

THE MOKAI SCHOOL REPORT

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WAI 789

WAITANGI TRIBUNAL REPORT 2000



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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LIST OF ABBREVIATIONS

app	appendix
BOT	board of trustees
CA	Court of Appeal
doc	document
EEO	equal employment opportunities
ERO	Education Review Office
HC	High Court
MOE	Ministry of Education
n	note
no	number
NZEI	New Zealand Education Institute
NZLR	<i>New Zealand Law Reports</i>
NZTPA	<i>New Zealand Town Planning Appeals</i>
p, pp	page, pages
para	paragraph
PC	Privy Council
ROD	record of documents
s, ss	section, sections (of an Act)
sec	section (of a book, report, etc)
TROTT	Te Reo o Te Tai Tokerau
v	and
Wai	Waitangi Tribunal claim



The Waitangi Tribunal
Wellington

The Honourable Dover Samuels
Minister of Maori Affairs
Parliament Buildings
Wellington

*Tē hurumi kau nei
Hoe taituha, tāi kī waho
Kī te whakangāoko i te motu nei.
Me hoki ra peā, kī te tuatahitanga
Kī te whānaketanga
Kī pihī kī te hiki o te rangi.
Kōmako te tangi he manu tui,
Tē tuiti, te tuiti,
Huia, tuia, tui tuia.
Tīhei Mouri Ora!*

E te Minita me tō rahi, ngā mihi

Nau mai, hāere atu rā ngā mihi o te rangi, o te papa whāroa, a te takiwa, ki a koutou te noho mai na i runga i tēna waka, whakahāere i te motu nei, urunga tomo ki te kai pupuri i te hoeroa.

Ko te tini mano, kua huri atu ki te wahangūtanga o te mate, kei te whatu manawa e pupuru ana inā, te ranga kei tua o pae maumahara mai uta, mai tai, kei ngā wahi katoa, hāere oti atu rā. Kāti mo aitua.

Ko te kaupapa e whai ake nei, kei te tautoko mātou i ngā whakapae a Te Whanau o Mokai arā, Ngati Te Kohera, Ngati Wairangi, Ngati Whaita, Ngati Haa, Ngati Moekino, Ngati Parekaawa me Ngati Tarakaiahi. Kahore i tika ngā ritenga whakahāere a te Karauna i te wā i aukatingia Te Kura o Mokai inā, ngā wahanga kihai i arotia ko to rātou Tino Rangatiratanga katahi, Te Taonga o Te Reo ka rua, me Te Matauranga Māori ka toru. Kei roto i te puku o te ripoata nei ngā whakamarama mo tēnei take.

Tēnei to mātou pātuki atu ki a koutou, te waka whakahāere i te motu nei, ki te wetewete i ngā here i runga i te Whanau o Mokai, ki a ō rite ai to rātou tū i tenei ao pēra i te Karauna, he ea ai, ki ngā tika whakahaere i raro i te Tiriti o Waitangi. Heoi ano, ko tēnei kaupapa kei roto i o koutou ringaringa otira, kei runga mātou i te tatari me te whakarongo.



We present to you our report on the claim made by Mohi Osborne and Te Aroha Adams on behalf of themselves and their children who were enrolled at Mokai

Primary School immediately before it was closed by the Minister of Education on 3 October 1999. They claimed they were prejudiced by breaches of the principles of the Treaty of Waitangi occasioned by inadequate consultation with the school community before the school's closure and by the closure itself. The claim was heard urgently by the Tribunal, with hearings in November 1999 and January 2000. We have completed our report with as much haste as is possible when careful consideration is also required.

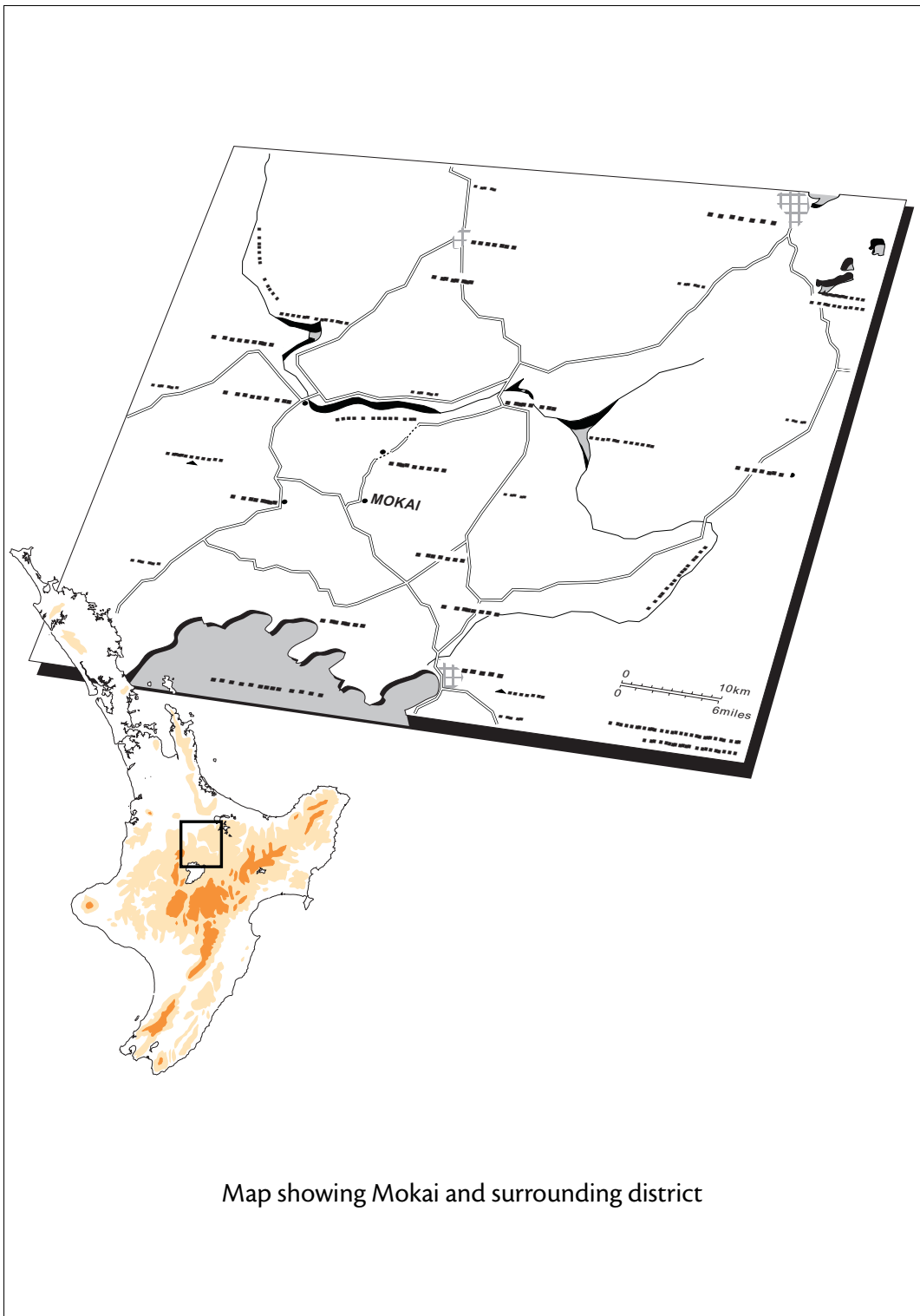
The claimants were supported by their people, who are joined by whakapapa links to the seven hapu of Mokai. They maintained that the school, which taught bilingually, made substantial progress in the last three years of its life towards meeting the Crown's requirements for quality education and the needs of Mokai children to be educated into, and in, their own community. Claimant witnesses were confident that, despite a range of difficulties, the last sole-charge principal and board of trustees of Mokai school, with abundant support from the wider community, were utilising te reo and matauranga Maori in the school's teaching in a manner that instilled in the students the self-confidence and pride that is essential to their educational success and their ability to thrive in the future within or outside Mokai. For this reason, the school was seen to be a critical means of preserving and strengthening the very identity of the Mokai people. Inevitably then, the tino rangatiratanga of Mokai, and its dependence on the acknowledged taonga of te reo and matauranga Maori, were central to the claim. It was said that the Minister of Education's closure of the school, and the process by which that was achieved, did not take sufficient account of Mokai tino rangatiratanga and the taonga of te reo and matauranga Maori that the Crown is obliged to protect.

The Crown's position was that the Minister's decision to close Mokai Primary School was reached after consideration of all relevant matters so that neither the process by which that decision was reached nor the fact of the school's closure was inconsistent with the Treaty's principles. This view was based on an interpretation of the ambit of the Crown's authority to govern (kawanatanga) that did not engage directly with the claimants' view that Mokai tino rangatiratanga is inextricably bound up with the taonga of Maori language and knowledge and that the Crown needed to give this matter due consideration when assessing the school's future. The Crown maintained that its assessment of the poor quality of education delivered at Mokai school, and of the school's inability to endure as a viable part of the national network of schools, was properly made according to the policies and practices of an education system that is committed to promoting quality education for Maori children by all reasonable means. The circumstances of Mokai school were such, however, that there were no reasonable alternatives to its closure.

Our analysis of the evidence and submissions presented in the claim leads to the conclusion that, despite the Crown's commitment to the goal of improving the education of Maori children, its closure of Mokai Primary School was not undertaken consistently with the principles of the Treaty of Waitangi. In brief, the 'good governance' that is required of the Crown, and that is demonstrated by its attention to protecting taonga and enhancing tino rangatiratanga by reasonable means, was not

evident in the chain of events that culminated in the school's closure. The nature of the prejudice this has caused the claimants is such that we recommend that Mokai Primary School be 'reopened' with more intensive support from the Crown than was available in the past. We also recommend that the Crown clarify its policies and processes for intervening (by closure or other means) in the governance of schools in difficulty.

Although the claim concerned one small primary school that was serving a rural Maori community, we consider that the Treaty arguments and evidence submitted to us (outlined in some detail in the first three chapters of this report), and our analysis of them (in chapters 1 and 4), raise larger questions about the responsiveness to Maori interests of contemporary Crown education policies. We do not purport to have the answers as to how the rights and responsibilities of the Crown and Maori may be balanced consistently with Treaty principles across the wide range of issues embraced by the education sphere. We believe, however, that this report's account of the parties' evidence and opinions, together with our analysis of their situation and comments on some of the larger questions, offers insights to matters that would benefit from further examination in light of the Treaty's principles. To that end, we have recommended that the Ministry of Education, in consultation with Maori communities, explore additional strategies to increase the Ministry's, and schools', responsiveness to the educational needs of Maori children.



CHAPTER 1

THE CLAIM AND THE PRINCIPLES OF THE TREATY OF WAITANGI

1.1 INTRODUCTION

This chapter contains:

- ▶ brief summaries of the claim and the Crown's response;
- ▶ an outline of the parties' Treaty arguments; and
- ▶ a discussion of the principles of the Treaty of Waitangi that the Tribunal considers to be relevant to the claim.

This information is presented in the opening chapter to assist readers to consider the evidence (outlined in some detail in chapters 2 and 3) within the framework provided by the Treaty principles. Chapter 4 contains both the Tribunal's assessment of the parties' evidence in light of those principles and our recommendations.

1.2 SUMMARY OF THE CLAIM

The claim, which was brought by Mohi Moses Huirama Osborne and Te Aroha Emma Adams, concerns the closure, on 3 October 1999, of a sole-charge primary school at Mokai. Both claimants are sole parents of children who attended the school before its closure. They were also members of the school's last board of trustees. (The amended statement of claim is set out in appendix 1.)

From 1994, the school provided a bilingual education to its pupils. At the time of the school's closure, and for an unknown period before that, all the pupils at the school were Maori. Since 1994, enrolment figures have been mostly in the range of 10 to 18 students, with a high of 24 and a low of four. In the three school terms of 1999 before its closure, enrolments at Mokai Primary School ranged from six to nine students. In 1997 and 1998, enrolments were consistently higher, ranging from nine to 24 students.

The Mokai village, matua marae (Pakaketaiari) and the school are situated some 30 kilometres from Taupo, in the vicinity of Atiamuri. The larger area of the seven hapu of Mokai is within the boundaries of both Ngati Tuwharetoa and Ngati Raukawa. The hapu are Ngati Te Kohera, Ngati Wairangi, Ngati Whaita, Ngati Haa, Ngati Moekino, Ngati Parekaawa, and Ngati Tarakaiahi.

Formal notice of the ministerial decision to close Mokai Primary School was published on 1 July 1999. The claim was submitted to the Waitangi Tribunal at the end of that month. At the same time, proceedings were filed in the High Court in an effort to obtain rapid judicial relief from the closure decision. Those proceedings, heard on 1 October 1999, were unsuccessful. The claimants then pursued their application to the Waitangi Tribunal for an urgent hearing of this claim. That application, heard on 21 October 1999, was granted.

The Tribunal heard claimant evidence on 23, 24, and 25 November 1999 and Crown evidence and closing submissions from counsel on 13, 14, and 17 January 2000. The entire hearing took place at Pakaketiairi Marae at Mokai. Further information about the hearing is supplied in appendix II.

The claimants contested the reasons for the ministerial decision to close Mokai Primary School. That decision was based in large part on seven unfavourable reviews of the school conducted by the Education Review Office (ERO) between 1991 and mid-1998. The claimants also contested the adequacy of the Ministry of Education's consultation with the school community during the nearly four-year period, commencing in November 1995, that was spanned by the closure process. They contended that the Crown did not give sufficient consideration to the school's importance to the children and the wider community of Mokai, nor to the efforts made by the school since late 1996 to improve the quality of education it was providing.

Those matters, it was said, are vital to the very identity of the people of Mokai and involve the taonga of te reo and matauranga Maori (Maori language and knowledge), which are protected by the Treaty of Waitangi. Had the Crown given due consideration to its Treaty responsibilities, the claimants argued, the Minister and Ministry of Education would have explored options, other than closure, that could have preserved and strengthened the unique and valuable opportunity that the school provided for Mokai children to be educated in their own community. This was not done, the claimants contended, with the result that the decision to close the school, and the consultation process that preceded it, breached the Crown's responsibilities under the Treaty of Waitangi.

1.3 SUMMARY OF THE CROWN'S RESPONSE

The Crown responded that the policy framework and its manner of implementing the Education Act 1989, which governs the operations of State schools, are consistent with its Treaty rights and responsibilities. In particular, the national system by which ERO measures schools' performance provides reliable assessments of the quality of education delivered by any school, including schools that teach bilingually.

Further, the Crown's governance role requires it to assess the viability of a particular school as part of the national network of schools. Therefore, when a number of factors, including poor educational quality, call into question a school's viability and there are alternative schools available to the students, the Crown is justified in taking the steps set out in the Education Act that can result in the school's

closure. The consultation that is required as part of that process, coupled with the Crown's awareness of its Treaty responsibilities, means that if the Education Act's steps are followed, as they were in relation to Mokai Primary School, no breach of the Crown's Treaty duties can be established.

1.4 THE PARTIES' TREATY ARGUMENTS

1.4.1 Kawanatanga: the Crown's authority to govern

(1) The claimants' position

The claimants' position is that the Crown's right of governance is qualified by the responsibilities that flow from the Treaty partnership, yet the Crown's dealings with the Mokai school community did not take proper account of those further responsibilities. It is notable that the claimants accepted that the exercise of the Crown's authority to govern could lead to a decision to close Mokai Primary School. However, it was said, such a decision would be within the Crown's authority only if it were made with due attention to the totality of the Treaty's meaning:

The claimants are not saying that the Crown could never close Mokai Primary School. The claimants have to accept that closure was an exercise of governance or kawanatanga which the Crown was entitled to take but only if in doing so the Crown gave due recognition [to] and considered its Treaty partner's guarantees, rights and the principles of the Treaty.¹

Accordingly, the claimants' argument about the ambit of the Crown's right of governance in relation to Mokai Primary School depends on their further arguments about the protection that is afforded by those Treaty principles that elaborate the guarantee to Maori, recorded in article 2 of the Treaty, of 'tino rangatiratanga o o ratou taonga katoa'.

(2) The Crown's position

The Crown's position is that, both generally and in relation to Mokai Primary School, its policies and conduct under the Education Act 1989 represent a legitimate exercise of kawanatanga. It was emphasised that the Crown's right of governance cannot be made subject to unreasonable restrictions as a result of the interpretation of other Treaty principles. In particular, it was said, the other principles are not intended to shackle the responsibility of a duly elected government to govern in the interests of all New Zealanders.² Instead, as the Judicial Committee of the Privy Council has stated, the relationship envisaged by the Treaty:

should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required

1. Document A29, para 3.20

2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 665–666 (the 'Lands case') (cited in doc A30, para 15)

in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances.³

For the purposes of the claim, Crown counsel summarised the essence of the Treaty's agreement in terms that emphasised the grant of British citizenship to Maori and the Crown's promise to protect taonga:

Article 1 of the Treaty expressed the cession of sovereignty. It gave to the Crown absolutely the rights of 'complete government', or kawanatanga, in exchange for the grant of British citizenship (Article 3) and the protection of the taonga of Maori (Article 2). Article 1 gave to the Crown 'forever' the authority to govern. As Richardson J stated in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (the Lands case) at p 682, adopting the words of Sir Hugh Kawharu:

'Maori acceptance of the first article in the Treaty gave the Crown sufficient authority to set about making and administering laws and regulations and eventually to establish constitutional government in New Zealand.'⁴

The broad implications for State schools of the Crown's view of its kawanatanga were then described in this way:

the Ministry of Education must exercise its responsibilities towards all State schools. It must ensure that all schools are providing education of the appropriate quality in accordance with the statutory requirements, and that in each case there is justification for the expenditure of limited government resources.⁵

The Crown interpreted the claimants' Treaty arguments to mean that all Maori have the right to insist upon a certain type of education wherever they might be located throughout the country. One consequence of this would be that the Crown could never exercise its governance in such a way as to close Mokai school against the wishes of the community, even if there were serious concerns about the quality of education being delivered by the school and about the school's viability. Despite claimant counsel's express denial that this was the claimants' position (quoted in section 1.4.1(1)), Crown counsel said in her closing submissions that the claimants:

assert that Article 2 of the Treaty supports an argument that a community such as that at Mokai has an absolute right (by virtue of the Treaty and not for any educational or social policy reasons) to receive a State education which accommodates that community's interests in the taonga of the Maori language and traditional knowledge and customs, disregarding all other considerations. They further assert that that right extends to delivery of that education in the context of the particular identity and place of that community.⁶

3. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC) (the 'Broadcasting Assets case') (cited in doc A30, para 16)

4. Document A30, para 12

5. Ibid, para 21

6. Ibid, para 10

Before Crown counsel read that passage from her submissions, she acknowledged that claimant counsel had expressly denied that the claimants were asserting ‘an absolute right for Maori to have an education at the place of their choice’. In response, she stated, ‘it is difficult for the Crown to see that the case for Mokai is inherently different from any other place where there may be a Maori community’.⁷

1.4.2 The principle of partnership

(1) *The claimants’ position*

Claimant counsel summarised the Treaty principle of partnership as requiring:

the Treaty partners to act reasonably and with the utmost good faith towards one another. The parties owe each other co-operation and in cases where there are Treaty implications a responsibility to make informed decisions which will require some consultation.⁸

It was plain that the claimants regarded the partnership principle as providing the relevant standard for assessing the sufficiency of the consultation undertaken by the Ministry of Education in the school closure process. As well, this principle underpinned the claimants’ argument that, by closing the school, the Crown gave insufficient attention to the importance of Maori language and knowledge to Mokai identity and autonomy and so failed to protect taonga. In his closing submissions, claimant counsel referred to the education quality and school viability issues that were considered by the Minister and asked:

where was the consideration by the Crown of the effect of closure upon the autonomy of its Treaty partner? The Crown possessed knowledge of the importance of this school as a focal point for this community and the close links between the school and marae. The Crown was possessed of knowledge that the school had a focus on bilingual education and was teaching te reo Maori. The Crown was possessed of knowledge that the school placed emphasis on local history, local heritage and local tikanga.

... Nowhere is there evidence that these factors were considered by the Crown.⁹

By relying on the Treaty principle of partnership, the claimants made plain their view that the school community is a Maori community exercising tino rangatiratanga that can expect the Crown, in the exercise of its kawanatanga, to take reasonable steps to respect and protect its interests. However, throughout the claimants’ submissions and evidence, there were few express references to the tino rangatiratanga of Mokai. Instead, claimant counsel and most witnesses described the values and relationships that unite the Mokai people as ‘the Mokai identity and autonomy’ or, more emotively, their ‘Mokaitanga’. It is the Tribunal’s understanding that this terminology was preferred for the very reason that it draws attention to the particular community involved in the claim. Occasionally, claimant counsel made it explicit that the tino

7. Second hearing, tape 13A

8. Document A29, para 3.38 (citing the Lands case)

9. Ibid, paras 3.22–3.23

rangatiratanga of the Mokai hapu is central to the claim. For example, in closing submissions, he stated:

If the Crown's case is that the appointment of a Commissioner would have impacted upon the tino rangatiratanga of Mokai where does that then leave the decision to close [the school]? Closure in that sense completely removes the tino rangatiratanga of the Mokai community, which it is submitted the Treaty principles do not permit.¹⁰

The claimants' accounts of Mokai tino rangatiratanga are returned to in connection with their arguments about the Treaty principle of active protection of taonga. The point of note for present purposes is that the claimants' reliance on the Treaty principle of partnership assumes a relationship between the Crown and the Mokai community, in their interactions concerning Mokai Primary School, in which not only the Crown's kawanatanga but also the community's tino rangatiratanga is relevant.

(2) The Crown's position

The Crown's response did not acknowledge that the Treaty principle of partnership is directly relevant to the claim. Instead, Crown counsel submitted that the consultation required by section 154 of the Education Act 1989 (as part of the school closure process) depends on the same basic features as are required by that Treaty principle, and that these were complied with.¹¹ More generally, the Crown submitted that the principles of the Treaty 'colour the interpretation' of the Education Act.¹² The High Court decision in *Barton-Prescott v Director-General of Social Welfare* was relied on in this regard – in particular, a passage from the judgment of Justices Gallen and Goddard where their Honours expressed the view that 'all Acts dealing with the status, future and control of children are to be interpreted' in this way.¹³

1.4.3 The Crown's duty actively to protect taonga

(1) The claimants' position

The claimants acknowledged 'the Crown's commitment to Maori education and in particular te reo Maori and matauranga Maori' but claimed that, by closing Mokai Primary School, the Crown failed to protect those taonga.¹⁴ It was made very plain that the claimants' understanding of the interdependent relationship between the people of Mokai and the taonga of te reo and matauranga Maori is critical to this claim. Claimant counsel, using the claimants' terminology, explained the relationship in these words:

What the claimants are asserting is that they have a distinct local Maori identity and autonomy, that is, their Mokaitanga. Mokaitanga is defined by its history, its tikanga, its

10. Document A29, para 3.53

11. Document A30, para 130

12. Ibid, para 63

13. *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179, 184

14. Document A29, para 4.6

whakapapa links, its marae. Interwoven through the Mokai identity is te reo Maori and matauranga Maori, central components not only of Maori culture but also of all local Maori identities.¹⁵

The school, it was said, played a vital role in preserving and strengthening the Mokai identity, 'including all its various components in particular its tikanga, matauranga and reo particular to this area'.¹⁶ Therefore, it was submitted, when the Crown considered closing the school, it needed to take into account far more than the fact that the school was teaching bilingually:

The point is not solely confined to the teaching in Maori. It is that Maori was being taught at Mokai Primary School together with local Maori tikanga and matauranga which assists this community in the retention of their local identity and autonomy, their Mokaitanga.¹⁷

While claimant counsel did not expressly invoke the Treaty principle of tino rangatiratanga, claimant witnesses' accounts showed that Mokai tino rangatiratanga is central to their understanding that the Crown's closure of the school was in breach of Treaty principles. For example, Mere Wall, the last chairperson of the school board, gave this overview of the claim:

This isn't really just about education. This is about who we are. Our identity. This is about our whole being, our wairua, our tinana, our tikanga, our kawa. . . . And it is time for us to stand up, as we are doing, and reclaim that. . . . It comes from an inbuiltness to strive and to fight for who we are. You take away a man's identity, he has no face. You move these tamariki out of Mokai, they have no face. They are faceless out in the world. You keep them here, you give them solid roots and solid foundations, as they go out to the world and they can face them with a face. So that when people ask them, 'Ko wai koe?' 'Ae ko au,' and [they] say who they are with pride and with dignity.¹⁸

Koti Te Hiko explained the claim in this way:

I believe that if we are to retain the ahi ka or Mokaitanga then we need to educate our tamariki here in Mokai. Te ahi ka is within us when we are born but it must be nurtured within Mokai for it to survive. As the future kaumatua and kuia of Mokai the tamariki must walk alongside their parents and grandparents to learn the ways and responsibilities of the people. With the marae being so close there is a natural flow and interaction between what we sometimes call the triangle, this being the marae, the Mokai village and the school.¹⁹

In support of the claimants' understanding that the principles of the Treaty of Waitangi required these matters to be considered by the Crown before it could close the school, claimant counsel referred to the evidence given by the Ministry of

15. Ibid, para 3.34

16. Ibid, para 3.18

17. Ibid, para 3.28

18. First hearing, tape 9A

19. Document A10, para 5

Education's group manager Maori, Rawiri Brell. When explaining the Ministry's vision for improving the quality of education delivered to Maori children, Mr Brell stated:

Under this kaupapa, the formal and informal processes of the marae and the integration of this with education, are critical to the formal process of education. The marae can exist and has done so without the education system, but the programme of education from early childhood to tertiary is enhanced if integrated with the dynamics of the marae. Relying simply on the education sector to achieve this is not as effective as the integration of all parts of the education sector into the life of the marae.²⁰

Mr Brell then said that it is not the sole responsibility of a school to provide te reo Maori or knowledge in tikanga Maori. Rather, there is a point at which 'the responsibility to provide intimate local tikanga must be given over to the community'.²¹ Expressly accepting the validity of this point, the claimants' position was summarised as being that 'in this particular setting, the school was together with the marae' serving the objectives referred to by Mr Brell; namely, of integrating the formal processes of education with the processes of the marae.²²

As a result, for the claimants, the matter at the heart of the claim is whether the Crown, by its decision to close Mokai Primary School and the process by which that was achieved, actively protected 'local Maori identity/autonomy, te reo Maori and matauranga Maori'.²³ It was submitted that the Crown's approach was 'narrow' for not considering the interdependence of these fundamental matters.²⁴

(2) The Crown's position

The Crown accepts that Maori language and culture are taonga of Maori and that the State education system has a role to play in carrying out its duty actively to protect those taonga. Its position is that the Crown's duty is fulfilled by the provision of a statutory framework under which the taonga may be protected and by the existing and developing strategies by which it supports communities' initiatives to implement the protection in ways that suit them.²⁵

Crown witnesses were far from complacent about the education system's present ability to close the gap between the attainments of Maori and non-Maori pupils. In particular, Mr Brell acknowledged that there is a long way to travel to achieve the goal of an education system that provides 'a high quality of education to Maori'. That education, he elaborated, would equip 'all young people with the skills, knowledge and confidence to live successful lives' and would ensure that children 'are confident in their own identity, culture and language'.²⁶

Crown counsel stated in closing submissions:

20. Document A20, para 30

21. Ibid, para 31

22. Document A29, para 3.17

23. Ibid, para 3.13

24. Ibid, para 3.24

25. Document A30, paras 23, 24

26. Document A20, para 19

the Crown has . . . identified many areas for improvement in the delivery of education to Maori. It has acknowledged the discrepancies in educational achievement between Maori and non-Maori students, and has taken significant initiatives for overcoming those discrepancies. As Rawiri Brell's model suggests, the answer lies to a significant extent in ensuring that Maori students obtain an education characterised by the high quality of its programmes in the curriculum as a whole, and by the application of those standards to the delivery of education in te reo Maori and tikanga.²⁷

Despite the claimants' emphasis on the interdependence of the matters, the Crown's submissions did not acknowledge or address the relevance of the Mokai community's tino rangatiratanga to the Crown's duty to protect the taonga of Maori language and knowledge. Instead, when defending the Minister's knowledge of the effect that the closure of Mokai school would have on the community, Crown counsel stated:

[claimant] counsel did not indicate what considerations are specifically regarded as relevant for the community, as distinct from those relevant to the children and their whanau. In this context, it is important to note that in the field of primary education ultimately it is the best interests of the children that must be given priority. Therefore, consideration was given to the distance the children could have to travel to attend the alternative schools and of any costs to the whanau for that travel.²⁸

1.4.4 Article 3: the rights of British citizenship

The claimants did not rely on article 3 of the Treaty at all. The Crown, however, submitted that, in modern-day terms, article 3 guarantees Maori 'equality of access to the benefits, rights and privileges of all citizens'.²⁹ That State primary education is regarded by the Crown as one such right is apparent from counsel's next statements, which summarise the tenor of the evidence given by several Crown witnesses:

All citizens are entitled to a quality, state-funded primary education. However, equality of education does not mean that all students must receive precisely the same education. The State education system is well equipped to accommodate Maori language and culture within the framework of curriculum delivery and to deliver that education.

