly access to royalties. However, Professor Hawke argued that there were sound reasons for the Crown not just to receive but to keep royalties:

It was perfectly possible for governments to distinguish the receipt of royalties and their final disposition. And it was only as the desire for oil intensified that the general conclusion was reached that governments would receive and keep any royalties. The same arguments as for nationalisation pointed to that conclusion:

- The government acted for the community as a whole, and it was the community which had an interest in uses of oil such as defence.
- The government would promote the welfare of the community against overseas interests.

68. Document A32, pp 3–8

69. Sir Apirana Ngata, 6 December 1937, NZPD, 1937, vol 249, p 1040

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- ▶ There were genuine doubts about the law on ownership of oil resource.
- ▶ Given the way that oil flowed underground, there were genuine difficulties in allocating oil to particular landowners.
- ▶ Nationalisation was desirable to many politicians, especially nationalisation at the expense of landowners. However, the comparison of New Zealand and Britain again suggests that this was in fact a minor motive (even though it loomed large in the political of 1938).⁷⁰

We accept immediately that the policy reasons for preferring a centrally rationalised system of petroleum regulation were sound, reasonable, and properly within the Government's sphere. It was clearly important that the regime in place should be attractive to international investors. Equally, oil was crucial to New Zealand's economy, to its defence, and to its place within the wider British Empire at the time.

We think a case can be made out for reasonable necessity for complete Government control of the resource. But, equally, a single-desk resource-owner might have been appointed to act as a trustee for the beneficial owners of the resource (including Māori). Such a model would avoid the drastic step of outright expropriation by the State and would achieve the objective of central control – but not direct Government control. A model akin to the producer boards would also have achieved many of the desired objectives.

On balance, however, we consider that there is considerable force in the argument that petroleum was of such strategic importance at the time, and the control of it such a high policy issue, that a single independent trustee owner would have been unsuitable. We accept that some form of Government expropriation was reasonably necessary, and that no reasonable alternative was available.

5.13 WHAT WAS THE LEAST INTERFERENCE POSSIBLE WITH THE RIGHT OF MĀORI?

The next question is, What was the least interference possible with the Māori petroleum right? In our view, this is where the Crown's action fell short of the required standard. As Ngata and others argued so eloquently in the House in 1937, even if the Crown did take control of the asset through expropriation, there was no justification to withhold royalties from the true owners of the resource.

A minimum interference in the Māori petroleum right would have seen the Crown act as a trustee on behalf of the actual beneficial right-holder, at least in respect of the distribution of royalties. We accept that royalty distribution would have raised initial difficulties because of the need to establish to whom the distribution should be made. But such difficulties were not insurmountable, as Crown counsel accepted: 'identification of the landowner recipient is

70. Document A32, p 6

not straightforward though one might expect that a rough and ready formulation could be produced'.⁷¹

Arguments that somehow the Crown was entitled to act on behalf of the wider community as the recipient of petroleum revenues are unpersuasive. The Crown had a legitimate role on behalf of the nation to secure control of the resource for defence purposes and to nurture the development of a viable oil exploration industry. But where was the justification for the Crown keeping petroleum revenue in the face of the guarantee of fundamental rights under the Treaty? Professor Hawke argued that there were genuine doubts about the law and ownership of the oil resource. We do not accept that that was the case. As we have said, the operation of a private property regime did pose genuine difficulties, but we have not been pointed to any evidence of real doubt about the title to land and the petroleum rights that went with it.

We find therefore that the Crown established a sound basis in Treaty principle for the expropriation of the country's petroleum resource in 1937. But it fails in terms of minimum interference with Māori Treaty rights. The Crown could have achieved all its important objectives and also acted to minimise that interference by holding petroleum revenue as a trustee for the landowners who had petroleum rights. The distribution of the revenue should have been effected through the payment of royalties.

Crown counsel rightly submitted that this would have provided only residual comfort to Māori, since so little land remained in Māori ownership. This was so generally, and of course it was particularly so in Taranaki. It does not, however, make the Treaty right that remained any less fundamental or any less deserving of protection. On the contrary, the land loss meant that the Crown was under an even stronger duty to remedy the wrongs already committed. The Crown cannot use its own wrongdoing to support its failure to deliver even the residual comfort Ngata sought in 1937.

5.14 THE 'EQUAL TREATMENT' ARGUMENT

This point leads us to the final argument to be addressed, one advanced forcefully by the Crown in our hearings. The argument is that all New Zealanders had their rights expropriated in 1937, not just Māori – Māori were affected on an equal basis and to an equal extent.

Superficially, this argument is an attractive one. It makes clear at least that the Crown was not focused primarily on the defeat of Māori interests. But, when examined more closely, the argument loses its force.

Quite simply, the expropriatory effect of the Act was not the same for Māori as for other New Zealanders. This is because, as we have seen, as at 1937 Māori retained only a fraction of their former landholdings. In Taranaki, iwi and hapū had suffered the unjust confiscation of

71. Document A35, para 72

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substantially their entire land base. This meant that, for people such as these, expropriation of an extremely valuable resource located beneath the remnant of these once-vast tribal estates hit much harder. Clearly, the smaller the land base, the greater the importance of the income-earning potential of any assets comprised within the land.

We think, therefore, that Taranaki Māori suffered disproportionately from the effect of section 3 of the Petroleum Act, and the same can be said for Ngāti Kahungunu. If there is a difference at all, it will be only a matter of degree. As the Privy Council said in the *Broadcasting Assets* case:

Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.⁷²

We apply this principle to the effect upon Māori of expropriation of their petroleum interests. Even if in theory the Petroleum Act was non-discriminatory, the circumstances of its practical application made it otherwise.

5.15 SUMMARY

To this point, we have concluded that the Government's policy to expropriate petroleum ownership in 1937 was reasonably necessary in all the circumstances. Those circumstances did not, however, justify the associated policy by which the Crown also took to itself the royalties paid by petroleum producers. With its adverse impact on all prior owners of the petroleum resource, both Maori and non-Maori, the royalty policy required independent sound reasons for its imposition. And if good reasons were lacking, as we have found they were, Maori could protest that their fundamental property rights, promised to be protected by article 2 of the Treaty of Waitangi, had been breached. Further, in the circumstances, neither the Crown's article 1 right to govern nor the article 3 guarantee of equality between Maori and non-Maori could justify the royalty policy.

72. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)

CHAPTER 6

THE MĀORI TREATY INTEREST IN THE PETROLEUM RESOURCE

6.1 INTRODUCTION

In light of our findings in chapter 5, what rights or expectations do the claimants now have in the modern Treaty settlement process in respect of the loss of their petroleum interests? At the start of the last chapter, we indicated that, where Māori legal rights to petroleum were extinguished in breach of the Treaty, a new interest arose. We call this a Treaty interest. It arises whenever legal rights are lost by means that are inconsistent with Treaty principles. When it arises, there will be a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right. Most importantly of all, the Treaty interest creates an entitlement to a remedy for that loss additional to any other entitlement to a remedy. Applied to these claims, the effect of this reasoning is that it is wrong in principle for the Crown to refuse to provide separate redress for its Treaty breaches in respect of the petroleum resource. It is also wrong in principle for the Crown to exclude petroleum-based remedies.

In this chapter, we explain the bases for our analysis and its meaning for the claims before us. We do this by examining the two major issues raised by the parties' submissions:

- ▶ whether separate redress is due to Māori, additional to that made for historical land-loss grievances, for the loss of rights in the petroleum resource; and
- ▶ whether the Crown's policy of excluding petroleum assets from settlements is justified.

But, before doing so, we discuss generally the appropriate approach to redress in Treaty settlements.

6.2 FAIR AND REASONABLE RECOMPENSE FOR THE WRONG

Earlier Tribunals have concluded that the Crown's fiscal limitations dictate that it cannot, and so is not obliged to, provide full compensation to Māori for all the prejudices they have suffered as a result of Crown breaches of the Treaty.¹ What the Crown should do, however, is provide 'generous reparation . . . to restore the Crown's honour and re-establish sound

1. Waitangi Tribunal, *Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), pp 314–315

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relations'.² Plainly, it will always be a challenge to find the right reparation package in particular cases. A vital factor in meeting that challenge is the utmost good faith which underpins the Treaty relationship. One result is that, just as the Crown must consider all the circumstances and resist any temptation to be miserly in its approach, so too must Māori resist any expectation of extravagant remedies.

