

TARANAKI MAORI,
DAIRY INDUSTRY CHANGES,
AND THE CROWN

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AND THE CROWN

WAI 790

WAITANGI TRIBUNAL REPORT 2001



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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The Honourable Parekura Horomia
Minister of Maori Affairs



The Waitangi Tribunal
110 Featherston Street
WELLINGTON

cc

The Honourable Jim Sutton
Minister of Agriculture

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

Parliament Buildings
WELLINGTON

5 December 2001

E te rangatira, tena koe

We present our report on the claim brought by Edward Rongomaiira Tamati and others on behalf of the beneficial owners of land held by the Parininihi ki Waitotara Incorporation concerning dairy industry restructuring (Wai 790).

This claim is to be seen in the context of the previously acknowledged breaches by the Crown of the confiscation and return of land in Taranaki, and the imposition of an unjust leasing regime on the returned land.

The focus of this report is the effect of recent developments in the dairy industry on the beneficial owners of the PKW Incorporation. This is set against a backdrop of the Crown remaining in breach of its Treaty obligations, obligations it has not addressed in anything approaching a timely manner.

It was claimed that there was a prejudicial effect on these claimants in four respects:

- the relative value of their unimproved land is decreasing;
- their rental income, assessed on the land's unimproved value, will consequently be of less value;
- the relative cost of exercising their right of first refusal will increase because of the reduced relativity of their unimproved land value compared with the value of the lessee's interest; and
- the cost of entering the dairy industry on their land will increase as 'fair value' shares increase in value.

We have found, for the reasons set out in this report, that the first three claims of prejudice are not well founded but that the fourth is. Moreover, we have found that that prejudice is compounded because:

- successive governments over more than a century have failed to respond to well-founded claims for relief (as validated by various commissions and inquiries);
- this failure to respond was in itself a breach of the Crown's duty actively to protect the rights promised in the Treaty; and
- had the Crown responded in a timely manner, the claimants would have been in a position to enter dairy farming prior to the effects of unbundling becoming apparent.

We consider that at the very least the Crown should have acted promptly after the receipt of the Ngai Tahu Report 1991, coming as it did after the 1975 report of the Sheehan commission. The claimants ought not to be prejudiced by the Crown's failure to act from the early 1990s to the present, but we have found that they are so prejudiced. They are particularly prejudiced by the difficulties they will encounter in obtaining sufficient capital to buy shares to ensure a right to supply milk from resumed farms. The Crown does not have an obligation to assist the claimants into dairying, but the whole sorry history of the Crown's breaches in Taranaki dictate that the claimants' opportunity to become dairy farmers in their own right should not have been allowed to diminish but should instead have been actively protected.

We recommend that the Crown now assist, by the guaranteeing of loans, to purchase shares. It is estimated that, if shares for all resumed farms were purchased now (and of course not all farms will be resumed in the immediate future), the borrowings would be approximately \$40 million, and could be more or less than that sum in the future depending on share price movement.

We also recommend that, if rents to the PKW Incorporation are reduced in real terms as a result of unbundling, as they might be, then the Crown should make up the rental figure and that monitoring and consultation might be necessary for these purposes.

Naku noa

A handwritten signature in black ink, appearing to read 'PJSavage', with a large loop at the beginning and a trailing flourish.

na PJSavage
Presiding officer

LIST OF ABBREVIATIONS

AJHR	<i>Appendix to the Journal of the House of Representatives</i>
app	appendix
CA	Court of Appeal
ch	chapter
cl	clause
CMV	current market value
doc	document
ed	edition
esp	especially
inc	incorporated
J	justice (when used after a surname)
kg	kilogram
ltd	limited
MRLAA	Maori Reserved Land Amendment Act 1997
NZDB	New Zealand Dairy Board
NZLR	<i>New Zealand Law Reports</i>
P	president of the Court of Appeal (when used after a surname)
p, pp	page, pages
para	paragraph
PKW	Paraninihi ki Waitotara Incorporation
s, ss	section, sections
ROI	record of inquiry
vol	volume

'Wai' is a prefix used for Waitangi Tribunal claim numbers

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CHAPTER 1

THE PARANINIHI KI WAITOTARA INCORPORATION
AND PERPETUAL LEASING

1.1 INTRODUCTION

The Paraninihi ki Waitotara Incorporation ('PKW') has its roots in the nineteenth-century wrongful confiscation and subsequent bungled return of Taranaki land. This history is examined in full in the Waitangi Tribunal's 1996 *Taranaki Report*.¹

Briefly, following war in Taranaki between various Maori groups and the Government, the Government confiscated Maori land as a punishment for so-called Maori 'rebellion'. The mechanism of confiscation was the New Zealand Settlements Act 1863 and its various amendments. To facilitate the return of some lands to Maori, the West Coast Commission was established in January 1880, and was followed by the appointment of a second commission in December 1880. Both had the aim of returning some land to Maori, in the form of Crown-granted reserves with individualised title – that is, shares would be allocated to Maori for ownership in Crown-administered reserves. The West Coast Settlement Reserves Act 1881 created the reserves and vested them in the Public Trustee.² That Act was amended five times by 1889, and then rewritten as the West Coast Settlement Reserves Act 1892 (itself amended many times). By the 1892 Act, the reserves vested in the Public Trustee were put into a 21-year perpetually renewable leasing regime, with rents based on the unimproved land value. Finally, all the relevant Native Reserve Acts were consolidated in the Maori Reserved Land Act 1955, which established rents at 5 per cent of the unimproved value of the land. Rent review periods remained at 21 years.³

Following the 1960 Hunn report⁴ and the Maori Purposes Act 1962, the Maori Land Court amalgamated all the remaining Taranaki reserves into one title in 1963. This became known as the Paraninihi ki Waitotara reserve. This 'mega' reserve consisted of the remaining 71,969 acres of perpetual lease land in Taranaki. The Taranaki Tribunal commented that, no doubt, 'the amalgamation was administratively convenient owing to the many

1. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, ch 9

2. *Ibid*, pp 246–247, 258

3. *Ibid*, pp 259, 262–263

4. JKHunn, *Report on Department of Maori Affairs*, Wellington, Government Printer, 1961

owners and their dispersal, but it had nothing to do with the customary preference of Maori'.⁵ The Maori owners now owned shares in pockets of land throughout Taranaki, regardless of their hapu affiliations, and regardless of whether they were of that land in Maori terms. Others were excluded completely.

Throughout this period, there were many complaints and petitions by Taranaki Maori over the ownership and management of their land. These complaints led to no fewer than 12 separate commissions between 1890 and 1975, as well as various reports of the parliamentary native affairs committees.⁶ The inequity involved in the confiscation, return, and management of the lands was well-recognised, and the subject of trenchant findings, but was largely ignored.

1.2 THE SHEEHAN COMMISSION

In 1975, the Commission of Inquiry into Maori Reserved Land ('the Sheehan commission') reported specifically on the impact of the Maori Reserved Land Act 1955. While stopping short of saying that perpetual leasing should be terminated, it did recommend that rent reviews should occur every five years and should be negotiated by the parties. It found that perpetual leasing had estranged Maori from their ancestral land, making them trespassers should they walk upon land they owned.⁷

It was a cogent and forceful document, which could not reasonably be ignored.

This and the previous commissions' and inquiries' recommendations were still not actioned in the years following the Sheehan commission's report. As a result, the gross breaches, which had been left unhealed, were aggravated by this wilful turning of a blind eye to what had been very deliberate injustices.

1.3 THE NGAI TAHU REPORT 1991

The Waitangi Tribunal's *Ngai Tahu Report 1991* provided further catalyst for change to the perpetual leasing regime as it operated under the 1955 Act. That Tribunal, in a lengthy discourse on the impact of perpetual leasing on Ngai Tahu, and the Mawhera Incorporation in particular, found that the insertion of the perpetual right of renewal in the leases of Maori reserved lands was inconsistent with the principles of the Treaty of Waitangi, as was

5. *The Taranaki Report*, p 267

6. *Ibid*, pp 259–260

7. Commission of Inquiry into Maori Reserved Land, *Report of the Commission of Inquiry into Maori Reserved Land*, Wellington, Government Printer, 1975 (also reproduced in AJHR, 1975, H-3), pp 54–86, esp pp 62, 81, 86

the failure of the Crown to implement the Sheehan commission's recommendations relating to the renewal of terms and reviewing of rents.⁸

The Tribunal maintained that, 'in legislating to take away forever from Maori their future rights of use and enjoyment' of their lands, the Crown was not discharging its guarantee to protect rangatiratanga under article 2. 'Nor can the Crown's unilateral action in respect of these perpetual leases, and their imposed unreasonable statutory terms, be seen to be dealing with Maori on the basis of sincerity, justice and the good faith of a Treaty partner.' The Tribunal therefore found that 'there has been a clear breach of article 2 of the Treaty . . . Not only have the claimants lost a right of use and occupation but they also lost a valuable property right in their land when the Crown gave away that right to the tenants.'⁹

The Tribunal commented that the net effect of this was to estrange Maori from their land and that perpetual leasing was a 'further indignity' to Maori who had already been reserved inadequate lands. The Tribunal noted that the Government's stated policy was, as at 1991, 'directed to Maori self-determination and [the] return of Maori land to Maori control'. The Tribunal considered that the 'statutory changes sought by the claimants should be implemented without further delay', recommending that the Maori Reserved Land Act 1955 be amended to:

- a) convert perpetual leases to term leases for two 21-year periods;
- b) immediately change the rental basis from fixed percentages to freely negotiated rents, subject to the Arbitration Act [1908]; and
- c) immediately change the rent review period of 21 years to 5 years in respect of commercial and rural land and 7 years in respect of residential land.¹⁰

This was a clear and pointed indication to the Crown that it should act promptly to heal the breach caused by perpetual leasing.

1.4 REPORT OF THE 1993 MAORI RESERVED LANDS PANEL ('THE TRAPSKI REPORT')

In January 1994, the 1993 Maori Reserved Lands Panel (which was chaired by Judge Peter Trapski) reported to the Government. The panel had been commissioned to consult with the public, especially lessors and lessees of Maori reserved land, and to take submissions on the Crown's proposals for the resolution of those leases. The panel said that the then current system had 'interfered with the natural and inherent rights of Maori land owners' by:

8. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 3, p 788

9. *Ibid*, pp 788-789

10. *Ibid*, pp 790, 792-793

1.5

removing Te Tino Rangatiratanga, their right to make their own decisions in respect of their land; the system has treated them like children or people under a disability incapable of making their own decisions simply because they were Maori.¹¹

We endorse the panel's view.

1.5 THE TARANAKI REPORT: KAUPAPA TUATAHI

We have already referred to the Waitangi Tribunal's 1996 report on confiscation in Taranaki, and on the perpetual leasing regime imposed on the returned lands. The report described how claimants revealed their bitterness with the perpetual leasing system and how they 'ruminate on the opportunities lost over the last 100 years to develop the experience and infrastructures themselves'.¹² The Taranaki Tribunal noted that 'the Government has now resolved to terminate the perpetual leases' (referring to what was to become the Maori Reserved Land Amendment Act 1997) and therefore did not provide more than an overview of the regime. It outlined instead an important issue then unresolved by the Government: namely, 'compensation to Maori for low rents and loss of possession from 1881 to the date of termination'.¹³ According to evidence from the Crown in the current inquiry, Maori will be compensated for rents being less than market in consequence of the recognition contained in schedule 5 to the 1997 Act. Schedule 5 reads in full:

The present Government recognises that Maori for a number of years have not been obtaining fair market rents for their land. This is an issue that has to be addressed by the present Government in the future. It is an issue that will be dealt with by the present Government as part of its consideration of historical grievances.