In addition, total immersion education and bilingual teaching are expressly supported: the first through the provisions for Kura Kaupapa Maori education (s 155 of the Act); the second through initiatives such as Maori Language Resourcing, the provision of curriculum and teaching materials in Maori language, and dedicated training for teachers working in the sphere of Maori education.³⁰

27. Document A30, para 66

28. Ibid, para 44 (as amended orally at hearing)

29. Ibid, para 46

30. Ibid, paras 47–48 (as amended orally at hearing)

1.5 THE TREATY PRINCIPLES RELEVANT TO THE CLAIM

1.5.1 Introduction

The contrast between the claimants' and Crown's positions signals the existence of fundamental differences in their understandings of the Treaty principles. We consider that the source of these differences is the parties' quite separate understandings of the relevance to the claim of article 2 of the Treaty of Waitangi, by which the Crown promised Maori tino rangatiratanga o o ratou taonga katoa as part of the exchange for the grant of kawanatanga.

Stated baldly, the claimants' view is that the Crown has overreached the limits of its kawanatanga by an attitude and actions that have failed to recognise the interdependence of Mokai tino rangatiratanga and the taonga of te reo and matauranga Maori. The Crown's view is that its kawanatanga justifies its protection of the taonga of Maori language and knowledge by means that do not pay particular attention to the Mokai community's assertions of a unique identity and autonomy. From the Tribunal's perspective, the result of the fundamental difference in the parties' approaches to the Treaty of Waitangi meant that, despite the care with which they assembled and presented their evidence, they 'talked past each other' during the hearing to a significant degree.

Our own analysis of the relevant Treaty principles has been assisted by the statements of the courts and the Waitangi Tribunal in the wide range of situations in which the Treaty has now been discussed and applied. In particular, we have paid close attention to the Tribunal's 1998 report on the claim by Te Whanau o Waipareira because it provides an in-depth account of the matters on which there is a lack of accord between the parties to this claim, most particularly the nature of tino rangatiratanga and how the relationship between the Crown and Maori is to be approached in modern times.³¹ (The text of the Treaty of Waitangi, in English and Maori, is set out in appendix III.)

1.5.2 Kawanatanga

We observe first that the meaning of the Treaty principle of kawanatanga cannot be understood independently of the principles that, together with the principle of kawanatanga, elaborate the spirit and nature of the Treaty relationship. In shorthand form, the effect of the other Treaty principles on the Crown's right of governance may be said to require the Crown to exercise 'quality kawanatanga' or, more familiarly, 'good governance', where the meaning of 'quality' and 'good' is determined by the consistency of the Crown's governance with the entirety of the Treaty's principles.

1.5.3 Tino rangatiratanga

The essence of tino rangatiratanga is found in the reciprocal relationships that exist, between a group's leaders and supporters, for the purpose of maximising the group's

31. Waitangi Tribunal, *Te Whanau o Waipareira Report*, Wellington, GP Publications, 1998

interests. As was explained by the Tribunal in its report on the claim by Te Whanau o Waipareira, tino rangatiratanga describes a value that is basic to the Maori way of life and permeates the essence of being Maori:

In contrast to the way it is often interpreted today, to mean autonomy, sovereignty, authority, or control – that is, as the exercise of rights – . . . rangatiratanga also concerns responsibilities, duties, obligations, service, and accountability – the other side of the same coin. Further, both leaders and supporters are equally important in the exercise of rangatiratanga – leaders cannot act decisively, creatively, boldly – effectively – without the respect, loyalty, and trust of their community. Both leaders and supporters owe each other reciprocal rights and duties.

Rangatiratanga, then, is grounded in reciprocity: a reciprocity between rangatira and their community. . . . Their leadership focuses not on self-interest but on the survival of the community at a level of maximum advantage. . . . A relationship of rangatiratanga between leaders and members is how a Maori community defines itself; it gives a group a distinctly Maori character; it offers members a group identity and rights.³²

We agree with and adopt that analysis, which, we consider, reveals that the ‘Mokai identity/autonomy’ or ‘Mokaitanga’ referred to and explained by the claimants is another way of referring to their tino rangatiratanga. As will be seen in chapter 2, the claimants’ evidence was directed at demonstrating that the survival of the Mokai community depends on its children being ‘educated into’ the community and that this is a matter of such importance that the State education system should, wherever reasonably possible, be a vehicle for that learning. That is why claimant evidence did not separate the welfare of the children from the welfare of the community, nor the role of the school from the role of Mokai marae and village, which are also critical elements in the community’s survival. We agree that the education of Maori children into their own community is a responsibility of tino rangatiratanga, properly understood. We also recognise that the relationships and values of tino rangatiratanga are evident in the Mokai community.

A further aim of the claimant evidence was to show that te reo and matauranga Maori are the primary means by which the people of Mokai know and identify themselves. Quite simply, for the people of Mokai – as for the people of other traditionally organised Maori communities – te reo and matauranga are concerned primarily with the resources – human, material, and spiritual – of their own past, present, and future. Accordingly, any suggestion that the primary value of those taonga can be found elsewhere effectively denies Mokai people their own identity.

This is why, when Mrs Wall spoke of giving the children of Mokai a face, we understood her to mean that the children’s confidence to manage their lives is best developed within their own community through learning about and taking pride in who they are. When Mr Te Hiko spoke of preserving te ahi ka of Mokai, we understood him to mean that the source of Mokai people’s belonging, which is

32. Ibid, pp 25–26

founded on whakapapa connections that are maintained over time, can be conveyed only by those living on their ancestral land and through their own knowledge of the world. That knowledge encompasses not only contemporary knowledge but also matauranga tupuna, the understanding and application of tikanga, history, creativity, and whakapapa that is specific to particular whare wananga, hapu, and rohe.

That, in turn, is part of why we understood claimant witnesses to be saying that their use of the Maori language clearly distinguishes who they are and to whom they belong. Indeed, Tuhuriwai Rangikataua said it directly when he recounted how he had learned the Maori language as an adult while living away from Mokai and was told by his kaumatua upon his return that his dialect was not that of his own people (see sec 2.3). Known as te mita – the life essence of the language, which serves as an identity marker – the local specificity of language derives from the differences between the human, material, and spiritual worlds of different Maori groups and is, in turn, an expression of each group's identity.

This understanding of tino rangatiratanga, with its inevitable connections with the taonga of te reo and matauranga Maori, does not appear to be shared by the Crown. Throughout the hearing, Crown witnesses and counsel did not acknowledge the tino rangatiratanga of Mokai and referred to the taonga in terms that did not emphasise their 'local dimension'. Crown counsel acknowledged the claimant's view that 'local knowledge and customs' and 'the community's interests in the taonga' are vital.³³ However, counsel's choice of language served only to record the Crown's awareness of the claimants' understanding, not to endorse it. Further, the Ministry of Education's explanation of matauranga Maori appears to reveal the view that it is part of the identity of iwi, rather than of hapu:

Matauranga Maori means Maori systems of knowledge and refer to the way in which Maori view things in a Maori world. *Matauranga Maori can vary from iwi to iwi*. It is generally accepted that teaching through Maori requires a foundation of matauranga Maori. The Ministry is aware of schools that are successfully implementing programmes using a foundation of matauranga Maori, eg Kura Kaupapa. [Emphasis added.]³⁴

We are confident that our understanding is in accord with the Treaty principle of tino rangatiratanga. Its essence, as stated in the report on the Waipareira claim, is that Maori communities are entitled to identify themselves, and to manage their affairs, in accordance with Maori custom and values.³⁵ In the words of that Tribunal, the principle is:

simply that Maori are guaranteed control of their own tikanga, including their social and political institutions and processes and, to the extent practicable and reasonable, they should fix their own policy and manage their own programmes.³⁶

33. Document A30, para 10

34. Document A25(1), p 23

35. *Te Whanau o Waipareira Report*, p 15

36. *Ibid*, p 26

We endorse that expression of the tino rangatiratanga principle and also agree with the Waipareira Tribunal's analysis of its consistency with the preamble in the Maori text of the Treaty and with historical opinion of Maori expectations at the time that the Treaty was signed.³⁷ Importantly, that Tribunal concluded that article 2 of the Treaty does not prescribe a finite list of objects over which the tino rangatiratanga of Maori groups would be respected but reflects an intention that it would generally be maintained:

We would not therefore read article 2 of the Treaty as circumscribing the operation of rangatiratanga but rather as reflective of it, and of the pervasiveness of rangatiratanga as a cultural norm. The principle now falls to be determined according to the new circumstances that apply in the late twentieth century.³⁸

In the present claim, the Crown suggested, by its brief submission on the modern-day meaning of article 3 of the Treaty (see sec 1.4.4), that State education is not a proper subject of the tino rangatiratanga of Maori groups, or, at least, of groups like Mokai. We note that the Crown's evidence of the existence and aims of iwi-based schooling improvement initiatives may demonstrate its recognition of iwi tino rangatiratanga and so of the need to balance Crown and iwi rights and responsibilities in the State education of Maori children. Whether or not that is so, the Crown's suggestion that State education is purely an article 3 'equal rights' matter was not given heavy emphasis in the claim, perhaps because the analogous argument (in relation to social and welfare services) was firmly rejected by the Waipareira Tribunal.

We also reject such an argument. Our recognition of the tino rangatiratanga of the Mokai community leads to the conclusion that the Treaty principle of tino rangatiratanga is relevant to the interactions between the Crown and the Mokai community over the State education of Mokai children. No other view is possible in light of the fact that those children are the recipients of State education and, as is acknowledged by the Crown, State education has an important role to play in the fulfilment of the Crown's duty actively to protect the taonga of Maori language and knowledge.

1.5.4 Partnership

The question raised by the claim is how Mokai tino rangatiratanga should be respected by the Crown's exercise of governance in the arena of State education. In seeking to answer it, we have found further guidance in the Waipareira Tribunal's report.

The Tribunal in that claim approached the comparable question before it by observing that the perception of a partnership relationship between Maori and the Crown arises from historical evidence of Maori and Pakeha expectations at the time of the signing of the Treaty as well as from the Treaty's exchange of 'the gift of

^{37.} Ibid

^{38.} Ibid, p 27

kawanatanga’ for ‘protection and the guarantee of rangatiratanga in all its forms’.³⁹ Noting that a partnership is a relationship where one party is not subordinate to the other but where each must respect the other’s status and authority in all walks of life, the Tribunal then emphasised that the partnership established by the Treaty is ‘a relationship between the Crown and Maori generally’. This led it to criticise and reject what it saw as a tendency to regard the Treaty partnership in a narrower, more contractual, way – as if it describes ‘a relationship between the Crown and particular classes of Maori persons’. Explaining that this line of thinking does not arise from the courts’ or the Waitangi Tribunal’s interpretations of the Treaty, the Tribunal reconfirmed that the primary purpose of the partnership concept is to describe the way in which Maori and the Crown should relate to each other.⁴⁰

In exploring further how Maori and the Crown should relate in the multitude of situations in which they are interested in modern times, the Waipareira Tribunal considered very closely the nature of the protection that is promised by the Crown to Maori by the Treaty. It concluded that the protection embraces all of the things, including tino rangatiratanga, that are important to Maori life. We agree with this conclusion, and we cannot improve on that Tribunal’s explanation:

As was noted by the Tribunal in the *Muriwhenua Land Report*, it was stated when the Treaty was signed, in response to Maori questioning, that the Maori custom would be respected and protected. In article 3, the Crown’s protection applies in respect of ‘nga tikanga katoa’ – all customs and values – just as it did to those of British subjects; and the term ‘taonga’ in article 2 encompasses all those things which Maori consider important to their way of life, which rangatiratanga so clearly is. For so long as there is adherence to such fundamental values as rangatiratanga entails, Maori custom survives, although in a number of new institutions and forms, and is guaranteed Crown protection.⁴¹

1.5.5 Active protection of taonga

In the present claim, the Crown acknowledged that Maori language and knowledge are taonga of Maori and that the State education system has a role to play in discharging the Crown’s responsibility to protect them. Our understanding of those taonga has already been outlined (see sec 1.5.3). The result of our discussion is that the Treaty principles of tino rangatiratanga and active protection of taonga provide the foundation of the partnership between the Crown and Maori. Accordingly, they must always guide the Crown’s efforts to find a reasonable balance between its kawanatanga and the rights and responsibilities of Maori communities in each of the many modern situations in which Maori interests are involved.

What is reasonable will, of course, depend on all of the prevailing circumstances. Chapters 2 and 3 of this report present in some detail the claimants’ and the Crown’s views of the circumstances involved in their dealings over Mokai Primary School. It is

39. *Te Whanau o Waipareira Report*, p 27

40. *Ibid*, pp 28–29

41. *Ibid*, p 26

the Tribunal's task to assess, from the parties' evidence and within the framework provided by the Treaty principles, whether a reasonable balance was maintained in their dealings so that the Crown can rightly claim to have exercised 'good governance' in all the circumstances. Chapter 4 of this report contains our assessment of those matters.

Of particular relevance to the balancing task, we consider, is this passage from the 1990 Tribunal report on the radio frequencies claim:

The protection of tino rangatiratanga means that iwi and hapu must be able to express their autonomy in the maintenance and development of their language and their culture. This inevitably involves taking more time over the consultation process, but this may provide a refreshing experience and an opportunity to get it right the first time, in pragmatic terms.⁴²

Finally, we note that the Waipareira Tribunal observed that an important question in that claim, arising from the principle of protection, was whether the Crown policies and practices in issue there 'enhance the solidarity and integrity of Maori communities and empower the people, or whether they divide and rule them'.⁴³

42. Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies*, Wellington, Brooker and Friend Ltd, 1990, p 44

43. *Tē Whanau o Waipareira Report*, p 215

CHAPTER 2

THE CLAIM

*Na roto i te purapura, te maramatanga i tipu mai i Mokai.
The knowledge of the light was born from enlightenment here in Mokai.¹*

2.1 INTRODUCTION

The claimants alleged that, by closing Mokai Primary School, the Crown failed to protect taonga of the seven hapu of Mokai and so did not meet its Treaty responsibilities. The school, it was said, was a significant vehicle for the retention and transmission of 'local identity and autonomy – Mokaitanga'.

One aim of the claimants' evidence was to demonstrate how the school fostered Mokai tino rangatiratanga. Claimant witnesses approached this by:

- ▶ explaining the standing of the school in the Mokai community (see sec 2.2);
- ▶ describing the kaupapa of the school – how it aimed to meet the requirements of the national primary school curriculum while simultaneously imparting te reo and matauranga Maori specific to Mokai (see sec 2.3); and
- ▶ emphasising the significance of the school's kaupapa to the Mokai community and the potential consequences of closing the school (see sec 2.4).

The claimants' challenge to the sufficiency of the Crown's consideration of options other than closure of the school was another important part of the claim. They contended that the school's unique value to Mokai children and the wider community, and the progress made by the school since late 1996, should have caused the Crown to consider options that would preserve and strengthen the delivery of education in Mokai.

Connected with that was the claimants' challenge to the quality of the consultation undertaken by the Ministry of Education during the process that culminated in the Minister's decision to close the school. The consultation, it was said, did not afford the school community sufficient opportunity to convey its views on the importance of the school and did not generate any discussion of alternatives to closure.

The claimants' evidence of those matters was directed at elaborating:

- ▶ the socio-economic, staffing, and resourcing problems faced by the school and how they were being addressed (see sec 2.5);
- ▶ the wider educational context for understanding those problems (see sec 2.6);

1. Koti Te Hiko, first hearing, tape 3B

- ▶ the progress made during the last three years in meeting the Crown's requirements for quality education delivery (see sec 2.7);
- ▶ the availability of alternatives to closing the school that the Crown could have invoked, or the school community could have initiated had it known about them (see sec 2.8); and
- ▶ the inadequacies of the consultation that was undertaken with the school community during the closure process (see sec 2.9).

Finally, this chapter contains a summary of two matters raised in the claimants' statement of claim that were modified during the course of the hearing. They relate to:

- ▶ a recommendation concerning the land on which the school is situated (see sec 2.10); and
- ▶ a claim based on the fact that the Education Act 1989 does not contain a 'Treaty clause' requiring the Act to be implemented consistently with the principles of the Treaty of Waitangi (see sec 2.11).

2.2 THE SCHOOL'S PLACE IN THE PAST, PRESENT, AND FUTURE OF MOKAI

Claimant counsel summarised the evidence of the important place of the school in the identity and autonomy of Mokai under the following heads:

- ▶ the land on which the school is situated is ancestral Maori land;
- ▶ the community is predominantly Maori;
- ▶ the children who were attending the school had whakapapa links to the seven hapu of the Mokai area;
- ▶ there are close links between the school and the matua marae of the area, Pakaketaiari;
- ▶ local tikanga was a component of the school's teaching; and
- ▶ the school had a bilingual focus and was teaching te reo Maori.²

In elaborating those matters, claimant witnesses spoke of the 'Mokai triangle' – a concept that captures their understanding of the interdependent relationship of the Mokai marae, village, and school. Their evidence touched on the historical significance of the school in the life of the once much larger community, of Maori and Pakeha, that was resident in the area. Mainly, however, claimant witnesses focused on the school's unique capacity to educate Mokai children in their own community, in close contact with the marae and their families, and thereby strengthen all three parts of the triangle and, with that, the identity of Mokai.

One kaumatua, Tuhuriwai Rangikataua, portrayed the three components of the triangle as a unity, observing that in the community nothing happened at the marae without happening at the school and vice versa.³ Mohi Osborne also considered the village, marae, and school to be a single entity.⁴ Jocelyn Waimata Kingi described the school and the marae at Mokai as an 'extension for us as Maori people'.⁵

2. Document A29, para 3.13

3. Document A9; tape 2A; doc A9, para 15

4. Document A15; tape 2A

5. Document A13, para 8

Ruth Forshaw, a retired teacher who assisted with the school's teaching of te reo and waiata, expanded on the nature of the triangle in a manner that is similar to Mr Te Hiko's explanation (see sec 1.4.3(1)):

*He whakamutunga korero maku, kahore e taea te whakawehe te marae me te kura.
Ko nga tamariki inaianei nga kaumatua mo apopo
Me ako ratou ki nga mahi o te marae
Nga mahi e mahingia ana i o ratou matua me nga mahi e mahingia ana e nga kuia,
koroua
Ma te noho i runga i te marae, ma te whakarongo
Ka taea te honohono i enei korero*

*To end my story I say you cannot separate the marae from the school
The children of today will be the elders of tomorrow.
They must learn the things of the marae
The work done by their parents – the work done by their grandparents
By living on the marae by listening these things will be achieved.⁶*

Mrs Forshaw also explained some of the practical aspects of the interactions that give meaning to the concept of the Mokai triangle:

Because the school is so close to the marae we are able to participate in all the powhiri. The tamariki sit with the kaumatua and kuia listening to the whaikorero and the karanga, on occasion they stand with us when we waiata. Whenever there are hui or tangihanga the tamariki participate in the powhiri . . . so the tamariki are exposed to the kawa of the marae at every level.⁷

The close association between the marae and the school – which are almost directly across the road from one another – is also reflected in the Mokai Primary School charter. It refers to the marae as being of 'great importance in providing the community with a focal point for its needs' and to the school as 'a major part' of that focal point.⁸

Crown counsel asked several claimant witnesses for their view of the relative importance of the marae and the school in fostering Mokai identity. Tuhuriwai Rangikataua agreed that the marae is the 'core' of Mokai and that if 'Mokaitanga' is strong, it will be protected by the marae and the community that belongs to it. In response to claimant counsel, he agreed that the closure of the school contributes to a loss of 'Mokaitanga'.⁹ Mr Te Hiko explained that the children need a 'stable, positive Maori education' and that the school is needed to support the children. He said it is difficult to maintain the 'spiritual wealth' of Mokai when there are few leaders.¹⁰ In response to questions from the Tribunal, Mr Te Hiko added that the community wants its children 'to maintain what is correctly kept at home' but also to build on it.¹¹

6. Document A12, para 28

7. Ibid, para 26

8. Document A25(18), p 3

9. First hearing, tape 2A

10. First hearing, tape 3B

11. Ibid

2.3 THE KAUPAPA OF MOKAI SCHOOL

The claimants did not provide detailed evidence about the school's governance and management before late 1996. The Crown supplied copies of annual reports prepared by the school's board and principal for the years 1991 to 1994.¹² No such reports were prepared in 1996 nor, it seems, in 1995.

From the reports supplied, it is clear that the decision to introduce bilingual teaching at the school was made late in 1993 in response to very low enrolments.¹³ The board chairperson's report for 1994 records a rise in the roll that year (from two pupils at the end of 1993 to 10 at the end of 1994) and attributes it to the change 'from mainstream to bi-lingual' teaching and the appointment of a new principal.¹⁴ The principal's 1994 report records difficulties with maintaining te reo teaching at 50 percent or more and cites as contributing factors 'a number of transient children, fatigue and Maori not being spoken at home'. The report adds that the time-frame for the school becoming a kura kaupapa Maori 'looks like it needs to be reviewed', that 'more whanau development' is needed and that 'an increase in the amount of Maori spoken in the homes and community will [make] and has made a difference'.¹⁵

In the absence of board and principal reports for 1995 and 1996, and the claimants' preference not to dwell on that period, evidence about the school during those two years is more patchy. Both Crown and claimant witnesses referred, however, to the very high turnover of acting principals during the period, and to the board's difficulties in finding a permanent principal. Crown evidence of the enrolments at the school during 1995 and 1996 reveals that the roll peaked at 20 pupils but was most often in the range of 12 to 18 pupils.¹⁶

The claimants' evidence of the school's provision of bilingual education focused on the period from late 1996 through to the school's closure – the period when Haromi Koopu was the permanent principal. Mrs Koopu, of Tuwharetoa and Ngati Whakarete descent, had been asked by the school board to apply for the principal's position.¹⁷ The Tribunal understood that her connections to Mokai were an important part of the reason for that request.

Claimant counsel described the parents' aspirations as being to see their children grow up educated in the basics of the curriculum and 'learning te reo Maori, matauranga Maori, tikanga and kawa' and 'how that applies in the Mokai context'.¹⁸ Mrs Koopu described the school's programme in this way:

Apart from the standard curriculum subjects of mathematics, technology and science, health and safety and physical well-being, social studies, arts and crafts, language and visual language, there was also a strong focus on what I call Mokaitanga. This involved teaching the children about who they were and where they came from

12. Document A25(4A)–(4D)

13. Document A25(4D)

14. Ibid

15. Ibid

16. Document A25(1), p 6

17. Document A8, para 2

18. Document A18, para 4.13

through whakapapa (genealogical links), iwi and hapu connections, whanaungatanga (family), pakiwaitara (stories), whakatauki (proverbs) and whakamoemiti (prayer). Further to this the children were taught raranga harakeke (flax weaving), traditional cooking, nga tikanga, performing arts, kapa haka, tukutuku and carving. Te reo was spoken continuously during the first half of the day.

The afternoon continued in both te reo and English. Underpinning all these activities was the spiritual dimension embracing whakamoemiti (prayer), manaakitanga (hospitality), whanaungatanga (family) and arohatanga (love). Because the school is situated next to the marae the children were often exposed to the realities of marae kawa, tikanga and te reo. To further enhance whakawhanaungatanga and Mokaitanga the children spent a great deal of time at the marae. They would actively participate in powhiri and would stand to support kaumatua and kuia with waiata. This also included school trips to other marae around Lake Taupo seeing and meeting first hand their chief, Tumu Te Heu Heu on their Tuwharetoa side . . . The tamariki saw for themselves the relevance of whanaungatanga and they will carry these experiences with them forever.¹⁹

It was apparent that claimant witnesses consider the national curriculum to be a suitable framework for the delivery of the kind of education desired by the Mokai community for its children. Mrs Koopu voiced her understanding that the school's emphasis upon matauranga and te reo Maori was wholly compatible with the national curriculum, in this way:

Don't anybody tell me that traditional Maori is not learning about the curriculum delivery, because it is the way that our tamariki have been able to cope with some of the curriculum delivery . . . Everything is one, how we deal with our Maori, how we deal with being in a Pakeha world. It's no different, it's just the way that we do it. It's the attitude that we have on how we should do things. It's just normal and natural to have a karakia. We just do that naturally.²⁰

Mrs Koopu also emphasised that the time devoted to the teaching of traditional Maori knowledge could not be distinguished from the time spent teaching the national curriculum:

It wasn't just something that you came in and said come on I want all you guys for three days, one week, mahi nga mahi o te Maori [to concentrate on 'Maori' work] – [then] that's it. It went right through.²¹

Illustrations were provided of the school's use of traditional knowledge to develop the children's skills in the essential learning areas of the national curriculum. Claimant counsel summarised this evidence as covering the following matters:

- (a) Bush studies as they pertain to this area.
- (b) Children being taught waiata that pertain to this area.
- (c) Children being prepared for kapa haka in this area.