The need for both parties to be aware of the broader context within which the settlement of long-standing Treaty grievances is made was explained by the Tribunal in the *Ngai Tahu Sea Fisheries Report 1992*:

there is a need for the Crown and Ngai Tahu to exercise the utmost good faith and good will in negotiating a compromise. A compromise does not always involve a settlement based solely on the issues. It may take into account a number of external circumstances such as the public conscience, the nation's ability to meet the costs and the desirability of a permanent solution. There are also to be measured the benefits that should flow from an agreed settlement and such intangibles as the satisfaction of a long outstanding grievance and the unity of people resulting therefrom. It must be an honourable settlement and the Crown, following the sad history of the loss of Ngai Tahu land and mahinga kai resource, has need to retrieve its honour.³

In the 1987 Court of Appeal *Lands* case, Justice Somers emphasised that the fundamental aim of the Treaty principle of redress is to right wrongs, even if strict 'eye for eye' remedies are unavailable:

As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other – a fair and reasonable recognition of, and recompense for, the wrong that has occurred.⁴

This is the spirit in which the Crown must approach all settlements over Treaty grievances.

6.3 A SEPARATE REMEDY

The Crown argued forcefully that there was no obligation to provide a separate remedy in respect of the acquisition of petroleum. The first basis for this stance was that the expropriation of residual Māori petroleum rights in 1937 was not in breach of the Treaty. As we have indicated in chapter 5, we do not accept that. The second reason relates to the acquisition of

2. Waitangi Tribunal, *Taranaki Report*, p 314

3. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), pp 307–308

4. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 693 (CA)

Māori land prior to 1937. In respect of those lands, the Crown accepted that at least some titles had been acquired in breach of the Treaty, but it rejected any argument that the loss of petroleum rights associated with that wrongfully acquired land might give rise to a right to a remedy separate to that relating to the loss of the land itself. This conclusion is reflected in the Crown's Treaty settlement policy, which holds that, ordinarily, when Māori lose land by means that are in breach of the Crown's Treaty obligations, the Crown's duty to provide appropriate redress does not extend to any particular attributes of the land. Accordingly, it does not matter whether the land is near a city (creating enhanced land values) or whether it is rugged hill country or fertile alluvial plains: the remedy due to Māori will not reflect such matters. This is because the level of redress available in modern Treaty settlements comprises such a tiny proportion of the actual loss that little would be gained from such a close evaluation of the land lost.⁵

There can be no doubt about the sense of that general approach. However, we consider that there are circumstances where it would be quite inappropriate to adopt that otherwise sensible general approach. Those circumstances are where, in the period between the Māori loss of land through breaches of the Treaty and the provision of redress for those breaches, some attribute is found (inherent in the land rather than brought to it) which not only is able to be valued separately from the land but also is so disproportionately valuable as to make the application of the general approach grossly unfair. Most often, the attribute which is subsequently discovered will be mineral wealth. It may be that this mineral wealth was known of but only recently rendered extractable, but the principle is the same. Petroleum is one of a small number of examples which fit this exceptions category. For Māori to lose the entire benefit of such valuable resources without appropriate redress, and for the Crown to gain it, would serve to compound the original, and often already grievous, Treaty breach in relation to the acquisition of the land.

The Court of Appeal's decision in the 1989 *Coal* case is of assistance here. The issue in that case, which arose from the Crown's proposed sale of the State-owned enterprise Coalcorp, was whether the protective scheme of the Treaty of Waitangi (State Enterprises) Act 1988 safeguarded Tainui's Treaty claims to two particular kinds of property that were proposed to be sold: Coalcorp mining rights and Crown surplus properties. The court upheld the Māori claimants' position, with the president of the court providing this overview of the situation:

It is obvious that, from the point of view of the future of our country, non-Maori have to adjust to an understanding that does not come easily to all: reparation has to be made to the Maori people for past and continuing breaches of the Treaty by which they agreed to yield government. Lip service disclaimers and token acknowledgements that the Treaty has not been honoured cannot be enough. An obligation has to be seen to be honoured . . .⁶

5. Document A30, para 12

6. *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, 530 (CA)

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For the Crown's fiduciary obligation to be seen to be honoured in the context of its enormously valuable rights in petroleum, the Crown must not give the appearance of mean-spiritedness. A broad, unquibbling, and generous approach is required.⁷ To pretend that sub-surface minerals can properly be treated in the same way as urban versus rural land valuations for the purpose of Treaty settlement quantum is mean spirited in our view. Petroleum is clearly a separate category of loss deserving of separate consideration for remedy on a broad, unquibbling, and generous approach. That is the correct approach.

We would add that, in order to be fair, the cost of settlement of any petroleum claim would have to be additional to whatever relativity calculations the Crown has already arrived at in respect of claimant groups. It would be grossly unfair if the Crown accepted our reasoning and then came to conclude the settlement of petroleum claims within relativity quantum calculated before that acceptance. That would see Māori giving up more Treaty interests for the same quantum. It is difficult to see how that outcome could be consistent with a reasonable or good-faith settlement process. In this regard, we note that Crown settlement policy since 2000 is consistent with the provision of additional compensation for new heads of claim: 'while maintaining a fiscally prudent approach, each claim is treated on its merits and does not have to be fitted under a predetermined fiscal cap.'⁸

Of course, the value and nature of any such additional redress must be a matter for agreement between the negotiating parties. The same broad considerations of affordability for the nation on the one hand, and sufficiency to restore the relationship on the other, will fall to be applied by the parties to those negotiations. All that we require is that the matter be on the table.

6.4 PETROLEUM INTERESTS OR ASSETS AS A POSSIBLE REMEDY

Having found that there must be a separate or additional remedy for the loss of legal rights in petroleum in breach of Treaty principles, we turn now to address the next question: whether modern-day petroleum assets or interests ought to be made available for the purpose. We approach the question in three steps. First, we identify the key Crown interests. Secondly, we discuss in broad terms the value of those interests. Thirdly, we address the arguments of the parties and reach our own conclusions.

7. *New Zealand Maori Council v Attorney-General*, p 655

8. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: Office of Treaty Settlements, [2002]), p 88

6.4.1 The nature of the Crown interest in petroleum

The Crown's legal ownership and regulatory control of the petroleum resource entitles it to the following benefits:

- ▶ control of the exploration and development of the resource (including the right to impose fees to cover the administrative costs involved);
- ▶ taxation revenue from successful exploration and production ventures;
- ▶ the imposition and receipt of royalties from the production of petroleum; and
- ▶ ownership of an 11 per cent non-contributory interest in the Kupe petroleum mining licence.

Our focus in this report is on the royalties and the Kupe licence interest, both of which have been identified by the claimants as assets that they might want to be included in the settlement of their Treaty grievances.

6.4.2 Royalties

Royalties are payments made to the owner of a resource for extraction or use rights. The Crown Minerals Act 1991 authorises the Minister of Energy to impose royalties (s34) and requires that policies be established to provide for 'the obtaining by the Crown of a fair financial return from its minerals' (s12). Previously, the Petroleum Act 1937 authorised the imposition of royalties (s18). Mining licences granted under that Act, and the royalties imposed, continue in force today (Crown Minerals Act 1991, s107).

The royalties currently applying in New Zealand are the *ad valorem* royalty and the hybrid *ad valorem* or accounting profits royalty. For the *ad valorem* royalty, the rates are:

- ▶ for licences issued before 1975, 5 per cent of the value of petroleum at the wellhead;
- ▶ for licences issued between 1975 and 1985, 10 per cent, and later 12.5 per cent, of the value of petroleum at a specified point and with certain costs deducted;
- ▶ for licences issued between 1986 and 1995, 12.5 per cent; and
- ▶ for exploration permits issued after 1995, and where there is a successful discovery and production to test its extent, 5 per cent of the sales price received or, if there has been no arm's length transaction, 5 per cent of the deemed sales price.⁹

For the hybrid *ad valorem* or accounting profits royalty, for mining licences issued since 1995, the royalty is the higher of a 5 per cent *ad valorem* royalty or a 20 per cent accounting profits royalty (based on defined accounting conventions).¹⁰

9. Document A29, paras 193, 203–210, 222

10. Ibid, paras 197–198, 223

6.4.3 The Kupe licence interest

The Crown's interest in the Kupe petroleum mining licence is a remnant from the licensing regime that was in force from the late 1970s to the mid-1980s. At that time, if the applicant for a prospecting licence wanted Government funding assistance, the Crown could agree to contribute up to 40 per cent of the exploration costs in return for the Minister of Energy having a 51 per cent share in the licence. The difference of 11 per cent was known as a non-contributory (or non-participatory, or carried) interest, because the Crown was not required to contribute that proportion of the exploration costs unless and until the licence owners discovered petroleum and decided to develop the field.