Taranaki iwi and hapu are currently negotiating with the Crown to settle historical grievances arising from confiscation and perpetual leasing issues. PKW is also currently negotiating with the Crown under schedule 5 to the 1997 Act. Crown counsel gave the Tribunal a very brief outline of these confidential negotiations, saying only that the Crown is currently negotiating with PKW and other trustees of Maori reserved land, and that they hope for a speedy outcome to the negotiations. The Tribunal was not informed what the parameters of the negotiations are. But it should be noted that in fact the Government has not terminated perpetual leasing as anticipated by the Taranaki Tribunal, instead providing a mechanism whereby these leases will end through the purchase of the tenants' estates by PKW over an extended and indefinite timeframe.

11. Reserved Lands Panel, *Report of the 1993 Reserved Lands Panel*, Wellington, Te Puni Kokiri, 1994, p 11

12. *The Taranaki Report*, p 257

13. *Ibid*, pp 257-258

The Taranaki Tribunal noted that, as a result of the 1975 Sheehan commission's recommendation that owners should administer their own lands through representative organisations, the administration of the Paraninihi ki Waitotara reserve passed from the Maori Trustee to an incorporated body of the owners. The PKW Incorporation was established by an Order in Council of 16 February 1976, and received 55,137 acres from the Maori Trustee to manage, 'being the whole of the leased land remaining'. This amounted to about 25 per cent of the original reserved lands in Taranaki. Most of the balance of the original reserved lands, having passed to the Public Trustee for administration, had been sold because they were uneconomic or too small. 'Between 1911 and 1976, about 63 per cent of the Maori reserves was purchased by the Crown, most of that being on-sold to lessees.'¹⁴ In just the 13 years since the creation of the single reserve in 1963, an additional 16,832 acres had been alienated.

The Tribunal found that, 'By the terms of the Treaty, Maori were solemnly guaranteed not merely the ownership of their lands but the control and possession of them', and that therefore the administration and imposition of perpetual leases were contrary to the Treaty because they denied Maori 'that possession and control of their lands that the Treaty had guaranteed to them. The sales and leases, being made without effective Maori control of the situation or consent, were invalid in Treaty terms.'¹⁵ The Tribunal supported the Ngai Tahu Tribunal's recommendation that the perpetual leases should be terminated after two terms of 21 years, but added that 'In all the circumstances . . . No less than the immediate termination of the leases would be just in light of the claimants' history.'¹⁶

The Tribunal considered that the Crown should settle Taranaki historical grievances with iwi and hapu, for 'although the shareholders of the PKW Incorporation can point to historical losses of possession and rents, the main loss has again been with the hapu and it is with the hapu that a settlement must be made'.¹⁷

The Tribunal commented that perpetual leasing was more than a grave injustice:

People were deprived of farming opportunities and the chance to grow with and be a part of the local economy. Investment opportunities were lost as well, along with the chance to develop new ventures from borrowing against the land. The business expertise and infrastructure that might otherwise have grown did not develop. The social cost has also to be considered. Kin group structures based on ancestral land interests were set asunder. People were forced from their land and the district with only the prospect of labouring for a living. The control of the reserves and the perpetual lease programme were forms of confiscation, forced removal, and social control by administrative stealth.¹⁸

14. Ibid, pp 269, 273

15. Ibid, p 273

16. Ibid, p 275

17. Ibid, p 316

18. Ibid, pp 275-276

We endorse and accept this statement. Its first three sentences are particularly pertinent to this inquiry.

1.6 HISTORICAL BREACHES

Various investigations into the confiscation and subsequent return of lands in Taranaki have established that the confiscation and return of land in non-traditional management regimes (including the imposition of perpetual leasing) were gross breaches of the Treaty of Waitangi. These historical grievances have been acknowledged by the Crown and are to be addressed through settlement with Taranaki iwi and hapu, and through negotiation with PKW for compensation for rents being less than market under schedule 5 to the Maori Reserved Land Amendment Act 1997. But the leases remain perpetual in terms of the 1997 Act.

1.7 SUMMARY OF THE MAORI RESERVED LAND AMENDMENT ACT 1997

The key features of the Maori Reserved Land Amendment Act 1997 are set out in Te Puni Kokiri's *A Guide to the Maori Reserved Land Amendment Act 1997*.¹⁹ In brief, the Act:

- ▶ continues the right of lessees to renew their leases in perpetuity;
- ▶ provides for a three-year delay before starting the move to market rents;
- ▶ provides for a move to market rents phased in over four years, beginning in 2001;
- ▶ provides for rent reviews every seven years, unless the parties have negotiated more regular reviews;
- ▶ allows parties to freely negotiate rents;
- ▶ gives landowners a right of first refusal (at market price) should a lessee wish to sell a lease (unless they wish to sell or transfer to their spouse or issue); however, if selling at public auction, the lessee need only give the landowner 20 working days' notice of the auction;
- ▶ gives lessees a right of first refusal should owners wish to sell (and where the land is Maori freehold land, no other member of the land owner's whanau wishes to purchase the land);
- ▶ compensates lessees for the move to market rents (\$35 million for the move to market rents plus \$2 million for extra transaction costs);

19. Te Puni Kokiri, *A Guide to the Maori Reserved Land Amendment Act 1997*, Wellington, Te Puni Kokiri, undated (doc A3(1.2)); doc A10

- ▶ compensates owners for the three-year delay in the move to market rents (\$21 million for the delay in the move to market rents plus \$2 million for extra transaction costs plus \$6 million lease purchase fund);
- ▶ provides for alternative compensation options through the Land Valuation Tribunal, and for the mediation and arbitration of disputes;
- ▶ continues to allow parties to negotiate mutually agreed changes to the lease conditions; and
- ▶ by schedule 5 to the Act, declares the Government's intentions to address the owners' grievances with rents having been less than market.

The Maori Reserved Land Amendment Act acts on the Sheehan commission's and Ngai Tahu Tribunal's recommendation to move to market rents and a reduced rent review period (though to seven years rather than five), but it does not do away with perpetual leasing as suggested by the Ngai Tahu and Taranaki reports. However, in its 30 September 1997 report to the Justice and Law Reform Select Committee on the Maori Reserved Land Amendment Bill, Te Puni Kokiri noted that many leases come up for sale within the then 21-year rent review period, and that therefore PKW may be able to attain control over the leases within that period. Current lessees can transfer their rights to their children.²⁰ We note that it is technically possible that, even should PKW wish to, and have the funds to, purchase under the right of first refusal provisions, it can be denied the exercise of that right and be kept off its land for something approaching a life in being plus a lifetime. The Te Puni Kokiri report to the select committee stated that the 'Right [of first refusal] will be triggered either by a family's decision to leave the land or at the death of the generation succeeding the current lessee'.²¹

1.8 PKW TODAY

PKW owns a leasehold interest in 343 properties totalling 20,354 hectares, with an estimated lessor's interest of \$105 million. Of those 343 properties, 250 (totalling about 14,000 hectares) are in dairy farms. PKW also has six properties farmed by 50/50 sharemilkers, and interests in freehold sheep and cattle properties.²²

From its creation in 1976, PKW has represented the rights of its shareholders, the beneficial owners of the land. Those owners now claim to have been prejudicially affected by the Crown.

20. Te Puni Kokiri, *Te Puni Kokiri Report to the Justice and Law Reform Select Committee: Maori Reserved Land Amendment Bill 1996*, Wellington, Te Puni Kokiri, 1997, p 20; see also doc A3(1.3)

21. *Ibid*, p 20

22. Claim 1.1(b), paras 5–8; doc A5, p 23. Note that Robin Brockie said in cross-examination that PKW has an interest in 344 properties, while paragraph 8 of claim 1.1(b) says that 342 PKW properties are required to be leased.

While endorsing the views of the Taranaki Tribunal that historical breaches should be settled with iwi and hapu, we see this claim as separate from the confiscation and the imposition of perpetual leasing breaches, although they provide the context of the claim.

Since the creation of the PKW Incorporation, it is the claimants who have borne the brunt of the injustice referred to by the Taranaki Tribunal as quoted above (s1.5), in that they have lost investment opportunities and have not been able to develop business expertise and infrastructure, nor have they been able to enter the dairy industry on their own lands. We therefore see an important aspect of the claim as the Crown's failure to act in a timely manner on the recommendations of successive inquiries and commissions and, in particular, those in the 1975 report of the Sheehan commission and the *Ngai Tahu Report 1991*, relating to the inequity of perpetual leasing. Had perpetual leasing been addressed as it should have, this claim might not have been necessary, since the claimants would have been involved in the dairy industry in their own right prior to the increase in share values.

In the quite narrow focus of this claim, any current and future detriment is with the beneficial owners of PKW in that capacity, and PKW is therefore in our view the appropriate body for the Crown to deal with in resolving issues arising from this claim. We understand that the Crown is separately negotiating compensation under schedule 5 to the 1997 Act with PKW (and other Maori reserved land trusts) for rents having been less than market, and it is not for us to comment. PKW may not be wholly endorsed by Taranaki Maori as the conduit for the settlement of historical grievances, but it could hardly be otherwise, given the vexed history of confiscation and land returns. Neither was PKW endorsed by the Tribunal as the correct conduit for reparation of the historical claim. That process is also under way outside the scope of this inquiry, and we do not consider that the resolution of those historical breaches will necessarily undo any prejudice caused to PKW by a lack of Crown protection and dairy industry unbundling. To undo any such prejudice, redress would have had to be provided prior to the impact of unbundling.

CHAPTER 2

OVERVIEW OF THE DAIRY INDUSTRY FROM 1990 TO THE PRESENT

2.1 INTRODUCTION

The following discussion is an overview of the changes apparent in the dairy industry from 1990 to the present, and has been drawn from a variety of sources, notably the evidence of Robin Brockie, John Larmer, Ranald Gordon, and Bill Sutton, as well as the 'Agreed Bundle of Documents'.¹

We look first at the international and national contexts of the dairy industry, then add a brief discussion of the effects alleged to be already apparent in Taranaki. We end this chapter by dealing with 'unbundling'.

The 'background' section to the Dairy Industry Restructuring Bill 1999 sets out the reasons why the dairy industry was restructuring:

With an annual turnover approaching \$8 billion and exports of \$5 billion a year, the dairy industry plays a significant role in New Zealand's economy. Amalgamating existing co-operative dairy processing companies into a single large processing and marketing company is seen by the industry as the best way of creating more wealth for the industry and the nation. A single co-operative is also seen by the industry as providing the critical mass necessary to provide growth in an internationally competitive export sector but on a commercial rather than a regulated basis.