19. Document A8, paras 13–14

20. First hearing, tape 10B

21. Ibid

- (d) Children participating in marae activities.
- (e) Whanau members being free to come and go at the school and participate in activities.
- (f) Children being taught the tikanga, kawa and matauranga of Mokai.
- (g) Children being taught those aspects of Maori life which will allow them to retain the ahi ka of Mokai.²²

During the site visit to the school, the Tribunal saw examples of student art depicting scenes from both the pre-contact and post-contact history of Mokai. Mrs Koopu said that the children were taught the korero accompanying a particular scene or event and so learned about the history of their community. She also showed how the children's mathematics skills were developed through the use in their artwork of grids for proportions and of enlarging and scaling techniques.²³

Mrs Forshaw explained how the children were exposed to their environment:

As part of our curriculum we taught the tamariki about the things that grow in the bush. They know the sounds of the manu (birds). In the bush we would often hear the flapping wings of the kereru (wood pigeon), although we couldn't see it, the tamariki knew which bird it was. Kereru can fly very high. When the tamariki see the orange berries on the ground we know the kereru have been feeding. The tamariki already know those bush areas and that they feel comfortable in the bush.²⁴

Mr Te Hiko, who participated in some of those lessons, said an important aspect of them was to teach the children how to survive on the land. An example he gave was of the children being taught to bake a rewana bread in a camp oven so they could survive if they did not have electricity. Such lessons, he said, were one way of teaching the children about their ahi ka.²⁵ Mr Rangikataua described familiarity with the environment and the ability to survive in the bush as characteristics of his 'Mokaitanga'.²⁶

Mr Te Hiko also explained how the raranga harakeke (flax weaving) that he and his wife taught at the school in 1997 and 1998 developed the pupils' skills in aspects of Maori and other knowledge. On the Maori side, the use of flax taught the children about rongoa (medicine), whakatauki (proverbs), whaikorero (oration), and waiata (song). As well, Mr Te Hiko explained, the weaving was used to teach mathematics: 'halving, quartering, subtraction and adding – it's all done with the harakeke'.²⁷

The interconnectedness of Maori and other knowledge, and the centrality to all learning of the skills learned through raranga, were explained by Mrs Koopu in this way:

So the raranga harakeke is not only our traditional values that we value so much, it is also how we brought in the curriculum. And I really want you to understand that

22. Document A18, para 4.10

23. First hearing, tape 10B

24. Document A12, para 25

25. First hearing, tape 3B

26. First hearing, tape 2A

27. First hearing, tape 3A; doc A10, para 4

because there is no separation. The traditional values of Maori and Pakeha go together. Why do they go together? You have to whakarongo [listen] to learn, and that is the key skill . . . Whether you're pakeha, Maori, Chinese, Japanese you have to whakarongo to get any skill . . . [After you] whakarongo, you have to titiro. You have to watch. You have to take it in. Then after the whakarongo, the titiro, you had to . . . mahi. You had to korero it.²⁸

Some of Crown counsel's questions to claimant witnesses suggested the Crown regarded the school's emphasis on 'Mokaitanga' as jeopardising its ability to deliver the national curriculum. For example, when Mrs Koopu said that 'Mokaitanga was an integral part of everything we did' at the school, Crown counsel asked what proportion of the school teaching day was involved with 'Mokaitanga'. Mrs Koopu replied that the question was impossible to answer because what she meant was that the children were looked at in an holistic manner. Soon afterwards, Crown counsel highlighted an ERO report's comment that 'the wider school community is deeply parochial about the school' and asked Mrs Koopu if it pointed to a problem with curriculum delivery which, counsel later suggested, might be related to the school's focus on 'Mokaitanga'. Mrs Koopu replied that what ERO described as 'deeply parochial' was, in her view, the people's understanding of 'how their children learn' and that the school's focus on 'Mokaitanga' was 'about understanding us and the values we place on who we are'.²⁹

Further insights into those matters were provided by other witnesses' accounts of how the school, in conjunction with the marae and the wider community, was providing the kind of education they wanted for their children. Claimant Te Aroha Adams, for example, spoke of the mana that can only be handed over by the old people. She recounted an experience her daughter had, while at the school, when a kuia invited her to karanga on the marae. In a manner that made it plain that it was a source of great pride for both mother and daughter, Ms Adams said her daughter learned how to karanga and, on the day, had welcomed the visitors onto the marae 'beautifully'.³⁰

Mr Te Hiko spoke of the benefits of the school's approach for children with special needs. With regard to one pupil (his nephew), with whom he had worked at the school, he said:

Prior to my involvement he was attending a special needs school in Taupo. [He] could never handle it, he was always angry. He was very unhappy and didn't appear to be learning anything. When it came to learning the culture of his people and speaking te reo, he began to settle down and was able to express his anger appropriately through haka and he just shined. When I began to work with him in 1997 he began to thrive and seemed to enjoy learning. As [he] gained confidence through his reo Maori he was able to identify who he was and what made him special.³¹

28. First hearing, tape 10B

29. First hearing, tapes 6A, 6B

30. First hearing, tape 4A

31. Document A10, para 9

A strong theme of the claimant evidence was that the opportunity provided to the most recent Mokai school students, to learn their language and about their past through the formal education system, was not available to their parents or grandparents. Claimant witnesses who were directly involved at the school were unanimous in their support of the approach taken by Mrs Koopu to the delivery of a bilingual education. Ms Adams said, for example:

I know what it is like to attend a mainstream school. My mother used to speak Maori to us at home. She was told by the principal at Tihoi School in 1966 not to speak Maori to us and we were told not to speak Maori because English was the number one language. Our reo was taken from us during my years of schooling. I have seen the strength in each individual child because of their reo and as a parent working along side them, it has given me the confidence to be involved with the kura, the whanau, the community and the marae. My tamariki are achieving far more than I did at their age and their reo helps them.³²

While discussing her childhood at Mokai some 60 years ago, Mrs Forshaw observed that ‘All the tamariki the same age as me weren’t able to korero Maori’.³³ She explained that she had learned to speak Maori when she was nearly 60 years old and living away from Mokai but travelling back there ‘nearly every weekend’.³⁴ She returned to live in Mokai in 1997, to ‘be another kanohi [face] for our marae and to help where I could’.³⁵ Mrs Koopu had asked her to help at the school and she began teaching waiata, including waiata tawhito (ancient waiata), about the area.³⁶

Mr Rangikataua said that he did not learn the Maori language while growing up in Mokai but at the age of 55 while living at Murupara. He also said that, upon his return to Mokai, his kaumatua were quick to remind him that, while he could now speak Maori, the dialect in which he spoke was not his own but that which prevails in the rohe of Ngati Manawa.³⁷

Tribunal member Rangitihi Tahuparae questioned Mr Te Hiko in Maori about the relationship between te reo and matauranga specific to Mokai and all other knowledge. He then summarised their exchange, in English, in these words:

Formal education, as I understand it, is [the] accumulation of knowledge from peoples all over the world. [It is] not specifically owned by any one nation. And what you’re saying at this point [is] that Maoridom has a contribution to make to the international plate of knowledge. Maoridom have a quotation: ‘Ko Ranginui e tu iho nei. Ko Papatuanuku e takoto ake nei’ . . . I acknowledge the universe above, and the planet earth below. It doesn’t specifically say the papa is the mud between my toes from Mokai alone. So . . . [no] one people own education as such in terms of the formality of

32. Document A14, para 15 (as amended orally at hearing)

33. Document A12, para 12

34. First hearing, tape 2B

35. Document A12, para 19

36. Ibid, para 20

37. First hearing, tape 2A

it. It is the accumulation of knowledge throughout peoples of the world . . . Every nation has a contribution. But what I can hear coming through is that Maori is an official language. And what I can feel coming through, you're saying, is that you have for Mokai here, a contribution to make to the system that has denied you.³⁸

2.4 EFFECTS OF CLOSURE

The claimants argued that the dual role of the education delivered at Mokai school depended on its delivery in Mokai. The simple reason for this is that Mokai is the children's turangawaewae.³⁹ Ms Adams identified the problems associated with enrolling her children elsewhere:

this is where my children are comfortable and this is where they belong within this supportive community surrounded by their whanau. I am not prepared to put my children into schools that do not value who they are.⁴⁰

In light of all the matters highlighted to this point, the kaupapa of Mokai school was plainly seen to be worth preserving:

I believe that we have something special in Mokai which should be protected and cared for and not destroyed. The Crown has a responsibility to support Maori education wherever possible. This is one opportunity where I believe it is possible.⁴¹

By closing our kura the MOE [Ministry of Education] has taken away my grandchild's opportunity to be educated in her own language – te reo Maori and her right to be brought up in all aspects of tikanga on their own papakainga where they feel comfortable. I am sad that this opportunity has been taken away from us without any consideration for what we wanted for our future mokopuna.⁴²

Mr Rangikataua summarised the claimants' argument:

The closure of the school will destroy the connection between our triangle – the school, the marae and the village. . . . The closure will also destroy the links that the children of Mokai have with the past and with their marae. We were never given the opportunity to learn te reo and our whakapapa links until late in life. These children were growing up in a unique environment where they actively participated in hui, tangi, and whanau gatherings at the marae where they could learn about their history, pakiwaitara, waiata, tikanga, kawa and whakapapa. They will never learn these things anywhere else. This is where they belong and this is where they should be nurtured amongst their own people.⁴³

38. First hearing, tape 3B

39. First hearing, tape 2A

40. Document A14, para 17

41. Document A10, para 13

42. Document A13, para 9

43. Document A9, para 15

2.5 MOKAI PRIMARY SCHOOL, 1996–99: ‘DIFFICULTIES AND PRESSURES’

A range of ‘difficulties and pressures’ facing the school in the last three years of its life were described by claimant witnesses.⁴⁴ They were confident, however, that real progress had been made in that time towards meeting the Crown’s requirements for quality education delivery (see sec 2.7).

The evidence of impediments to the school’s ability to comply with all the matters monitored and reported on by ERO covered a broad area. There was evidence of what may be described as ‘local difficulties’, including the socio-economic circumstances of the Mokai community and associated problems that impacted negatively on the school’s staffing and other resources. These were compounded, it was said, by the additional pressure the school was under during its last three years to respond not only to the three ERO reviews conducted in that time but also to the Ministry of Education, which was, especially from mid-1998, very actively pursuing the process for closing the school. These matters are outlined in section 2.5.

The claimants also relied on information supplied by the Crown, in the form of ERO and Ministry of Education publications, for the purpose of providing a larger context for their ‘local difficulties’. That information, it was said, reveals that the school’s problems are of a kind experienced by other small New Zealand schools, especially those in rural and predominantly Maori communities. That information is outlined in section 2.6.

2.5.1 Socio-economic circumstances

(1) Unemployment, housing, and income factors

Throughout the claimant evidence, there were strong indications that the Mokai community’s low level of financial wealth had a range of negative implications for the school’s governance and day-to-day operations. Underpinning many of the problems, it seems, is the scarcity of regular employment in the small community.⁴⁵ A symptom of that, noted in the school’s own reports as well as ERO and Ministry documents, is the ‘transient’ nature of some of the school’s parents and children who, it was explained, move away from and return to Mokai as their circumstances demand.⁴⁶

Another indication of the community’s circumstances is the scarcity and condition of housing at Mokai. The Tribunal was told that a large number of the homes in the Mokai village do not have running water and that the school has been ‘an important focal point in the very survival of the community’ because for many years it has provided water to the community for every day use.⁴⁷ At the school, the Tribunal saw the school pool’s changing sheds and was told they are used by village residents for showers. The last board chairperson, Mere Wall, said that she knew whanau who wanted to enrol their children at Mokai school but could not do so

44. Document A29, para 2.99

45. First hearing, tape 4B

46. For example, doc A6E, attachment 3.2; Haromi Koopu, first hearing, tape 10B

47. Document A8, para 11

because there was no housing available. She was confident that, if the school was still open and ‘if the issue of housing was dealt with, we probably would have over a hundred kids’ enrolled.⁴⁸

Mrs Koopu referred to the fact that some children at the school did not have sufficient food to eat: ‘The parents struggle to do their best by their tamariki. There were times when tamariki were absent from school due to a lack of food particularly before the benefit was due.’⁴⁹

(2) *The school’s decile ranking*

It was in light of these matters that the school appealed the decile 6 ranking that it had in 1997.⁵⁰ The decile ranking system is used by the Ministry of Education as a part determinant of school funding so that lower ranked schools receive more funding than higher ranked schools. The system is explained in the 1998 ERO publication *Good Schools – Poor Schools* and Ministry liaison officer Graeme Kitto responded to claimant counsel’s questions about it during the hearing of Crown evidence.⁵¹

The decile system ranks each New Zealand State school into decile (10 percent) groups according to information about all the households with school aged children in the areas from which the school draws students together with ethnic data from school roll returns. The factors taken into account are household income, parental educational qualifications and occupation, household crowding, income support, and ethnicity.⁵² Mr Kitto said that small schools are invited to specify where their students live and the Ministry engages statisticians to study the populations from the relevant census mesh blocks in order to determine the schools’ decile rankings. He agreed with claimant counsel that, by being based on the wider category of all households with school aged children in the relevant mesh blocks, and not on the actual households of a school’s students, the system is not a foolproof measure of a school’s socio-economic status. However, he said, no one has come up with a better system.⁵³

From that information, Mokai school’s level 6 decile ranking put it in the upper half of New Zealand schools in terms of the socio-economic characteristics of school communities. The appeal to that ranking, initiated by Mrs Koopu – and which she said contributed to the demands on her time – resulted in the school being reclassified as decile 3.⁵⁴ Claimant witnesses clearly considered that even this reduced ranking was too high. Mrs Koopu said that the school should have received a decile 1 ranking – the lowest on the Ministry’s scale.⁵⁵ Having noted that most of the parents who did voluntary work at the school had left high school without any formal qualifications,⁵⁶ she later added:

48. First hearing, tape 9A

49. Document A8, para 12

50. Ibid, para 11

51. Document A25(27), p 4

52. Ibid

53. Second hearing, tape 6B

54. First hearing, tape 6A

55. Document A8, para 11

56. Ibid, para 10

Our parents, some of them have been down there at the bottom of the heap. They've been there. And I say that proudly . . . because somebody has to understand that they need encouragement, they need support, they need help.⁵⁷

(3) *The need for and benefits of community involvement in the school*

In order to respond to the socio-economic issues, Mrs Koopu said she perceived a need to involve the community as much as possible in the school's operation. One way in which this occurred was through the parents' voluntary work at the school, which provided them with the opportunity to 'develop their own skill base as well as their understanding of te reo'.⁵⁸ She explained further:

If our tamariki are going to survive in this world, then we have to look beyond our tamariki, and look to the support that we need to give to our parents. So I would say that would be one of the most important roles that I have had in all my teaching is to give the empowerment to the parents, the empowerment to the community to say, 'This is your kura. I'm here to facilitate you. You do the mahi. I haven't got the skills – you have – you have all got the skills.'⁵⁹

Mrs Koopu saw that approach as being facilitated by the Tomorrow's Schools philosophy which she described as encouraging 'parent ownership of the school'. Crown counsel later asked Mrs Wall, the school board's last chairperson, whether Tomorrow's Schools really went as far as Mrs Koopu believed or, instead, provided for 'increased parental involvement in governing the school'. Mrs Wall replied that she did not understand Tomorrow's Schools as merely providing for a greater parental role in school governance, and, if that is all that it does, then, for the last 10 years, she had mistaken the essence of the policy.⁶⁰

Claimant witnesses described how, with the goal of building confidence in the children and their parents, the school attempted to improve self-esteem by mitigating the stigma associated with a low socio-economic status. One very practical example was provided by Mrs Koopu when, speaking of the children who had insufficient food, she said:

We overcame this problem by encouraging the children to bring along vegetables, a potato, kumara or carrots and we would make soup together for lunch. On other occasions we would pick mushrooms and make mushroom soup, make fried bread or pancakes for lunch, whatever was available. I consider it an important part of getting rid of barriers of feeling whakama [ashamed, embarrassed] and in this way we build up their self confidence so they can feel they can come to school no matter what.⁶¹

Further examples, outlined earlier, emphasised the importance of instilling pride in the children about who they are through learning about their 'Mokaitanga'. It was

57. First hearing, tape 10B

58. Document A8, para 10

59. First hearing, tape 10B

60. First hearing, tape 9A

61. Document A8, para 12

apparent that claimant witnesses saw this as a prerequisite to the children's success in the wider world. Mrs Wall's statement about giving the children a 'face' captured this point graphically (see sec 1.4.3(1)). In sum, the holistic approach taken by the school was seen by the wider community to be a necessity in all the circumstances.

Asked by Crown counsel if she believed student learning had improved in the last three years at Mokai school, Mrs Koopu replied:

The children's confidence has grown. They've built up their self-esteem, they feel good about themselves, learning is fun ... How else do we measure children's achievement?⁶²

Crown counsel then asked Mrs Koopu if there was a 'measurable, discernible, positive effect' from the children coming to school and asked her to identify areas where that improvement had taken place. Mrs Koopu replied that there 'has to be' a measurable positive effect of going to school, and that it could be seen in the children's improved ability to articulate their thoughts and feelings.⁶³

2.5.2 Staffing difficulties

When Mrs Koopu accepted the position of principal of Mokai Primary School, it was her first full-time teaching position since 1987 – prior to the adoption of the Tomorrow's Schools system.⁶⁴ The position also provided her first experience of sole-charge teaching.⁶⁵ Claimant evidence highlighted the pressures placed on Mrs Koopu and the board because of her need for training in various aspects of the contemporary educational environment while also managing a heavy workload.

(1) The demands on a sole-charge principal

The major problem Mrs Koopu identified was that sole-charge teaching of children spanning years 1 to 8 places great demands on the teacher:

Twelve children were on the roll in the fourth term in 1996 and this increased to eighteen. These children ranged from levels Y1–Y8, new entrants to form 2. The children were aged from 5–13 years. The main difficulty with such a wide range of children was catering for all the different levels. Whilst I may have only had eighteen children, you could almost say that I had eighteen different groups of children.⁶⁶

Another matter referred to by Mrs Koopu was the number of children at the school with what she described as 'special needs' but who did not qualify for Special Education Service support. In 1996, she said, among 18 children enrolled, five were 'special needs children', and assessments were done in the areas of language development and

62. First hearing, tape 6B

63. Ibid

64. Document A8, para 2

65. First hearing, tape 6A

66. Document A8, para 6

behavioural management. Five applications were made to Special Education Services but only one was successful and that student did not qualify for ongoing funding.⁶⁷ Mrs Koopu added that the process involved in these applications was ‘quite a burden’ and that she wished there was assistance available in the form of someone else being able to assess the children.⁶⁸ She also indicated that the proportion of children with ‘special needs’ made the school ‘highly dependent on voluntary assistance from the community’ and provided the major reason for the board’s employment of Mrs Forshaw as a part-time teacher working specifically in the areas of language development and behavioural management support.⁶⁹ Between 1997 and 1999, Mrs Koopu said, the school had seven ‘special needs’ children and, at times, another older child enrolled by the Children and Young Persons Service.⁷⁰

Jim Hogan, who acted as principal’s release teacher (one day a fortnight) for the first term of 1998,⁷¹ agreed that the workload was heavy:

When I was there . . . Haromi [Koopu] was a sole-teacher. She was in charge of 14 kids that ranged from 5–13 years of age. To cope with this you have to be a magician, not a teacher. It is very hard to have everybody organised, you have to work about a 12 hour day and then you have to work in the evenings on top of that. You have young people’s programmes, middle group programmes and an older group programme, everybody is on a different programme.⁷²

When questioned by the Tribunal, Mr Hogan explained further:

When you are the only person in the school, from the moment the first child arrives to the moment the last child leaves, there is no time in there to do anything called administration unless it’s a very, very brief period of time . . . [For] most teachers, the day begins either the previous day or at least an hour or so before school begins to be adequately prepared . . . Haromi put me off being a principal. The time that she spent was just unbelievable. I didn’t have it. So, from 7 in the morning – probably earlier – 6 o’clock until later at night, with a break. That’s a long, long day, and that time needed to be spent to be fully prepared and to be one step ahead of everything – which you had to be.⁷³

Mr Hogan also referred specifically to Mr Te Hiko’s role:

There were other people involved in the school, Koti was one of these, he . . . would take a group of special needs children and speak to them totally in Maori. They would sing songs and develop their handcraft skills. He would be just part of the programme and the students had a great respect for Koti and they never said anything wrong with him around.⁷⁴

67. Document A8, para 18

68. First hearing, tape 5B

69. Document A11, para 19

70. Document A8, para 23

71. Document A11, para 4

72. Ibid, para 17

73. First hearing, tape 5A

74. Document A11, para 7

In the course of her evidence, Mrs Koopu mentioned that, under current rules, a sole-charge school can have up to 28 students. Crown counsel asked if the student-to-teacher ratio at Mokai school was too high for the things that Mrs Koopu had to do, to which she replied: 'I want to put it this way. Tomorrow's Schools brought in great changes, but Tomorrow's Schools did not address the situation of sole-charge teaching. It did not.'⁷⁵

Crown counsel also asked if Mrs Koopu believed that the official roll census returns from 1989 to 1999 were accurate. Those returns indicate that the roll was generally lower than 20 students.⁷⁶ Mrs Koopu explained that the returns are taken in March and June each year so that some of the numbers recorded could be lower than the numbers actually enrolled at other times. She noted that the roll peaked at 24 students during her tenure as principal and that, at that time, she had telephoned the general manager of the Hamilton office of the Ministry of Education to ask for help. Later, in its own evidence, the Crown produced a weekly breakdown of the enrolment figures from 1990 to 1999 which shows that the roll peaked at 24 students in 1990 (in the last term) and in 1998 (for the first five weeks of term 2) (see sec 3.5.1).

(2) Training

Another demand on Mrs Koopu's time came from the training courses she attended in her capacity as principal of the school and member of the board of trustees. Describing the limited time she had to attend all the relevant courses, Mrs Koopu said:

It was like you couldn't take all that much. You had so much to comply – to contend – with anyway, it was like you just added another burden to what was already your big load.⁷⁷

Acknowledging Crown counsel's suggestion that there were specific curriculum-related training courses that Mrs Koopu had not attended, she again noted:

There was so many courses to go to, like the technology ones, that you just couldn't keep up. I mean I had the Maori – the Aro Matawai one – the assessment one, that in the end I turned down because I couldn't keep up. I guess I'm saying I couldn't do all the training in that time.⁷⁸

Mrs Koopu also noted that when she was able to attend training sessions, she did not always obtain maximum benefit from them because of how they were run and the pressures of her existing responsibilities:

We did have training sessions. Some of them were held at night at Tokoroa, from 7 o'clock at night till 9 o'clock at night – two hours. It was just really too fast for any of us to take in, especially for me at that hour of the night when your head is just full of what

75. First hearing, tape 6A

76. Document A7, para 59

77. First hearing, tape 6A

78. Ibid

you've just done. Adding to that you had those sessions once a term. By the time you come in to the next one, you'd forgotten what the first one was about . . . So yes, we did receive that kind of help from the Ministry . . . but it wasn't help that was relevant to us.⁷⁹

When questioned by Crown counsel about the rural adviser's support, Mrs Koopu described it as 'absolutely wonderful'. She added, however, that, while it enabled the school's situation to be assessed and planned, it did not assist with implementing those plans. Having earlier observed that the board of trustees was 'continually meeting' and that it was 'a mammoth task, calling on parents who didn't have the skills to fulfil what was required', Mrs Koopu said that 'you need the people to be able to put the plan into action'.⁸⁰

Despite those difficulties, the professional support provided through the Ministry of Education did enable the board to plan for the future of the school. Mrs Koopu said that the meetings held for that purpose contributed to the community's focus on the school by facilitating 'understanding of where they wanted to be' in relation to it and its services.⁸¹ As has been noted earlier, other claimant witnesses attributed the community's increased focus on and support for the school to Mrs Koopu's holistic approach to teaching with its emphasis on empowering parents to take ownership of the school.

(3) Community support

Whanau support at Mokai school seemed to be noticed and acknowledged by all who interacted with it. The January 1997 ERO report commended the school and community in this regard.⁸² The next report, however, notes difficulty in obtaining active parental support for the school.⁸³ The final ERO report comments negatively on the presence at the school of voluntary helpers' pre-schoolers.⁸⁴

Mr Hogan said that it was his impression that the school was a 'community centre'.⁸⁵ Mrs Koopu explained that, from January 1997, when the board adopted a plan, 'backed by all of the school community', to set up proper administration systems, place an embargo on spending, and train board members:

The parents, grandparents and many others who didn't have children in the school gave freely of their time to assist us in the reorganisation of the school. This included the administration, the library and the classification and distribution of teaching resources. Everyone helped out wherever they could with a true sense of purpose and whanaungatanga. This continued right up to the closure.⁸⁶

79. First hearing, tape 6A

80. Ibid

81. Ibid

82. Document A25(3E)

83. Document A25(3F)

84. Document A25(3G)

85. Document A11, para 14

86. Document A8, para 8

It was plain from claimant witnesses' accounts that the level and nature of the community's support for the school was seen as essential both to lighten the load on Mrs Koopu and to promote the 'Mokai-specific' education that was being provided. Also emphasised were the benefits to the adult whanau members who were directly associated with the school, especially those who felt that they had more to learn about their own identity. Mr Osborne, for example, a parent and board member, said that he felt welcome and comfortable at the school. Crown counsel questioned Mr Osborne about his not feeling comfortable at any other school and asked 'but schools are for children, aren't they?' He replied, 'Well it's all a learning thing. Everybody learns something new every day.'⁸⁷ It has already been noted that Ms Adams said that working alongside her daughters at the school gave her the confidence to become involved with the school, whanau, community, and marae.⁸⁸ Jocelyn Kingi, a volunteer aide and grandparent, noted that the school provided her with a chance to participate in her own culture.⁸⁹

Some elements of the community's support were questioned by Crown witnesses for their compliance with education system rules. One was the school's use in the classroom of community volunteers who were not qualified teachers. The Crown's evidence reveals that such people cannot be left alone with children unless they are registered teachers or have a 'limited authority to teach' granted by the Ministry of Education. No such authority had been sought by the school board for its volunteers, and Crown witnesses clearly believed, as a result of ERO report comments, that some volunteers were, at times, unsupervised. Mrs Koopu said that, while all but two of the people who assisted at the school were not trained teachers, they possessed all the skills needed for their roles and that she was 'always there' supporting the volunteers and the children in their programmes.⁹⁰ When claimant counsel asked Mrs Koopu what she would do, if there were no community volunteers, when people came to the school, or the phone rang, or there were some other 'disruption' that she had to deal with, she replied that she would have to rely on the older children to supervise the others while she dealt with the matter. Her preference, she said, was 'definitely' to have parental support.⁹¹

Te Iria Whiu provided an overview of the education quality issues raised by the claim. With 36 years' teaching experience before her retirement early in 1999, Ms Whiu's last position was as principal, for a decade, of the Bernard Ferguson Bilingual School in Ngaruawahia. In her time there, Ms Whiu led the school towards kura kaupapa Maori status. She is also a past president of the New Zealand Education Institute (NZEI), having held various executive positions in that organisation at both the regional and national level over a period of some 20 years. One such position was as chairperson of the Maori council of the NZEI. Ms Whiu also chaired the Waikato group, Akatea, whose members are Maori educators in management positions in

87. First hearing, tape 2A

88. Document A14, para 15

89. Document A13, para 5

90. First hearing, tape 6B

91. First hearing, tape 7B

both the primary and the secondary education sectors. That body, she noted, is acknowledged nationally as a body to be consulted in regard to Maori education.⁹² Responding to questions from the Tribunal, Ms Whiu explained that the goal of Akatea is to 'work in partnership', and added, 'Who better to give a direction to Maori education than Maori? . . . We have to work together.'⁹³

Ms Whiu stated her belief that, if Maori children are going to achieve, one of the 'key elements' is that they must be and feel 'culturally safe within their own environment'. She added that they must also have high self-esteem.⁹⁴ One of the fundamental components in their achievement, she said, is 'the active support of the whanau', which 'can only happen when a parent accepts responsibility for their child's education and when they feel welcome in the school at any time of the day'.⁹⁵ Later, she added that 'The essence of Tomorrow's Schools is to empower parents to take control of their children's education'.⁹⁶

On the matter of developing a curriculum that addresses Maori children's needs in terms of language and tikanga Maori, Ms Whiu said that 'local tikanga is also very important so that the child can relate to his or her turangawaewae'. She explained further:

It is always an ideal situation where the school is situated within a Maori community. This gives the school access to a large number of people who are knowledgeable in local history, tikanga, kawa and all things Maori. It offers an opportunity to hapu and whanau members to teach their own children.