The Kupe prospecting licence was granted in 1981 and, originally, the Crown's interest in it was managed by the State-owned enterprise Petrocorp, which owned the other 49 per cent of the licence. By 1985, all the interests of Petrocorp and the Minister had been sold to New Zealand Oil and Gas Limited (an exploration company) except for the Minister's 11 per cent non-contributory interest. That interest remained, despite various other sales, through to the time of the discovery of the Kupe petroleum field in 1991. The licence interest holders then formed a joint venture and applied for a mining licence, which, with extensions, has been in force since 1992. The Crown's 11 per cent non-contributory interest has been transferred to the mining licence, which is for a term of 25 years from 1996.¹¹

Since April 2002, the Kupe mining licence has been owned 70 per cent by Genesis Power Limited (a State-owned enterprise which generates and retails electricity), 19 per cent by New Zealand Oil and Gas, and 11 per cent by the Crown.¹²

In the past year, there have been reports of plans by Genesis to develop the Kupe field by 2005 and of talks it has held with oil companies which could take over as Kupe's operator.¹³ A November 2002 news item stated that OMV Petroleum Proprietary Limited had confirmed its interest in taking over from Genesis as the operator of the Kupe field. That company is a subsidiary of the Austrian-based oil and gas group, which is the 'leading group in Central and Eastern Europe'.

The continuation of the Crown's 11 per cent interest in the Kupe field is now unique among current exploration and mining licences. Crown witness Evelyn Cole informed the Tribunal that, in 1986, the Government decided to sell all its interests in petroleum licences, both contributory and non-contributory. The existence of the latter interests, and the idea of their sale, was unpopular with the industry, and it transpired that there were no sales of the 11 per cent non-contributory interest alone. By 1988, the Crown decided not to sell the 11 per cent interest where it had been taken under the 1986 royalty regime – a decision that did not affect

11. Document A29, para 206; doc A10(1)

12. 'Genesis Takes Stake in Offshore Kupe Field to 70% with Shell Purchase', 24 April 2002 (http://www.med.govt.nz/crown_minerals/news/news.asp?newsID=-764524658)

13. 'NZOG Welcomes Renewed Interest in Kupe', 15 August 2002 (http://www.med.govt.nz/crown_minerals/news/news.asp?newsID=-1118040915); 'OMV Confirms Interest in Operating Kupe Field', 25 November 2002 (http://www.med.govt.nz/crown_minerals/news/news.asp?newsID=969197187)

the Kupe licence, which was issued in 1981. In 1995, licences with the 11 per cent carried interest were given the choice to transfer to the new hybrid petroleum royalty regime outlined above. All did. Meanwhile, the Crown progressively sold its commercial interests in licences (namely, the contributory plus non-contributory interests), and some licences with Crown interests were surrendered, to the point where the sole remaining Crown interest is that in the Kupe mining licence.¹⁴

The joint-venture agreement between the mining licence holders contains terms that allow the other partners to give the Minister of Energy 90 days within which to elect to join in a programme of development of the Kupe field. Should that occur, the Minister would be obliged to do one of three things:

- ▶ agree to participate, thereby activating the 11 per cent interest to a contributory interest and so obliging the Minister to contribute 11 per cent of past and future capital expenditure and development costs in order to receive 11 per cent of the production revenues from the field;
- ▶ sell or assign the 11 per cent interest to another party (who would then take on the obligations outlined in the previous paragraph); or
- ▶ withdraw from the licence by assigning the 11 per cent interest to the other licence holders for no consideration.¹⁵

With regard to the first of those options, it was estimated in 1998 that the cost to the Crown of activating its 11 per cent interest would be around \$30 million. That estimate was made because the Government of the day was contemplating the sale of the interest – a matter which prompted meetings in Wellington, Hawera, and Manaia between Crown officials and representatives of south Taranaki Māori. Crown witness Andrew Hampton told the Tribunal that, at those meetings, officials outlined not only the estimated cost of converting the Crown's 11 per cent interest but also the rights of the other partners under the Kupe joint-venture agreement should the Crown seek to transfer its interest to an outside party. The key rights described were:

- ▶ the right of first refusal (namely, to match the price offered and be secured as the purchaser) should the Crown propose to transfer its interest to any other than a Government-owned entity;
- ▶ the right to be satisfied as to a potential joint-venture partner's financial ability to contribute to the cost of the joint venture before the Crown's interest can be transferred to that potential partner.¹⁶

We noted in chapter 1 that the prospect of the Crown selling its Kupe interest has now arisen again. It has been publicised that the potential purchaser is State-owned enterprise Genesis Power Limited. As noted above, such a transfer would not trigger the first right of refusal held by the other partner.

14. Document A29, para 208

15. Document A10(1)

16. Document A30, para 14

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6.4.4 Crown expenditure on and revenue from petroleum

In response to the Tribunal's request at the hearing, Ms Cole provided information from the Government's and Petrocorp's annual reports about the value to the Crown of its ownership of the petroleum resource. There are gaps in the information because of different accounting reporting practices in some years and because some reports were not able to be accessed by Ms Cole.¹⁷ Despite the gaps, it is evident from her explanation of Government expenditure on petroleum exploration and production since the late 1960s that the Crown has invested several billions of dollars in the following endeavours:

- ▶ the purchase of Kapuni natural gas by means of a 25 year 'take or pay contract' with the Government, which underwrote the development of the field and which, between 1968 and 1976 alone, required Crown loans to the Natural Gas Corporation of some \$58 million;
- ▶ the development of the Maui gas field in the 1970s, which has included an initial \$30 million licence purchase price, plus the purchase of over \$300 million of gas not yet taken, and \$56 million reimbursement of the other Maui joint-venture parties after the completion of the second platform;
- ▶ the establishment of Petrocorp in 1977 and, in 1986, the payment of \$800 million to pay that amount of debt;
- ▶ the provision of exploration cost assistance (by means of the Crown's 40 per cent contributory interest, plus 11 per cent non-contributory interest regime), which involved payments of some \$400 million between 1977 and 1997;
- ▶ the provision of assistance to promote gas use, involving millions of dollars of loans or grants to maintain and upgrade pipelines; and
- ▶ the provision in the early 1980s of \$120 million to the Synfuels project and, in 1990, the payment of \$174 million to the company paid to take over the Crown's shareholding.¹⁸

On the revenue side, Ms Cole's evidence, albeit incomplete, indicates that the Crown has received several billion dollars from its ownership of petroleum. This includes:

- ▶ royalties from 1970 to June 2000 totalling more than half a billion dollars (namely, \$509,341,434);
- ▶ energy resource levies (a type of tax) totalling more than \$1.5 billion (\$1,589,686,025);
- ▶ income of some \$75 million from crude oil sales plus a \$14 million dividend paid by Petrocorp to the Crown in 1983 and 1984 relating to profits from the McKee mining licence;
- ▶ income of some \$120 million from the sale of mining licence interests (excluding the \$140 million from the sale of the McKee and Kaimiro licences to Petrocorp, which, it seems, was funded by a Crown grant);

17. Document A29(a), p 1

18. Ibid, pp 1–3

- ▶ income of some \$800 million from the sale of Petrocorp (although that amount was offset by restructuring costs and liabilities at the time of the sale); and
- ▶ sales of pre-paid Maui gas, which, in 1990, resulted in a payment of \$254 million to the Government.¹⁹