The current regulatory framework for dairying is based on a statutory board with an export monopsony [single buyer]. The industry proposes that there be a more competitive commercial entity owned by farmers. The proposed new structure allows for alternative dairy processors to enter the market and purchase milk from farmers. This is significant for an industry in which 84 percent of its export sales revenue is gained from product sold outside quota and quota-like arrangements.²

The Primary Production Select Committee report on the 2001 Dairy Industry Restructuring Bill also noted the importance of dairying to New Zealand:

1. Documents A3, A6, A7, A9, A9(a), A13
2. 'Dairy Industry Restructuring Bill: As Reported from the Committee on the Bills' (314-2) (doc A13, app B), p ii

The dairy industry is New Zealand's most important industry. It generates almost a quarter of export earnings and comprises nearly seven percent of the economy. The formation of Fonterra Co-operative Group through the amalgamation of the NZDB, the New Zealand Co-operative Dairy Company Limited and Kiwi Co-operative Dairies Limited represents the largest commercial undertaking in New Zealand's history. By allowing amalgamation, the bill removes the 'single desk seller' concept and introduces competition to the market.³

The Dairy Industry Restructuring Act 2001 was enacted on 26 September 2001. Fonterra, which came into existence on 2 November 2001, is now New Zealand's largest company.

2.2 THE INTERNATIONAL CONTEXT TO DAIRY INDUSTRY RESTRUCTURING

New Zealand is recognised as a low-cost producer of raw milk, as well as an efficient producer of bulk commodity products. These advantages should continue. But international competition (eg, Nestlé and Kraft) is likely to increase as large domestic producers outgrow their domestic markets. While mature dairy markets will be hard for New Zealand to compete in, consumption is expected to expand in developing regions such as Asia, South America, and eastern Europe. For New Zealand to compete in the international market, size is important. New Zealand will need to ensure that the product is cost competitive, distribution networks are good, alliances are maintained and developed with key industry players in chosen markets, and new value-added products are developed. To manage the risks of dealing in the international markets, Fonterra will need to ensure access to finance, as well as be able to control costs.⁴

International commodity prices are currently high. Although in terms of the United States dollar they are well below their all-time highs, in terms of the New Zealand dollar they are close to their all-time highs, and are 52 per cent above the average of the last decade. The Dairy Board has reported that international dairy commodity prices remain buoyant. Butter, cheddar, and skim-milk powder have all posted reasonable gains, though casein has fallen about 2 per cent.⁵

3. 'Dairy Industry Restructuring Bill: As Reported from the Primary Production Committee' (139-2) (doc A13, app F), p 20

4. Document A9, pp 3-4

5. Ibid

2.3 THE NATIONAL CONTEXT TO DAIRY INDUSTRY RESTRUCTURING

Changes in the dairy industry started in the late 1980s, following on from the general movement to a more open economy in the mid-1980s. The dairy market was very weak in the period from 1986 to 1988 inclusive, following the combination of the floating of the dollar, inflating internal cost structures, and high interest rates. In the late 1980s, Kiwi Co-operative Dairies Limited (Kiwi) moved from a low share value structure, where shares were transferred in farm sale and purchase agreements without separation within the total prices, to a nominal \$1 share. This was regardless of the amount of product supplied. The dairy market recovered to a substantial degree from 1988 to 1990, but the recovery was short lived, and eased in 1990, 'culminating in an unprecedented reduction in the Dairy Board basic pay out'.⁶ The market recovered again, at first gradually in 1991 and 1992, and then steeply from late 1992 through to another decline from 1997 to 2000, when demand for dairy land decreased following increasing interest and exchange rates and higher operating costs. Uncertainty was also caused by the proposed industry restructuring and merger, but that uncertainty lifted at the end of the 1999–2000 season. Then, with a falling exchange rate and increased overseas demand for product, the market again recovered, leading to the current high point.⁷

By the mid-1990s, dairy company suppliers (dairy farmers) were becoming uneasy with the high level of farm conversions from drystock to dairying, because not only was expansion into dairy farming increasing the amount of product that had to be sold overseas, but existing shareholders in dairy co-operatives were having to contribute extra capital so that milk processing facilities could be expanded to process the increasing supply. Valuer John Larmer commented that 'The fact that conversion farms could enter the dairy industry at a nominal cost was seen as inequitable and the pressure mounted to put in place a share standard that more properly reflected the suppliers *off farm* investment' (emphasis in original).⁸

This concern led Kiwi to increase its share standard to \$1.50 per kilogram of milk solids supplied, gradually increasing this over subsequent seasons to \$1.75 and then, by the 2000 season, to \$2 per kilogram of milk solids supplied. Meanwhile, merger discussions were taking place between the New Zealand Dairy Group and Kiwi.⁹ These discussions led, ultimately, to the creation of Fonterra Co-operative Group and the passing of the Dairy Industry Restructuring Act 2001, as the enabling legislation. The Government's objective for the dairy industry is 'to maximise the returns from the industry to New Zealand while protecting the interests of New Zealand dairy farmers and New Zealand consumers'.¹⁰ The share standard is currently \$4 per kilogram of milk solids supplied.

6. Document A6, pp 5, 10

7. Ibid, pp 10–11

8. Ibid, p 6

9. Ibid

10. Document A12, p 4

Fonterra will be regulated by the following conditions:

- ▶ open entry and exit to it or any other processor, based on fair value of shares and the issue of capital notes;
- ▶ one-year supply contract, and 20 per cent of milk can be supplied to alternative processors;
- ▶ raw milk market can be subject to Government control;
- ▶ divestment of the interest in the New Zealand Dairy Foods Limited business;
- ▶ single desk exporter status ended with merger, but existing quotas are retained exclusively until 2007, after which a new system will be phased in over four years; and
- ▶ the Livestock Improvement Corporation will become a co-operative owned by farmers, with the Dairy Research Institute being owned by Fonterra.¹¹

With the merger as a background, other national developments have occurred. The area of dairy farmland has continued to grow, with conversions from drystock to dairying particularly apparent in the South Island and the east coast of the North Island. The number of dairy herds has continued to fall – from 14,700 in 1998 to 13,800 in 2000 – while the average herd size has been increasing from 208 to 236. The average value of cows has increased dramatically from the 1998 value, and the current payout per kilogram of milk solids supplied is \$5 compared with \$3.50 in 1998. Return on assets has improved significantly, which is in turn fuelling further expansion. This is creating a demand for good quality dairy land, and so dairy land values have also increased significantly.¹²

2.4 THE EFFECT OF DAIRY INDUSTRY RESTRUCTURING IN TARANAKI

Valuers John Larmer and Ranald Gordon both provided four sample farms showing how they believe restructuring has affected various Taranaki and PKW dairy farms to date. The sample farms showed an increase in land value (land value being the sum of the value of the unimproved land plus improvements on and to the land), said to be common across Taranaki. But Messrs Larmer and Gordon both asserted that, notwithstanding the increase in the land value, PKW's asset (the value of the unimproved land) would reduce in proportion to the value of shares. That is, the increase in the value of dairy company shares would cause a corresponding decrease in the unimproved value of the land. Messrs Larmer and Gordon both suggested that rental returns to PKW would also fall, as rents are set on the value of the unimproved land.¹³ However, valuer Richard Davison, for the Crown, suggested that the amount of rent that a farmer would be willing to pay to PKW would be determined also by the productivity of the land, the price of milk, and alternate

11. Document A9, pp 5–6; see also doc A12, p 7

12. Document A9, p 5

13. Document A6, pp 8–16, apps 1–4; doc A7, pp 10–16

land-based products. Mr Davison commented that ‘The rent that a dairy farmer will be willing to pay for the use of the lessors’ interest will be determined in large part by the profit generated by milk production’.¹⁴

Mr Larmer explained his view that, as the share value increased, the value of the land would fall as a proportion of the farm business as a whole, because the unimproved land value is the only aspect of the farm business that is not fixed. Improvements on and to the land have a fixed value, even if not used for dairy farming, while share value is currently increasing.¹⁵ Mr Gordon agreed with this proposition, asserting that:

Most valuers experienced with these types of fractional interests find common agreement that the diminution in value attaches to the unimproved value and not either class of improvement, either improvements to the land or improvements on the land.¹⁶

Essentially, Messrs Larmer and Gordon both asserted that the unbundling of the total farm package into its various values was detrimental to the value of PKW’s interest in the land – that is, the unimproved land.

2.5 ‘UNBUNDLING’

According to an internal Ministry of Agriculture and Forestry paper of 16 July 2001 (supplied to the Tribunal as part of this inquiry), there have been two historical features of New Zealand’s dairy industry:

1. its co-operative structure – with share ownership directly in proportion to supply and nominal value shares; and
2. the bundling together of payments for raw milk and returns received from the shareholder’s capital investments in the co-operative.

Because shares have historically had a nominal value and share ownership has been linked to production, which in turn is closely link[ed] to land holdings, the capital structure of the sector has also included a significant degree of bundling. In the case of capital, a proportion of share value has been bundled into land values.

The combined effect of these features has been to obscure the relationship between capital allocation in the dairy industry and returns.¹⁷

14. Richard Davison to Graham Calvert, chairman, Dairy Industry Establishment Board, 29 August 1999 (doc A2, app), p3

15. Document A6, pp12–16

16. Document A7, p14

17. Bryan Smith, ‘Unbundling in the Dairy Industry’, internal paper, Ministry of Agriculture and Forestry, 16 July 2001 (doc A3(3.2)), p1

The paper continued that, because shares in dairy co-operatives had not been fully valued:

artificially high milk returns have been capitalised into dairy land prices rather than share values. This can be seen as a transfer of wealth from shareholders of dairy co-operatives to landowners. In most cases, however, farmers have owned both the land and the shares.¹⁸

We note that, in this claim, PKW has been excluded from owning the shares because it is not a supplier to the dairy co-operatives, and its participation in the dairy industry has been limited to owning the unimproved land.

To solve the problems inherent in bundling, the industry determined to ‘unbundle’ out the separate values of the land holdings and the capital structure. ‘Unbundling’ has been usefully defined by Dan Bolger of the Ministry of Agriculture and Forestry as:

the separation of a farmer’s returns into two streams, the returns generated on farm from the sale of raw milk and the returns generated off farm from a farmer’s investments in his or her dairy co-operative (now Fonterra). Traditionally these returns have been bundled together as a single payment for milksolids, and the source of the returns (on farm or off farm) has been extremely difficult to determine.

While Fonterra proposes to maintain a single payment for milksolids, its decision to move to ‘fair value’ shares will have the effect of unbundling capital investments. This will make the source of returns increasingly transparent.¹⁹

The process was also aimed at financing plant expansions for the rapidly expanding milk supply. Over the past 10 years, the New Zealand Dairy Group and Kiwi moved separately towards fair value shares, and then, once agreeing to merger, included this proposal in their merger agreement:

GDC [Global Dairy Company, now Fonterra] will be established as a co-operative and its capital structure will address both the dilution effect of new shareholding and the cost of new capacity. GDC will have fair value shares to be issued and surrendered through GDC. Capital will be held both in proportion to a supplying shareholder’s total supply over a season and that shareholder’s peak supply.²⁰

The Ministry of Agriculture and Forestry paper concluded by noting that, owing to commercial drivers, ‘the dairy industry has been moving inextricably toward the full unbundling of capital investments in dairy co-operatives from land values’:

18. ‘Unbundling in the Dairy Industry’, p 2

19. Document A12, p 2; also referred to in doc A18, p 9

20. Merger agreement between the New Zealand Dairy Group and Kiwi Co-operative Dairies Ltd, 19 December 2000, cl 3.1 (quoted in ‘Unbundling in the Dairy Industry’, p 5)

These drivers will continue to be major issues for the dairy industry under any future industry structure involving co-operatives. Consequently, both co-operatives have moved to introduce fair value shares regardless of the proposed dairy industry merger.²¹

We accept that the move to fair value shares is an industry initiative and not an action or policy of the Crown.