. . . In my opinion it is a 'quick track' method of developing high esteem in children. When children hear positive affirmations that value them as people, for example, 'it is neat to be Maori. It is great to be Maori and I am proud to be Maori' they are more likely to achieve. The spinoff from that is the change in attitudes towards learning within the classroom. Kura Kaupapa Maori is the best example of this. That is the key thing to remember. It is the attitudes and the learning attitudes that develop the outcomes of quality.⁹⁷

Ms Whiu emphasised that Maori children are 'characteristically more reserved and shy than their Pakeha counterparts'. She said that Maori children often lack confidence and the ability to communicate effectively and that many have difficulty coping at school 'in the first instance' and in environments that 'do not value who they are'.⁹⁸ Later, in response to Tribunal questions, she added that it is also important to remember that the parents and grandparents of today's Maori students are 'products of a system that failed them'. This contributes to their hesitancy about schools, she said, for they will often have unfavourable memories of their own education. This is why, Ms Whiu continued, it is necessary to encourage the parents to become

92. Document A17, paras 2–17

93. First hearing, tape 10A

94. Document A17, para 18

95. Ibid, para 19

96. Ibid, para 28

97. Ibid, paras 20, 22 (as amended orally at hearing)

98. Ibid, para 27

involved. By contrast, she noted, Pakeha parents have ‘so much confidence, they want to tell the teachers what’s right!’⁹⁹

Ms Whiu said that ‘As Maori we instinctively know what is important for Maori’ but noted that this ‘begs the question’ whether the Ministry of Education knows what is right for Maori. She acknowledged that the Ministry develops policies that it believes are in the best interests of Maori children but criticised its provision of resources for the task.¹⁰⁰ With regard to ERO’s reviews generally, she commented that ‘What is not ever recognised in these reports is [the] importance of the wairua in creating a welcoming Maori environment. That is how children, in my opinion, do well within a Maori environment with whanau support.’¹⁰¹

In response to Crown counsel’s questions, Ms Whiu made it plain that, from her own experience of ERO reviews and, through the various positions she held in which she heard other Maori principals’ views, she believed it was very important to know who were the Maori reviewers involved in particular ERO reviews. Only if she knew that, she said, would she offer a comment on the ERO reviews of Mokai school.¹⁰² She acknowledged that there has been ‘some improvement’ in the way ERO conducts reviews and then explained that her concern with ERO reviewers is really a concern with the assessment measures that the office applies:

Perhaps why I made that statement is because I often wonder, having had personal experience in reviews, the question I ask myself is, ‘What standards, what yardstick of measurement are they using?’ Now I know they have terms of reference to meet, et cetera, et cetera, and that’s basically what I think I’m referring to there. What standards are they using? Whose standards are they? Is it a monocultural society standard or is it taking into account the view of the other partner in this game? And that’s a question that continually goes through my mind with reviews.¹⁰³

2.5.3 Resources

(1) Board members’ need for training

In relation to human resources, Mrs Koopu indicated that at the root of many of the school’s governance difficulties was board of trustees members’ lack of relevant skills:

It was a mammoth task . . . [we were] calling on parents who did not have the skills to fulfil the obligations that were required . . . I say that comfortably . . . they will say themselves, ‘This is too difficult for me to understand’ . . . [That] was the reality of the situation.¹⁰⁴

Acknowledging that difficulty, the board had sought training to assist members to better provide for the governance of the school. The training received was, however,

99. First hearing, tape 10A

100. Document A17, para 28

101. Ibid, para 29

102. First hearing, tape 9B

103. Ibid

104. First hearing, tape 6A

criticised for failing to meet the board's needs. In a letter written in August 1998 by the former chairperson of the board to the Ministry's district manager, it is stated:

Last year the BOT undertook training from [a particular provider] to increase its skills at governance. Unfortunately this training was not appropriate in that the practical aspects of governing the school were not covered. The BOT has now arranged further training with [two other providers]. A more practical approach will mean the BOT is able to carry out the activities necessary to ensure appropriate governance occurs.¹⁰⁵

In response to Crown questioning, Mrs Wall elaborated on the inadequacies of the training received by the board:

What is meant is that when you attend a training session you may get a booklet . . . you have up to 1½ to two hours to take this booklet in. You are given basic things on what it is, and then you go away and are meant to implement what is in here. The difficulty the board had was understanding everything that was in here. So once you attended a training session, there was no back up . . . what they [the board of trustees] asked for was, 'Please come to the school, and show practically what you mean, how do you mean to implement it?'

What they needed was processes in simple English for them to understand with a couple of practical exercises for . . . it to be reinforced. They never got that. So what I had to do was take these books away, [and] turn it around into flip charts or to meaningful things that they could understand. That wasn't my job, that was the job of the facilitator. Yet all the contracts that were given never offered the practical support to go with it.¹⁰⁶

Mrs Koopu also mentioned a difficulty the school had in attracting parent board members who lived sufficiently close, or had the money for petrol, to get to meetings and who had the confidence to come onto the board to do what was known to be a big job.¹⁰⁷

(2) The teaching resources and debt 'inherited' in late 1996

The poor state of the school's teaching resources and records at the time that Mrs Koopu took up the principal's position were also the subject of evidence. Mrs Koopu said that, before taking up the position, she initiated a meeting with the board of trustees' chairperson, the relieving principal, and the rural adviser to assess the position of the school. The findings of that assessment were described as follows:

- (a) There was a number of records missing. There were no teaching plan or guidelines or student profiles. The admission and withdrawal register had not been updated and contained anomalies, for example in some instances, children were named on the admission and withdrawal register more than once.

¹⁰⁵. Document A16(d), p 2

¹⁰⁶. First hearing, tape 8A

¹⁰⁷. First hearing, tape 6B

- (b) There was no inventory of resources.
- (c) The resources that were in the school at the time were largely outdated and unusable; and
- (d) The resource areas were inappropriately positioned.¹⁰⁸

Mrs Wall, who is employed as an administrator at the kura kaupapa Maori in Taupo, gave evidence that, at the end of 1996, she was involved in a 'total re-organisation of the [school] office' over a period of a month. Then, in the first six months of 1997, she did a substantial amount of voluntary work to restructure the administration of the school's records and train the volunteer administrator.¹⁰⁹ In response to Crown counsel's questions, Mrs Wall added that her mother, Mrs Koopu, had asked her to help in this way and that she did other voluntary work for the school right through to the time of her election to the board (and to the role of chairperson) in the latter part of 1998.¹¹⁰ Among the other tasks Mrs Wall undertook while not a board member were training new board members, writing a report in response to the ERO review of December 1997 and doing the school's financial accounts.¹¹¹

Mrs Wall stated that the ERO reviewers who came to the school at the end of 1997 had told her they were 'very happy with' the school's administration systems.¹¹² In the course of responding to Crown counsel's questions, Mrs Wall made plain that she strongly disputed the statement, in the final ERO report of 1998, that 'Administration systems are ad hoc'.¹¹³ That report then notes that 'The sound procedures which have been documented to ensure consistent practices for dealing with finance, should be extended to other administration responsibilities'.¹¹⁴ Once it became clear that Mrs Wall was referring to the school's 'basic fundamental processes' of office administration (including banking, mailing, and filing), Crown counsel assured her that the ERO report 'had absolutely no quibble with any of that administration'.¹¹⁵ The inference was that the ERO report's reference to 'administration systems' was a reference to the systems the school had in place to meet its overall governance responsibilities, including those in the area of financial management.

Crown counsel and Mrs Wall had a detailed exchange about the debt that the board of trustees also 'inherited' in 1997 and the strategy that was used to discharge it by the end of 1998. During the exchange, Crown counsel focused on the cause of the debt, asking several times if it resulted from the purchase of a school bus. Mrs Wall replied by emphasising the lack of financial skills on the board of trustees at the time, and reiterated the inadequacy of the training that members had received in relation to financial management:

108. Document A8, para 3

109. Document A16, paras 7–8

110. First hearing, tape 8A

111. Document A16, paras 9, 12; first hearing, tape 8B

112. Document A16, para 11

113. First hearing, tape 8A

114. Document A25(3G)

115. First hearing, tape 8A

It [the cause of the debt] was probably an accumulation of things, where the biggest thing was that the board did not understand, or have adequate training to understand, their role in financial governance. Yet, they did the best that they could.¹¹⁶

The strategy employed by the board of trustees to rectify the problem was twofold. First, an embargo on spending at the school was imposed. As part of that, an inventory of resources was carried out to prevent the school from purchasing things it already had. Secondly, as Mrs Wall put it, the board got ‘innovative and resourceful’. Among the matters mentioned in this regard were that the services of a bus driver and cleaners were obtained on a voluntary basis; that board members did not claim fees for their work; that companies were invited to provide their products to the school free of charge; and that weekly fundraising activities were held in Tokoroa.¹¹⁷

Despite the success of the strategy in meeting the board’s financial responsibilities, it seemed that the spending embargo set back the school’s ability to purchase as many new or better teaching resources as would otherwise have been possible. The scarcity of the school’s science resources was highlighted in Mr Hogan’s evidence:

The science equipment was pretty thin. The resources supplied by the MOE were pathetic for what they were asked to do and I think [that] there has to be some serious questions asked. If criticism is made of the children’s achievement and their educational ability, [then] questions need to be asked about why the MOE didn’t supply more equipment to learn, especially science.¹¹⁸

When questioned by Crown counsel on this matter, Mr Hogan accepted that the school board, rather than the Ministry of Education, was responsible for purchasing science resources, and that science was one area that required more development.¹¹⁹

Mrs Koopu highlighted more widespread deficiencies in the school’s teaching resources and the impact of this upon her role. Plainly, she believed that the embargo on spending during 1997 and 1998 was partly responsible for the situation:

I was forever saying, ‘How can you expect . . . quality delivery of quality education if you haven’t got the resources?’ I am referring to reading books . . . maths equipment. You just had to make the best that you could with what you had. . . .

Unfortunately, boards [of trustees] are expected to come out with a surplus to be good organisers of finance. Where to me its like, ‘Hey, why can’t we go into debt because we need this money?’ . . .

I accepted that the board wanted to come out with a plus. [But] it just placed more strain on us the teaching staff . . . with the resources that we had. I mean, look at them. They were your tamariki you’re talking about – giving them quality education, you didn’t have the quality resources.¹²⁰

116. First hearing, tape 8B

117. Ibid

118. Document A11, para 21

119. First hearing, tape 5A

120. First hearing, tape 6B

When Crown counsel informed Mrs Koopu that it was not correct to say boards of trustees are required to ‘come out with a profit’, she replied that there was an assumption that the failure to come out with a surplus indicated that the board was not managing the finances well.¹²¹

(3) Pupils – the small roll in 1999

The Crown’s evidence of the small and fluctuating nature of the school’s enrolments over the years is outlined in section 3.5.1. A point in issue between the parties that is not dealt with there was the cause of the low enrolments at Mokai school in 1999, for the three school terms before its closure. In 1997 and 1998, enrolments were consistently higher, and claimant evidence was that the roll dropped in 1999 (to a minimum of six and a maximum of nine pupils) because of the ‘threat of closure’. As is elaborated later in this chapter, and in chapter 3, the Minister’s ‘decision in principle’ to close the school was conveyed to the board by letter of 27 July 1998. Mrs Wall said:

During 1998 we had 23 children enrolled at our school including two of my own. The school roll dropped because of the effects of the closure on the families. We lost ten children in one term.

At the end of 1998 we received 15 enquiries from people who wanted to enrol their children at the school. Because we couldn’t give a definite answer, the kids were enrolled elsewhere.¹²²

Mrs Koopu also referred to the ‘uncertainty’ over the school’s future during 1998 as the cause of the ‘dramatic drop in student numbers and in prospective enrolments’.¹²³

Crown counsel questioned Mrs Koopu about the effects of other factors on the school’s roll, noting that low enrolments had been of concern to the community and Ministry for several years and that the board had acknowledged that the roll was affected by such matters as children moving on to secondary school or out of the district. Mrs Koopu acknowledged that a combination of factors impacted on the roll and that there was ‘nothing sinister’ in the board recognising that. She emphasised, however, in support of her view that the 1999 roll was affected by a new factor – the uncertainty over the school’s future – that ‘whanau here were saying, “Is the school going to be open?”’¹²⁴

(4) Funding issues – decile ranking, rural funding, and transport subsidies

The level of funding received by the school is clearly relevant to its resources. The claimants’ dissatisfaction with the school’s decile ranking, even after its reduction to decile 3, has already been noted. Another matter of concern to claimant witnesses was the school’s ineligibility for targeted rural funding. That funding is available to schools that are at least 30 kilometres from a trade service centre with a population of

121. Ibid

122. Document A16, paras 26–27

123. Document A8, para 25

124. First hearing, tape 6A

2000 or more.¹²⁵ Mrs Koopu explained that, when she arrived at the school, it qualified, under different rules, for a ‘shopping day’ each month. However, the new targeted rural funding rules meant that the school was no longer recognised as having particular needs because of its location. Yet, she said, the school is 28.5 kilometres from the centre of Taupo and ‘it’s not just down the road to get a bottle of milk’.¹²⁶

Also of concern to the school community were the rules governing school transport subsidies. Mrs Wall explained her understanding of the effect of those rules to be:

that MOE would not allow the [Mokai] children to travel on the bus because they were within a radius distance, even though the buses went past their door. So while that was fine for some of them, it was not fine for the rest of them. But I’ll say that the MOE did pay a conveyance allowance for the children, but not nearly as much as what it costs to run a bus to get your children [to Mokai school].¹²⁷

Evidence supplied by the Crown provides some further clarification. In the Ministry’s response to Tribunal questions, it is noted that:

There is some flexibility in Ministry policies to recognise that a desired specialist school may not always be the closest school. For example, transport funding policies are flexible to support children wishing to attend a Kura Kaupapa Maori. Currently schools offering bilingual education are not included in this policy.¹²⁸

From this, the Tribunal understands that, at least for some children travelling from outside the immediate vicinity of Mokai school to attend it, the Ministry’s transport funding policies meant that Ministry-funded buses that take other children to other schools drove past the homes of some Mokai pupils, and then past Mokai school (or a point near to the school) but could not pick up the Mokai pupils and take them to the school. Therefore, the parents’ choice of Mokai school for their children, rather than the kura kaupapa in Taupo for example, was one that had comparatively adverse financial effects. The Tribunal gained the impression from the claimants’ evidence (which did not dwell on this matter) that the transport funding rules represented one of a number of examples of Ministry rules that they believed denied funding to the school community unfairly. From the community’s perspective, the underlying purpose for which the funding is available was met by the circumstances of Mokai school, and yet it fell outside the limits of the Ministry’s policies.

In chapter 3, more detailed information is provided about the level of funding received by the school in recent years (see sec 3.5.3).

125. Document A25(27), p 5

126. First hearing, tape 6A

127. First hearing, tape 9A

128. Document A25(1), p 10

2.6 THE WIDER CONTEXT: SMALL PRIMARY SCHOOLS

The claimants relied on written evidence supplied by the Crown (largely in the form of ERO publications) and Crown witnesses' knowledge of the 'larger picture' of New Zealand schools, to support their view that the problems faced by Mokai Primary School and, in particular, their effects on the school's ability to attain and maintain compliance with national education standards, are also faced by other New Zealand schools. In closing submissions, claimant counsel summarised the claimants' position in these words:

ERO and MOE have been critical of both the Board in its management performance of the school and the Principal in her delivery of the curriculum. These criticisms should not be considered in isolation. As the ERO literature clearly indicates, Mokai Primary School was not alone in facing difficulties. The difficulties Mokai faced were the same difficulties facing a number of small and poor schools. It is submitted that this is an important contextual issue for the Tribunal to bear in mind when it considers the quality and viability arguments raised by the Crown.¹²⁹

The ERO publication to which claimant counsel gave most attention is the 1999 report *Small Primary Schools*.¹³⁰ It presents the results of an analysis of 500 ERO reports on full or contributing State primary schools. Of those reports, 400 (completed between June 1996 and August 1998) were on small schools (schools with fewer than 150 pupils). The other 100 reports, completed between July 1997 and August 1998, were drawn from all State primary schools (excluding intermediates) and formed a control group for comparison. The 400 small schools were divided into four groups, each of 100 schools, depending on their rolls. The first group, with one to 25 students, are classified as 'very small schools'. The next group, with 26 to 49 students, are 'smaller schools'. The next two groups, with 50 to 99 students and 100 to 149 students respectively, are classified simply as 'small schools'. Each of the 500 ERO reports was analysed against a range of indicators that focus on school management performance. Those indicators fall into three main groups: governance and management; curriculum management and delivery; and school climate.¹³¹

Claimant counsel's summary of the results of the study pointed out that in the areas of school governance and management and curriculum management and delivery, the performance of very small schools (with rolls of fewer than 26 pupils) was consistently below that of the control group.¹³² Indeed, the ERO study notes that the performance of very small schools was consistently below that of all 400 small schools (one to 149 pupils) in those areas.¹³³ By contrast, all small schools performed best on the 'school climate' indicators. In fact, they bettered the control group's performance on the matters of 'Effective school/community relationships' and 'Effective Board/

129. Document A29, para 2.20

130. Document A25(24)

131. Ibid, pp 11–12

132. Document A29, para 2.15

133. Document A25(24), p 12

Principal/Staff relationships'.¹³⁴ For very small schools, these were the only two matters in which their performance bettered that of the control group.¹³⁵

Counsel quoted the major part of the ERO study's identification of the most common issues facing all 400 small schools, observing that 'those were exactly the sort of things which ERO and the Ministry identified that were occurring on the ground' at Mokai Primary School.¹³⁶ In full, the issues are:

Boards of trustees of small schools may:

- have difficulty achieving and maintaining full membership;
- experience high turnovers;
- be deflected from their priorities by other difficulties;
- face a spiral of decline at their school in response to governance difficulties;
- face challenges through significant changes in the school roll;
- rely excessively on the principal to carry out governance responsibilities; or
- receive inadequate professional support and advice, especially on curriculum monitoring, where principals or teachers are inexperienced.

The quality of **curriculum management and delivery** in small schools may be compromised by:

- difficulty recruiting and retaining skilled and experienced staff;
- appointment of inexperienced or unqualified teachers or teachers unfamiliar with the New Zealand Curriculum;
- high turnover in sole-charge or teaching principal positions;
- the multiple roles of teaching principals or the time spent out of the classroom;
- roll fluctuations; or
- the range of student needs in multi-level classes and sole-charge schools.

Learning opportunities for students in small schools may be limited by:

- their individual needs not being identified and met because of lack of systems to facilitate this;
- issues such as transience or absenteeism;
- lack of classroom stability through the impact of roll fluctuations or transience;
- the small student roll precluding some sports and other group activities; or
- the school's isolated rural location. [Emphasis in original.]¹³⁷

In light of this information, claimant counsel asked Karen Sewell, ERO's national manager reporting services, about her statement that the majority of schools are functioning well, and there is no one particular type of school where this [the Tomorrow's Schools'] governance model has failed'.¹³⁸ Ms Sewell agreed that small schools are more likely to have problems complying with national education standards than other schools and said the most helpful parts of the *Small Primary Schools* study are its identification of examples of good practice in small schools and the discussion of possible interventions in small rural primary schools. She stated

134. Document A29, para 2.15

135. Document A25(24), pp 54–57

136. Document A29, para 2.16 (as amended orally at hearing)

137. Document A25(24), pp 15–16

138. Document A23, para 75

that, while ERO considers there are more difficulties in small rural schools, there are a number of such schools that are succeeding.¹³⁹

2.7 PROGRESS MADE IN MEETING THE CROWN'S REQUIREMENTS FOR QUALITY EDUCATION DELIVERY

2.7.1 Introduction

The responsibilities of school boards of trustees and the functions of ERO are described in chapter 3 (see sec 3.2). In brief, school boards are required by law to comply with, and to demonstrate compliance with, national education standards that cover governance (or administrative) matters as well as matters directly related to the content of schools' teaching and the monitoring of students' progress. (Those last matters are prescribed by the national curriculum.) ERO is the Government department responsible for assessing schools' compliance with the national standards and publicly reporting on any areas in which individual schools are not meeting their governance or management obligations.

Mrs Koopu stated that, in response to the audit of Mokai school's records and resources that she initiated upon her appointment as principal in October 1996, she contacted ERO and invited it to review the school. When Crown counsel suggested that ERO had decided to review the school in December 1996 anyway, Mrs Koopu replied that her reason for contacting ERO was that she 'was not going to be responsible for somebody else's doings'. While making it plain that she was not criticising the previous principal, Mrs Koopu said that the high turnover of principals in the year prior to her appointment had culminated in a state of affairs for which she would not accept responsibility.¹⁴⁰ ERO's January 1997 report on the school notes that since the previous review, in 1994, there had been six changes of principal, including four relievers, which had a negative impact on both curriculum delivery and board performance.¹⁴¹

Between 1991 and mid-1994, ERO had reviewed Mokai Primary School four times. Those reviews identified a number of areas in which the school's governance and management systems did not comply with the requirements of the State education system. After Mrs Koopu's appointment, ERO conducted three further reviews of the school, the last of which was reported on in mid-1998. Claimant witnesses and counsel drew attention to the fact that, while the January 1997 ERO report (based on the December 1996 review) identified 14 areas in which the school did not comply with national requirements, the December 1997 report identified nine such areas and the last ERO report identified six outstanding non-compliances.

The claimants clearly believed that the progress made by the school in complying with the national education standards during Mrs Koopu's tenure as principal, coupled with the benefits to the community from the approach she was taking,

139. Second hearing, tape 8B

140. First hearing, tape 6A

141. Document A25(3E)

counterbalanced the weight the Minister had placed, in the decision to close the school, on the poor quality of the education delivered there. Claimant counsel summarised the challenge to the Crown's conclusion that the quality of education delivered at Mokai Primary School was poor by pointing to these matters:

- ▶ that ERO reports measure school management performance, not individual student achievement;
- ▶ that it is the Crown's position that good school management performance in terms of governance and curriculum management is likely to have a positive effect on student achievement;
- ▶ that there are no national assessment standards against which individual student achievement can be measured;
- ▶ that ERO reports review management performance against a number of performance indicators, some of which are more critical than others to the delivery of education;
- ▶ that there is no evidence that pupils at Mokai were achieving at levels less than their average contemporaries; and
- ▶ that criticisms made by ERO about the delivery of a balanced curriculum, the planning and implementation of programmes, and the monitoring of students' progress must be contrasted against what the ERO reports of December 1997 and June 1998 actually say. In particular, the ERO report of December 1997 indicates that a balanced curriculum was being delivered, that planning and implementation of programmes were in place, and that at least some monitoring had commenced.¹⁴²

Attention was focused at the hearing on the level of compliance with national standards that had been reached by the school at the time of the last ERO review in mid-1998. The six non-compliances recorded in ERO's review report at that time are:

- ▶ monitoring student progress against the national achievement objectives;
- ▶ documenting how the national education guidelines are being implemented;
- ▶ maintaining an ongoing programme of self-review;
- ▶ consulting with the community to reach broad agreement on the desirable treatment of the health syllabus;
- ▶ developing and implementing an equal employment opportunities (EEO) programme each year and reporting annually to ERO on the extent to which the board was able to meet the programme for that year; and
- ▶ developing and implementing a maintenance programme to keep buildings and facilities in a safe condition.¹⁴³

In response to questions from claimant counsel, ERO's Hamilton and Rotorua area manager, Ian Hill, identified the first of those matters as the principal's responsibility and the other five as the board of trustees' responsibility. He made plain that ERO regarded the inadequate monitoring of student progress to be very serious because it

142. Document A29, para 2.44

143. Document A25(3G)

is a ‘fundamental’ part of education delivery that is critical for sequential learning to take place (see sec 3.4.3(2)).¹⁴⁴

2.7.2 Monitoring student progress against national achievement objectives

Mr Hogan, the principal’s release teacher at Mokai school for the early part of 1998, acknowledged that the lack of monitoring was a problem at the school and that the board should have attended to it. He then described the difficulty of the task involved and the context in which he considered the school’s non-compliance should be seen:

That [monitoring of student progress] is a behemoth. That is a monster. It’s something that we should all do all the time, and I’m not surprised to see it is not achieved. I would like to see a school where it is achieved.¹⁴⁵

Mrs Koopu acknowledged, in response to Crown counsel’s questions, that she had not complied with the national standards for assessing and recording student progress but said that she had observed each student’s development:

Some of the things that I would have lacked would have been having put down what would be the outcome of what your objective was. . . . That was pointed out to me . . . my naïve reply was ‘But I can see it.’ . . . It was about me coming to grips with all this assessment and monitoring, and a lot of time that was spent on it. I really felt that I couldn’t get into the depth of the actual teaching. Because there was so much time in assessing, I was thinking, ‘When am I going to get to really teach?’¹⁴⁶

Crown counsel asked Mrs Koopu if the progress record cards for each child were filled in on the basis of ‘progressive, ongoing work that you had from the children that you could look at and measure their progress’. Mrs Koopu replied that she believed she was able to do that and that, if she had failed in her documentation, that did not worry her because she had the parents alongside her and they knew and could see ‘where we were at’.¹⁴⁷ She also noted that the progress record cards were filled in at least twice a year and that other documentation was being set up in the form of personal profiles for each child. The intention was that these would be forwarded to the parents to enable them to gauge their child’s achievement.¹⁴⁸

Mr Hogan praised Mrs Koopu’s organisation of the children’s work and her knowledge of the level each child was working at:

Whenever I came out to the school . . . the work left by Haromi was of excellent quality and it was very easy to pick it up and work with the separate groups. She would leave individual work programmes for each student. That work I could pick up and work with and add on whatever I was doing with maths and science.