Ms Cole's evidence left it uncertain whether overall the Crown has yet to make a profit from its involvement with the petroleum resource. Certainly, its earlier involvement as a funder of exploration and development left it with a substantial debit to be offset by future successes. However, now that the Crown has removed itself from active involvement in the petroleum industry (except for the potential of the Kupe licence), its position with regard to the resource is solely that of a revenue gatherer. While more recent figures would be most useful, we observe that the royalties in each of the last four full years accounted for by Ms Cole – from 1996 to 1999 – ranged between \$26 million and \$36 million and, in the same four-year period, gas energy resource levies earned the Crown between \$81 million and \$97 million annually.²⁰

The expert witness commissioned by the Tribunal, Geoffrey Logan, provided an estimate of \$13 billion as being the amount of gross revenue from New Zealand petroleum in the years 1970 to 1999. Of that estimated gross amount, Mr Logan assessed the Crown's 'take' at 46 per cent, or \$6 billion. It must be noted that the following caveats apply to Mr Logan's estimates:

- ▶ the dollar figures are nominal figures, not inflation adjusted (which would increase the figures by some 150 to 250 per cent);
- ▶ the assessed level of the Government's take of 44 to 46 per cent relates specifically to the Government's current petroleum programme, which has been in place only since 1995;
- ▶ the numbers are accurate to about plus or minus 5 per cent, and are rounded to the nearest billion dollars; and
- ▶ the \$13 billion and \$6 billion are gross revenue figures (including royalties), with no deductions for costs of any sort.²¹

6.4.5 Crown and claimant submissions

The Crown's view is that petroleum assets are particularly unsuitable for use in the settlement of historical Treaty grievances. Andrew Hampton explained that this view is based on an incompatibility between the characteristics of petroleum interests and the overall aims of the Treaty settlement process. The features of petroleum interests that the Crown considers to be problematic are:

19. Ibid, pp 4–5, 6, 7. The revenue sources and figures exclude the permit and annual fees that are imposed and collected in order to recoup the Crown's costs of administering its minerals exploration and mining regime: see doc A29(a), p 8.

20. Document A29(a), pp 6, 7

21. Document A46

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- ▶ the considerable uncertainties and difficulties in ascertaining the value of petroleum deposits;
- ▶ the high costs involved in the exploration and exploitation of the resource; and
- ▶ the considerable risks involved in proceeding to commercial development even once a discovery has been made and assessed.

As a result of those factors, the Crown maintains that it is not possible to be sure of the value to be attributed to any petroleum interest that might be included in a Treaty settlement. Consequently, there is a high risk that the interest would turn out to be worth much less or much more than its estimated value. That, in turn, means that the Crown's objective of durable settlements that are fair between claimant groups would be jeopardised.

As for the possible use in Treaty settlements of revenue streams from petroleum development, the Crown contends that this too would pose problems because:

- ▶ returns are uncertain and will fluctuate depending on the success over time of the petroleum exploration or extraction venture; and
- ▶ as a result, a similar risk arises to that outlined above, in that the possibility of a claimant group receiving varying amounts each year, or a total amount that differs from the original estimate of what is due to them, threatens the durability of the particular settlement and its fairness relative to settlements made with others.²²

When concluding the Crown's argument about the unsuitability for use in Treaty settlements of royalties and other sources of revenue, Crown counsel Virginia Hardy submitted that, once the real opportunity for redress is reduced to the Crown's income stream, 'there is little reason to link that to income from petroleum as opposed to money from other sources which the Crown garners'.²³ This statement is particularly applicable to Taranaki Māori, whose lands were taken so comprehensively by raupatu and for whom there is very little, if any, Crown land in their rohe that can be returned.

With regard to the claimants' submissions on remedies, it needs to be recalled that this report does not deal with the claims that focus on Māori participation in the management of the petroleum resource. They will be the subject of a separate report, to be issued in the near future. In fact, the claimants placed significant emphasis on the need for enhanced Māori involvement in the management of the environmental effects of petroleum exploration.

The nature of the prejudice caused by the loss of legal rights in petroleum was not the subject of detailed submissions from the claimants. Ngā Hapū o Ngā Ruahine's statement of claim contended that their prejudice included the denial of 'the right to use petroleum to create an economic base' for their people after the loss of most of their land through raupatu and various Crown 'purchases' and the failure to be compensated for the Crown's assumption of the control of petroleum.²⁴

22. Document A30, paras 4–12

23. Document A35, para 120

24. Claim 1.1(a), paras 4.2(i), (j)

On the matter of an appropriate remedy for that prejudice, Ngā Hapū o Ngā Ruahine claimed that the strength of their customary rights to petroleum warranted a Tribunal finding and recommendation that the ownership of the resource within the rohe of the hapū should be vested in them. Further, the claimant hapū said that compensation should be provided for the loss of benefit from the resources that they have suffered. As to the nature of that compensation, the claimants sought a specific finding and recommendation that the Crown should not only offer its interest in the Kupe licence to Ngā Hapū o Ngā Ruahine but also offer to provide the financial resources necessary to enable the hapū to contribute to the development of the field on an ongoing basis.²⁵

Andrew Erueti's submissions on behalf of Ngā Hapū o Ngā Ruahine at the Tribunal hearing provided some context for their stance on appropriate remedies. First, he noted that settlements with aboriginal peoples in Canada, the United States of America, and Australia, and the settlements concerning pounamu and coal in New Zealand, show that various remedy options exist that 'can recognise the claimant's Treaty rights whilst not interfering with existing permit holders or future development of the resource'.²⁶

Next, Mr Erueti emphasised the importance to the claimants of the Crown being open to negotiating with them on the use of petroleum as a means of redress. It was said that this was important for two reasons. First, if the Crown showed that it would 'seriously consider' that possibility, it would demonstrate its good faith towards the claimants:

it is not enough for the Crown to reject out of hand any one or more remedies without further discussion with the claimants. Remedies should be discussed in detail and in the spirit of partnership and good faith between the Crown and Maori.²⁷

Secondly, the use of petroleum as a means of redress is particularly important to Ngā Ruahine, for there is little Crown land available for settlement:

Petroleum is the only natural resource within the claimant's tribal rohe of real economic value and an interest in petroleum would greatly assist in the restoration of Nga Ruahine's tribal mana.²⁸

The Wai 852 claimants contended that they had suffered the effects of 'past, present and future prospecting, exploration and mining of petroleum resources within the Ngāti Kahungunu rohe' and had been denied the 'exercise of development rights' in respect of those resources.²⁹ They sought findings and recommendations that would allow Ngāti Kahungunu to exercise tino rangatiratanga and kaitiakitanga in respect of petroleum resources within their rohe and recognise their customary rights in respect of those resources. As well, they

25. Ibid, paras 5.1(d)–(f)

26. Document A13, para 175

27. Ibid; doc A48, para 88

28. Document A13, para 176

29. Claim 1.2(a), paras 8.3, 8.4

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sought compensation for the losses they had suffered as a result of Crown Treaty breaches concerning the petroleum resource.³⁰ Counsel Grant Powell contended that the Māori interest in petroleum required the Crown to ensure that ‘a significant share’ of the Crown’s present interest in the resource within the Ngāti Kahungunu rohe be transferred to Ngāti Kahungunu. The task of quantifying that share and articulating exactly how its transfer might be achieved, Mr Powell submitted, was one for the Crown and Ngāti Kahungunu to negotiate on the basis of good faith and goodwill.³¹

6.4.6 Petroleum-based remedies – our view

We have found above that the Treaty interest creates an entitlement to a remedy for the loss of legal rights to petroleum and that this remedy must be additional to any other entitlement to redress. It must follow from those conclusions that no relevant Crown asset capable of providing redress to the particular claimants should be excluded from the negotiations without a good reason. Indeed, the learned president of the Court of Appeal in the *Coal* case added a further requirement. He also required Māori agreement to any such exclusion:

what is clear in my opinion is that the attempt to shut out in advance any Tainui claim to be awarded some interest in the coal and surplus lands in issue in this case is not consistent with the Treaty. Unchallenged violations of the principles of the Treaty cannot be ignored. Available means of redress cannot be foreclosed without agreement.³²

In the case of petroleum, the Crown has made it clear that it has decided to exclude from settlements the Kupe licence and any royalties. It has done this unilaterally and in the face of strong claimant opposition. On its face, the Crown’s stance appears to be inconsistent with the dictum in the *Coal* case. However, the Crown contended that it was supported by good reasons.