We conclude this chapter by highlighting the following points:

- ▶ Driven by the dairy industry, unbundling has been occurring over the last 10 years, to the effect that shares have risen from a nominal value to \$4 per kilogram of milk solids supplied in the current season.
- ▶ Only existing suppliers hold shares – all new entrants to the dairy industry (including PKW) will have to buy shares to cover their supply to Fonterra (\$4 per share, based on this season's price).
- ▶ Under the perpetual lease Maori reserved land regime, PKW owns only the unimproved portion of the land, while the lessees (the supplying farmers) own the improvements on and to PKW's land. It is these supplying lessee farmers, not PKW, who have been issued the fair value shares.
- ▶ If PKW is to exercise the right of first refusal to regain possession of whatever leases come up for sale, in addition to the market price for the lease, it will have to pay for the shares to supply Fonterra. Otherwise, it will continue to be excluded from the dairy industry.

21. 'Unbundling in the Dairy Industry', p 6

CHAPTER 3

BACKGROUND TO THE HEARING

3.1 APPLICATION FOR URGENCY

On 20 August 1999, counsel for four beneficial owners of PKW land lodged an application for an urgent hearing into the effects of dairy industry restructuring on PKW land. By way of summary, in their first statement of claim the claimants stated that the ongoing ‘un-bundling’ of the dairy industry would cause them prejudice. They perceived that dairy industry restructuring would change the basis of farm valuation, reallocating value between land and share value (the share value representing the supplier’s investment in ‘off-farm’ infrastructure). This reallocation of value to shares, it was claimed, would thereby decrease the relative value of the unimproved land for the lessor (PKW) and, as a flow-on effect, reduce the rent from the land, while raising the value of the shares and improvements for the lessees. In addition to reducing PKW’s cashflow, this would also make it more expensive for PKW to repurchase lessee interests under the right of first refusal provisions of the Maori Reserved Land Amendment Act 1997 (which were designed to enable landowners gradually to regain control over their land). The claimants maintained that this defeated the purpose of the 1997 Act.¹

3.2 THE TRIBUNAL’S DIRECTION ON URGENCY

After hearing submissions from the claimants, and from the Crown, which opposed urgency, the chairperson of the Tribunal issued a direction on 24 September 1999. He determined that there was a strong case for an urgent inquiry and directed that the Crown and the claimants should consult to attain some understanding and clarification of the issues, and to attempt to resolve them. He said that any such consultation should ‘proceed on the basis that the Crown has a continuing responsibility to assist in the recovery of the lands for the Maori owners, to the extent now fair and practicable’.²

The chairperson summarised the key points of the claim as follows:

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1. Claim 1.1
 2. Paper 2.6, p 6

TARANAKI MAORI, DAIRY INDUSTRY CHANGES, AND THE CROWN

3.3

- ▶ The PKW claim could well be pertinent to the settlement of Taranaki raupatu claims in general, as well as of schedule 5 (loss of fair rents on reserved lands) to the 1997 Act.³
- ▶ The 1997 Act was not a settlement for the wrongful dispossession of the owners and for low rents over many years, or of the fact that the owners continue to be denied immediate possession: 'Rather the 1997 Amendment represented the best the Crown felt it could do with regard to the existing leases having regard to the competing equities of PKW and the lessees.'⁴
- ▶ With the benefit of the Tribunal's *Taranaki Report*:

it seems plain that Maori were wrongly denied the possession of certain reserves, much larger than they are today. The report indicated a compelling case that the Crown is obliged to assist Maori to recover possession of such of the reserves as remain, to the extent that may now be practicable. The 1997 Amendment was a significant step to assist in achieving that, especially having regard to the competing equities that now exist. However, the claimants have an arguable case that subsequent developments in the dairy industry are likely to prejudice the projected recovery of possession under the scheme as envisaged in 1997. They have an arguable case that the Crown should review the position, in association with the claimants, to determine whether anything more might reasonably be done . . .

. . . the wider issue is whether the Crown has a continuing obligation to promote the repossession of the land by Maori where this is not unfair to other parties. It may well appear to the Tribunal, if possessed of the matter, that an obligation of that sort enures for so long as Maori are without possession in fact.⁵

The chairperson left open the possibility of either party returning to the Tribunal for further direction.

3.3 APPLICATION FOR URGENCY RENEWED

The Crown and the claimants were unable to reach common ground on the impact of dairy board restructuring and any Crown obligation to PKW, and the claim returned to the Tribunal in July 2001 with a renewed application from the claimants for urgency on the basis of 'impending enabling legislation' – namely, the Dairy Industry Restructuring Bill 2001.⁶

3. Paper 2.6, p 2

4. Ibid, p 3

5. Ibid, pp 5–6

6. Paper 2.7, p 2

The deputy chairperson of the Tribunal requested submissions from Crown and claimant counsel as to the Tribunal's jurisdiction, noting that section 6(6) of the Treaty of Waitangi Act 1975 provides that the Tribunal has no jurisdiction in respect of any Bill that has been introduced into Parliament (unless it has been referred to the Tribunal under section 8 of the Act). The deputy chairperson specifically requested submissions addressing whether or not policy considerations surrounding dairy industry restructuring could be separated from the Bill.⁷

The Crown responded by opposing the grant of urgency, and invoked the jurisdictional bar, claiming that the Dairy Industry Restructuring Bill was at the centre of the claimants' application.⁸

The claimants responded that any remedy to their claim would involve an amendment to the 1997 Act, not to the 2001 restructuring Bill. They claimed that, if the Crown were to remedy their grievance, this would most equitably be achieved by the Crown purchasing equity capital in the industry for the claimants, 'so that all parties are subject to the same market forces and competing on a level playing field'.⁹ The claimants said that their claim was less about the actual restructuring than about the Crown's lack of provision for compensation to them for their historical grievances and its failure to put them on a level playing field with other owners of dairy land. The 1997 Act was a partial remedy, but the value of this remedy would, owing to restructuring, be wiped out unless the Crown took action to purchase equity capital (shares) in the new company and put in place a mechanism for the future assessment of their attributable loss.¹⁰

In a further submission, claimant counsel argued that the current regime, whereby claimants are locked into a perpetual leasing system continued by the 1997 Act, is 'inequitable and unjustifiable'. He continued that the claimants had accepted the 1997 Act, even though it was no more than 'a compromise falling well short of their objective that control of their land be returned to them'. The claimants wished to be put in the same position as other owners of dairy land in order to benefit from the restructuring of the dairy industry, rather than being prevented by the Crown from participating in and benefiting from the industry, even while they were the owners of prime dairy land.¹¹

Claimant counsel said that the claim was:

not about anything more than the Crown's duty under the Treaty, having imposed a harsh regime on the claimants and other owners of Maori reserved land, in breach of their personal property rights, to compensate the claimants and others and to restore their personal property rights over their freehold land.¹²

7. Paper 2.8

8. Paper 2.9, p 4

9. Paper 2.10, p 7

10. Ibid, pp 2-7

11. Paper 2.14, pp 1-3

12. Ibid, p 4

At the crux of the claim is the contention that the 'claimants remain prejudiced by the Crown's failure to deliver possession of the land, for well over a century'. Restructuring and unbundling 'will impact severely on the claimants' chances of recovering possession of their land in the future'.¹³

On 30 August 2001, the deputy chairperson found that section 6(6) should be interpreted as narrowly as possible in order to protect the right of Maori to bring claims before the Tribunal and that the claimants would still have a claim if consideration of the Bill were taken out of the proceedings.¹⁴

The deputy chairperson continued:

The gravamen of the claimants claim appears to be as follows. Firstly, the industry decision to unbundle the elements which used to make up land value has reduced the asset value of Paraninihi Ki Waitotara. Second this will make it harder for Paraninihi Ki Waitotara to return to possession of its land. Third the Crown should intervene to ensure that in respect of Paraninihi Ki Waitotara interests, that prejudice is removed. These arguments can be made whether the Dairy Industry Restructuring Bill 2001 is enacted or not.¹⁵

The deputy chairperson therefore instructed that 'the decision in principle reached by Chief Judge Durie on 24 September 1999 is unaffected by the Bill and I am now bound to implement it'.¹⁶

The request for urgency having been granted, the claim was heard on 12 and 13 November 2001.

13. Paper 2.14, p 9

14. Paper 2.15, p 2

15. Ibid, p 3

16. Ibid, p 3

CHAPTER 4

THE CLAIM

Following the decision to grant urgency, the claimants submitted a further amended statement of claim on 1 October 2001.¹ This somewhat changed the focus of the claim from the three elements identified by the deputy chairperson in his memorandum of 30 August 2001. The increased cost of taking up the opportunity to enter the dairy industry had now become a central issue of the amended statement of claim. The Crown filed a response to the amended statement of claim on 16 October 2001.²

In this section, we set out the key points of the amended statement of claim, followed by a summary of claimant counsel's closing submissions. In the following chapter, we set out the Crown's response and its closing submissions.

4.1 THE AMENDED STATEMENT OF CLAIM

The claimants stated that:

- ▶ the Crown has an ongoing duty to them to 'facilitate the return of the Land to the control of the lessors by terminating or assisting them to terminate the inequitable leasing regime imposed on the lessors by the Crown';
- ▶ they are excluded from participating in the dairy industry on their own land;
- ▶ the Crown adopted a policy 'intended to facilitate the return of the Land over a period of time and to provide for the claimants to be compensated by fair market rents until this occurred'; and
- ▶ the 1997 Act, 'although not considered adequate by the claimants, gave them a better chance of acquiring occupation of their land and being able to farm it'.

The claimants then set out the actual particulars of their claim regarding the restructuring of the dairy industry, which they believe has 'resulted in a deterioration rather than an improvement' in their position. They claimed that:

- ▶ the relative value of the unimproved land is decreasing;

1. Claim 1.1(b); see also claim 1.1(c)

2. Paper 2.22

4.1

- ▶ the rental income, assessed on the unimproved land value, will consequently be of less value;
- ▶ the relative cost of exercising the right of first refusal will increase because of the reduced relativity of the unimproved land value to the value of the lessee's interest; and
- ▶ the cost of entering the dairy industry on the claimants' land will increase as 'fair value' shares increased in value.

These are the key particulars of the alleged prejudice.

In response to the 1997 Act, PKW developed a land management plan in consultation with valuation, economic, and accounting advisers. PKW is concerned that the restructuring will detrimentally affect its land management plan, it being said that the cost of borrowing will increase owing to 'reduced equity as land value drops', impacting negatively on projected cashflows.

Lack of consultation was also an issue for the claimants. They believed that the Crown had not provided an opportunity for them to participate in the restructuring process or considered their position at all.

The claimants explained that, as new entrants to the dairy industry, they would have to purchase shares to be able to supply the co-operative. These shares are currently valued at \$4 per kilogram of milk solids. This increased share value will result in an equivalent loss of unimproved land value of around \$18 million 'assuming the diminution in value attaches totally to the unimproved value'.

The claimants requested that the Tribunal recommend to the Crown that it should, with regard to the dairy industry restructuring:

- ▶ consult with the claimants;
- ▶ set in place a process for quantifying the impact of restructuring on the claimants; and
- ▶ ensure that there is no transfer of value from the lessors' interest in the land, or make provision for compensation for any such loss, and purchase for the claimants fair value shares to 'enable them to enter the industry as suppliers from their own land'.