144. Second hearing, tape 10A

145. First hearing, tape 5A

146. First hearing, tape 6B

147. Ibid

148. Ibid

... She knew exactly the level the students were at and could lay her finger on the exact page of work in her workshop, her office, that all these different students were working on. She was very efficient and well organised. Haromi always showed a very powerful sense of aroha, love for the students and a very welcoming attitude towards anyone who came into the school.¹⁴⁹

Mrs Wall was asked by Crown counsel how the board knew that the core curriculum, with its seven essential learning areas (see sec 3.3.2(3)), was being delivered and that the progress of the children was being measured. She replied that, at the board's monthly meetings, the principal reported on her teaching, giving a practical demonstration using the children's work and term plans. Mrs Wall referred, as an example, to a board meeting in January where it was decided, from the principal's term plan, what the children would participate in. She also said that the board saw the children's progress records and could see improvements in the children's behaviour and work. In sum, Mrs Wall said, the board saw quality education being delivered even if it was not documented to the standards required by the Ministry of Education.

Mrs Wall also provided the example of her own son who, at the time of the hearing, was in form 1 in a Taupo school. She explained that he had attended Mokai school for three terms in 1998 and had left the school only because 'his father missed him'. At the school in Taupo he had been invited to sit tests to join the progressive class there. Out of 147 students who sat the tests, she said, there were only three Maori students. Her son 'made it into the progressive class with marks from 96 to 92'. Therefore, she said: 'I know at the end of 1998, he must have done some learning up to the national education guidelines criteria because he would have not made it into that class.'¹⁵⁰

Mr Hogan also gave his view of the quality and effects of the teaching that he saw and took part in at Mokai school during the first term of 1998. He introduced his comments by saying:

Everyone would get on with their work pretty much as individuals, as you would expect any other student to work. When you were working with one group, the others would work on their own. This meant that they developed into very confident people responsible for their own learning and that was impressive.¹⁵¹

On the matter of his own maths and science teaching at the school, which occupied most of his time, Mr Hogan was complimentary about the children's abilities and the standard of their knowledge and work:

I taught them at their entry level and their standard of maths was very good. They were certainly very sharp on all their numerals, their tables, very quick, intelligent little kids. The 7-8 year olds were well up to date with their maths, if you put them in a line of everybody, they would be good average students. The older kids in Form 1 and 2, the 10-11 year olds, were well up to date with what was happening and they would get on

149. Document A11, paras 25, 30

150. First hearing, tape 8B

151. Document A11, para 6

with their work and were completing some quite difficult work on their own. That was of a standard you would expect of a good Form 1 and 2.

When I hear the comment that the quality of education was not up to standard, I would have to seriously ask what evidence suggests that? The maths ability of these children was very good. Most of their maths was working out of books and most of it was working on their own.¹⁵²

Asked again by the Tribunal about the standard of Mokai students in maths, Mr Hogan replied that in the course of travelling to assist some 10 primary schools, which he named, he found that:

when you have the privilege of walking into a school . . . it's painfully obvious what schools are and are not doing. . . . And I have to say in all honesty that the students here [at Mokai], while they weren't perhaps at the 99 percent level of achievement, they were certainly not at the 10 percent level of achievement. And I would guess . . . that they were at a level that I would expect them to be at, and certainly would be able to hold their heads up in a national examination if you like.¹⁵³

Mr Hogan also referred specifically to one student at the school when he was there who he knew was able to 'go straight into the form 3 level . . . without too much problem'. That, he said, was indicative of the fact that she was 'actually up to scratch'. Reiterating his earlier comments, he added, 'When you say, "Were they of a good standard?", "Yes", I have to say, "Yes"'.¹⁵⁴

2.7.3 The board's response to the 1998 non-compliances

Mrs Wall produced and spoke to a 'road map' that the board of trustees had developed at the end of 1998 for meeting all the outstanding non-compliances with the national standards.¹⁵⁵ She noted that the board acknowledged the enormity of the task of achieving full compliance with national education standards and that the 'road map' identified the issues, objectives, and time-frames for the implementation of remedial action in each area.¹⁵⁶

Mrs Koopu stated that she believed the school had reached a position, by the time of its closure, where it complied with all the national education standards.¹⁵⁷ Late in August 1998, the former chairperson of the board had written to the Ministry of Education's district manager stating:

All compliances are being addressed or have already been met. The outstanding issues are not of such a nature that the school should be threatened with closure. ERO was invited into the school in the last term of 1996 by the new Principal to assist her getting the school into shape. Since that first review the school has steadily reduced the

152. Ibid, paras 19–20

153. First hearing, tape 5A

154. Ibid

155. Document A6E, attachment 3.3

156. First hearing, tape 8B

157. First hearing, tape 7B

outstanding compliances and is now in a position to have all met in the near future. Not everything can be addressed simultaneously and it is unfair to penalise the Principal and BOT [board of trustees] for bringing the school to the attention of ERO.¹⁵⁸

The bulk of the claimants' evidence of the progress made in remedying the non-compliances is contained in a letter dated 2 March 1999 from the board to the Minister of Education and in the more than 100 pages of attachments to that letter. The following paragraphs summarise that information, which was also presented in person by the board to representatives from the Ministry's Hamilton office at a meeting on 2 March 1999. Mrs Wall said that, to her surprise, the Ministry officials at that meeting did not ask any questions about the school's progress and responded in writing only to seek clarification about transport issues. She described the course of the meeting in these words: 'We presented to them. I read the covering letter out. They accepted it. We had lunch. Kua mutu.'¹⁵⁹

In brief, the claimants' evidence of the school's most recent efforts to comply with the matters identified in the 1998 ERO report is as follows:

- ▶ The letter of 2 March 1999 states, with regard to the requirement to monitor student progress against the national achievement objectives that unit and term plans have been developed and that monitoring systems have been revamped. Samples of individual student profiles and of the new monitoring and evaluations are attached to the letter.
- ▶ The same letter reveals the board's belief that it had complied with the requirement to document how the national education guidelines are being implemented. It states:

During the Christmas break period, a 'Planning Team', made up of board members, staff and advisors where necessary, undertook to develop and implement what we called foundation documents for the school. One of the core tasks was to develop and implement the National Administration Guidelines and National Education Guidelines into the school management system. I am pleased to say that the school now has in place a full set of documentation on the NAGS and NEGS relating to our kura.¹⁶⁰

The attachments to the letter include two pages that list the documentation required to comply with national administration guidelines 2 to 6; 10 pages that set out, for five of the essential learning areas, the rationale, achievement goals, and year-by-year achievement profile for each area; and (in the board's self-review documents) six pages that list the policies, procedures, and supporting documentation required by national administration guidelines 1 to 6, and 10 pages that list the 10 national education guidelines and what is needed to be done to achieve each one.

- ▶ The letter of 2 March 1999 states, with regard to the requirement that the board maintain an ongoing programme of self-review, that the board developed and

158. Document A6C, p 3

159. First hearing, tape 9A

160. Document A6E, attachment 4, p 1

completed a range of specified tasks towards this end in 1998. Attached to the letter is a 'Mokai Bilingual School: Development Plan and Self Review Plan', which spans some 40 pages.¹⁶¹

- ▶ The school's view that it had complied with the requirement to consult with the community to reach broad agreement on the desirable treatment of the health syllabus is recorded in a letter dated 24 August 1998, from the then chairperson of the board to the Ministry's district manager. It states:

The community has been supplied with a copy of the full health syllabus and has been asked to comment. The panui also indicated that a full hui would be held if anybody wished to discuss this further. The health syllabus has been accepted as set out by the Principal.¹⁶²

- ▶ With regard to the requirement to develop and implement an EEO programme each year and to report to ERO on the extent to which the board was able to meet the programme, the attachments to the letter of 2 March 1999 contain, in a section headed 'Examples of Self Reviews Completed', five pages which suggest that a policy had been drafted, and perhaps approved by the board, in February 1999. One of the five pages is a Ministry circular to all State and State-integrated schools, dated 26 November 1998, which reminds boards of their EEO responsibilities and records that 'significant numbers of schools' are experiencing difficulty in meeting the annual reporting requirement and, to this end, a standard report form is attached.
- ▶ On the final matter, the development and implementation of a maintenance programme to keep buildings and facilities in a safe condition, the board chairperson's letter of 24 August 1998 states that compliance has been achieved. It notes that audits are taking place and that the matter is reported on monthly at the board's meetings.¹⁶³ Mr Osborne gave evidence that, in 1998, he had been co-opted to the board as property manager and to assume responsibility for health and safety matters.¹⁶⁴ He had attended one training seminar 'run by the MOE . . . at a pretty fast pace' but his previous work experience meant that he understood what was expected of a property manager. Despite that, he noted that he had found it difficult to 'figure out exactly what it was that MOE wanted and how to meet the compliances'.¹⁶⁵

2.7.4 The meaning of the ERO reports

The board's understanding of the ERO reports on Mokai school contributed to its view that, by the time the school was closed, it had achieved at least a substantial degree of compliance with all national education standards. Claimant counsel

¹⁶¹. Ibid, sec 4

¹⁶². Document A16(d), p 3

¹⁶³. Ibid

¹⁶⁴. Document A15, para 6

¹⁶⁵. Ibid, para 7

questioned Mr Hill about the apparent contrast between the comments made, and compliances recorded, in the most recent ERO reports and Mr Hill's criticisms of the school since 1991.

One ERO report extract that was discussed was the section in the December 1997 discretionary report that states:

3.5 Provide a balanced curriculum in accordance with the national curriculum statements. . . .

Compliance has been achieved

All essential learning areas are being taught based on curriculum statements or syllabi. There is evidence of this in long term and daily planning, in student's books and in work on display around the classroom.

The principal has obtained copies of all statements and syllabi and is planning from these documents. Her knowledge and understanding of the mathematics and science curriculum statements has increased following considerable assistance from advisors. This is reflected in the planning and science and mathematics programmes. Training in the implementation of the English curriculum statement is arranged for early 1998. In the meantime, the principal is making a genuine effort to plan and implement programmes from this document.

A draft curriculum delivery statement has been developed. The Principal/teachers are directed to deliver a balanced curriculum in accordance with the National Education Guideline requirements.¹⁶⁶

When asked how the opening statements in that section squared with Mr Hill's criticisms of the school's curriculum delivery (see sec 3.4.3), he replied that the provision of a balanced curriculum is a planning exercise and that, while there had been long-term planning done, there was no evidence of its implementation. Mr Hill was then referred to his written evidence, where he stated that the learning programmes at Mokai were not based on current curriculum statements and there was no school scheme and no implementation plans.¹⁶⁷ Mr Hill said that this criticism was consistent with the above quoted passage from the ERO report. He explained again that his point was that, while there was evidence of overview or long-term planning, the implementation of the plans was not happening in the day-to-day operation of the school. Therefore, the intention was not being implemented.¹⁶⁸

Mr Hill was then referred to the next section of the December 1997 ERO report, which states:

3.6 Plan and implement programmes based on the underlying principles, stated essential learning areas and skills, and the national achievement objectives. . . .

Compliance has been achieved.

A sound beginning has been made towards addressing this requirement. A recently developed draft curriculum delivery policy provides direction for specific learning

166. Document A25(3F), p 3

167. Document A24, para 22

168. Second hearing, tape 10A

outcomes to be developed for all learning programmes. This is being implemented in the majority of learning areas.

The principal has recently written some unit plans, skilfully integrating a number of essential learning areas into one theme. For the most part, learning outcomes are stated for each learning area integrated into the study. The challenge now is to plan units which identify learning outcomes for all essential learning areas, not just those integrated into units of work. This should include learning outcomes for physical education, health education, music, and all aspects of language (including reading).

There is a strong focus on attitudes and values in all planning. Learning outcomes are stated for these in some of the units planned. Objective assessment of these should enable the principal to make informed judgements about how successful the school is in the continued thrust to improve students' self esteem.¹⁶⁹

Claimant counsel pointed out that the first lines of that section say that compliance has been achieved with both planning and implementing learning programmes and yet Mr Hill had criticised the school in both these regards. He replied that the next paragraph in the section reveals what ERO found, namely that there was no school scheme – only an overview with 'no next steps'. Mr Hill explained that is why the ERO report says 'a sound beginning has been made' in this area in the 12 months since the previous accountability report. Mr Hill also explained that the above-quoted section of the ERO report acknowledges the work done, but does not say that the school is 'there' yet. ERO's remaining concerns, he said, are indicated in that section of the report, as well as in the previous section (section 3.5, quoted above), where it is said that there is still much to be done.¹⁷⁰

The Tribunal also questioned Mr Hill about the effectiveness of the most recent ERO reports for alerting the Mokai school board to the seriousness of the continuing non-compliances, and therefore their likely impact on the closure process that was in train at the time. He acknowledged that the language and structure of the discretionary reports may be confusing to the lay person.¹⁷¹ Mr Hill said that the summary at the start of each report, and the brief concluding statement at the end, were provided specifically to assist boards' understanding of the report. As well, the purpose of the 'exit meeting' that takes place between the reviewers and the board is to tell the board about the issues ERO thinks exist and to go over them.¹⁷² As well, since 1998, ERO has produced an 'open letter to the community' about each review report, providing an overview of its main points. Such a letter was written about the last ERO review of Mokai school.¹⁷³

Ms Sewell was asked by claimant counsel why the ERO reports, which counsel described as 'quite positive' in their tone, did not spell out more clearly the Crown's concerns about education quality at Mokai school. She replied that the State Sector Act 1988 prevents ERO from saying anything that interferes with the employment relationship between a school board and principal. While there were times, she said,

169. Document A25(3F), p 4

170. Second hearing, tape 10B

171. Ibid

172. Ibid

173. Ibid

when the board could have ‘read into’ ERO’s reports what they wanted to see there, she emphasised that every report referred to the absence of self-review processes (which she described as a key to quality education delivery) and to the fact that the curriculum was not being properly delivered. Ms Sewell said that ‘the way we described the curriculum weaknesses would have been clear to professionals and should have been clear to the board [of trustees] but may not have been clear to the community’. The addition of the ‘community pages’ to each report is now done, she explained, so that ‘the messages get through’. Ms Sewell also said that the exit meeting between the ERO reviewers and board would make clear ERO’s view of how things were going at the school.¹⁷⁴

In his closing submissions, claimant counsel identified, ‘probably more as an aside’, three issues that arise out of the language used in the ERO reports on Mokai school:

- (a) Whether the reports are written in such a way that all recipients of the reports will understand what is being said.
- (b) If the reports are identifying serious issues of non-performance perhaps they need to be more clearly spelt out. If a serious issue is highlighted but couched in positive language, there is a danger that a mixed message might be received by the recipients of the report.
- (c) If certain areas of non-compliance are more critical than others, then that should in some way be identified for the recipients.¹⁷⁵

2.8 THE AVAILABILITY OF ALTERNATIVES TO CLOSURE

The claimants’ position, in brief, was that the support and training provided to the school was unsuitable yet the Ministry of Education, which knew about other options for strengthening the school’s performance, did not give sufficient attention to utilising them. Instead, it was asserted, the Ministry pursued the closure of the school with too narrow a view of the issues involved.

In large part, the claimants’ evidence of possible alternatives to the school’s closure was provided through Crown witnesses’ answers to claimant counsel’s questions. The following paragraphs outline the evidence that was given about:

- ▶ statutory interventions, other than school closure, that are available in respect of a school that is in difficulty; and
- ▶ the school-initiated options, other than training and support, that are available and that, the claimants contended, the Ministry should have explored with the school community.

In chapter 3, an outline is presented of the Crown’s evidence that the training and support provided to Mokai Primary School was adequate (see sec 3.7).

174. Second hearing, tape 8B

175. Document A29, para 2.45

2.8.1 Statutory interventions

(1) *Appointment of a commissioner*

Section 107 of the Education Act 1989 provides that the Minister can dissolve a board of trustees and appoint a commissioner in its place when the Minister is satisfied that the board should not continue in existence because:

- ▶ of mismanagement, dishonesty, disharmony, incompetence, or lack of action (either generally or in relation to any particular matter or matters); or
- ▶ it has taken or intends to take an unlawful action, or has failed or refused, or intends to fail or refuse, to take an action required by law (s 107(1)(a), (b)).

Kathleen Phillips, the Ministry's senior manager responsible for six management centres (including the Hamilton office), told claimant counsel that, while Mr Kitto would know the details, to the best of her knowledge the appointment of a commissioner had not been considered in relation to Mokai Primary School.¹⁷⁶ More generally, she referred to the 'tight set of criteria' that define the circumstances in which a commissioner can be appointed and said the commissioner's role is to work with a community to generate a new board of trustees. It was generally implicit in a commissioner's appointment that the school would continue, Mrs Phillips said, but the new board of trustees might look at closure of the school as an option. As to whether the statutory criteria for appointment of a commissioner were present in the Mokai situation, Mrs Phillips referred again to the commissioner's role of generating a new board and said that it might be 'really difficult' to generate a board and this factor would need to be balanced against other factors.¹⁷⁷ A summary of Ministry policies supplied to the Tribunal states that a commissioner's appointment 'will only be practicable in situations where an election is likely to give rise to a different, and more capable, group of trustees than were originally on the board'.¹⁷⁸

Mr Kitto said that there had been consideration given by the Ministry and ERO to appointing a commissioner for Mokai Primary School but, to his knowledge, this had not been discussed with the school board. He added that the discussion between the Ministry and ERO on the matter was informal and nothing was written down.¹⁷⁹

The outcome of the Ministry's and ERO's consideration of a commissioner for the school, Mr Kitto indicated, was that the agencies were uncertain that the statutory criteria for an appointment were satisfied. He was referred to section 107 of the Education Act (see above) and asked why the agencies doubted that the Mokai school board fitted the descriptions given there. Mr Kitto replied that because the concerns related to the board not sustaining action, it was not clear that a commissioner's appointment was authorised. And, as for whether the board was incompetent, it needed to be given the benefit of the doubt.¹⁸⁰ Agreeing that the appointment of a commissioner is a less final step than school closure, Mr Kitto said it is also a totally

¹⁷⁶. Second hearing, tape 3B

¹⁷⁷. Ibid

¹⁷⁸. Document A25(1), p 25

¹⁷⁹. Second hearing, tape 5B

¹⁸⁰. Ibid

different step and mentioned three considerations relevant to the decision not to recommend the appointment of a commissioner for Mokai school.

The first consideration was that the school had a low roll as well as other viability issues. The second ‘critical thing’, Mr Kitto said, is that a commissioner is expected to work towards the election of a new board of trustees whereas the evidence showed that there was a limited number of people available to be on the Mokai board and that the board was taking steps to try to meet the requirements on them. The other consideration, he said, was that:

all of us are aware . . . of the particular nature, character, of this community. There’s a consideration that we often have in these sorts of circumstances . . . that comes under the heading of ‘tino rangatiratanga’ . . . Is it better for the people to work through these issues themselves or do their best to achieve them, or do we impose somebody from the outside – assuming that someone acceptable can be found? We have considerable discussions about these sorts of things. We don’t lightly move the idea that a commissioner may be what is going to save a particular situation.¹⁸¹

Ms Sewell was asked about the role of ERO in recommending a commissioner or another intervention authorised by the Education Act. She explained that ERO can recommend to its Minister that he or she recommend to the Minister of Education that a commissioner or financial management specialist be appointed. Ms Sewell added that ERO had taken that course from time to time in relation to the financial management specialist option. When asked whether ERO could have recommended a method of resolving the school’s problems in its reports, Ms Sewell said that maybe ERO could have done that but indicated that, each time there was a review, there was some significant action promised, or recently taken, that made it difficult for ERO to assume that role.¹⁸²

To illustrate that point, Ms Sewell referred to the 1994 ERO review and said a commissioner was not recommended at that time because a new principal had been appointed and the hope and expectation was that she would make ‘the difference that everyone was seeking’. Then, in January 1997, there was another new principal and, in December 1997, a new board chairperson. She continued:

Sometimes it’s really clear when you go to a school, when you carry out a review, that there’s no option but to recommend a commissioner, but it’s not a decision that we would take lightly because it’s a taking away . . . of a community’s right, at least for a time, to manage its own educational outcomes. The decision [about Mokai school] was by no means clear cut at any stage in this process given the things that were said. I suppose each of these times when something new was happening we hoped that the board statements of intent would be translated into practice because of all the changes in personnel.

I think I should also say from reading all of the reports . . . it seems to me that I think there was a further consideration being applied even if it wasn’t stated overtly. It seems to me that there was an underlying concern that the recommendation of a

181. Second hearing, tape 5B

182. Second hearing, tape 8B

commissioner might damage the mana of the board and the community, who, whether they succeeded or not, were significantly trying to meet the needs of their students. . . . So I think in looking at Mokai as Mokai, rather than Mokai as just any old school, that we tried to take that into account too. In looking at that, I suppose we would have thought that damaging the mana of the community [and] the board to that extent might have made a commissioner's job very difficult.

In hindsight . . . I think they were the right decisions . . . [with] two new principals and a new board chairperson and their will to improve that. We wanted to give them the opportunity to do so.¹⁸³

In closing submissions, claimant counsel stated, in relation to Crown witnesses' concerns for the impact of a commissioner on the Mokai school community:

Counsel accepts that might be a fair argument when considered in isolation. In this case however the Crown chose closure which is far more final than the appointment of a Commissioner. If the Crown's case is that the appointment of a Commissioner would have impacted upon the tino rangatiratanga of Mokai where does that leave the decision to close? Closure in that sense completely removes the tino rangatiratanga of the Mokai community, which it is submitted the Treaty principles do not permit.¹⁸⁴

(2) Direction to engage specialists

By an amendment to the Education Act in December 1998, the Secretary of Education is authorised, when satisfied that a board is not meeting its statutory obligations, to direct the board to engage, for a specified period, specified people or organisations acceptable to the secretary who can provide the board with appropriate assistance (s 64A(1)). There was no evidence that this recently created intervention had been considered in relation to Mokai school. Commenting more generally in response to claimant counsel's questions, Mrs Phillips said that, in the tertiary education area, there is power to appoint someone onto a board – a ministerial monitor – to give information back to the Ministry and that perhaps section 64A could be used in the future to similar effect.¹⁸⁵

Ms Sewell said that ERO had used the financial support provision (s 81B) to prevent things getting to a critical stage and had also, before the enactment of section 64A, recommended the appointment of independent people, such as mediators and facilitators. She said that these things were not recommended for Mokai because, for the most part, that sort of support was already in place.¹⁸⁶

Mr Kitto noted that section 64A is broader than section 81B, but that both provisions require a board to pay for the services engaged. On this, he commented:

it seems a little illogical to say, 'Well, we know you haven't any money, but we're going to require you to spend some of it that you may or may not have to a particular person that the Secretary [of Education] is going to appoint to do certain parts of the work'.¹⁸⁷

183. Ibid

184. Document A29, para 3.53

185. Second hearing, tape 3B

186. Second hearing, tape 8B

187. Second hearing, tape 5B

2.8.2 School-initiated options

Claimant counsel also asked Crown witnesses about other options for educating children at Mokai that could have been initiated or pursued by the school community. Underlying these questions was the claimants' view that, as the 'gatekeeper' of the information about such options, the Ministry should have told the school community about them and assisted with the implementation of any that were appropriate in all of the circumstances.

The effect of the Crown witnesses' responses was that, apart from improving the quality of governance and management of the school, any actions that might have been pursued by the school in an effort to ensure the children's education in Mokai – such as satellite schooling – were unlikely to have been available to it in the circumstances that prevailed in recent years. One factor working against Mokai becoming a satellite school, it seems, is that funding policies effectively require a roll at the satellite school sufficient to generate an additional teacher for the host school. Satelliting also depends on the availability of a willing host school. Crown counsel observed in closing submissions that the Ministry has no authority to 'impose' a satellite arrangement on a host school: the arrangements must be agreed between the schools.¹⁸⁸

(1) *Educational development initiative*

The Crown referred to Mokai school having considered an 'educational development initiative' in 1993 or 1994.¹⁸⁹ The Tribunal inferred that the Crown considered that the school could have, and should have, pursued such an initiative at or after that time. The information provided about the educational development initiative policy explains that, whenever the provision of education in an area is 'rationalised' (by the closure of a school or the merger of schools, or by some other reorganisation of existing arrangements), the boards involved can negotiate with the Ministry 'enhancements from the savings of the rationalisation to benefit the education of students in their 'new' schooling arrangement(s)'.¹⁹⁰

From the evidence, it seems that Mokai school considered such an initiative near the time, in late 1993, when its then principal wrote to the Ministry asking for information about the school closure process. The response from Mr Kitto, on 22 September 1993, enclosed standard information about the procedures involved that included a brief statement about the educational development initiative policy.¹⁹¹ Mr Kitto said that, in March 1994, he had attended a meeting at the school with the then principal and kuia Marina Jacobs to discuss the closure process. That would have provided the opportunity for further information to be supplied about the policy.¹⁹²

Plainly, the school did not pursue an educational development initiative at that time or later. It seems to the Tribunal (in light of the viability of nearby schools –

188. Document A30, para 137

189. Second hearing, tapes 8B, 14B

190. Document A25(1), p 25

191. Document A25(20)

192. Second hearing, tape 5B

except for Tihoi school, which was closed in 1996) that Mokai school could have relied on such an initiative only if it were prepared to close. The reasons for the school community's opposition to that possibility are at the heart of the present claim. Therefore, to the extent that the Crown may have considered the school community to have been unreasonable, or parochial, for not pursuing an educational development initiative in 1994 or later, the community's 'defence' would involve many of the grounds on which, in this claim, it challenged the Crown's conduct.