The Crown said that it would destabilise the Crown’s overall Treaty settlements framework if assets of uncertain value and some degree of risk were included. It will be recalled that the Crown’s policy for resolving historical Treaty grievances is to achieve both fair and certain settlements with each claimant group and also fair and certain relativity as between the various groups’ settlements.

According to the Crown, the uncertainty relating to petroleum exploration could mean either that the asset to be transferred may be valueless or that its value may far exceed the appropriate redress for the grievances of the claimant group. All of this would depend on whether exploration was successful, and there is no way of knowing that at the time of the settlement. Either way, the Crown said, relativity between claimants would be undermined.

30. Claim 1.2(a), p 6

31. Document A22, para 102

32. *Tainui Maori Trust Board v Attorney-General*, p 530

We find it difficult to see why the Crown should be so concerned with relativities at the point of settlement when the day afterwards iwi are free to invest in whatever commercial ventures they choose. Experience has shown that some investments have been more successful than others, but that does not appear to have destabilised relativities in any way. The Crown acknowledged in hearings that, if the Taranaki tribes wish to utilise their settlement funds to invest in petroleum exploration after the settlement, it could not stop them. That, it seemed to us, undermined the logic of the Crown's argument.

It may be that the Crown sees its stance as consistent with the Treaty principle of active protection. In our view, however, active protection does not mean that the Crown can usurp decisions properly for the partnership. The content of the active protection duty in the settlement phase is not to take away decision-making from Māori in order to save them from their own folly. The duty of the more powerful partner, acting in good faith and in the spirit of mutual respect, must properly be to inform the Māori partner of the risks involved in any proposed component of the settlement package and then to encourage its partner to make a carefully reasoned business and Treaty decision.³³ The claimants have indicated that they are prepared to proceed in this way. Such a process would promote te tino rangatiratanga of Māori communities who are seeking to settle their Treaty grievances and plan their future paths. It would also promote principled and transparent kawanatanga.

There is one further point. While we do not wish to diminish the case of other claimants, we do have the advantage of the assessment of Taranaki grievances in the Tribunal's *Taranaki Report* on raupatu. It is difficult to think of a more deserving case for the provision of adequate petroleum-based assets. Few Crown assets remain within the region, and petroleum assets must be among the most valuable of them. What is more, there is an undeniable nexus between the horrendous land loss suffered by the Taranaki people and the petroleum assets now owned by the Crown. This makes those assets a suitable remedy should the claimants, after considering the risks, wish it.

The result of our reasoning is that the critical issues for negotiation at the time of settlement are how much additional value the Crown will put on the table in recognition of the petroleum grievance and what the net present value of any petroleum-based remedy is. As we have said, all that we require is that the issues and the assets be on the table.

In the final chapter of this report, we present a summary of our findings and make recommendations to the Minister of Māori Affairs, in accordance with section 6(3) of the Treaty of Waitangi Act 1975.

33. See, for example, *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 304 (CA), per Cooke P (summarising the view of the five Court of Appeal judges in the 1987 case *New Zealand Maori Council v Attorney-General*).

CHAPTER 7

FINDINGS AND RECOMMENDATIONS

7.1 SUMMARY OF FINDINGS

In this report, we have made the following findings:

- ▶ Prior to 1937, Māori had legal title to the petroleum in their land.
- ▶ A Treaty interest was created in favour of Māori for the loss of legal title to petroleum by:
 - the alienation of land prior to 1937 by means that breached Treaty principles; and
 - expropriation under the Petroleum Act 1937, without payment of compensation to landowners and without provision being made for the ongoing payment of royalties to them.
- ▶ Whenever that Treaty interest arises, there will be a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the petroleum.
- ▶ The redress to be provided is in addition to any other entitlement to redress.
- ▶ It is in breach of Treaty principle for the Crown to exclude petroleum-based remedies from settlements.
- ▶ Therefore, the Crown's royalty entitlements, and its remaining interest in the Kupe petroleum mining licence, ought to be available for inclusion in settlements with affected claimants.

7.2 RECOMMENDATIONS

In making the following recommendations, we have in mind the whakatauki that the Crown has chosen for its Treaty settlements policy. To us, 'Ka tika ā muri, ka tika ā mua' means that, if the foundations are properly laid, the relationship will endure.

We recommend, therefore:

- ▶ that the Crown and affected Māori groups negotiate for the settlement of petroleum grievances in accordance with our findings; and
- ▶ that, in the meantime, the Crown withhold from sale the Kupe petroleum mining licence until a rational policy has been developed to safeguard Māori interests, or until the petroleum claims are settled.

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We realise that there are practical problems of application. If an allocation regime is to be established, there are design issues to be confronted, but answers can be found. For example, for the last decade fisheries quota lease rounds have been conducted by the Treaty of Waitangi Fisheries Commission, with allocations to regionally based consortia of iwi within quota management areas. This has attracted little controversy. The allocation task is in fact easier with petroleum, where exploration and production are confined to particular parts of the country. We are satisfied that, if the parties come to the table with good will, they will be able to agree upon a workable mechanism.

There remains the unresolved issue of Māori rights in the seabed, which was not argued before us. That is a matter before the courts and it would be quite inappropriate for us to express any view about those proceedings. We can make two points, however. The first is that Māori access to offshore petroleum remedies does not depend upon the claim to customary title in that area being upheld. Offshore petroleum remedies can be made available for historical breaches above or below the high-water mark. The second point is that, if the Māori applicants in the seabed litigation are successful, that may reinforce the conclusions that we have reached in this report.

Dated at *Wellington* this *19th* day of *May* 2003



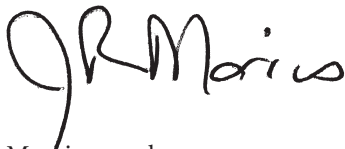
J V Williams, presiding officer



J Baird, member



J Clarke, member



J R Morris, member



APPENDIX

RECORD OF INQUIRY

RECORD OF HEARINGS

THE TRIBUNAL

The Tribunal that was constituted to hear claim Wai 796, concerning Māori rights to petroleum resources, comprised Chief Judge Joseph Williams, John Baird, John Clarke, and Joanne Morris.

THE COUNSEL

Counsel appearing were Andrew Erueti, Deborah Edmunds, and Kim Bellingham for the Wai 796 claimants; Grant Powell and Sheena Te Pania for the Ngāti Kahungunu claimants; and Helen Carrad for the Crown. Appearing with a watching brief only were Patrick O'Driscoll and Nigel Denny for the Wai 871 claimants; Leo Watson and Trina Dyll for the Wai 716 claimants; Gerard Praat for the Wai 99, Wai 201, and Wai 506 claimants; and David Tapsell and Damien Stone for the Ngāti Ruanui Me Te Muru Raupatu Working Party.

THE HEARINGS

The hearing was held at the the Novotel Hotel in Wellington from 16 to 19 October 2000.

Evidence and submissions were heard from claimant and Crown counsel; Richard Boast (doc A12); Marylinda Brooks (doc A20); Evelyn Cole (docs A29, A29(a), (b)); Andrew Hampton (doc A30); Professor Gary Hawke (doc A32); Geoffrey Logan (docs A37, A38, A46); Sue Wolff (doc A27); and Dr John Yeabsley (doc A31).