They also requested that the Tribunal make any other recommendations that it thought fit.

The claimants called on various expert witnesses to support their claim. (The evidence of these witnesses forms the bulk of documents A1 to A9 on the record of inquiry.) In order of appearance at the hearing, the witnesses for PKW were:

- ▶ Paul Te Poa Karoro Morgan, the chair of Wakatu Incorporated, a beneficiary of PKW, the executive deputy chair of the Federation of Maori Authorities, and a former deputy chair of the Organisation of Maori Authorities;
- ▶ Peter Charleton, a chartered accountant and the secretary of PKW;
- ▶ John Larmer, a registered valuer, arbitrator, and mediator who specialises in the valuation of unimproved land;

- ▶ Ranald Gordon, a registered valuer, arbitrator, mediator, and realtor;
- ▶ Robin Brockie, a chartered accountant who was engaged by PKW to assist in the preparation of their land management plan; and
- ▶ Gareth Morgan, an economist, who presented the evidence of another economist, Adolf Stroombergen, who was unable to attend the hearing.

The Tribunal also received independent written submissions from Gail Young and from Rata Pue, who gave his submission at the hearing. Both submissions addressed broader historical and contemporary issues as they saw them, rather than the somewhat narrow focus of this claim. They supported the claim, but they did not necessarily support PKW as a trustee of the land.

4.2 THE CLAIMANTS' CLOSING SUBMISSIONS

Counsel for the claimants summarised the key points in their claim and the supporting evidence in closing submissions given orally at the hearing.³ The following is a summary of those submissions.

Claimant counsel asked the Tribunal to:

- ▶ Note that there are two principles of paramount relevance for this inquiry: the principle of active protection and the principle of equity. These principles lead to two corresponding duties for the Crown: that it should act in good faith and that it should consult with Maori.⁴
- ▶ Note that active protection has two levels to it: first, an overall responsibility to Maori and, secondly, specific responsibilities to particular Maori. Here, the Crown had a duty to specifically intervene to protect the claimants.
- ▶ Note that, in this case, the claimants should be protected by the Crown, not from normal market forces but from Government policies which are restraining them from achieving a desirable outcome and preventing them from operating in the market on a fair and equal basis. In implementing its policies, the Crown has a duty to act in the utmost good faith. This includes the duty to make all reasonable efforts to examine and rectify every aspect of a grievance. Consultation needs to be very thorough, and needs to lead to an outcome relating to that consultation.
- ▶ Note that the Crown had moved progressively and deliberately to a perpetual leasing regime and had not, until 1997, accepted any of the recommendations from the many commissions to improve the regime for Maori.

3. A transcript of the claimants' closing submission (doc A20) was later provided by counsel. See also document A17.

4. With reference to Waitangi Tribunal, *The Napier Hospital and Health Services Report*, Wellington, Legislation Direct, 2001, ch 3

4.2

- ▶ Note that the Crown had not fulfilled its duty of active protection. A Cabinet Policy Committee paper showed that the Crown was aware that any restructuring would have negative effects on Maori Reserved Land Amendment Act landowners' interests.⁵ Mr Sutton and Mr Bolger had both shown that the Crown had met with Maori landowners but had ignored their concerns. Crown witness Donn Armstrong had agreed that prudent administrators of the land would, if possible, provide for reversion of supplier-held company shares at the termination of a lease.⁶
- ▶ Note that the Crown has suggested that its only responsibility is to return the occupation of the land to the beneficial owners. But both the Crown and the claimants have the expectation that the land will be used for dairy farming, being the best use of the land in today's market.
- ▶ Accept that the claimants are being disadvantaged and that the Crown in its active protection role must take responsibility for that. The Crown has, through legislation, continued to shut them out of participating in an industry in which other participants were benefiting from unbundling. The claimants are receiving no such benefit.
- ▶ Note that, had the Crown not intervened in the control of their land in the past, the claimants would be dairy farmers already and would have paid for off-farm assets. They would have also accrued benefits, as have the dairy farmers on their land. Therefore, the Crown's contention that the unbundling of shares and any corresponding decrease in the value of the unimproved land would be a correction of an inappropriate allocation of value was unfair, since it was the Crown who had shut the claimants out of benefiting from that original allocation and then from the reallocation due to unbundling.
- ▶ Discount the Taranaki Tribunal's comments that the Crown should negotiate with Taranaki iwi and hapu only, as this claim is a contemporary one, arising in part from the 1997 Act. The claimants are Maori landowners and are entitled under the Treaty of Waitangi Act 1975 to have their claim heard on its own merits. 'The Tribunal has an opportunity now to give new weight to a contemporary claim which arises out of historical circumstances, as all claims must do.'
- ▶ Accept that this is a contemporary claim. The Crown restated its position with the passage of the 1997 Act, with a substantial degree of good faith, but already circumstances have meant that the expectations arising from that Act will not be realised.
- ▶ Note that the claimants had accepted the 1997 Act as a mechanism that would go a long way to addressing their grievances. But they did not in 1997 foresee the impacts of unbundling and, if they had realised that possible outcome, they might have taken a very different approach to the 1997 Act.

5. Document A13(a), pp11–12

6. Document A15(a), p 2

- ▶ Note that Benjamin Paki for the Crown had acknowledged that there was an aggravated grievance to be addressed and that Andrew Hampton, also for the Crown, had acknowledged that this was a contemporary claim.
- ▶ Note that other claimants have asked the Tribunal to consider land that had been removed from its original owners; for example, the South Island Landless Natives Acts and the Mangakino case.⁷ In these examples, the original owners did not have to be taken into account over and above the current Maori beneficial owners.
- ▶ Look at the merits of this contemporary claim separate from, but in the context of, historical grievances.
- ▶ Note that the unimproved land value's share as a proportion of the market value of the total business had decreased from 44 per cent to 39 per cent in the Tippet property example. If this property were to go up for rent review, it would be worth another \$240,000 before unbundling. In answer to a question from the Tribunal, claimant counsel agreed that unimproved land value, as a proportion of the current market value of the dairy business, had increased, but he stated that it would have increased further without unbundling. If the owners had been the supplying dairy farmer on the land, they would have captured the total rises in all values.
- ▶ Note that, even though revenue flow may go up, it will not be as high as it would have been after the 1997 Act without unbundling.
- ▶ Note that rental streams may be up in dollar terms but they are not up in relative terms, so the claimant's interest in the farm business as a whole has diminished.
- ▶ Note that PKW's land management plan is no longer achievable in its original form, and, though it may still be achievable with modifications and over a longer period of time, this will not be the case if share values rise to \$5 or \$6 or even higher.
- ▶ Note that they denied the Crown's suggestion that the effects of unbundling had been apparent prior to 1996. The effects of unbundling had been slight at least until the 1995–96 season, when shares were valued at only \$1.
- ▶ Recommend a monitoring mechanism to protect the claimants' position now and in the future.

7. See Waitangi Tribunal, *The Pouakani Report 1993*, Wellington, Brooker's Ltd, 1993, ch 17

CHAPTER 5

THE CROWN'S RESPONSE

5.1 THE CROWN'S RESPONSE TO THE AMENDED STATEMENT OF CLAIM

In its response to the amended statement of claim, the Crown:

- ▶ Accepted that the claimants may have been deprived of an absolute ownership right in the land following its confiscation and later return subject to the enforced leasing regime:

to the extent that the imposition of the statutory leasing regime constituted a breach of the principles of the Treaty of Waitangi, it is a matter that will be addressed by the Government in negotiations with iwi and hapu of Taranaki over their historical Treaty claims.

- ▶ Acknowledged that PKW's land is subject to the perpetual leasing regime, and that the Maori Reserved Land Act 1955 restricted the claimants' (or their representatives') ability to freely enter into commercial arrangements. However, the 1997 Act provided for fair annual rents, and it is 'reasonable to hypothesise that some of the value of the off-farm assets in the dairy industry in Taranaki has been capitalised into the unimproved value of the land'. The Crown said that the lessor is not required to purchase any such assets.
- ▶ Stated that it has duties to both lessor and lessees. The Crown believed that it has addressed and discharged its duties to the lessor (PKW) to facilitate the return of the land and to terminate the imposed leasing regime through the 1997 Act.
- ▶ Asserted that, to the extent that it acknowledges any 'residual ongoing Treaty based duty to the claimants and others with a like interest':

[that duty] is being addressed as part of the negotiations to settle the historical grievances of iwi and hapu in Taranaki, and as part of present attempts to negotiate a settlement of the commitment recorded at Schedule 5 of the 1997 Amendment Act.

- ▶ Accepted that the statutory leasing regime as amended by the 1997 Act 'may restrict the extent to which the claimants can participate in the activity of dairy farming', but considers that policies of the 1997 Act reflect a 'fair and reasonable reconciliation of competing equities, consistent with relevant Treaty obligations'.

5.1

- ▶ Did not accept that dairy industry restructuring has necessarily resulted in a deterioration of the claimants' relative circumstances, and that, even if it had, did not accept that such deterioration would be a breach of Treaty principles.
- ▶ Noted that the relative value of the unimproved land may or may not be decreasing.
- ▶ Did not accept that the rental income will fall relative to the rental income previously derived as a fixed percentage (5 per cent) of the unimproved value.
- ▶ Stated that the relative cost of exercising the right of first refusal may or may not increase, but that this will not be due to an increase in the value of off-farm assets, 'because they do not form part of the lessee's interests required to be purchased under the right of first refusal'. Even if so, the cost of buying out the lessee may decrease for the lessor 'as a result of a reduction in the improved value of the land that may also occur due to unbundling'.
- ▶ Acknowledged that entry costs for the claimants into dairy farming on their own account may increase, but does not believe that it follows that this necessarily causes detriment to the claimants.
- ▶ Did not agree that changes resulting from dairy industry restructuring will necessarily be detrimental to the claimants.
- ▶ Did not accept that 'there were quantifiable benefits considered to arise from the 1997 Amendment Act that are now compromised in the way alleged by the claimants'. 'Inherent in the concept of a change to fair annual rents is the possibility that rental income derived from the land may both increase or decrease according to market variables.'
- ▶ Was unable to comment on PKW's land management plan, because it had not seen it, but considered that assumptions as to the projected loss of income are hypothetical.
- ▶ Denied the claimants' alleged Treaty breaches. Under article 1 of the Treaty, Maori ceded the right to govern and the Crown is therefore entitled to pass statutory instruments that may have the effect of limiting claimants' use and enjoyment of the lands, and that the issue is 'whether in the exercise of that power the Crown has had due regard to the rights and interests guaranteed to the claimants and their ancestors pursuant to Article 2 of the Treaty'. Further, the Crown has acknowledged that:

aspects of the original acquisition of the land and subsequent imposition of the statutory leasing regime constituted breaches of the Treaty of Waitangi and the principles of the Treaty of Waitangi, and that redress should follow. Such redress is being provided in these settlements.

- ▶ Considered that any duty to consult specifically with claimants had been properly discharged.
- ▶ Denied that the claimants are entitled to participate in a process to develop regulatory measures to assist them to enter the dairy industry, and denied that its

legislation and policy with regards to dairy industry restructuring has compromised the desired outcome of the 1997 Act.