(2) Other options, including satellite schooling

On the matter of the information provided by the Ministry to the Mokai community about any other options for educating the children in Mokai, Mr Kitto said that, at all the meetings he attended with the school community, he provided information as requested. However, he said, it became clear (from at least late 1995, it would seem) that the school community did not want to discuss options that would involve closing the school and so he did not discuss those, including satellite schooling and school mergers. It was not the sort of information he was asked to provide, he said, and it would be illogical in the circumstances to discuss options that may depend on school closure. When asked if the Ministry, which has the necessary information, has a responsibility when it is concerned about a school to inform the school community of all the alternatives that exist to sending their children to another school, Mr Kitto said:

I don't believe there is any obligation on the Ministry to do that. Every situation is different. Sometimes those sorts of questions may be asked of us. . . . in my experience never have they been asked of me in the closure of 11 or 12 schools.¹⁹³

Rawiri Brell was asked by the Tribunal to clarify the situation regarding Mokai school becoming a kura kaupapa – a matter referred to by the claimants as a longer-term aspiration for the school. He was not sure of the details about Mokai and the kura kaupapa in Taupo but said that it is difficult to 'navigate the way round the education system and get the right information'. The Ministry, he said, 'has some responsibility for tidying that part up'. Mr Brell then explained that the satelliting option has been used by the kura kaupapa Maori movement to overcome the fiscal and resource constraints that exist in establishing a new kura kaupapa.¹⁹⁴

In light of all the evidence, the Tribunal asked Crown counsel during her closing submissions whether there is any way that a New Zealand community can have a school if it proves unable to elect a board of trustees with the necessary skills to perform the role required of it. Counsel replied that a number of schools have been closed because their boards have failed to 'get their governance, management, and curriculum delivery together'. She then said that 'shared boards' can be arranged and referred to Mokai school having looked at an educational development initiative at one stage.¹⁹⁵

193. Ibid

194. Second hearing, tapes 2B, 3A

195. Second hearing, tape 14B

The reference to shared boards is to the possibility of school boards combining. Section 110 of the Education Act provides that, when the Minister is satisfied that the boards concerned have consulted the parents and that, in relation to each school, most parents favour combining the schools' boards, the Minister can establish a combined board for those schools. Therefore, this is a school-initiated action which depends on cooperation between or among two or more schools. Another school-initiated and cooperative action provided for by the Act is the merger of schools (s 156A). As Mr Kitto indicated, merger results in the continuation of one school and the closure of the merging school or schools.¹⁹⁶

The claimants' evidence suggested that such options as combining boards or merging with another school were not suitable for Mokai school because of the importance to the community of the children receiving an education in te reo and matauranga specific to Mokai. The Crown's understanding of the claimants' reasons for wanting to keep Mokai school open was challenged most directly in connection with the Ministry's view of the alternative schools available to Mokai pupils. The Crown's response to that challenge is outlined in chapter 3 (see sec 3.9.5).

2.9 CONSULTATION DURING THE CLOSURE PROCESS

The claimants criticised the consultation process undertaken by the Ministry for not sufficiently engaging the school community in discussion about the range of issues relevant to the school's future, including possible alternatives to closure that might preserve and strengthen the delivery of education in Mokai. Underlying that criticism is the claimants' view that the Crown's prior understanding of the school's unique value was inadequate and so could not be relied upon to remedy the deficiencies in the consultation process.

Sections 154 and 157 of the Education Act 1989 require three major steps to be taken in the process of closing a school. First, the Minister needs to be satisfied, after consulting the board of the school, that the school should be closed (s 154(1)). The point at which the Minister is satisfied was referred to as the point at which a decision in principle is made to close the school. Once a decision in principle is reached, the Minister may, by written notice ask the board if it has any arguments in favour of the school staying open (s 154(1)).

The second step is that the Minister must consider any arguments made by the board within 28 days after it receives written notice asking for them. After that, the school may be closed as from a specified day, which is effected by notice in the *Gazette* specifying the day on which the school will close. On that day, the school ceases to be established (s 154(2)). The other step that must be taken in the closure process is that the boards of all State schools whose rolls might be affected by the school's closure must be consulted (s 157(3)(f)).

¹⁹⁶ Second hearing, tape 5B

A detailed chronology, and Crown witnesses' accounts, of the consultation engaged in before the closure of Mokai school is presented in chapter 3 of this report (see sec 3.9). The two most important dates involved are:

- ▶ 14 November 1995 – when Mr Kitto delivered to the school community a letter from the Ministry's acting senior manager of national operations dated 7 November 1995. The letter informed the school board that it had been decided, under section 154 of the Education Act, to consider the closure of the school and that the Hamilton office of the Ministry had been directed to consult with the board; and
- ▶ 27 July 1998 – when the Minister wrote to the school to convey the decision in principle to close the school and ask for any arguments it had in favour of the school staying open.¹⁹⁷

Claimant counsel challenged the adequacy of the consultation on two bases: that it did not comply with the requirements of the Education Act or with the principles of the Treaty of Waitangi. While it is not the Tribunal's task to determine the legality of the consultation undertaken by the Ministry of Education, all the claimants' allegations of deficiencies in the consultation process are relevant to our assessment of its consistency with Treaty principles. In summary, those allegations were that:

- ▶ any meetings between the Ministry and board before November 1995 could not be relied on the Ministry as part of the consultation process because, under the Education Act, that process commenced with the delivery of the letter on 14 November 1995;
- ▶ a meeting in March 1996 could not be relied on because it was 'historical' by the time the decision in principle to close the school was made in July 1998;
- ▶ in the period between November 1995 to July 1998, there were no meetings specifically dedicated to the issue of closure;
- ▶ in that same period, on the occasions where the issue of closure was raised, it was raised in the context of discussions about other matters and the discussion was not of a quality to generate 'ideas, solutions and alternatives to closure';
- ▶ the Ministry did not consider, before the decision in principle to close the school was made, whether alternative bilingual education was available to Mokai school students; and
- ▶ after the decision in principle was made, the Ministry did not investigate options other than closing the school but merely sought and recorded the board's views on particular matters about which it wanted clarification.¹⁹⁸

Claimant counsel summarised the claimants' position in this way:

Clearly the closure of Mokai Primary School involved Treaty implications – that is local autonomy (tino rangatiratanga), te reo Maori and matauranga Maori.

Therefore the Crown was under an obligation to consult and in doing so, have a fully fledged discussion about all alternatives and options in an attempt to find an agreed position in accordance with Treaty principles.

197. Document A7D; doc A6B

198. Document A29, paras 2.89–2.95, 3.45–3.56

It is submitted that the Crown failed to do so. No such meetings appear to have been specifically designated on the topic of closure, no generation of alternatives and options were made. It appears that the Crown simply took on board the views of the Mokai community and Board that they did not want the school to close, consider[ed] that there was bilingual education within the local area and relay[ed] that on to the Minister. In those circumstances it is submitted that the consultation with regard to Treaty principles was inadequate and in breach of the Treaty principles.¹⁹⁹

In chapter 3, the outline of the Crown's response to this challenge includes Crown witnesses' answers to the questions put by claimant counsel about the elements of the consultation process that the claimants criticised. That outline serves to highlight the points of difference in the parties' quite detailed evidence about all the matters listed in the bullet points above. Therefore, we refer readers to section 3.9 for that further information.

2.10 THE SCHOOL LAND

In the amended statement of claim, the claimants sought as a recommendation (but only if the Tribunal did not recommend reopening Mokai Primary School or using the school facilities for a new educational institution) that the land upon which the school is situated 'be returned to the successors in title of the original donors'. Also sought was a recommendation 'that all assets seized by the Ministry of Education pursuant to the closure process including school buildings be transferred to the successors in title of the original donors of the land'.²⁰⁰

At a meeting with claimant and Crown counsel during the hearing of claimant evidence, and in a telephone conference before the hearing of Crown evidence, it was agreed that the history of the land's acquisition was uncertain and that the research needed to clarify the matter was unlikely to be completed in time for the January hearing of the claim. Both counsel agreed to pursue that research independently of the other issues raised by the claim and, only if necessary (as a result of the Tribunal's findings and recommendations or the parties' inability to agree on the land's history, or both) to pursue the matter before the Tribunal at a later date.

In closing submissions, Crown counsel noted that there is a statutory process (under the Public Works Act 1981) for dealing with the school land and that the former Minister of Education had assured the school board that the process would be followed. As for the school assets, the Crown objected to the claimants' assertion that these had been 'seized' by the Ministry and referred to the Education Act's provision, in section 154(3)(b), that all assets, liabilities, and debts of a school board become, upon the school's closure, those of the Minister.²⁰¹ In his closing submissions, claimant counsel amended the recommendation sought in relation to the assets but

199. Document A29, paras 3.54–3.56 (as amended orally at hearing)

200. Claim 1.1(b), para 40

201. Document A30, paras 132–134

only so as to include, as an alternative recipient of the school assets, ‘such legal entity as agreed by the Crown, claimants and the wider Mokai community’.²⁰²

We observe that, if the recommendations made in chapter 4 of this report are adopted, they will have the effect of rendering irrelevant any remaining doubts about the history of the school land and the status of the school’s assets. If any other outcome should eventuate and the status of the school land is contested between the parties, we would hope the Public Works Act process would be utilised to settle the matter. However, on the basis that the issue was raised and deferred in this claim, we consider that the claimants can return to the Tribunal should they believe that to be necessary.

As for the school assets, we note that the provision of section 154 of the Education Act that vests school assets in the Minister assumes that a school has been closed lawfully. The determination of that matter is outside the Tribunal’s authority. Therefore, should our recommendations in chapter 4 not be adopted and the matter of the school’s assets remains in contention between the parties, it would seem that court action is the only avenue available to resolve the matter.

2.11 THE EDUCATION ACT CLAIM

In the statement of claim and claimant counsel’s opening submissions, it was claimed to be inconsistent with the principles of the Treaty that the Education Act 1989 does not contain a ‘Treaty clause’ requiring its implementation to be consistent with the principles of the Treaty.²⁰³

In his closing submissions, claimant counsel withdrew that claim. Instead, it was observed that the absence of a Treaty clause in the Education Act leaves the claimants, and other Maori, in the position of having to resort to the Waitangi Tribunal to challenge Crown conduct on the basis of its alleged inconsistency with the Treaty. Further, it was submitted that, because the education sphere is so important to the retention and active protection of te reo Maori and matauranga Maori, and the Crown is committed to those ends, ‘then there can be no harm’ in amending the Act to include a Treaty clause. The claimants then sought as a recommendation from the Tribunal that the Education Act be amended to include a clause preventing the Crown from acting in a manner inconsistent with Treaty principles.²⁰⁴

Crown counsel was invited to make written submissions in response to the claimants’ amended position because no warning of that amendment had been given and the Crown’s closing submissions had been prepared on the basis that the claimants would adhere to their original Treaty arguments. The Crown submitted a memorandum dated 20 January 2000, to which claimant counsel responded by memorandum dated 21 January 2000. Crown counsel then submitted a further memorandum, dated 23 February 2000.²⁰⁵

202. Document A29, para 5.3.3

203. Claim 1.1(b), paras 21–24; doc A18, paras 3.1–3.22

204. Document A29, paras 4.8–4.12, 5.3.4

205. Papers 2.23–2.25

The Crown's response to the claimants' amended argument is that the Tribunal lacks jurisdiction to consider the question 'Where is the harm in including a Treaty clause in the Education Act 1989?' Observing that section 6 of the Treaty of Waitangi Act 1975 confers jurisdiction in respect of allegations of inconsistency with Treaty principles, Crown counsel submitted that, because claimant counsel withdrew the allegation that the Education Act itself is inconsistent with Treaty principles, the question he posed in its place is not one upon which the Tribunal is entitled to make findings or recommendations.²⁰⁶ In addition, the urgent nature of the hearing of the claim and the fact that the question raises matters of 'high constitutional import and belongs in the arena of high policy' would make it inappropriate for the Crown to enter debate on those matters, even if the Tribunal had jurisdiction.²⁰⁷

The response from claimant counsel acknowledges that the Education Act claim 'was not sustainable' but submits that, as a commission of inquiry, it is for the Tribunal to decide whether or not there has been a breach of the principles of the Treaty and, if so, to recommend the action that should be taken to remove the prejudice.²⁰⁸ Crown counsel's further response argues that the Tribunal's powers as a commission of inquiry do not enlarge its jurisdiction but relate only to its procedures.²⁰⁹

Our approach to this matter is guided by our awareness of the very large implications of the question posed by claimant counsel. As Crown counsel suggested, the question indirectly challenges the constitutional position that the Treaty of Waitangi is not enforceable in the courts without express legislative incorporation of its principles. That position, which has been debated in the public arena in the past and will, no doubt, continue to be debated in the future, requires far greater consideration than the Tribunal can give it. And that is especially the case in the context of an urgent hearing of a claim relating to one school in the primary education sector, which is just one of the sectors in the education sphere, which is, in turn, just one of the many spheres of Crown activity, all of which are subject to the constitutional position.

We observe that an inevitable consequence of the constitutional arrangements is the 'prejudice' identified by claimant counsel – that Maori individuals or groups may be compelled in the education sphere, and in other spheres, to resort to the Tribunal to challenge contemporary Crown conduct for its inconsistency with the principles of the Treaty. The conferral of the right to resort to the Tribunal for those purposes was, however, the primary purpose of the Treaty of Waitangi Act 1975, which was only later amended (in 1985) to enable challenges to be made to past Crown conduct, back to 1840.

Accordingly, we have declined claimant counsel's invitation to make the recommendation sought in relation to the Education Act 1989, even although, as we discuss in chapter 4, we consider that the Crown's conduct in relation to the closure of Mokai Primary School was not consistent with the principles of the Treaty of Waitangi.

206. Paper 2.23, paras 7–13

207. Ibid, para 14

208. Paper 2.24, paras 2–7

209. Paper 2.25, paras 3–4

CHAPTER 3

THE CROWN'S RESPONSE

3.1 INTRODUCTION

Counsel for the Crown interpreted the claim as focusing on the question:

whether there is an obligation on the Crown, through the Minister of Education, to keep open a small sole-charge school in a rural, and predominantly Maori community, in circumstances where the education being provided by the school is inferior to the quality of education to which they have an entitlement, and where there is an alternative education available within a reasonable distance of the homes of the children who attend the school.¹

The Crown's defence of the closure decision focused on the two major concerns the Minister had with Mokai Primary School:

- ▶ the quality of the education being delivered there; and
- ▶ the viability of the school.

To a very large extent, the concerns about education quality arose from the reports of ERO on the seven reviews of the school conducted between late 1991 and mid-1998. This chapter first presents information, drawn from the Crown evidence, that provides the immediate context for understanding the roles and responsibilities of ERO and school boards of trustees (see secs 3.2–3.3). Then it outlines the Crown evidence of:

- ▶ the causes and nature of the problems with the quality of education provided by Mokai Primary School (sec 3.4);
- ▶ the further factors that called into question the school's viability (sec 3.5);
- ▶ the kinds of support available to New Zealand schools (sec 3.6);
- ▶ the appropriateness of the training and support provided to Mokai Primary School and of the school's closure (secs 3.7–3.8);
- ▶ the consultation undertaken as part of the closure process (sec 3.9); and
- ▶ the Crown's policy, in the State primary school sector, for protecting the taonga of te reo and matauranga Maori (sec 3.10).

1. Document A26, para 10

3.2 THE EDUCATION REVIEW OFFICE

The Education Review Office (ERO) is the Government department responsible for independently evaluating and reporting on the quality of educational services provided by all registered New Zealand schools. It is separate from the Ministry of Education, which has responsibility for the development and implementation of education policy across all State-funded education sectors. ERO shares common objectives with the Ministry, however, and works with it in the collective interest of government. All ERO reports on schools are copied to the Ministry and ERO may make direct recommendations to the Ministry. Since the establishment of ERO in 1989, responsibility for the separate ministerial portfolios of education and education review has very often been vested in one Minister.²

The primary objective of ERO is to provide reliable, accurate, and useful evaluations that support and improve the quality of decisions taken by key education stakeholders. To that end, ERO officers review every school on a three to four yearly basis, unless the circumstances at particular schools justify their more frequent review. The ERO report that follows each review evaluates the school's implementation of government education policies and the quality of education provided at the school. It also highlights areas where the school's accountability and education quality would be improved by direct intervention or by changes in its use of training or other services.³

3.2.1 Review criteria

There are no national measures of primary school pupils' educational achievements. In their absence, ERO reviews focus on the performance by boards of trustees of their obligations to govern and manage the delivery of education. These obligations, defined by the school charter and the national education guidelines (see secs 3.3.1–3.3.2), are extensive. As a senior Ministry of Education officer said at the hearing, the role of a school board of trustees in New Zealand 'is no sinecure', for it involves a high level of responsibility for the provision of a quality education to children of the community.⁴

Underpinning ERO's review criteria is the understanding that there is a correlation between the quality of a school's governance and management systems and the quality of the educational achievements of its students. Ms Sewell acknowledged that there is no significant evidence that better governance improves students' learning. However, she noted that in the first three years after ERO's establishment, its 'assurance reviews' revealed that only 6 to 8 percent of schools were fully compliant with their legal obligations. In the next three years, that figure increased to 85 percent compliance as boards of trustees became aware of their obligations. This showed, she said, that ERO's evaluations led to change and that boards want to deliver what is required of them by the education system.⁵

2. Document A23, paras 10–14

3. Ibid, paras 18–19, 24

4. Document A21, para 11

5. Second hearing, tape 8B

With the rise in compliance levels, ERO introduced 'accountability reviews' (see sec 3.2.2), which, Ms Sewell said, focus more on 'the bigger issue' of school performance, including quality of teaching. She said that it would assist the review process, and school boards of trustees, if there were national student assessment practices. However, ERO can and does evaluate teaching quality through evidence such as school records and workbooks. By that means, ERO evaluates the quality of students' learning.⁶

3.2.2 Accountability and discretionary reviews

The regular (three to four yearly) ERO reviews of New Zealand schools, known as accountability reviews, evaluate school boards' compliance or non-compliance with all their legal obligations. In addition, discretionary reviews will be conducted when ERO has concerns about particular schools' performance. Generally, a discretionary review will be done as a follow-up to an accountability review that identifies significant difficulties in a school's governance and management. Among ERO's criteria for conducting a discretionary review are that the areas of poor performance impact significantly on the wellbeing of the children and that the response of the board of trustees to the previous report is not likely to result in improved performance.⁷

Normally undertaken within six to 12 months of the release of an accountability review report, a discretionary review focuses only on the matters identified in the previous report as not complying with the board's obligations. Ms Sewell explained that, because improvements are generally made between an accountability review and a discretionary review, it is extremely rare for ERO to conduct consecutive discretionary reviews.⁸

The three-stage ERO review process begins with a scoping stage, in which information held or gathered by ERO is assessed to determine the extent and focus of the review. The on-site review follows, with a team of trained, experienced, and tertiary-qualified review officers observing the school in action and consulting all key stakeholders in the course of evaluating the school's performance. When the on-site review has been completed, and at a time that suits the school's board of trustees, the ERO reviewers meet with the board for a final 'exit meeting' to discuss the reviewers' findings and assessments. In the post-review stage, the reviewers' unconfirmed report is made available to the school board for its comments, within a minimum of 15 working days. At the end of this process, the confirmed review report is made available to parents and the school. Subsequently, the board is asked to inform ERO of any action it has taken or plans to take in response to the report's findings or recommendations and that response is publicly available.⁹

6. Ibid

7. Document A23, para 46

8. Ibid, para 43

9. Ibid, paras 32–33, 47–60; second hearing, tapes 9A, 9B

3.3 BOARDS OF TRUSTEES' LEGAL OBLIGATIONS

The current school governance model was introduced in 1989 and vests overall responsibility for the successful operation of a school in an elected board of trustees. The board must have a majority of parent representatives. Ms Sewell explained that the model applies to all 2700 schools in New Zealand whether or not special factors apply, such as the size or remoteness of the school or the extent to which a community is able to provide the skills that are required for effective governance.¹⁰

There are two sources of the obligations of a board of trustees: the school's charter and the national education guidelines. The Education Act provisions governing these matters make up an important part of the policy framework which, the Crown submitted, meets its Treaty responsibilities relevant to this claim.

3.3.1 The school charter

Under section 61(1) and (3) and section 62 of the Education Act 1989, every school board is required to have a written charter of the school's aims, purposes, and objectives, prepared following consultation with parents and staff, and consideration of the views of Maori communities in the area. The Act deems certain aims to be included in all charters, namely:

- ▶ the aim of conforming with the national educational guidelines (see sec 3.3.2);
- ▶ the aim of developing policies and practices that reflect New Zealand's cultural diversity and the unique position of the Maori culture; and
- ▶ the aim of taking all reasonable steps to ensure that instruction in tikanga Maori and te reo Maori are provided for full-time students whose parents ask for it (ss 61(3), 63).

A charter is an undertaking by a school board to the Minister of Education that all reasonable steps will be taken, first, to manage and administer the school for the purposes set out or deemed to be contained in the charter and, second, to ensure that the school, its students, and the community achieve the charter's aims and objectives. Accordingly, the purpose of an ERO review is to evaluate a board's compliance with the stated and deemed provisions of the school's charter.¹¹

3.3.2 The national education guidelines

The national education guidelines are promulgated by the Minister under section 60A of the Education Act 1989. They have three components: the national education goals, the national administration guidelines, and the national curriculum statements.

10. Document A23, para 73

11. Ibid, paras 64–67

(1) *The national education goals*

The national education goals are the Government's 10 overarching goals for the State education system. Boards of trustees and teachers are required to consider how best they can contribute to each goal in light of their local circumstances and to demonstrate, by their documentation and activities, that their work is designed to achieve the goals.

As can be seen from the following selection, the national education goals are framed broadly:

1. The highest standards of achievement, through programmes which enable all students to realise their full potential as individuals, and to develop the values needed to become full members of New Zealand's society.
2. Equality of educational opportunity for all New Zealanders, by identifying and removing barriers to achievement.
- • • • •
5. A broad education through a balanced curriculum covering essential learning areas with high levels of competence in basic literacy, numeracy, science and technology.
6. Excellence achieved through the establishment of clear learning objectives, monitoring student performance against those objectives, and programmes to meet individual need.
- • • • •
9. Increased participation and success by Maori through the advancement of Maori education initiatives, including education in Te Reo Maori, consistent with the principles of the Treaty of Waitangi.
10. Respect for the diverse ethnic and cultural heritage of New Zealand people, with acknowledgement of the unique place of Maori, and New Zealand's role in the Pacific and as a member of the international community of nations.¹²

(2) *The national administration guidelines*

The national administration guidelines are designed to support learning and assist schools to meet the national education goals. They provide direction to school boards in their governance and management in relation to:

- ▶ the provision of a balanced curriculum;
- ▶ employer responsibilities;
- ▶ financial and property matters;
- ▶ documenting the national education guidelines' implementation;
- ▶ maintaining an ongoing programme of self-review;
- ▶ health and safety; and
- ▶ compliance with legislation affecting schools.¹³

Unlike the national education goals, the national administration guidelines are quite specific in their requirements, leaving little room for interpretation by boards of

12. Document A25(6), p 1

13. Ibid, p 2

trustees. For example, the first guideline requires all boards to ‘foster student achievement by providing a balanced curriculum in accordance with the national curriculum statements’. It then specifies that this requires the implementation of particular learning programmes, the monitoring and assessment of students, and other matters. A substantial amendment to that guideline, notified in the *Gazette* of 22 November 1999 and to take effect from 1 July 2000, provides, among other things, that each board must, through its principal and staff and ‘in consultation with the school’s Maori community, develop and make known to the school’s community policies, plans and targets for improving the achievement of Maori students’.¹⁴

Another example of the guidelines’ specificity is provided by the third guideline, which requires compliance with legislation on financial and property matters and specifies that boards must ‘monitor and control school expenditure, and ensure that annual accounts are prepared and audited as required by the Public Finance Act 1989 and the Education Act 1989’.¹⁵

(3) *The national curriculum statements*

The purpose of the national curriculum statements is to ensure the implementation of the New Zealand curriculum that applies to all schooling from years 1 to 13. The curriculum, revised as a result of education reviews in the 1980s, establishes principles for teaching and learning, identifies seven essential learning areas and eight groupings of essential skills, and defines national achievement aims and objectives. To bridge the distance between the curriculum and the classroom, a number of new curriculum statements have been developed, and the rest are in the process of development by the Ministry of Education. That process involves widespread consultation with educators and the community.¹⁶

Once a new curriculum statement has been trialed and finally approved, it is gazetted and becomes mandatory. Before that time, schools are required to use existing syllabi.¹⁷ By October 1999, when Mokai Primary School was closed, four of the seven national curriculum statements, in English, had been developed and gazetted and four statements in Maori, for use in Maori medium education, had been published in final form but not gazetted.¹⁸

Each curriculum statement relates to one of the seven essential learning areas identified by the national curriculum: language and languages, mathematics, science, technology, social sciences, the arts, and health and physical wellbeing. The statement defines the knowledge, understanding, skills, attitudes, and values described in the curriculum for that area and specifies the learning outcomes for all students. It also identifies strands of learning and achievement objectives for each strand, suggests assessment procedures, and provides guidelines for appropriate teaching and learning approaches.¹⁹ One Crown witness described the curriculum statements as being

14. Document A25(7)

15. Document A25(6)

16. Document A25(9), p 22

17. Document A25(6)

18. Document A21, para 16

19. Document A25(9), esp pp 22–23

sufficiently broad and flexible to allow for local interpretation and elaboration, and sufficiently specific to provide students, teachers, parents, and communities with clear information about what is to be learned and achieved during the years of schooling.²⁰

3.4 THE QUALITY OF EDUCATION PROVIDED BY MOKAI PRIMARY SCHOOL

Mokai Primary School was reviewed seven times by ERO between 1991 and June 1998. Four of the reviews were discretionary in nature, carried out to follow up the unsatisfactory results of previous reviews. In fact, two consecutive discretionary reviews were conducted within a five-month period in 1994 and again in the six-month period between late 1997 and mid-1998.

The following table shows the timing and nature of the seven reviews. (It should be noted that before accountability reviews were introduced in 1997, the non-discretionary reviews conducted by ERO were known as assurance reviews or as reviews.)

Date of review report	Type of review
October 1991	Review
September 1993	Assurance
March 1994	Discretionary
July 1994	Discretionary
January 1997	Assurance
December 1997	Discretionary
June 1998	Discretionary

Timing and nature of ERO reviews. Source: doc A25(3A)–(3G).