RECORD OF PROCEEDINGS

1. CLAIMS

1.1 Wai 796

A claim by Thomas Ngatai on behalf of the descendants of Ngā Hapū o Ngā Ruahine concerning rights to petroleum resources, natural gas, and minerals within the Ngā Hapū o Ngā Ruahine rohe, 15 July 1999

(a) Amendment to claim 1.1, 20 December 1999

1.2 Wai 852

A claim by William Blake, Toro Waaka, Marei Apatu, and Murray Hemi on behalf of themselves and Ngāti Kahungunu concerning rights to petroleum resources within the Ngāti Kahungunu rohe, 13 June 2000

(a) Amendment to claim 1.2, 21 August 2000

1.3 Wai 890

A claim by Peter Love and Ron Tapuke on behalf of themselves and Ngāti Te Whiti hapū concerning rights to petroleum resources within the Ngāti Te Whiti rohe, 19 October 2000

1.4 Wai 891

A claim by Karanga Paora, Makareti Takarangi, Ivan Komene, Mansil Baker, and Betty Jones on behalf of Ngā Mahanga and Ngāti Tairi concerning rights to land, lakes, rivers, and resources within the Ngā Mahanga and Ngāti Tairi rohe, 22 December 2000

2. PAPERS IN PROCEEDINGS

2.1 Memorandum from chairperson to registrar directing latter to register claim 1.1 as Wai 796, 2 December 1999

2.2 Memorandum from Wai 796 claimant counsel to Tribunal seeking urgent hearing, 18 November 1999

2.3 Declaration of registrar that notice of registration of claim 1.1 given, 15 December 1999
List of parties sent notice of registration of claim 1.1, 15 December 1999

2.4 Memorandum from Wai 796 claimant counsel to Tribunal seeking urgent hearing, 20 December 1999

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- 2.5** Memorandum from chairperson to registrar directing latter to register amended statement of claim 1.1(a), 22 March 2000
- 2.6** Declaration of registrar that notice of registration of claim 1.1(a) given, 28 March 2000
List of parties sent notice of registration of claim 1.1(a), 28 March 2000
- 2.7** Memorandum from Wai 796 claimant counsel to Tribunal seeking urgent hearing, 1 May 2000
- 2.8** Memorandum from Crown counsel to Tribunal opposing Wai 796 claimant counsel's application for urgency, 1 May 2000
- 2.9** Memorandum from Joanne Morris to parties summarising submissions of Crown counsel and Wai 796 claimant counsel at 1 May 2000 judicial conference, granting urgency, and convening further judicial conference, 12 May 2000
- 2.10** Memorandum from Crown counsel to Tribunal concerning confidentiality of negotiations between Crown and Taranaki iwi and time required to prepare for urgent hearing, 12 May 2000
- 2.11** Memorandum from Crown counsel to Tribunal concerning Crown's position in respect of sale of Kupe mining licence and confidentiality of negotiations in respect of any such sale, 12 May 2000
- 2.12** Direction from deputy chairperson constituting Tribunal of Chief Judge Joseph Williams (presiding), John Baird, John Clarke, and Joanne Morris to hear claim Wai 796, 18 May 2000
- 2.13** Memorandum from Wai 852 claimant counsel to Tribunal requesting that Wai 852 be heard with the petroleum claim of Ngāti Ruanui, 13 June 2000
- 2.14** Memorandum from Crown counsel to Tribunal concerning conclusion of Taranaki Treaty settlements and jurisdiction of Tribunal, 14 June 2000
- 2.15** Memorandum from Tribunal to parties setting out draft statement of issues in regard to Wai 796 and inviting comment thereon, undated
- 2.16** Memorandum from Wai 852 claimant counsel to Tribunal commenting on draft statement of issues (paper 2.15), 20 June 2000

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2.17 Memorandum from Wai 796 claimant counsel to Tribunal commenting on draft statement of issues (paper 2.15), 20 June 2000

2.18 Memorandum from Crown counsel to Tribunal commenting on draft statement of issues (paper 2.15), 20 June 2000

2.19 Memorandum from Tribunal to parties summarising discussions at 14 June 2000 judicial conference and setting out timetable for filing of evidence and submissions, 22 June 2000

2.20 Letter from acting registrar to parties notifying them of registration of claim Wai 852 and consolidation of its record with that of Wai 796, 28 June 2000

2.21 Declaration of registrar that notice of registration of claim 1.2 given, 11 July 2000
List of parties sent notice of registration of claim 1.2, 11 July 2000

2.22 Letter from Wai 796 claimant counsel to Tribunal seeking extension to deadline for filing of evidence and submissions, 4 August 2000

2.23 Memorandum from Tribunal to parties extending deadline for filing of evidence and submissions, 9 August 2000

2.24 Memorandum from Wai 716 claimant counsel to Tribunal seeking leave to appear at Wai 796 proceedings by way of watching brief, 28 July 2000

2.25 Memorandum from Tribunal to parties granting Wai 716 claimant counsel leave to appear at Wai 796 proceedings by way of watching brief, 9 August 2000

2.26 Memorandum from Tribunal to registrar directing latter to register amended statement of claim 1.2(a), 31 August 2000

2.27 Declaration of registrar that notice of registration of claim 1.2(a) given, 8 September 2000
List of parties sent notice of registration of claim 1.2(a), 8 September 2000

2.28 Memorandum from Wai 871 claimant counsel to Tribunal seeking leave to appear at Wai 796 proceedings by way of watching brief, 21 August 2000

2.29 Memorandum from Tribunal to registrar directing latter to register claim as Wai 871 and granting Wai 871 claimant counsel leave to appear at Wai 796 proceedings by way of watching brief, 31 August 2000

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- 2.30** Declaration of registrar that notice of hearing of claim Wai 796 given, 29 September 2000
Notice of hearing of claim Wai 796, 28 September 2000
List of parties sent notice of hearing of claim Wai 796, 8 September 2000
- 2.31** Memorandum from Crown counsel to Tribunal concerning negotiations between Crown and Ngāti Ruanui Muru me te Raupatu Working Party for deed of settlement, 14 September 2000
- 2.32** Letter from registrar to Crown counsel seeking timeframe for execution of deed of settlement between Ngāti Ruanui and Crown, 28 September 2000
- 2.33** Letter from Crown counsel to registrar advising latter of anticipated timeframe for execution of deed of settlement between Ngāti Ruanui and Crown, 2 October 2000
- 2.34** Memorandum from Wai 796 claimant counsel, Wai 852 claimant counsel, and Crown counsel to Tribunal suggesting procedure for cross-examination of witnesses, 6 October 2000
- 2.35** Memorandum from Wai 99 claimant counsel to Tribunal seeking leave to appear at Wai 796 proceedings by way of watching brief, undated
- 2.36** Memorandum from Wai 506 and Wai 201 claimant counsel to Tribunal seeking leave to appear at Wai 796 proceedings by way of watching brief, undated
- 2.37** E-mail from registrar to counsel for Ngāti Ruanui Me Te Muru Raupatu Working Party asking whether latter has interest in Wai 796 proceedings, 9 October 2000
E-mail from counsel for Ngāti Ruanui Me Te Muru Raupatu Working Party seeking leave to appear at Wai 796 proceedings by way of watching brief, 10 October 2000
E-mail from registrar to counsel for Ngāti Ruanui Me Te Muru Raupatu Working Party acknowledging receipt of application for leave to appear at Wai 796 proceedings by way of watching brief, 10 October 2000
- 2.38** Memorandum from Tribunal to parties granting Wai 99, Wai 506, and Wai 201 claimant counsel and counsel for Ngāti Ruanui Me Te Muru Raupatu Working Party leave to appear at Wai 796 proceedings by way of watching brief, 13 October 2000
- 2.39** Memorandum from Tribunal to registrar directing latter to release document A37, 24 October 2000

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2.40 Memorandum from Wai 852 claimant counsel to Tribunal concerning negotiations for access to Tuhara 2 site on Whakaki 2N block, 3 December 2000

2.41 Letter from Wai 796 claimant counsel to Tribunal expressing concern at signing of Ngāti Ruanui deed of settlement, 28 February 2001

2.42 Memorandum from Tribunal to registrar directing latter to register claim 1.3 as Wai 890 and to consolidate its record with that of Wai 796, 1 March 2001

2.43 Declaration of registrar that notice of claim 1.3 given, 23 March 2001
List of parties sent notice of hearing of claim 1.3, 23 March 2001

2.44 Memorandum from Tribunal to registrar directing latter to register claim 1.4 as Wai 891 and to consolidate its record with that of Wai 796, 1 March 2001

2.45 Declaration of registrar that notice of registration of claim 1.4 given, 23 March 2001
List of parties sent notice of registration of claim 1.4, 23 March 2001

2.46 Memorandum of Taane Karaka for Wai 702, 22 March 2001

3. RESEARCH COMMISSIONS

3.1 Memorandum from deputy chairperson to Geoffrey Logan commissioning him to prepare a report on the geoscientific, financial, and legal factors regulating the petroleum, natural gas, and minerals industry, 26 July 2000

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A DOCUMENTS FILED UP TO END OF FIRST HEARING

A1 RP Boast, 'Maori and Petroleum: A Report to the Waitangi Tribunal', report commissioned by Wai 796 claimants, May 2000