- ▶ Accepted that the claimants will face an entry value of \$4 if they wish to become suppliers to the dairy industry, but regarded the claimed projected loss of income as 'hypothetical and speculative'.
- ▶ Stated that there is 'no present empirical basis' for assuming that any loss in value 'would attach wholly or primarily to the unimproved value'.
- ▶ Asserted that it has consulted appropriately with claimants; does not accept that there is a proper basis for the claimants' proposal that it should establish a process for quantifying the impact of restructuring on them; and does not accept that there is any proper basis for the recommendations sought that it should compensate the claimants for any loss, or purchase shares to enable them to enter the dairy industry.¹

The evidence of the Crown witnesses is contained in documents A10 to A15 on the record of inquiry. These witnesses were, in order:

- ▶ Benjamin Paki, a principal at Te Puni Kokiri;
- ▶ Andrew Hampton, the director of the Office of Treaty Settlements and previously the manager responsible for the negotiation of the Taranaki historical claims settlement;
- ▶ Dan Bolger, the director of sector performance policy at the Ministry of Agriculture and Forestry;
- ▶ Bill Sutton, a senior policy analyst of Maori policy at the Ministry of Agriculture and Forestry;
- ▶ Lewis Evans, a professor of economics at Victoria University of Wellington and the executive director of the New Zealand Institute of the Study of Competition and Regulation; and
- ▶ Donn Armstrong, a registered valuer (Mr Armstrong was not available to attend the hearing, so he provided written answers to previously prepared questions from claimant counsel).

5.2 THE CROWN'S CLOSING SUBMISSIONS

The Crown summed up the evidence of the witnesses and reinforced its response to the claimants in its closing submissions.² The Crown:

- ▶ Said that the claim as now formulated focuses on the Maori Reserved Land Amendment Act 1997:

1. Paper 2.22

2. Document A18

The major complaint appears to be that this legislation regulates and effects the use of the land in such a way as to prevent the Maori owners from ameliorating the adverse effects of unbundling in the dairy industry by making appropriate provision in their leasing arrangements.

This is in turn claimed to have the effect of reducing PKW's asset value and income stream, making recovery of possession of the land pursuant to the right of first refusal more difficult.

- ▶ Reiterated that it has acknowledged that its actions imposing perpetually renewable leases were in breach of the Treaty, as in the evidence of Andrew Hampton.³
- ▶ Suggested that the claimants do not have a significant separate claim from the historical grievances already accepted by the Crown, and that the current claim includes both historical and contemporary aspects.
- ▶ Submitted that the Maori Reserved Land Amendment Act 1997 was a 'fair and reasonable attempt to address and resolve the competing equities in the reserved lands'.
- ▶ Did not accept that the 1997 Act is deficient or in breach of the Treaty, because unbundling began as an industry initiative well before the passing of that Act. As a result of the introduction of fair market rents and more frequent rent reviews, it will be the market that influences the relationship between lessor and lessee, rather than legislation. The 1997 Act also has the implicit objective of assisting Maori owners to recover possession of their reserved lands. This is consistent with the Crown's relevant Treaty obligations. The Crown is already providing redress for breaches of the Treaty in Taranaki through its negotiations with iwi and hapu, and through negotiations with PKW under schedule 5 to the 1997 Act for rents being less than market. This is relevant to an assessment of the Crown's fulfilment of its Treaty duties to the claimants:

The Crown position is that the historical aspects of the present claim cannot [easily] be separated from the fundamental breach of the Treaty and its principles acknowledged in respect of the iwi and hapu who originally held the land. With regard to the contemporary aspects of the claim, the Crown does not accept that the MRLAA was deficient or in breach of the principles of the Treaty on the grounds alleged by the claimants.⁴

- ▶ Denied that it has not adequately consulted with the claimants, and considered that the evidence shows that the Government was aware of and understood the claimants' concerns.⁵ It was not any failure to consult that was at issue, rather 'a well understood difference of view between the Crown and the claimants as to the nature and extent of the Crown's Treaty obligations, and as to the impact of unbundling'. Furthermore,

3. Document A11, app B, pp 43-44

4. Document A18, p 8

5. See docs A12, A13; see also doc A3, esp docs A3(2.1)-(2.83), A3(3.1)-(3.13)

the Crown maintained that unbundling is not a Crown action or policy, nor is it an action 'by or on behalf of' the Crown. Although unbundling has been consistent with Crown policy with regard to the dairy industry, it has been devised and implemented by the industry itself over the last 10 years.

- ▶ Accepted that the evidence of their witness Donn Armstrong acknowledged that, if using a static model as developed by claimant witnesses, the transfer of value to shares as a result of unbundling will result in a deduction from the value of the unimproved land.
- ▶ But did not accept that permanent capital value will be lost as a result, nor that the value situation will remain static. Unbundling to date has in fact caused an increase in both total farm values and unimproved land values. Any loss is in relative terms only and, in some cases, is a projected rather than an actual loss.⁶ Claimant witness Mr Brockie had accepted under cross-examination that PKW's land management plan might not fail, as asserted by Mr Charleton, but would take longer to implement.
- ▶ Considered that, to assess an actual loss in unimproved land values, it would be necessary to consider all the effects of unbundling in a dynamic farm market. The production decisions of existing suppliers will change in response to the move to fair value shares. This is because industry restructuring will result in both new costs and benefits for the supplier (the lessee). Milk payouts and profits are likely to be higher for suppliers. 'This will have the flow-on effect of also making land values higher than they would otherwise be.' Meanwhile, an increase in milk payouts will be captured in the unimproved land values, on the claimants' own evidence.⁷ The Crown said that the overall outcome remains ambiguous, and conclusions as to loss can still only be hypothetical.
- ▶ Did not accept that any change in business value will impact only on the land value, as other factors of production could well be affected also.
- ▶ Did not accept that unbundling will make it more difficult for claimants to exercise their right of first refusal and return to possession of the land. Increased entry cost to supply Fonterra is not the same thing as the cost of exercising the right of first refusal. When exercising their right of first refusal, the claimants are not required to purchase the lessee's shares in Fonterra. Also, the deregulation of the dairy industry creates an opportunity for the formation of competing dairy companies which might not require the purchase of shares as a condition of supply:

The restructuring will have little or no impact on the exercise of the [right of first refusal] itself. On the claimants' own evidence, it is the unimproved value that would be affected by the shift to fair value shares. The lessee's interest (being the balance of

6. Document A18, pp 9–10, with reference to docs A5, A6, A7, A15

7. Document A18, p 11 (citing doc A8, para 19)

the value of the land and improvements) remains unchanged or would in fact reduce in value. The lessee's interest may decrease in value also if some of the transfer in value comes out of the value of the cowshed.⁸

- ▶ Did not accept that any reduction in the value of unimproved land would necessarily affect PKW's revenue stream. In fact, the claimants' evidence had suggested that PKW's estimated cash flow for 2001 would be the same as or greater than its 1998 cash flow.⁹ Neither would a reduction in unimproved land value necessarily reduce rental income. Though the calculation of fair annual rents must have regard to the unimproved value of the land, Mr Armstrong suggests that rents are also determined by what a farmer will pay on a production per hectare basis. 'Given projected increases in expected milk payouts there seems no reasonable basis to infer that a per hectare rate will decrease.'¹⁰
- ▶ Asserted that it would not be possible to assess any actual impact until after the first rent reviews have been completed. Any negative impact on unimproved land values would suggest, in the Crown's argument, that off-farm assets had previously been capitalised into the unimproved value: 'Unbundling is therefore a legitimate correction as it returns to the lessees the value of their interests in the improvements and off-farm assets.' The Crown cited the select committee's rejection of claimant submissions on both the 1999 Dairy Industry Restructuring Bill and the 2001 Act, and supported the committee's contention that the claimants have never had an interest in the improvements.¹¹

In answer to questions from the Tribunal, Crown counsel said that a negotiator has been appointed to assist in resolving any obligation to compensate for rents being less than market imposed on the Crown by schedule 5 to the 1997 Act. PKW is a party to those negotiations, though counsel was not in a position to tell the Tribunal more about what the parameters of the negotiations are. He did say that an outcome to negotiations might become apparent in the near future.

Crown counsel also explained to the Tribunal that its policy with regard to Taranaki is to settle with the descendants of those communities that suffered the original grievances. He pointed out that there was overlap between the fundamental or original breaches and the serious consequences that had flowed from them, which might be regarded as an aggravation of them or, on the other hand, as breaches in themselves. The consequence is that there is difficulty for the Crown in determining where this claim lies in relation to the historical breaches, who it should deal with, and to whom any remedy should flow if this claim is well founded.

8. Document A18, p 12

9. Document A9, para 31, p 7

10. Document A18, p 13

11. Ibid, pp 13-14; see also doc A14(a)

CHAPTER 6

FINDINGS AND RECOMMENDATIONS

Various investigations into the confiscation and then return of lands in Taranaki have established that that confiscation of land, and its then return in non-traditional management regimes, including the imposition of perpetual leasing, were gross breaches of the Treaty of Waitangi. These historical grievances have now finally been acknowledged by the Crown and are to be addressed through settlement with Taranaki iwi and hapu. Meanwhile, the Crown is negotiating compensation for rents being less than market with PKW under schedule 5 to the Maori Reserved Land Amendment Act 1997.

Those breaches form the context in which the Crown should have acted as soon as it was aware of them to actively protect Taranaki Maori from further prejudice.

6.1 THE PRINCIPLE OF ACTIVE PROTECTION

It is well established in Treaty jurisprudence that, in return for ceding sovereignty, the Crown promised to protect Maori rangatiratanga. The *Turangi Township Report 1995* referred to the principle of protection in these terms:

the principle that the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga is fundamental to the compact or accord embodied in the Treaty and is of paramount importance. It should be seen as overarching and far-reaching because it is derived directly from articles 1 and 2 of the Treaty itself.

Implicit in this principle is the notion of reciprocity. Under article 1, Maori conceded to the Crown kawanatanga, the right to govern, in exchange for the Crown guaranteeing to Maori under article 2 tino rangatiratanga, full authority and control over their lands, forests, fisheries, and other valuable possessions (taonga), for so long as they wished to retain them.

It is clear, therefore, that the cession of sovereignty to the Crown by Maori was conditional . . . The confirmation and guarantee of rangatiratanga by the Queen in article 2 necessarily qualifies or limits the authority of the Crown to govern.¹

We do not regard the protection required as being met by the Crown merely acting as a buffer between Maori and settler or lessee pressure. Active protection was required. In *New Zealand Maori Council v Attorney General*, a pointed and clear indication was given to the Crown that a torpid and selfish approach would not do; and this a decade before the changes that concern this report began to bite:

What has been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the *fullest extent practicable* . . . I take it as implicit in the proposition that, as usual, practicable means reasonably practicable. [Emphasis added.]²

We regard the duty of active protection to be the key in this claim. We now identify a distinct breach: the failure actively to protect following earlier proven breaches.

6.2 THE FAILURE ACTIVELY TO PROTECT FOLLOWING EARLIER PROVEN BREACHES

The Crown's duty of active protection was all the greater when it had full knowledge of the historical wrongs it had done and the manner in which those wrongs had flowed down through and caused prejudice to successive generations. Here, we regard the wilful and repeated turning of the Crown's face from its Treaty obligations and breaches as a further breach in itself.