The claimants highlighted the fact that the number of non-compliances identified in the last three ERO reports declined steadily during the tenure of Mrs Koopu, the school's last principal. The Crown acknowledged the decline (from 14 to nine to six non-compliances) but cautioned the Tribunal against reading too much into it. One reason is that the last two reviews, being discretionary, were confined in their scope to the areas of non-compliance identified in the previous accountability review. This means that any 'fresh' non-compliances occurring since the accountability review (occasioned, for example, by the failure to maintain systems that had earlier been assessed as complying with requirements) would not have been investigated in the last two reviews.²¹ The other reason for caution, given far more weight by the Crown, is that the non-compliances remaining at the time of the final review were of a significant nature, being 'critical to the school's effective delivery of quality education'.²²

20. Document A24, para 20

21. Document A30, para 76

22. Document A22, para 39

3.4.1 Long-term systemic problems

The Crown did not confine its assessment of the school to the period when Mrs Koopu was principal. Instead, as was explained by Mr Kitto, the Ministry liaison officer with operational responsibility for the considerations relevant to the closure of the school:

all the reports of ERO need to be considered to understand the cumulative impact of the quality of education delivered at Mokai. The statements included in the ERO reports disclose a picture of significant non-compliance in major areas of governance and delivery. The board's non-compliance with the statutory requirements over a period of at least eight years has culminated in a state of affairs which in the end could neither be rectified nor continue to be tolerated.²³

Ian Hill, the ERO area manager with responsibility for the last three reviews of the school, outlined the problems remaining at the time of the final review in 1998 as follows:

In summary, ERO found no basic documentation in the school. The board had not, since March 1994, and over five ERO visits, been able to show how it implemented the National Education Guidelines and did not demonstrate an understanding of the need to implement systems to address the National Administration Guidelines. In ERO's judgment, such a situation amounted to an administration that was disorganised and ad hoc. In the review report of July 1998, ERO commented:

- There was little formally-adopted policy to guide management in following the board's direction.
- A 1997 objective of the school development plan to establish board roles and responsibilities had not been implemented.
- Basic material such as the charter, codes of conduct, and handouts on the national Administration Guidelines had not been given to trustees.
- Individual documents for administration were developed in isolation, often with little relationship to other documents.²⁴

3.4.2 Frequent changes of board members and principal

Crown witnesses identified, as a major reason for the school's difficulties over the years, the frequency of change in the school board's membership. Mr Kitto said that 'in effect the board was always needing to start again'.²⁵ He summarised the practical consequences of this:

- the board made statements of intent that were not completed due to changes in personnel;
- progress made by the board was not sustained;
- key governance matters that were the responsibility of the board were not complied with or compliance was not sustained;

23. Document A22, para 37

24. Document A24, para 52

25. Document A22, para 15

—there was a lack of continuity and progress in meeting goals because of the loss of knowledge, training and experience that go with the operation of a stable board.²⁶

Commenting on the frequent changes of school principal before late 1996, Mr Hill said that each new principal needed training and ‘documentation requirements had to be spelled out again, and the systems which were needed had to be yet again identified’.²⁷ Commenting on the situation since Mrs Koopu was appointed, he said:

Except for the fact that the same principal remained at the school between October 1996 and its closure, the problems experienced at the school before that time remained the same, in spite of the good intentions of the board and staff. There continued to be a lack of achievement data on the progress of students. Data on the levels which the children had achieved were, on the principal’s own admission, not available. Therefore, there was no evidence of any progress of the students at Mokai School.²⁸

Further, in response to claimant evidence of the pupils’ achievements during the last principal’s tenure, Mr Hill said:

ERO would contest any suggestion that the level achieved by the students at Mokai School is on a par with the standards achieved elsewhere, including other comparable schools in rural areas, with a wholly or largely Maori community, a small roll and a decile 3 rating. There is no doubting that Mokai School provided a caring environment and that the principal worked to develop the self esteem of the children who attended. The fact is, however, that the curriculum was not being delivered according to the national curriculum. Therefore, the children were not receiving the education to which they were entitled. This contrasts with the many small rural schools of low decile rating which ERO has reviewed, where the curriculum is being delivered.²⁹

3.4.3 Curriculum issues

The Crown placed particular weight on the school’s problems in delivering the curriculum to its students. Mr Hill observed that all the ERO reports between 1991 and 1998 recorded curriculum difficulties to varying degrees, such as:

- ▶ a lack of planning of appropriate objectives;
- ▶ a lack of statements and objectives of the curriculum being taught;
- ▶ difficulty in implementing learning programmes;
- ▶ a lack of review or appropriate benchmarks of what was being taught and achieved;
- ▶ difficulty in keeping children on task; and
- ▶ a lack of assessment of student progress.³⁰

26. Ibid, para 14

27. Document A24, para 15

28. Ibid, para 16

29. Ibid, para 17

30. Ibid, para 21

(1) Curriculum content and planning

Crown witnesses emphasised the critical importance of quality planning of teaching and learning objectives, methods, resources, and assessment. Mr Kitto said that teaching is ‘about planning, assessing and reporting’ and that, without the necessary documentation, it would be only ‘by chance’ that a satisfactory educational outcome might be delivered.³¹ He explained that the questions teachers need to address are ‘what are the appropriate levels for these children to reach and how am I going to know [how they are doing]?’ The current curriculum, Mr Kitto said, is very different from the earlier one and this is critical to teachers’ need to plan and record. He also noted that, once detailed planning has been done for a unit of work, it does not need to be done again.³²

Mr Hill said that the learning programmes at Mokai Primary School were not based on current curriculum statements. Nor was there any school scheme or implementation plans. He was clear that, without some form of planning and record keeping, sequential learning will not occur, notwithstanding that there were examples at Mokai of interactive learning experiences for the children which affirmed and respected Maori culture. While the 1998 ERO report had noted that the children were in a caring environment, it stated:

they are not receiving progressive and sequential coverage of skills in all learning areas. Learning opportunities could be improved considerably by a more organised and planned approach to curriculum delivery and regular monitoring of achievement against national achievement objectives.³³

From the three most recent ERO reviews, Mr Hill highlighted the school’s failure to develop long-term (year) plans in each learning area within a reasonable time; the lack of comprehensiveness of the plans that were developed; large gaps in term plans; and inadequate weekly planning. He also referred to the teaching programme’s heavy reliance on visiting speakers and performers and a teacher trainee, all of which, he said, can be ‘a good thing when it complements planned sequential learning based on the New Zealand curriculum’. However, he said, that was not the case at Mokai school.³⁴

(2) Monitoring and assessment

Mr Hill identified the problems with monitoring and assessment as being particularly serious. He explained that the national curriculum builds on the close relationship between learning and assessment and provides clear learning outcomes against which students’ progress can be measured. Assessment of the progress of individual students is an integral part of successful curriculum delivery because it enables teachers to improve teaching and learning. This is done by diagnosing learning strengths and weaknesses, measuring student’s progress against defined achievement

31. Second hearing, tape 7A

32. Ibid

33. Cited in doc A24, para 23

34. Document A24, paras 25–26

objectives, and reviewing the effectiveness of teaching programmes. These profiles are then used to inform teachers about each student's learning and development and to provide the basis for feedback to students and parents.³⁵

Describing monitoring and assessment as 'a major problem' at Mokai in all the years since ERO began reviewing the school, Mr Hill stated:

There was no organised assessment to indicate children's progress. There was also a lack of monitoring of the coverage of the curriculum. ERO considered that the lack of systematic planning of curriculum delivery was the problem.³⁶

Mr Hill strongly criticised the most recent principal's observation-based approach to assessing children's progress. He said that the principal's suggestion that she would have welcomed an expert coming in to the school to monitor the students was, in ERO's view, inconsistent with a teacher's responsibility for monitoring. That responsibility, he explained, is an integral part of the learning process as well as of the job for which a teacher is paid.³⁷ Mr Hill gave examples from the last two ERO reviews of students' very limited use of their exercise books and of the general absence of marking of the work in those books.³⁸ He also challenged the release teacher's views of the children's achievement levels and progress for not being based on any systems of assessment and said that parents would not be able to ascertain progress by being alongside the children at the school.³⁹

3.4.4 Governance issues

Acknowledging that 'There is no question about the board's commitment to the school and community vision', Mr Hill concluded that 'the ability of the board to govern the school was severely under strain, because the board did not develop the required infrastructure, nor take advantage of the training provided'.⁴⁰ One example he gave of 'ad hoc' administration by the board included the school's use, in the classroom, of unsupervised resource people who were not trained teachers. Another example was the lack of formal definition of the administrative role undertaken by the principal's daughter, Mrs Wall, before she became a board member. Mr Hill accepted that, in light of her experience, Mrs Wall may not have needed direction from the board.⁴¹ However, he explained, ERO's concerns stem from the lack of accountability of such helpers, which puts their work outside the legal framework within which the board is required to operate.⁴²

35. Ibid, para 36

36. Ibid, para 37

37. Ibid, paras 38–39

38. Ibid, para 40

39. Second hearing, tapes 9B, 10A

40. Document A24, para 45

41. Second hearing, tape 10B

42. Document A24, paras 46–48

Mr Hill provided a list of ‘serious and ongoing problems’ that were evident in the last three ERO reviews and that, the reports indicate, arose from board members’ incomplete understanding of what is involved in school governance:

- the board lacked an understanding of its roles and responsibilities;
- it did not provide an adequate infrastructure with documented systems for the governance and day to day management of the school;
- it failed to demonstrate familiarity with the National Education Guidelines and their significance in the continuing operation and administration of the school;
- it allowed the principal and one member of the board to take all the responsibility for the running of the school;
- it had some members who were unwilling to make the necessary commitment to training;
- the board was not well informed about curriculum delivery nor about the progress of the pupils.⁴³

Examples of those matters were given which, in Mr Hill’s view, indicated the board’s unsatisfactory attitude towards its responsibilities. One example was the board’s delegation to the principal, by June 1998, of full responsibility for all property management. This matter was ‘more properly the responsibility of the board or of a board subcommittee’ and its delegation ‘would have detracted from [the principal’s] ability to fulfil curriculum responsibilities’.⁴⁴ Another example was that, in June 1998, the principal and board chairperson were the only board members working on the school’s self-review long-term plan and intending to undertake training for that purpose.⁴⁵ The inference was that there is a fundamental inconsistency between, on the one hand, board members’ acknowledgements in recent years of their need for training to understand their roles and responsibilities and, on the other, the board’s preparedness to let the principal and chairperson shoulder such important board responsibilities.

A major theme of the Crown’s evidence was that, despite all the training and support available to and utilised by the school, its benefits were not applied within a reasonable time-frame to improve the school’s governance and management. This suggested that the problem was not caused solely by the frequent changes in board membership. Rather, there must be an additional factor – that board members, especially longer serving members, lacked the skills or commitment to implement what was learned in training sessions. If board members had used the knowledge gained in training to set up the required systems, a differently composed board would be able to follow those systems rather than having to ‘start again’ by obtaining training and support in the same areas.

Mr Hill said that the experience of the board usually stays with it in the form of some members who can keep things going while new trustees familiarise themselves

43. Document A24, para 50 (as amended orally at hearing)

44. Ibid, para 51

45. Ibid

with their role. Normally, he said, six to 12 months is enough time to 'rectify the situation'.⁴⁶ Mr Kitto said:

In my professional opinion, the amount of training and support offered to Mokai was extensive and appropriate. The quality of the support and training can be determined by comparison with other schools in similar positions. As the Ministry Liaison Officer for the region, I have received positive reports about the training provided by the above agencies, both about the people delivering and about the applicability or suitability of the training received. The success of these support mechanisms in other similar schools contrasts significantly with the lack of success at Mokai School. This suggests to me that the failure identified at Mokai cannot be attributed to deficiencies in the training and support offered.⁴⁷

3.4.5 Elaboration of ERO evidence

Mr Hill was questioned closely by claimant counsel about his evidence, particularly about the circumstances surrounding the last three ERO reviews and the content of the ERO reports.

(1) The dilemma of attracting a principal

Mr Hill's criticism of the last principal's teaching led claimant counsel to ask him about the ease or difficulty of attracting a suitable principal to a sole-charge school. Mr Hill said it was the responsibility of the board to ensure the principal can deliver what is needed, and to have a performance agreement with that person (which, he noted, Mokai school did not have for some time). Then, if there were problems with the principal's delivery of the curriculum, the board should look to training to overcome them. He then acknowledged that attracting principals to sole-charge rural schools does pose 'a dilemma' for boards. He noted that an ERO publication identified a need for experienced, high-quality teachers in such schools. When asked who would pay to attract those people, Mr Hill said it would be 'up to the government' to decide. He confirmed that there is no incentive scheme whereby the Crown encourages teachers to go to such schools, although there had been a rural incentive allowance available in the past. He also commented that it may now be open for boards to offer incentives to attract suitable teachers.⁴⁸

(2) The meaning of the ERO reports

Claimant counsel's questions to Mr Hill, and his answers, about the precise meaning of the ERO reports has been outlined already in chapter 2 (see sec 2.7.4). Crown counsel, in closing submissions, rejected the inference from claimant counsel's questions that non-compliances by the board, as opposed to the principal, are 'somehow not apposite to the quality of education at Mokai or the learning outcomes of the

46. Second hearing, tape 9B

47. Document A22, para 59 (as amended orally at hearing)

48. Second hearing, tape 9B

students'.⁴⁹ The board's non-compliance with the requirement to document how the national education guidelines are being implemented was given as an example of a matter that is vital to education quality:

Unless the board achieves its primary task of demonstrating that it knows how the National Education Guidelines are being implemented, it cannot take action on the delivery of the curriculum being undertaken on its behalf by the principal. The board otherwise has no basis on which to call the principal to account, nor to account to the Crown, as it must under its school charter, for the implementation of the curriculum requirements. It is not merely a matter of perfunctory recording. The matter goes to the heart of the governance of the school and its operation in delivering a quality education.⁵⁰

The same point was made in relation to the ongoing non-compliance with the requirement for a programme of self-review and the non-compliance relating to the health syllabus.⁵¹

(3) A school under pressure?

Mr Hill stated that if a board does not respond to the unconfirmed ERO report, ERO assumes that it accepts the report's contents.⁵² He said the Mokai board had not responded to the 1996 unconfirmed accountability review report. His description of the board's responses in 1997 and 1998 suggested that they were very limited in nature.⁵³

In response to claimant counsel's questions, Mr Hill said he was aware of the 'wider context' – that the board was faced with various issues at the time of the last three ERO reviews and, in particular, meetings and correspondence with the Ministry of Education about the school's closure. He also indicated that he was not suggesting the board's responses to unconfirmed reports were more important than the actions taken between reviews. When asked whether Mokai Primary School was 'a school under pressure' during its last two years, Mr Hill said that it was 'no more than other schools'. He then acknowledged, however, that 'probably not' many schools would have three ERO reviews in such rapid succession and be the subject of closure discussions as well.⁵⁴

Later, claimant counsel referred to the 'underlying difficulties' for the school's problems which, he said, were that rural Maori schools have a small and comparatively unskilled population base from which to draw school board members. Mr Hill acknowledged these difficulties. Counsel also referred to 'the reality on the ground' which, he said, was that 'the same small group of people' was making attempts to comply with the ERO reports while at the same time responding to the Ministry of Education over the threatened closure of the school. Counsel asked

49. Document A30, para 79

50. Ibid, para 80 (as amended orally at hearing)

51. Ibid, paras 80–81

52. Document A24, para 11

53. Ibid, paras 11–13

54. Second hearing, tape 9B

whether, in light of these matters, Mr Hill's criticisms of the board's attitude and ability were not 'unduly harsh'. Mr Hill replied that they were not because, in 'comparative situations of schools of similar sizes', there were 'plenty of examples' of schools that had 'set up systems' to meet their legal obligations. However, despite considerable amounts of training and its stated intentions, the Mokai school board failed to meet its obligations.⁵⁵

3.4.6 The school's charter

A further governance issue highlighted by Mr Kitto was that Mokai school had not amended its charter at any stage since 1990 to reflect its bilingual teaching. Crown counsel emphasised that the school was a mainstream school and that there is no such thing as a 'bilingual school', although a mainstream school can teach bilingually. This emphasis was directed at correcting some claimant witnesses' descriptions of the school, and the school's description of itself since about 1997, as 'Mokai Bilingual Primary School' or 'Mokai Bilingual Kura'.⁵⁶

Clearly, the Ministry's concerns about the school's charter stem from the fact that a charter is a legal undertaking to the Minister which is required to describe in clear terms the education services that the school will deliver in recognition of the hopes and wishes of its community. Mr Kitto explained that, like Mokai school, most New Zealand schools originally adopted a variant of a 'model' charter circulated by the Ministry. However, he said, many schools have since amended their original charters to reflect their own aspirations. He estimated that, since mid-1997, about 30 percent of the schools in the Hamilton area had submitted amendments to their charters.⁵⁷ Mr Kitto also noted that the Ministry is encouraging all boards to initiate charter reviews at the end of their three-year terms so that new boards can start out by doing the reviews, becoming aware of their responsibilities and taking ownership of the charters.⁵⁸

Mr Kitto acknowledged claimant counsel's point that the Mokai school charter contained references to the Treaty of Waitangi, the desire for children to learn some Maori, the relationship between the school and the marae and the socio-economic position of the community. Those references, he said, do allow others to understand better the local goals of the school – but only as at 1990 when the charter was approved. He acknowledged that the Ministry knew that the school was delivering a bilingual education and said that amending the charter to 'cement' the school's aims was a simple matter. It was important, however, that the charter accurately reflect the school's aims because, as Mr Kitto put it, 'if you don't know where you're going you'll probably end up somewhere else', whereas, 'if you know what you want to achieve [and] write it down, then everybody knows what you want to achieve'.⁵⁹

55. Second hearing, tape 10A

56. See, for example, docs A25(4F), A6 E(4)

57. Second hearing, tapes 5A, 7B

58. Second hearing, tape 5A

59. Second hearing, tape 5A, 5B

3.5 VIABILITY

While the Minister's greatest concern was with the 'serious questions' raised by ERO about the quality of education provided at Mokai Primary School, 'there was also concern about the school's ongoing low and fluctuating roll numbers and the question of viability which flowed from that'.⁶⁰ Kathleen Phillips explained that viability refers to 'the viability of a community over time to actually sustain quality of education' and that a number of considerations are relevant to this, including roll numbers, the potential for new pupils, the wider network of schools in the geographical area, and the cost-effectiveness of the school.⁶¹ The Crown's evidence of educational quality at Mokai Primary School has already been outlined. Sections 3.5.1 to 3.5.3 outline the Crown's evidence of the other matters relevant to viability.

3.5.1 Roll numbers and sustainability

When considering a school's viability, the Ministry considers both the size and the sustainability of its roll. Mr Kitto explained that there is no minimum roll which will automatically result in a school's closure. This contrasts with the situation before 1989, when a roll of nine students would lead to that result. There is also no policy to 'target' small schools for closure. These schools, namely sole-teacher schools with fewer than 29 students, make up 4.5 percent of all New Zealand schools.⁶²

Mr Kitto described the roll at Mokai Primary School over the last decade as being 'generally low' and with numbers that 'fluctuated, sometimes on a week to week basis'.⁶³ He noted that the Tribunal had been given written evidence that showed that ERO, successive school principals, and the board were all conscious of this issue for some time.

An analysis of the school register of attendances from 1990 to 1999 was presented in evidence, and the situation from late 1996 was summarised as follows:

- the maximum number of children on the roll at any one time since Term 4 of 1996 was 24 (during the first five weeks of Term 2 1998);
- during the 122 school weeks of Mrs Koopu's tenure, there were 7 weeks when the roll showed 20 or more students; 84 weeks with between 10 and 19 children enrolled, and 31 weeks where fewer than 10 children were enrolled.⁶⁴

Apart from the fluctuations in the roll, it was said that further difficulties arose because some children had substantial periods of absence. Also, in its report of July 1998 ERO expressed concern that the attendance, admissions, and withdrawals registers were unreliable.⁶⁵

60. Document A30, para 84

61. Second hearing, tape 4A

62. Document A22, para 10; second hearing, tapes 5B, 7B

63. Document A22, para 40 (as amended orally at hearing)

64. Ibid, para 42; doc A25(1), pp 4-7

65. Document A22, para 42

From the Ministry's analysis of the Mokai school roll, the total number of children enrolled at the school for any period of time in each of the years from 1990 is as follows:

1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
29	25	20	19	15	26	22	29	28	12

Total number of enrolments in each year from 1990

Clearly, the total number of enrolments in a year does not equate with the enrolments in particular weeks of the year. From the Ministry's analysis, for example, it can be seen that during the 30 school weeks of 1999 that Mokai school was open (when a total of 12 children were enrolled at some point), the maximum weekly school roll was:

- ▶ nine children (for nine weeks);
- ▶ eight children (for 15 weeks);
- ▶ seven children (for five weeks); and
- ▶ six children (for one week).

As for fluctuations in the roll numbers, there were three weeks during the 1999 year, including the last week the school was open, when there was a difference (of one or two students) between the minimum and maximum enrolments for the week.

The Ministry's analysis also shows that, in both 1997 and 1998, the weekly enrolments were not only consistently higher than in 1999 but also more variable. In 1997, with a total of 29 children enrolled during the year, the enrolments in the first half year were fairly constant, at between 12 and 14 students, for all but three weeks (when 16 children were enrolled). In the second half year, the enrolments were also fairly constant (but at between 10 and 12 students) for all but five weeks at the start of term 3. In those five weeks, the roll started at 14 and dropped to nine before settling at 10 for the rest of the term.

In 1998, with a total of 28 students enrolled during the year, roll numbers were consistently higher than in 1997 (with between 14 and 24 students every week of 1998) but also more variable. Generally, it appears there were fluctuations in the roll in about 10 weeks of that year and that, in one week, the roll changed by five students and, in three other weeks (two of them in term 1), by three students.

In terms of the sustainability of the Mokai Primary School roll, Mrs Phillips explained that the Ministry believed there were very few pre-schoolers in the school's catchment area and this was evidenced by the absence of a kohanga reo at Mokai.⁶⁶ Mr Kitto acknowledged the claimants' evidence that whakapapa links were important to the size of the catchment area and that those links extended beyond the immediate geographical area surrounding the school. He also acknowledged the 'mobility of Maori' and the evidence, from both the claimants and the Crown, that children travelled some distance to attend Mokai school. Mr Kitto explained, however, that, 'normally, the core of the enrolments' comes from the immediate area of a school and

66. Second hearing, tape 4B

this provides the Government with some assurance that the school can sustain a reasonable population of children'.⁶⁷

Crown counsel stated in closing submissions that the Crown does not accept the claimants' contention that the school's roll dropped in 1999 because of the discussions about closure. Rather, she submitted, the fact of the roll being generally low and fluctuating is attributable to socio-economic factors in the area. Counsel referred to the work in the area being seasonal in nature and to the board's acknowledgement, in its 1999 submission to the Minister, that, in addition to the uncertainties arising from the closure process, socio-economic factors contributed to the enrolment situation. She noted that Mrs Wall, the last board chairperson, had said in evidence that, before the school roll could be enhanced and stabilised, 'housing and employment' would be needed in Mokai. From this, it was concluded that the threat of the school's closure did not create the roll problems at Mokai.⁶⁸

3.5.2 The availability of other schools

With the Crown's responsibility being to maintain a national network of schools, the number of other successful schools operating in an area can tilt the balance for or against the closure of a school that is not meeting its responsibilities. In the case of Mokai Primary School, the Crown considered there were alternative schools available where the children could obtain a good quality bilingual education (see further section 3.9.5).

3.5.3 Cost-effectiveness

(1) Staffing and operations funding

The Ministry of Education is responsible for ensuring a fair allocation of education funding so that a viable network of schools is maintained.⁶⁹ A fair allocation does not mean that all students obtain equal funding because the Ministry recognises that students and schools have differing needs. One example of differential funding is the Maori language resourcing policy 'which is a recognition by the Ministry that it is more costly to provide quality education in te reo Maori than instruction in English'.⁷⁰

In response to questions from the Tribunal, Mrs Phillips stated that, while effective use of education funding is one thing the Minister must look at in assessing a school's viability, the Ministry sees the issue of viability in terms of the school's ability to sustain quality education over time, not merely its cost-effectiveness or the cost-effectiveness of the network of schools in the area.⁷¹ Certainly, Crown witnesses emphasised the quality of education as the most important factor in the decision to

67. Second hearing, tape 5B

68. Document A30, para 93

69. Document A21, para 46

70. Ibid, para 50

71. Second hearing, tape 4A

close Mokai Primary School. In addition, Crown counsel's questions of claimant witnesses drew attention to the high cost of the school. It was because those questions suggested that the school's cost was a significant factor to the Crown that the Tribunal asked it to produce statistics that compared the funding of Mokai school with that of similar schools.

The statistics produced by the Ministry for 1997, 1998, and 1999, when the 'resourcing roll' of Mokai Primary School was, respectively, 15, 18, and eight students, do not allow a direct comparison of the school with other decile 3 schools that have similarly low rolls. Mr Kitto said it would be possible to obtain such comparative figures and that the small roll at Mokai school was 'the single greatest reason' why it received more funding per pupil than any of the five categories of school identified in the Ministry's statistics.⁷² Indicating the dramatic effect of a small school roll on the school's operational funding (which is one component of its funding), Mr Kitto said that the smallest schools in New Zealand, of whatever decile ranking, receive a fixed minimum sum of operational funding irrespective of their actual roll size. This meant, he said, 'that in 1998 the staffing and operational grants to the smallest primary schools totalled around \$10,500 per pupil, while the average primary school received \$3,250'.⁷³ It was this fact, the Tribunal understood, which led Mr Kitto to say that Mokai Primary School had been 'generously resourced over a significant period of time'.⁷⁴

The Ministry's statistics show that, in 1997 and 1998, the staffing and operations funding of Mokai Primary School on a per pupil basis was \$6508 and \$6422 (including ACC, GST, and the salaries grant for management). Mokai school's 1999 per pupil costs had not been finalised by the Ministry, but the estimate provided, with eight pupils as the basis, was over \$14,000 per pupil.⁷⁵

In the five categories given by the Ministry as comparators for Mokai school, the highest average per pupil cost is for 'all rural decile 3' schools. In 1997, the average per pupil cost in those schools was \$3761 and, in 1998, \$4454. Clearly, those figures are considerably lower than the actual per pupil cost of Mokai school in 1997 and 1998. (For 1999, the Ministry's statistics compare only the operations grants to Mokai school and the five categories of schools.)

While the Ministry did not provide specific cost information about small schools, the 1999 ERO publication *Small Primary Schools* states that the Government 'recognises that small schools experience diseconomies of scale, and therefore spends considerably more per student in small primary schools than large ones'.⁷⁶ It then presents the following table of estimates of the average per pupil cost of various sized schools in 1996.

72. Second hearing, tape 6A; doc A22, para 50

73. Document A22, para 47

74. Ibid, para 44

75. Document A25(1), p 11

76. Document A25(24), p 5

Roll range primary schools	Estimate of average funding per student in 1996 (\$)
Under 13	9029
13–24	5411
25–49	4159
50–99	3293
100–149	3040
150–199	2899
200–249	2852
250–299	2837
300–349	2663
350–399	2585
400–449	2554
450–499	2515
500–599	2490
Over 600	2411
Average	2795

Average cost per pupil for various size schools. Source: Education Review Office, *Small Primary Schools*, Wellington, Education Review Office, 1999, p 5.

Claimant counsel drew Mr Kitto's attention to that table's estimate of the average cost in 1996 of schools with between 13 and 24 students (\$5411) and asked if it was 'not too far away' from the actual costs of Mokai Primary School (\$6508 in 1997 and \$6422 in 1998) Mr Kitto said that the table's figure was 20 percent less than Mokai's costs. He acknowledged, however, that Mokai school's costs were not in excess of 100 percent more than that figure – which is how the Ministry's statistics depict Mokai school's costs in relation to all the selected comparator categories. Mr Kitto also agreed that Mokai school had not received funding to which it was not entitled.⁷⁷

The 1996 per pupil estimates in the *Small Primary Schools* table reveal very clearly the problems inherent in relying on the average cost of a broad range of schools as a comparator for the actual cost of a small school. For example, that table shows that all nine groups of schools with rolls over 150 students have average per pupil funding figures of under \$3000. As a result, the average of all schools, from under 13 pupils right through to over 600 pupils is \$2795. Yet, as the table also shows, that amount is approximately half of the average cost of schools with 13 to 24 pupils, and a third of the average cost of a school with fewer than 13 pupils.