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- (b) Crown Minerals, 'Summary of New Zealand's Petroleum Exploration and Mining Regime', table, undated
- (c) Ministry of Economic Development, 'New Zealand Petroleum Legislation', undated (http://websitenew/crown_minerals/petroleum_info/petlegislation.html, downloaded 29 June 2000)
Ministry of Economic Development, 'Overview of the Crown Minerals (Petroleum) Regulations 1999', 11 April 2000 (http://websitenew/crown_minerals/petroleum_info/pet_reg.html, downloaded 29 June 2000)
- (d) Ministry of Economic Development, 'Conferences, Publications, and Further Information', 28 June 2000 (http://websitenew/crown_minerals/petroleum.html, downloaded 29 June 2000)
Ministry of Economic Development, 'Table of New Zealand Oil and Gas Reserves and 1997 Production', 11 April 2000 (http://websitenew/crown_minerals/petroleum_info/98petreserves.html, downloaded 29 June 2000)
Ministry of Economic Development, 'Table of New Zealand Oil and Gas Reserves and 1998 Production', 14 December 1999 (http://websitenew/crown_minerals/petroleum_info/99petreserves.html, downloaded 29 June 2000)
- (e) Ministry of Economic Development, *New Zealand Petroleum Updates*, issue 10 (June 2000) (http://www.med.govt.nz/crown_minerals/petroleum_news/nzpupdate010.html, downloaded 30 June 2000)
- (f) Ministry of Economic Development, *New Zealand Petroleum News*, issue 26 (June 2000) (http://www.med.govt.nz/crown_minerals/petroleum_news/nzpnews026.html, downloaded 5 July 2000)
- (g) Ministry of Commerce, *Explore New Zealand Petroleum* (Wellington: Ministry of Commerce, Crown Minerals, Publicity Unit, 2000)
- (h) *Australia's Paydirt*, vol 1, issue 59 (February 2000) (includes *Paydirt's New Zealand Petroleum Handbook* (Wellington: Ross Louthean and Crown Minerals, 2000))
- (i) *Paydirt's New Zealand Petroleum Handbook* (Wellington: Ross Louthean and Crown Minerals, 1999)
- (j) Ministry of Commerce, *A Guide to the Crown Minerals Act 1991* (Wellington: Ministry of Commerce, Energy and Resources Division, Resources Policy Unit, 1992)
- (k) Ministry of Commerce, *Crown Minerals Act 1991: A Discussion Document for Iwi* (Wellington: Ministry of Commerce, Energy and Resources Division, Resources Policy Unit, 1992)
- (l) Ministry of Commerce, *Draft Minerals Programme for Petroleum – He Tuhinga Matapakinga: A Discussion Document* (Wellington: Ministry of Commerce, Energy and Resources Division, 1994)
- (m) Ministry of Commerce, *Crown Minerals Act 1991: Evaluation of Allocation and Pricing Regimes* (Wellington: Ministry of Commerce, Energy and Resources Division, Resources Policy Unit, 1992)

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(n) Ministry of Commerce, *Crown Minerals Act 1991: Transition to a New Resource Management Administration* (Wellington: Ministry of Commerce, Energy and Resources Division, Resources Policy Unit, 1991)

(o) Ministry of Commerce, *Report of the Secretary of Commerce to the Minister of Energy on Submissions Received on the Draft Minerals Programme for Petroleum* (Wellington: Ministry of Commerce, 1994)

(p) Letter from general manager, Energy and Resources Division, Ministry of Commerce, to Minister of Energy concerning report of Secretary of Commerce on submissions received on draft of minerals programme for petroleum and secretary's recommendations thereon, 10 November 1994

(q) Letter from unit manager, authorisations, Crown Minerals Operations Group, Energy and Resources Division, Ministry of Commerce, to Minister of Energy enclosing notice to be given of revised draft of minerals programme for petroleum, 7 December 1994

Minister of Energy, notice of release of revised draft of minerals programme for petroleum, undated

(r) Letter from Minister of Energy to chairperson, Taranaki Maori Trust Board, conveying decision to exclude Mount Taranaki and Pouaki, Pukeiti, and Kaitake Ranges from petroleum permitting where land is above sea level, 5 December 1994

(s) Manager, Resources Policy Group, Ministry of Commerce, 'Mt Taranaki: Iwi Request', memorandum to Minister of Energy concerning exclusion of Mount Taranaki and Pouaki, Pukeiti, and Kaitake Ranges from petroleum permitting, 1 November 1994

(t) Minister of Energy, 'New Petroleum Regime for New Zealand', press release concerning announcement of new royalty and permit allocation regime for petroleum exploration and mining to apply from 1 January 1995, 28 October 1994

(u) Cabinet, 'Report of the Cabinet Committee on Enterprise, Industry and Environment: Week Ended 20 October 1994', minutes of 25 October 1994 meeting, CAB(94)M40/6B, undated
Cabinet Committee on Enterprise, Industry and Environment, 'Crown Minerals Act 1991: Minerals Programme for Petroleum', minutes of 18 October 1994 meeting, CIE(94)M35/2, undated

(v) Covering sheet from senior conservation officer, Wanganui Conservancy Office, Department of Conservation, to Ministry of Commerce enclosing 'Te Maunga Taranaki', 18 October 1994

Cheryl Rei, 'Te Maunga Taranaki – The Maori Viewpoint', submission to Taranaki National Parks and Reserves Board on Egmont National Park management plan, 10 February 1983

(w) Cabinet Committee on Enterprise, Industry and Environment, 'Crown Minerals Act 1991: Minerals Programme for Petroleum', committee paper, CIE(94)237, 17 October 1994

Letter from general manager, Energy and Resources Division, Ministry of Commerce, to Cabinet Office concerning submission of paper on minerals programme for petroleum by Minister of Energy to Cabinet Committee on Enterprise, Industry and Environment, 13 October 1994

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Minister of Energy, 'Crown Minerals Act 1991: Minerals Programme for Petroleum', paper to Cabinet Committee on Enterprise, Industry and Environment, 17 October 1994

(x) Letter from general manager, Energy and Resources Division, Ministry of Commerce, to Minister of Energy enclosing summary of 11 October 1994 briefing given to Minister by general manager, 13 October 1994

Letter from Minister of Energy to Prime Minister notifying latter of former's intention to submit paper on royalty and permit allocation regime for petroleum to Cabinet Committee on Enterprise, Industry and Environment and enclosing summary of 11 October 1994 briefing given to Minister of Energy by Ministry of Commerce, undated

Summary of 11 October 1994 briefing given to Minister by Ministry of Commerce concerning proposed royalty and permit allocation regime for petroleum, undated

(y) 'Minutes of Hui between the Min of Commerce and Taranaki Iwi', minutes of 13 October 1994 hui at Puniho Marae between the Ministry of Commerce and Taranaki iwi concerning exclusion of areas from petroleum exploration, undated

(z) 'Draft Minerals Programme for Petroleum: Draft Record of an Iwi Briefing Session Held at the Ministry of Commerce Building Te Manatu Tauhokohoko on Monday 21 March 1994 at the Ministry of Commerce, Wellington, between 11 am and 4 pm', minutes of 21 March 1994 iwi briefing on draft minerals programme for petroleum, undated

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(a) Ministry of Commerce, *Prospectus for Petroleum Exploration in New Zealand*, 2nd ed (Wellington: Ministry of Commerce, 1990)

(b) Ministry of Energy, 'New Zealand Revised Licensing Provisions and Policy', typescript, December 1985

(c) Ministry of Energy, *Prospectus for Petroleum Exploration in New Zealand* (Wellington: Ministry of Energy, 1980)

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(a) David Tapsell, 'Maori Claims to Petroleum', *2000 New Zealand Petroleum Conference Proceedings* (Wellington: Ministry of Economic Development, Crown Minerals Group, Publicity Unit, 2000)

(b) Evelyn Cole, 'An Appropriate Return to the Crown from the Petroleum Estate', paper of Ministry of Economic Development, Crown Minerals Group, undated

(c) Mark Christensen, Kitt Littlejohn, and Russell Karu, 'Tangata Whenua Issues and the Petroleum Industry', in *New Zealand's Basins of Opportunity – 1998 New Zealand Petroleum Conference Proceedings – Field Trip Guides* (Wellington: Ministry of Commerce, Crown Minerals, Publicity Unit, 1998), pp 419–425