Having invaded and then confiscated Maori land in Taranaki in the 1860s, and then having imposed perpetual leasing on returned lands, the Crown again breached the Treaty by not heeding in a timely manner the recommendations of so many commissions and inquiries. Had the Crown acted immediately following the *Ngai Tahu Report 1991*, for example, it would not now face allegations of prejudice flowing from the unbundling process. Active protection should have been well underway at the time that unbundling began to impact.

1. Waitangi Tribunal, *The Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, p 284, drawing from Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 269; see also Waitangi Tribunal, *The Napier Hospital and Health Services Report*, Wellington, Legislation Direct, 2001, p 48

2. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 664 (CA), per Cooke P

We repeat, this breach of the duty of active protection consists of the Crown turning a blind eye to its previous breaches, even when fully and repeatedly informed, and then failing to remedy the consequences for Maori.

We accept that the Maori Reserved Land Amendment Act 1997 was a 'fair and reasonable' attempt at resolution given two opposing property rights, as claimed by the Crown, but we find that it came too late to actually provide a fair and reasonable solution for PKW. The consequences of the lateness of this remedy are becoming increasingly apparent with the impact of unbundling.

6.3 PREJUDICE

This Tribunal has therefore found another primary breach involving Taranaki Maori, in addition to the existing historical breaches. We turn to examine the four allegations of prejudice said to be visited on these particular claimants.

6.3.1 Allegation 1: The relative value of the unimproved land is decreasing

The first allegation was that the relative value of the unimproved land is decreasing.

Tables for seven farms showing changes in value from 1990 to 2001 were provided by the claimants. While some figures differed, the pattern was clear and it will be sufficient if we refer to the Tippett farm as typical (see table over).

From this, we noted the following:

- ▶ The share value in 1990 was nominal, in 1997 it was \$1.50 per kilogram of milk solids, and in late 2001 is \$4.
- ▶ The current market value has increased from \$645,000 to \$1.63 million from 1990 to 2001; and is up 41 per cent from 1997 to 2001.
- ▶ The actual value of unimproved land is up from \$190,000 in 1990 to \$630,000 in 2001, and is up 50 per cent from 1997.
- ▶ The value of the lessees' interest has increased from \$455,000 in 1990 to \$1 million in 2001, and is up 37 per cent since 1997.
- ▶ The unimproved land value as a proportion of total market value has increased from 29 per cent in 1990 to 37 per cent in 1997, and to 39 per cent in 2001.
- ▶ The claimants allege that the unimproved land value would be \$240,000 more in 2001 – that is, \$870,000 – if unbundling had not occurred.

We heard conflicting evidence as to the effect of the changes to the dairy industry over the past 10 years:

Share value Tippett	Nominal 1/01/90 (\$)	% of CMV	\$1.50/kg 1/01/97 (\$)	% of CMV	\$4/kg 1/10/01 (\$)	% of CMV	1997-2001 % change
Production (kg)	50,000	—	50,000	—	60,000	—	+20
Value improvements	20,000	32	210,000	18	240,000	15	+14
Land value	430,000	66	840,000	73	1,120,000	69	+33
Capital value	630,000	98	1,050,000	91	1,360,000	83	+29
Chattels	14,999	2	25,500	2	30,000	2	+17
Shares	1	—	75,000	7	240,000	15	+220
Current market value	645,000	100	1,150,500	100	1,630,000	100	+41
Lessee's interest	455,000	71	730,500	63	1,000,000	61	+37
Actual unimproved value	190,000	29	420,000	37	630,000	39	+50
Adjusted unimproved value + shares	—	29	495,000	44	870,000	53	+75
Loss in unimproved value	—	—	75,000	—	240,000	—	—
Rental loss	—	—	3750	—	12,000	—	—

CMV: current market value

Based on the Tippett farm sample table supplied by Ranald Gordon: doc A7, p 10.

- ▶ Valuers Messrs Larmer and Gordon said that the unimproved land value alone would be reduced by the increased value of shares.³
- ▶ An economist for the claimants, Mr Stroombergen, quantified this loss as 40–50 per cent of the value of the unimproved land if shares rise to \$5. He noted that this effect may have been camouflaged by an overall increase in land values. He also claimed that ‘the amount [a prospective dairy farmer] would be willing to pay for the unimproved land would fall – by the entire amount of the change in share prices.’⁴
- ▶ An economist for the Crown, Professor Evans, concluded that:

to ascribe any change in supplier-business value to its inputs – eg (unimproved) land per se, cows, managerial labour – would be fraught with assumptions and measurement difficulties, and require taking into account the factors that affect the extent of inefficiency under nominal share pricing. These include the effect of expectations about, and the timing of, un-owned capital accretions and declines over time.⁵

Weighing that evidence, and having regard to the actual figures provided, we conclude that the relative unimproved land value has not decreased, but we recognise that it could either increase or decrease in the future.

We also considered who funded the off-farm assets – that is, who provided the money to build up the off-farm dairy industry investment? It was asserted by PKW that its beneficiaries had contributed to the off-farm assets by providing land for dairy farming at peppercorn rents due to the method of setting the rents and the 21-year rental periods. We also noted that, if off-farm assets were financed by reduced dairy payouts, unimproved land values may have been lower than otherwise and therefore rents may have been lower – that is, the unimproved value of the land may have accumulated losses as well as gains. We note that the inadequacy of rents prior to 1997 is to be addressed by the Maori Reserved Land Amendment Act 1997 schedule 5 negotiations currently in train. However, we are persuaded that the off-farm assets were built by the producers through their participation in the dairy industry, and we do not therefore consider that the share value (\$240,000 in the Tippett example) should attach to the claimants’ interest in the land. But we do not believe that this is necessarily equitable, as the lessees have had the land for so many years at a token rent, while at the same time the claimants have been denied an opportunity to improve it, and enter the dairy industry from it, themselves. While as a matter of law, the off-farm assets belong to the suppliers, we note that this has, in itself, created a strong sense of injury and grievance amongst the claimants.

The claimants have alleged a breach of the principle of equity. The Tribunal’s recent *Napier Hospital and Health Services Report* commented on the principle of equity: ‘it is the

3. Documents A6, A7

4. Document A8, pp 3, 6

5. Document A14(a), p 2

6.3.2

conferring of citizenship rights upon Maori that supplies the underlying principle of equity. These rights were, like all others, placed under Crown protection.⁶ Once again, we come back to the principle of active protection, which includes, in our view, an obligation on the Crown to ensure equity amongst all its citizens. It seems clear to us that no equity has been achieved by Maori or been protected by the Crown in the Taranaki dairy industry to date. It is our view that equity will be achieved only once Maori landowners can enter the Taranaki dairy industry as equal players with other landowners, and without being further prejudiced by well over a century of lack of Crown protection, active or otherwise.

We find that to date the relative value of unimproved land, the only part of the farm business that the claimants own, has not decreased as a result of unbundling. However, we recognise that it could decrease in the future, and refer to that possibility further.

6.3.2 Allegation 2: Rental income will be of less value

The second allegation was that rental income, assessed on the unimproved land value, will consequently be of less value.

We do not agree with this proposition because:

- ▶ The 1997 Act changed rentals from 5 per cent of the unimproved land value to fair market rents.
- ▶ With the move to fair market rents, evidence suggested that the overall return to a farmer less costs outside his or her control will influence the rent the farmer will be prepared to pay.
- ▶ Conditions ruling in the industry will also influence market rents and whether they go up or down. The value of the unimproved land will no longer be the sole determining factor of rent on an open market.
- ▶ Rents may well increase on the open market.

Therefore, no realistic finding is possible.

6.3.3 Allegation 3: The relative cost of exercising the right of first refusal will increase

The third allegation was that the relative cost of exercising the right of first refusal will increase because of the reduced relativity of the unimproved land value to the value of the lessee's interest.

Again, we do not accept that the relative unimproved land value has reduced to date, and therefore that the relative cost of exercising the right of first refusal has increased. As well:

6. *The Napier Hospital and Health Services Report*, p 62

- ▶ The value of a lessee's interest may have reduced owing to the changes in the lease, thereby making it easier for PKW to buy.
- ▶ If rents increase, the value of the lessee's interest may decrease.
- ▶ In 1990, PKW would have had to purchase 71 per cent of the overall farm, in 1997 it would have had to purchase 63 per cent, and, in 2001, 61 per cent (based on Tippett property figures, and the unimproved value rising from 29 per cent to 37 per cent to 39 per cent of the overall farm business).

We have therefore found that these three heads of claim are not well founded.

6.3.4 Allegation 4: The cost of entering the dairy industry has increased

The fourth allegation was that the cost of entering the dairy industry on the claimants' land has increased, and will continue to do so, as 'fair value' shares increase in value.

We do not accept that the Crown has an obligation to fund the claimants or PKW into the dairy industry (or into any particular industry), but the breaches that are pertinent to this particular claim have cost the claimants an opportunity that could reasonably have been taken by them had the land been in their possession. The Crown should, under the principle of active protection, redress to the fullest extent practicable any ongoing prejudice. That is, the Crown should put PKW in a position whereby it can implement its choice of what is the best use for the land, and in this case that is clearly dairying.

We have taken as the start point the year 1991. We do so because, having ignored the Sheehan report, the Crown should, at the very least, have given the matter urgent attention and provided a fulsome remedy when the implications of the finding of the *Ngai Tahu Report* were apparent, and had the strong words in the 1987 judgment of the Court of Appeal been taken to heart.

Crown inactivity has meant that entering the dairy industry has become more costly for the claimants. The claimants should be at least be put back to the relative position they held in 1991 in regard to the cost of entering the dairy industry.

In 1991, the cost for PKW entering the dairy industry was the cost of the lessee's interest plus stock. In 2001, it is also the cost of shares. In the case of the Tippett farm, this is an additional \$240,000.

We consider that the Crown should act now to remedy this loss to the claimants. We note that:

- ▶ Mr Gordon gave advice that 9.7–10 million kilograms of milk solids could be generated from PKW's portfolio. Shares to cover this volume would cost \$18–\$20 million at \$2 per kilogram of milk solids, which is the value used in the 1998 PKW land management plan. However, with the shares valued at \$4 per kilogram of milk solids, as

6.4

currently, this will cost \$36–\$40 million and, should the shares rise to \$5, the cost would be \$45–\$50 million dollars.⁷

- ▶ Total capital assets of the developed PKW farms have increased in the land management plan from \$229 million in 1998 to \$299 million in 2001. Borrowing capacity at 30 per cent of assets has increased from \$69 million to \$90 million.⁸ The shortfall, before property sales, had increased from \$78 million to \$118 million. (Property sales are no longer possible upon the reclassification of the land as Maori freehold land by the Maori Land Court. This means that the ‘before property sales’ figure is the only relevant figure for PKW.)
- ▶ The difficulties for the owners of Maori reserved land in raising security on their land are well known. It is an unattractive security to money lenders, and the proportion of asset value which can be borrowed is much lower than for other entities. Maori freehold land is notoriously ill-regarded by money lenders for security.
- ▶ It is becoming standard practice for administrators of leasehold land not in perpetual leasing regimes to provide for the reversion of supplier-held company shares from the lessee to the landowner at the termination of a lease. PKW has not been in a position to ensure this.
- ▶ The above points indicate that unbundling from 1998 to 2001 has caused an extra \$40 million to be required in 2001 compared with 1998 in order for PKW to enter the dairy industry, and that PKW will not easily be able to borrow this money.

6.4 TRIBUNAL RECOMMENDATIONS

The Tribunal therefore recommends:

1. That the Crown should assist PKW to buy shares as required to ensure supply on farms as they are resumed. The Crown should do this by guaranteeing loans within the following parameters:
 - (a) the loans should be no greater than the sum of the value of the shares at acquisition cost;
 - (b) the loans should be applied to purchase of shares in Fonterra; and
 - (c) PKW net assets should not be less than 35 per cent of their total assets (which is the ownership ratio in PKW’s 1998 land management plan).
2. That, on the possibility that rents are reduced in real terms in the future and it being shown that unbundling has been a significant contributor, the Crown should make up the rents to the extent of the unbundling contribution.

7. Document A7, p15

8. Document A9, pp7-8

3. That the Crown should reimburse the claimants' and/or PKW's reasonable legal and witness expenses in prosecuting this claim. It was brought with dispatch and conducted in a measured way, having regards to the economics of litigation.

6.5 CONSULTATION

The Crown's duty to consult with Maori and the circumstances that trigger that duty are enunciated in a number of Tribunal reports. Most recently, the Tribunal's report into the Napier Hospital claim said that:

We consider that consultation, when required, is a duty of government common to the observance of all four of the Treaty principles that we have defined [the principles of active protection, of partnership, of equity, and of options]. The active protection of Maori rangatiratanga, and of Maori people in general, requires the Crown to inform itself adequately in order to exercise its powers of sovereignty fairly and effectively. Partnership can scarcely proceed in ignorance of the views and wishes of the Maori partner. Ensuring equitable delivery of and outcomes from Government services requires information from the beneficiaries of those services, and often their direct involvement in generating that information. Finally, information and opinion from Maori is indispensable for the appropriate design of bicultural options.⁹

The Tribunal then said that:

the Crown must establish whether there are Treaty implications and, if there are, it must satisfy itself that it has sufficient information to act consistently with Treaty principles.¹⁰

We endorse those views.

In this claim, the nub of the problem and breach arise not from the Dairy Restructuring Act 2001, which was merely enabling, but rather from the Crown's studied inactivity, coupled with market forces and developments external to the Crown (dairy industry restructuring and unbundling). The failure of the Crown was more basic than not consulting. Had it earlier faced the implications of its breaches, then the duty to consult would be in sharp focus. With the Crown having chosen the path it did, there was nothing to consult about. At last, the process for negotiating the historical and perpetual leasing breaches referred to earlier has been established. Therefore, the failure to consult was not a relevant breach in this claim.

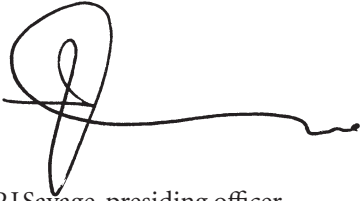
9. *The Napier Hospital and Health Services Report*, p 67

10. *Ibid*, p 68


Having found, however, that there is a further and recent breach and that there may be more change in the market that causes active protection to be further required, consultation may become necessary. If so, this should be with regard to our second recommendation.

The parties must work with the utmost good faith towards the resumption of these lands in a steady and timely process with a relatively short time span.

Dated at *Rohima* this *4th* day of *December*, 2001



PJ Savage, presiding officer



JB Baird, member



R Tahuparae, member



APPENDIX

RECORD OF INQUIRY

RECORD OF HEARINGS

THE TRIBUNAL

The Tribunal constituted to hear the claim Wai 790, concerning the effects of dairy industry restructuring on PKW Incorporation land, comprised Judge Patrick Savage (presiding), John Baird, and Rangitihī Tahuparae.

THE COUNSEL

The counsel who appeared before the Tribunal were John Stevens and Paul Thompson for the claimants and Michael Doogan and David Soper for the Crown.

THE HEARING

The hearing was held at the offices of the Waitangi Tribunal in Wellington on 12 and 13 November 2001. Submissions and evidence on behalf of the claimants were received from Robin Brockie (docs A9, A9(a)); Peter Charleton (docs A1, A5); Ranald Gordon (doc A7); John Larmer (docs A6, A6(a)); Paul Te Poa Karoro Morgan (doc A4); Rata Pue (docs A19, A19(a), (b)); Adolf Stroombergen (doc A8); and Gail Young (doc A16). Submissions and evidence on behalf of the Crown were received from Donn Armstrong (docs A15, A15(a)); Dan Bolger (doc A12); Lewis Evans (docs A14, A14(a), (b)); Andrew Hampton (doc A11); Benjamin Paki (doc A10); and Bill Sutton (docs A13, A13(a)).

RECORD OF PROCEEDINGS

1. CLAIMS

1.1 Wai 790

A claim by Edward Rongomaiira Tamati, Peter Moeahu, Spencer Waemura Carr, Tohe Rahipere Ngatai, and John Te Rangi Okiwa Morgan on behalf of themselves and the beneficial owners of the land held by the Parininihi ki Waitotara Incorporation concerning the effects of dairy industry restructuring on that land, 20 August 1999

- (a) Amended statement of claim, 9 July 2001
- (b) Second amended statement of claim, 1 October 2001
- (c) Amendment to second amended statement of claim, 24 October 2001

2. PAPERS IN PROCEEDINGS

2.1 Direction of chairperson registering claim 1.1 and assigning it claim number Wai 790 and scheduling judicial conference to hear submissions on application for urgency, 7 September 1999

2.2 Application for urgency from claimant counsel, 30 August 1999

2.3 Declaration that notice of claim 1.1 given, 8 September 1999
List of parties sent notice of claim 1.1, 8 September 1999

2.4 Submissions of claimant counsel concerning application for urgency, 15 September 1999

2.5 Submissions of Crown counsel opposing application for urgency, 22 September 1999

2.6 Direction of chairperson adjourning application for urgency sine die pending consultation between Crown and claimants, 24 September 1999

2.7 Renewed application for urgency from claimant counsel, 9 July 2001

2.8 Direction of deputy chairperson requesting submissions on jurisdiction, 17 July 2001

2.9 Submissions of Crown counsel on jurisdiction, 20 July 2001

2.10 Submissions of claimant counsel on jurisdiction and urgency, 20 July 2001

- 2.11** Direction of deputy chairperson concerning scheduling of judicial conference to hear submissions on application for urgency and requesting submissions on aspects of claim, 24 July 2001
- 2.12** Direction of deputy chairperson registering claim 1.1(a), 23 August 2001
- 2.13** Declaration that notice of claim 1.1(a) given, 24 August 2001
List of parties sent notice of claim 1.1(a), 24 August 2001
- 2.14** Submissions of claimant counsel in response to paper 2.11, 28 August 2001
- 2.15** Direction of deputy chairperson scheduling hearing and requesting submissions on proposed timetable, 30 August 2001
- 2.16** Memorandum from Crown counsel seeking extension for filing of submissions on proposed hearing timetable, 31 August 2001
- 2.17** Direction of deputy chairperson granting seeking extension for filing of submissions on proposed hearing timetable and constituting Tribunal to hear Wai 790, 20 September 2001
- 2.18** Transcript of telephone conference between presiding officer and Crown and claimant counsel, 4 October 2001
- 2.19** Direction of presiding officer registering claim 1.1(b), 10 October 2001
- 2.20** Declaration that notice of hearing given, 10 October 2001
Notice of hearing, 10 October 2001
List of parties sent notice of hearing, 10 October 2001
- 2.21** Declaration that notice of claim 1.1(b) given, 10 October 2001
Direction of presiding officer registering claim 1.1(b), 10 October 2001
List of parties sent notice of claim 1.1(b), 10 October 2001
- 2.22** Statement of response of Crown counsel to claim 1.1(a), 16 October 2001
- 2.23** Transcript of telephone conference between presiding officer and Crown and claimant counsel, 23 October 2001
- 2.24** Direction of presiding officer registering claim 1.1(c), 5 November 2001

APP

2.25 Declaration that notice of claim 1.1(c) given, 6 November 2001

List of parties sent notice of claim 1.1(c), 6 November 2001

2.26 Memorandum from counsel for Fonterra Co-operative Group to Tribunal seeking leave to appear, 8 November 2001

2.27 Memorandum from counsel for Muru me te Raupatau mo nga Hapu o Ngaruahinerangi to Tribunal seeking leave to appear by way of watching brief, 8 November 2001

2.28 Memorandum from counsel for New Zealand Dairy Board to Tribunal seeking leave to appear, 7 November 2001

2.29 Memorandum from Rata Pue and Gail Young on behalf of the Jessie Wi Kingi Whanau Trust and the Waihi Hapu of Ngati Tamarongo to Tribunal seeking leave to appear, 7 November 2001

RECORD OF DOCUMENTS

A DOCUMENTS RECEIVED UP TO 13 NOVEMBER 2001

A1 Brief of evidence of Peter Charleton, 27 August 1999

A2 Brief of evidence of Philip Barry, 22 September 1999

A3 Two volumes of documents, entitled 'Agreed Bundle of Documents', comprising:

(1.1)–(1.8) Documents concerning the Maori Reserved Land Amendment Act 1997, various dates (1996–97)

(2.1)–(2.83) Documents concerning dairy industry restructuring, various dates (1999–2001)

(3.1)–(3.13) Governmental documents concerning dairy industry restructuring and unbundling, various dates (1996–2001)

(4.1)–(4.4) Industry documents concerning dairy industry restructuring and unbundling, various dates (1999–2001)

A4 Brief of evidence of Paul Te Poa Karoro Morgan, undated

A5 Brief of evidence of Peter Charleton, undated

(a) Table showing the effect of share values on unimproved land value, undated

- A6** Brief of evidence of John Larmer, undated
(a) Document entitled 'Business Structure – Dairy Farming', undated
- A7** Brief of evidence of Ranald Gordon, undated
- A8** Brief of evidence of Adolf Stroombergen, undated
- A9** Brief of evidence of Robin Brockie, undated
- A10** Brief of evidence of Benjamin Paki, November 2001
- A11** Brief of evidence of Andrew Hampton, 5 November 2001
- A12** Brief of evidence of Dan Bolger, November 2001
- A13** Brief of evidence of Bill Sutton, November 2001
(a) 'Wai 790 Dairy Industry Reform Claim: Proposed Crown Response', POL(01)214, Cabinet Policy Committee paper, 23 August 2001
- A14** Brief of evidence of Lewis Evans, November 2001
(a) Lewis Evans, Graeme Guthrie, and Neil Quigley, 'The Effect on Economic Efficiency and Supplier Asset Valuations of the Structure of Dairy Co-operatives', report prepared by the New Zealand Institute for the Study of Competition and Regulation Incorporated for the Ministry of Agriculture and Forestry, 2 November 2001
(b) Curriculum vitae of Lewis Evans, October 2001
- A15** Brief of evidence of Donn Armstrong, November 2001
(a) Supplementary evidence of Donn Armstrong, 12 November 2001
- A16** Submission of Gail Young on behalf of the Jessie Wi Kingi Whanau Trust and the Waihi Hapu of Ngati Tamarongo, 26 October 2001
- A17** Outline of opening submissions of claimants, 12 November 2001
- A18** Submissions of Crown counsel, 13 November 2001
- A19** Submission of Rata Pue, undated
(a) Letter from Hapu o Taranaki to Waitangi Tribunal concerning relief sought, 10 November 2001

APP

A19—*continued*

(b) Document entitled 'Background Paper on the International Treaties', undated

A20 Transcript of closing submissions of claimant counsel, undated