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- (d) David Grinlinton, 'A Brief History of Petroleum Law in New Zealand', in *Confronting the Issues, 1996: An International Perspective – 1996 New Zealand Petroleum Conference Proceedings*, 2 vols (Wellington: Ministry of Commerce, New Zealand Crown Minerals, Publicity Unit, 1996), vol 1, pp 304–313
- (e) David Grinlinton, 'The History and Development of Petroleum Law and Policy in New Zealand' [1995] *Otago Law Review* 8
- (f) John Adlam, 'The Legal Environment for Petroleum Exploration: An Overview', in *1994 New Zealand Petroleum Conference Proceedings: The Post Maui Challenge – Investment and Development Opportunities* (Wellington: Ministry of Commerce, Energy and Resources Division, Crown Minerals Operations Group, Publicity Unit, 1994), pp 434–445
- (g) Richard Boast, 'Indigenous Claims to Petroleum Resources', in *1991 New Zealand Oil Exploration Conference Proceedings* (Wellington: Ministry of Commerce, Coal and Minerals Operations Group, 1991), pp 472–477
- (h) Gordon Wong, 'The Crown Minerals Act 1991', in *1991 New Zealand Oil Exploration Conference Proceedings* (Wellington: Ministry of Commerce, Coal and Minerals Operations Group, 1991), pp 478–485
- (i) Barrie Fowke, 'Government Involvement in Petroleum Exploration and Development', in *1991 New Zealand Oil Exploration Conference Proceedings* (Wellington: Ministry of Commerce, Coal and Minerals Operations Group, 1991), pp 548–553
- (j) Derek Johnston, 'The Role of the Crown in Petroleum Exploration', in *1991 New Zealand Oil Exploration Conference Proceedings* (Wellington: Ministry of Commerce, Coal and Minerals Operations Group, 1991), pp 554–560
- (k) Deborah Edmunds, 'Unitisation and the Law of Capture in New Zealand', in *1991 New Zealand Oil Exploration Conference Proceedings* (Wellington: Ministry of Commerce, Coal and Minerals Operations Group, 1991), pp 457–461
- (l) Dennis Stickley, 'The Petroleum Act as a Conservation Code', in *1991 New Zealand Oil Exploration Conference Proceedings* (Wellington: Ministry of Commerce, Coal and Minerals Operations Group, 1991), pp 40–44
- (m) Lindsay Gow, 'The Resource Management Act: The Relevance of its Provisions to Oil Exploration and Extraction', in *1991 New Zealand Oil Exploration Conference Proceedings* (Wellington: Ministry of Commerce, Coal and Minerals Operations Group, 1991), pp 45–52
- (n) John Auld, 'Environmental Considerations in Petroleum Exploration in New Zealand', in *1991 New Zealand Oil Exploration Conference Proceedings* (Wellington: Ministry of Commerce, Coal and Minerals Operations Group, 1991), pp 53–59
- (o) Peter Blanchard, 'Treaty of Waitangi: Implications for the Oil and Gas Industry', in *1989 New Zealand Oil Exploration Conference Proceedings* (Wellington: Ministry of Commerce, Petroleum and Geothermal Unit, 1989), pp 422–426

(p) Evelyn Cole, 'An Overview of the New Zealand Petroleum Exploration Scene and the Role of Government in Petroleum Exploration', in *1989 New Zealand Oil Exploration Conference Proceedings* (Wellington: Ministry of Commerce, Petroleum and Geothermal Unit, 1989), pp 31–34

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(b) Matthew Velde, 'Wild Speculation and Vain Hopes – The Story of the First 50 Years of Oil Exploration in New Zealand', *Petroleum Exploration in New Zealand News*, vol 27 (January 1991), pp 27–33

(c) Dave Francis, 'Historic Oil Exploration in the East Coast Basin – Part 1: 1874 to 1932', *Petroleum Exploration in New Zealand News*, vol 38 (December 1993), pp 21–27

Dave Francis, 'Historic Oil Exploration in the East Coast Basin – Part 2: 1932 to 1940', *Petroleum Exploration in New Zealand News*, vol 39 (March 1994), pp 22–26

(d) Matthew Velde and Evelyn Cole, 'Exploration in New Zealand: A Historical Review', *Petroleum Exploration in New Zealand News*, vol 29 (July 1991), pp 40–43

(e) Dave Francis, 'Historic Oil Exploration in the East Coast Basin – Part 2: 1932 to 1940', *Petroleum Exploration in New Zealand News*, vol 39 (March 1994), pp 22–26

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(1) Interdepartmental Committee on the Review of Mining Legislation, 'A Discussion Paper on Policy Issues for the Review of Mining Legislation', discussion paper, March 1987

(2) Morris Te Whiti Love, 'Accessing the Management and Control of Natural and Physical Resources', paper presented at Institute for International Research conference on commercial implications of the Treaty of Waitangi, Wellington, 28 September 1992

(3) Office of Treaty Settlements, *Crown Proposals for the Settlement of Waitangi Claims: Summary* (Wellington: Office of Treaty Settlements, [1994])

Office of Treaty Settlements, *Ngā Kaupapa a te Karauna hei Whakatau i ngā Kerēme o te Tiriti o Waitangi: He Whakarāpopototanga* (Wellington: Office of Treaty Settlements, [1994])

(4) Office of Treaty Settlements, *Crown Proposals for the Settlement of Waitangi Claims: Detailed Proposals* (Wellington: Office of Treaty Settlements, [1994])

(5) Ministry of Foreign Affairs and Trade, *Elimination of Racial Discrimination: 10th and 11th Report of the Government of New Zealand*, no 1 (May 1996)

(6) Office of the Parliamentary Commissioner for the Environment, *Environment Information and the Adequacy of Treaty Settlement Procedures* (Wellington: Office of the Parliamentary Commissioner for the Environment, 1994)

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(8) Ministry of Energy, *From Generation to Generation: A New Zealand Heritage Fund and a New Pricing Regime for Energy and Minerals* (Wellington: Ministry of Energy, 1989)

(9) Caren Wickliffe, *Indigenous Claims and the Process of Negotiation and Settlement in Countries with Jurisdictions and Populations Comparable with New Zealand's: Background Report for Environmental Information and the Adequacy of Treaty Settlement Procedures* (Wellington: Office of the Parliamentary Commissioner for the Environment, 1994)

(10) John Leshy, 'Indigenous Peoples, Land Claims, and Control of Mineral Development, Australia and US Legal Systems Compared' (1985) 8 UNSWLJ 271

(11) Richard Boast, 'The Treaty of Waitangi and Mining Law in New Zealand', paper presented at 22nd annual conference of New Zealand branch of Australasian Institute of Mining and Metallurgy, 1988

BN Gunderson and DA Edmunds, 'The Mining Licensing Regime: Current Developments', paper presented at 22nd annual conference of New Zealand branch of Australasian Institute of Mining and Metallurgy, 1988

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The Mining Act 1971, short title, ss 69, 126

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- (15) Jon Altman, *Native Title and the Petroleum Industry: Recent Developments, Options, Risks and Strategic Choices: CAEPR Discussion Paper 125* (Canberra: Centre for Aboriginal Economic Policy Research, Australia National University, 1996)
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- (19) BD Anderson, 'The Kupe Project, in *Confronting the Issues 1996: An International Perspective – 1996 New Zealand Petroleum Conference Proceedings*, 2 vols (Wellington: Ministry of Commerce, New Zealand Crown Minerals, Publicity Unit, 1996), vol 1, pp 119–124
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- (24) *Resource Management Law Reform: The Rights to use Land, Water, and Minerals (Working Paper No 5)* (Wellington: Ministry for the Environment, [1988])
- (25) Chapman Tripp Sheffield Young, *Petroleum Act 1937*, pt 2 of *Resource Management Law Reform: Analysis of Existing Statutes – Legal Analysis (Working Paper No 7)*, 8 pts (Wellington: Ministry for the Environment, 1988)
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A18 Brief of evidence of Thomas Ngatai concerning loss of land and resources by Ngā Ruahinerangi and tikanga Māori, 21 August 2000

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A19 Brief of evidence of Gloria Kerehoma concerning loss of land and resources by Ngā Ruahinerangi and traditional uses of oil, 21 August 2000

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