While the *Small Primary Schools* figures are merely estimates, and are for 1996, the Tribunal believes they indicate that the actual per pupil costs of Mokai Primary School are not as far removed from the actual cost of similarly small schools of low decile rankings as tended to be suggested by the Crown's questions and evidence. Overall, however, Crown witnesses' evidence on the relevance of Mokai school's cost to the closure decision can be seen to be consistent with their accounts of Government policy on the matter. That policy is summarised in *Small Primary Schools* in these words:

77. Second hearing, tape 6A

For very small schools which are the most expensive per student, the Government needs to balance its interest in ensuring access to schooling against the educational and financial viability of the school and the need to obtain value for money in the use of taxpayer funding. The Government considers whether it should resource very small schools on a case by case basis, taking into account factors such as current and predicted rolls, proximity to other schools and alternative education options for the students involved.⁷⁸

(2) Maori language resourcing

One cost-related matter to which Crown witnesses gave attention was the school's receipt of Maori language resourcing. Between 1996 and 1999, it received that resourcing at the level 2 rate, which is available to schools that teach in te reo Maori for between 51 and 80 percent of class time. This level, Mr Kitto explained, was informally confirmed by a Maori liaison officer in March 1998 when Mr Kitto and that officer were invited to the school by the principal to discuss the possibility of raising the resourcing level to level 1. At that meeting, it was agreed that the school was not ready to provide level 1 immersion teaching and that no change should be made to the school's Maori language resourcing.⁷⁹

Mr Kitto explained that a school's entitlement to level 1 Maori language resourcing (for teaching 81 to 100 percent of class time in te reo) is determined by Ministry verifiers who make annual visits to all level 1 schools to assess and monitor the level of teaching in te reo. For levels 2, 3, and 4 resourcing, however, schools assess their own level, after discussion with a Ministry official. Verifiers visit only a sample of schools each year to determine whether the level of teaching matches the level of resourcing provided.⁸⁰ In response to claimant counsel, he said it seemed that Mokai school had not been visited by a verifier.⁸¹

Mr Kitto also explained the history of Mokai school's Maori language resourcing from the time the community 'opted' for bilingual education late in 1993 and a principal with bilingual skills was recruited. He noted the principal's report of 1994, which acknowledged difficulties in maintaining delivery of te reo at 50 percent level or higher and identified the contributing factors (see sec 2.3).⁸²

Mr Hill made strong suggestions in his evidence that the school was not teaching te reo to the extent required by its level 2 resourcing status.⁸³ The force of his evidence was reduced, however, by his answers to claimant counsel's questions. In particular, it emerged that Mr Hill's suggestions were based on file notes made by ERO reviewers and that neither he nor the reviewers were aware of the Ministry's March 1998 informal assessment of the school's Maori language resourcing level. In closing submissions, Crown counsel stated that it was not suggested that Mokai school received more than its funding entitlements.⁸⁴

78. Document A25(24), p 6

79. Document A22, para 21

80. Ibid, paras 19–20

81. Second hearing, tape 5B

82. Document A22, para 18

83. Document A24, paras 32–34

84. Document A30, para 88

3.6 SCHOOL SUPPORT STRATEGIES

3.6.1 Support versus intervention and the schools support project

Underpinning the Crown's approach to the assistance needed by schools in difficulty is the school governance model introduced by Tomorrow's Schools. It requires, as a logical consequence of vesting substantial responsibilities in school boards that they also be allowed a substantial measure of independence to self-manage, including by making decisions about and implementing the actions that they consider are needed to ensure their schools' delivery of quality education. Crown counsel summarised the effect of this for the Ministry of Education:

The Ministry acknowledges that improvement of such problems [as those of successive boards and principals at Mokai] is most sustainable when driven by the people most affected and most responsible. For this reason, the Ministry prefers to support schools through funding a variety of agencies to support the school directly rather than through imposing intervention measures. The success of this approach is evident in some schools which have 'turned round' their performance (Hill). Graeme Kitto discussed the success of these support mechanisms in schools similar to Mokai.⁸⁵

In the context of an urgent hearing, and in light of the Crown's clear view that the support provided to Mokai school was appropriate and the decision to close it fully justified, Crown witnesses did not provide detailed evidence of the full range of measures available to assist schools in difficulty. However, the 1999 Ministry of Education paper 'Schools Support Project', submitted by the Crown, elaborates the partnership established between the Ministry and education sector groups in 1994.⁸⁶ That partnership is intended to provide 'a range of safety net strategies' that will:

- enable earlier intervention in an at risk situation;
- provide support to local communities to improve/resolve difficulties before they began to place student achievement at risk;
- support an improvement in community capability to self manage as opposed to dependence on central Government for support; and
- provide for long term sustained change and continued improvement.⁸⁷

The partnership was needed because of problems the Ministry had experienced in taking responsibility for the interventions available under the Education Act. (In 1994, the possible interventions were appointing a commissioner; directing the board to engage a financial manager; and taking legal proceedings against the board). The Ministry's experience was that:

the 'one size fits all' scenario of one board of trustees taking responsibility for one school and delivering an effective education for the students of the surrounding community had its problems, eg

85. Document A30, para 101

86. Document A25(14)

87. Ibid, p 2

- Not all communities had access to sufficient people with the skill capability to make up an effective board of trustees;
- Ineffective and/or weaker boards of trustees had particular difficulties in respect of managing their human resource, performance management, financial and property responsibilities.

And, in some schools, the consequences in terms of educational delivery were problematic:

- Principal leadership and teacher quality was unable to be maintained;
- School organisation and curriculum delivery could not be guaranteed;
- Health and safety of students could not be guaranteed;
- Student achievement was not acceptable to the parents of students.⁸⁸

Before 1994, the Government and Ministry were concerned that there was an increase in the number of commissioners and financial managers being appointed. There was also concern that, even after having a commissioner and a new board, some schools still struggled to provide an acceptable standard of governance, management, and student achievement.⁸⁹

The schools support project utilises two kinds of support: schooling improvement initiatives and 'safety net' actions for individual schools. Schooling improvement initiatives involve clusters of schools with similar characteristics being invited to work together with the Ministry. By November 1999, 10 such initiatives had been established and four more were nearing the completion of scoping.⁹⁰ Each initiative is assumed to require up to three years additional resourcing from the schools support project to initiate and implement change, with a phased exit by the Ministry 'over an agreed medium time frame to bed in the changes'.⁹¹ However, it is noted, in relation to the schooling improvement initiatives that are now in their third year of implementation, that 'bedding in change and change management, and creating sustainability, will in many communities take longer to achieve than originally planned'.⁹²

The individual school safety net actions are described by the Ministry paper as forming a continuum 'from an early, low level intervention through to a statutory intervention by the Ministry of Education'.⁹³ Four types of action make up this continuum: informal action, formal action, business case, and statutory action. From the descriptions given of each of those, it appears that Mokai Primary School was assisted with informal actions prior to the statutory action of closure being taken. The two actions that were not utilised are described in terms that suggest they are of limited availability. Formal actions need to be agreed between the Ministry and the school board and the Ministry may provide financial support where implementation of an action plan involves less than 10 percent of the school annual operations grant or less than \$25,000 (whichever is the lesser amount) and the board can afford to repay the assistance over one year. The business case process is described as 'a serious

88. Ibid, p 1

89. Ibid, pp 1–2

90. Ibid, p 2

91. Ibid, p 5

92. Ibid, p 10

93. Ibid, p 5

one, involving the development of a viability report on the school, and it is by no means certain that the Ministry or Ministers will agree to resourcing and reforming independent of structural change to the school'.⁹⁴ The viability report referred to there 'will always include consideration of resolving the problems by resourcing and reforming the school as a single entity, merging/combining/closer cooperation with neighbouring schools, and possible closure'.⁹⁵

Claimant counsel asked several Crown witnesses whether, apart from the informal actions of support and training, and the statutory interventions such as appointing a commissioner (discussed at section 2.8), there are other 'informal interventions' that the Ministry can suggest to a school. In particular, he asked whether the Ministry could suggest that a school get in a specified person to help. Mr Kitto explained that the Ministry has a contractual obligation to provide school support services, which come at no cost to a board, and that the membership of associations also comes at no cost to the board and can lead to assistance tailored to its needs.⁹⁶ But neither he nor other Crown witnesses could identify any informal, intermediate steps that the Ministry can take to assist under-performing boards.

3.6.2 Iwi–Ministry schooling improvement initiatives

Some information was provided about four schooling improvement initiatives established in the Far North, the East Coast (Ngati Porou), Tuhoe, and Tuwharetoa.⁹⁷ It has been noted in chapter 1 that the area of the seven Mokai hapu is within the boundaries of both Ngati Tuwharetoa and Ngati Raukawa. The very new Tuwharetoa initiative was clearly of interest to the claimants.

Crown counsel said that the four partnerships with iwi groups operate predominantly in mainstream State primary schools within rural Maori areas.⁹⁸ The information provided about the Far North initiative was the most extensive and is summarised here to provide an indication of the purpose and potential scope of such initiatives.⁹⁹

Te Putahitanga Matauranga is a partnership between the Ministry and Te Reo o Te Tai Tokerau (TROTT), an organisation of Maori professionals in the education sector in Northland. TROTT is a charitable trust, with a board of four kaumatua and kuia trustees and a management group of Maori representatives from early childhood education, primary, secondary, area schools, and kura kaupapa Maori.¹⁰⁰

The goal of the partnership initiative is to deliver excellent education to students so that they will achieve well at school and throughout their lives. Its 'long-term vision' is to establish governance and management structures for schooling which will

94. Document A25(14), p 6

95. Ibid, p 6, n16

96. Second hearing, tape 6A

97. Document A25(14)

98. Document A30, para 39

99. Document A25(14)

100. Ibid

deliver strong, enduring education outcomes. The initiative has the potential to apply to all 76 schools in the Far North local territorial authority area. Over 80 percent of those schools are in the lowest three socio-economic deciles and, based on ERO reports, 41 percent of the schools perform poorly. Ministry statistics suggest that Maori students are 85 percent of students in those poorly performing schools.¹⁰¹

To overcome the schools' difficulties, the initiative proposes to combine short-term, external support to individual schools with more enduring support to enhance local capacity to manage education provision. Doing this 'may involve developing new structures for delivering quality education based on clustering arrangements for governance and leadership'. This could include the merging of boards and extending the administration clusters. It could also include 'incorporating future changes in the nature of principalship'.¹⁰² That seems to be a reference to the possibility that, for particular schools with poorly performing boards, principals may be empowered to assume responsibility for a school's governance as well as its day-to-day management.¹⁰³

It is proposed that education action clusters of schools will be created around successful schools and that 'highly regarded education leaders' will be seconded to develop a range of services that support improved education outcomes within each cluster. Community facilitators will assist school communities to strengthen links between families or whanau, board, and schools. In addition, barriers to student learning will be reduced through collaborative approaches with health and welfare agencies.¹⁰⁴

To date, the Ministry and TROTT have each appointed a strategic project manager, and these two people have been working together to implement the policies and decisions made by the partnership. For these purposes, funding of \$310,000 was available in the 1998–99 year. For the 1999–2000 year, \$920,000 is available. Additional human resources to be added in the 1999–2000 year include two team leaders and a number of educational and community facilitators, whose work will be overseen by the team leaders.¹⁰⁵

The more limited information provided about the other Maori–Ministry initiatives suggests that all three have been more recently established. The foundation for the Whaia Te Iti Kahurangi (East Coast) initiative was an area-wide ERO report in 1997. With 21 schools already affiliated, and funding for a strategic development framework made available in 1999, the initiative is expected to continue for up to five years. The Tuhoe initiative is underpinned by area-wide research commissioned by the Ministry in 1997. With 15 schools affiliated and a salaried executive manager running the day-to-day operations of the project, funding of \$337,500 was available in the 1998–99 year.¹⁰⁶

101. Ibid

102. Ibid

103. See doc A25(26), pp 17–20

104. Document A25(14)

105. Ibid

106. Document A25(14)

The Tuwharetoa partnership initiative is the most recent, having been formally signed only in December 1999 during the hearing of the present claim. The Tuwharetoa Maori Trust Board is the Ministry's partner in the initiative. Funding of \$19,490 is available in the current financial year to begin the process of preparing 'an Education Strategic Plan for Ngati Tuwharetoa'.¹⁰⁷

Rawiri Brell described the 'education visions' of the Maori partners in these initiatives as being 'a quality education in Maori which is inclusive of both tikanga and their language'.¹⁰⁸ He said the initiatives are medium- to long-term projects by which the Ministry has the opportunity to work with iwi, using their infrastructure within communities and schools, to find innovative ways to address education quality issues in their areas. Mr Brell also explained that, so far, the opportunity for schools to be part of such initiatives was, for the most part, limited to those in the tribal areas that have chosen to 'go down this particular track'. The exceptions that he noted related to the clusters of predominantly Maori schools in areas such as Mangere and Otara, and to a kura kaupapa management project, which is available to all kura kaupapa.¹⁰⁹

When asked by claimant counsel whether Mokai school fell within any of the clusters of schools supported by such initiatives, Mr Brell replied that he was not familiar with the tikanga between Tuwharetoa and Mokai and that the Ministry's agreement with Tuwharetoa had been signed just a few weeks earlier.¹¹⁰ He elaborated by explaining that, while a school can enter other school support projects, there is 'a much bigger kaupapa behind the agreements between the Ministry and iwi'. He noted that the Ministry relies 'on the other partner to seek the mandate on the Maori side of the partnership'.¹¹¹

Crown counsel also asked Mr Brell if it would be up to schools in the area to join the Tuwharetoa initiative or whether that was a matter internal to Tuwharetoa. He replied that, in other iwi projects, there was neither any insistence that particular schools join nor any exclusion of schools. The only limitation, Mr Brell noted, was the resources available to support each of the various projects. He then noted that the aim of the Tuwharetoa project is to strengthen education in the schools of the rohe and to find the best ways to do that.¹¹²

Asked by claimant counsel whether, if Mokai school was on the East Coast, it would be the sort of school to qualify for the school support project there, Mr Brell said that it would be invited into that project. He noted that not all schools join the initiatives into which they are invited but that any initial reluctance usually gives way in the face of encouragement to seek help.¹¹³

107. Document A25(14)

108. Document A20(a), para 8

109. Second hearing, tape 1B

110. Ibid

111. Ibid

112. Second hearing, tape 3A

113. Second hearing, tape 1B

3.7 THE TRAINING AND SUPPORT PROVIDED TO MOKAI SCHOOL

The Crown's position is that, over the years, the Mokai Primary School board and principal received assistance from the Ministry of Education and, especially, from service providers funded by the Ministry, that was extensive, appropriate, and sufficient to enable compliance with all the board's legal responsibilities.¹¹⁴ The Ministry supplied a comprehensive year-by-year list of the training and other events in which the school had been involved since 1989. It also supplied a summary of the main types of training and other support utilised by the board and principal over the years.¹¹⁵

Together, the list and summary depict a situation in which there was a range of opportunities available to the board and principal to attend training sessions on all aspects of school governance and management. In addition, there was more direct 'hands-on' assistance available in the area of curriculum delivery and, in the classroom, especially through the principal's and kaiawhina te reo support programmes. Mr Kitto provided this general overview of the situation:

The Mokai School log book and other records disclose that advisors and trainers have worked extensively with the Mokai School board and successive principals in a great variety of ways in the decade of Tomorrows Schools. The training covered such matters as board governance responsibilities, financial and accounting services, budgeting, charter requirements, EEO non-compliances, property matters, monitoring and review, and principal appraisal. The records also disclose other services available to the board and principal, and how these were utilised . . . Providers included MultiServe Education Trust, Independent Education Services, New Zealand School Trustees Association, School Support Services and Rural Education Activities Programme. Most of this support was provided through Ministry funding at no charge to the school.¹¹⁶

In her closing submissions, Crown counsel summarised the training and support available to and utilised by Mokai Primary School:

- Training was provided in governance areas, including the role of trustees, board organisation, performance management, curriculum, school review, strategic planning, obligations of boards, budgeting, ERO and compliance issues by Multiserve and Independent Education Support (IES).
- Training was also provided in operational areas by School Support Services (SSS) covering the various curriculum areas.
- Support was provided by Rural and Maori Advisers from SSS whose direct role was to advise the board and principal on operational matters and how best to progress through to compliance. The principal described this support as 'absolutely wonderful'.
- The New Zealand School Trustees Association also gave on site assistance including a weekend session on the marae for the board.

114. Document A22, paras 56–59

115. Document A25(22)

116. Document A22, para 57

- The Central Plateau Rural Education Activities Programme (REAP) also supported the school by funding Kaiawhina te reo support.¹¹⁷

The Ministry's summary of the assistance provided to the school notes that not all the opportunities for training and other support were utilised by the board and principal.¹¹⁸ It is the Tribunal's impression, nevertheless, that the school availed itself of support that was extensive and time-consuming for the few individuals involved. Mr Kitto appeared to agree when he said that, if anything, the training and support that the board and principal tried to undertake may have been too extensive.¹¹⁹ Crown counsel explained this by saying that the board and principal undertook 'several parallel courses covering the same ground' and, as a result, appear to have 'missed focused training on National Education Guidelines, Charter and compliances'.¹²⁰

3.8 OPTIONS OTHER THAN CLOSURE OF MOKAI SCHOOL

The Crown was clear that, in all the circumstances, the closure of Mokai Primary School was the most appropriate course of action that could be taken. Claimant counsel's questions of Crown witnesses explored other possible intervention options, particularly that of appointing a commissioner to the school. The exchanges on those matters, and also on the possibility of school-initiated options that Mokai school may have relied on had it known about them earlier, have been outlined at section 2.8.

In her closing submissions, Crown counsel summed up the Ministry's position in these words:

There was much questioning around interventions that may have been available, including the appointment of a commissioner or of a specialist adviser. Some internal consideration was given to whether a commissioner should be appointed (Kitto). However the Ministry was aware that the Board was working with training staff from various Crown agencies and it was felt that the board must be given the opportunity to do things they were embarking on.

The main objective of installing a commissioner is to establish a new board (Sewell). A commissioner is not a permanent institution of any school. As Crown witnesses testified, if previous history shows a lack of available people or skill, even in the face of the extensive training and support as discussed above, there is little advantage in imposing a commissioner upon a school. The situation of instability had already gone on long enough, at the expense of the students' education, and the Minister decided that the situation had reached the point that closure had to be seriously considered.

Karen Sewell also indicated her appreciation that there could be cultural concerns associated with imposing a commissioner on a community.¹²¹

117. Document A30, para 101

118. Document A25(22)

119. Second hearing, tape 7B

120. Document A30, para 108

121. Ibid, paras 104–107

3.9 CONSULTATION ABOUT THE SCHOOL'S CLOSURE

3.9.1 Introduction

The Crown defended the consultation undertaken in the process of the school's closure, under section 154 of the Education Act 1989, as being consistent with the principles that have been developed by the Court of Appeal about consultation in the context of the Treaty partnership.

The three steps required by the Education Act 1989 in the process of closing a school have been described in chapter 2 (see sec 2.9). In brief, the Minister needs to be satisfied, after consulting the school board, that the school should be closed (s 154(1)). That is the point at which a decision in principle to close the school is made. (In relation to Mokai school, the consultation commenced with a meeting on 14 November 1995, and the Minister's decision in principle was conveyed to the board by letter dated 27 July 1998.) At that point, the Minister may ask the board if it has any arguments in favour of the school staying open (s 154(1)). The second step is that the Minister must consider any arguments that are made by the board within 28 days after it was asked for them (s 154(2)). The other step is that the boards of all State schools whose rolls might be affected by the school's closure must be consulted (s 157(3)(f)).

Much of the Crown's evidence of how the first two steps were followed in relation to Mokai school is contained in the affidavit sworn by Mrs Phillips in September 1999 for the High Court proceedings and the documents accompanying that affidavit,¹²² particularly a submission to the Minister, dated 24 July 1998, entitled 'Consideration of Closure of Mokai School', also prepared by Mrs Phillips.¹²³ However, Mrs Phillips was not personally involved in any meetings with the school board. That responsibility belonged to Mr Kitto. Therefore, his responses to questions, especially from claimant counsel, about the consultation process supplemented the written evidence.

3.9.2 1993 to 13 November 1995

Mrs Phillips' affidavit dates the start of the closure process back to late 1993, when the then principal requested information about it as a result of concern about low roll numbers.¹²⁴ After that, it is stated that meetings between the Ministry and the school board were held in 1994 and 1995 to discuss the possible closure of the school and to provide information about the closure process.¹²⁵

Mr Kitto referred to 'his first visit to the school' as being to attend a meeting in March 1994 to discuss closure.¹²⁶ No other evidence was given of meetings held that year for that purpose. Crown counsel did not mention the March 1994 meeting in her

122. Documents A7A–A7S

123. Document A7J

124. Document A7, para 12

125. Ibid, para 13

126. Second hearing, tape 5B

closing submissions about the meetings held in this period but referred to an earlier hui, held at the school on 9 October 1993. She noted that the school logbook entry about that meeting records that it was held:

to discuss viability of school's future. About 60 people attended. Consensus was to keep school open and go bilingual. Things put into motion. A positive meeting.¹²⁷

The 1995 meetings referred to in Mrs Phillips' affidavit took place on 30 August and 12 October. A Ministry submission to the Minister dated 19 October 1995 refers to those meetings, immediately after noting that the school roll 'rose to 19 before declining to 12 during Term 3', as follows:

The Ministry met with the Board and parents on 30 August 1995 when it was learned the principal had resigned and that 8 of the children will leave the school at the end of Term 3.

The Ministry met again with the Board and parents on 12 October and confirmed a suitable relieving principal had been appointed for the remainder of 1995 and that the current roll is 7.¹²⁸

Mrs Phillips' affidavit notes that the Ministry submission of 19 October 1995 expressed concerns about the low roll and stated that there were alternative schools available. The Minister then instructed the Ministry to write to the board 'outlining that the Minister had decided to consider the closure of the school under s 154 of the [Education] Act'.¹²⁹ That letter, from the acting senior manager of the Ministry's national operations, Heather Colby, was dated 7 November 1995. It notes that the Mokai board 'has recently discussed the future of Mokai School with the Ministry of Education' and that the roll of the school has fallen from 'a high of 19 this year to 7 at present'. Ms Colby then states 'I am mindful that the New Zealand curriculum encourages balanced programmes where students learn in a variety of social settings'. The letter continues, 'For these reasons it has been decided, under the provisions of section 154 of the Education Act 1989, to consider the closure of Mokai School'. It is then explained that section 154 'provides that if, after consulting with the board of a school the Minister of Education is satisfied that a school should be closed, he may close the school'. Therefore, the letter concludes, the Ministry's Hamilton office has been directed to consult with the school board.¹³⁰

3.9.3 14 November 1995 to 26 July 1998

Mr Kitto explained that he delivered Ms Colby's letter of 7 November 1995 to a meeting of the school board and community on 14 November 1995. At the meeting, Mr Kitto also provided a flow chart on the closure process.¹³¹ He was very clear that

127. Document A25(19) (cited at doc A30, para 119)

128. Document A7B

129. Document A7, para 13

130. Document A7D

131. Second hearing, tape 7A

the meeting initiated the consultation with the board that is required by section 154 before the Minister can be satisfied there are reasons to close the school and make the decision in principle to close it.¹³²

Mrs Phillips' affidavit states, after referring to Ms Colby's letter of 7 November 1995, that, 'although consultation had commenced, problems were encountered'. Her understanding of 'one of the major reasons' for this is said to be 'the refusal of the Board of Trustees to meet with Ministry officials to discuss, or provide information relating to, the possible closure of the school'.¹³³ The affidavit then states Mrs Phillips' understanding that Ministry officials in Hamilton made numerous attempts to meet and discuss the possible closure of the school with the board, and refers in this regard to a letter dated 11 December 1995 from the Ministry to the board.

That letter, from Mr Kitto to the Mokai board chairperson at the time, records the Ministry's discussions, the night before, with the boards of Tihoi and Marotiri schools and states that Mr Kitto has not heard from the Mokai board since he visited on 14 November, some four weeks earlier. It then asks the chairperson to let Mr Kitto know the earliest date on which they can meet 'to continue the consultation process which I discussed with you on my last visit' and also to tell him of any specific information the board requires as part of the consultation.¹³⁴

The Tribunal understands that the meetings with the other school boards (Tihoi and Marotiri) were held because of the requirement in section 157 of the Education Act that other boards likely to be affected by a school's closure be consulted. Tihoi school was subsequently closed. In 1998, the Ministry consulted Tirohanga and Marotiri schools about the closure of Mokai school.¹³⁵ However, there appears to be some confusion in the Ministry's records as to whether it was Tihoi school or Tirohanga school that was consulted in 1995. While Mr Kitto's letter says he consulted Tihoi and Marotiri schools in 1995, the Ministry's 24 July 1998 submission to the Minister says that Tirohanga and Marotiri schools were consulted in 1995 and again in 1998.¹³⁶

Mrs Phillips' affidavit also notes that, 'Apart from a meeting on 8 March 1996 at the request of the Ministry, such attempts [at consultation with the Mokai board] were unsuccessful'.¹³⁷ That statement would seem to suggest that the Ministry believes that it barely met, or did not meet, the requirements of section 154 of the Act to consult the Mokai school board about closure after 7 November 1995 and before late July 1998 when the Minister reached the decision in principle to close the school. That suggestion appears to be strengthened by a statement in the 24 July 1998 Ministry submission to the Minister entitled 'Consideration of Closure of Mokai School'. There, it is stated, under the heading 'Consultation under Sections 154 and 157 of the Education Act 1989':

132. Ibid

133. Document A7, para 14

134. Document A7E

135. Document A7J

136. Documents A7E, A7J

137. Document A7, para 14

Meetings between the board and the Ministry to discuss possible closure under Section 154 of the Education Act 1989 took place on 30 August and 12 October 1995. It was made clear to the board at these meetings that no decision about closure had been reached. The board understands that all relevant information will be given to you for your consideration before you decide if you are satisfied the school should close.¹³⁸

Those two 1995 meetings are the only meetings referred to in the submission as being relevant to the section 154 consultation process. However, later paragraphs of the submission's section on consultation refer to other efforts taken by the Ministry to obtain the board's views. First, it is said that the board has been encouraged to make a written submission to the Minister giving its views on the possible closure of the school, but has not taken this opportunity.¹³⁹ Second, it is stated that the Mokai board had been given the opportunity to comment on the Ministry's present submission before it was prepared in final form.¹⁴⁰ The board's response is then noted, in these terms:

In comments received from the board on 5 June 1998 it was claimed the roll had grown to 22 and that this was because the school is offering a bi-lingual programme unlike its neighbours at Marotiri and Tirohanga. It commented that few students would be likely to attend either of these schools if Mokai School were closed. It appears a significant number of students are temporarily staying with relatives in the area and have come from a range of other schools in the wider Rotorua/Taupo regions.¹⁴¹

Mr Kitto's firm statement that the consultation required by section 154 of the Education Act started with the meeting on 14 November 1995 appears to conflict with the statement in the Ministry's 24 July 1998 submission that meetings held before November 1995 were relevant to the section 154 consultation process. It is also notable that the July 1998 submission does not mention any consultation meetings held after November 1995.

Claimant counsel questioned Mr Kitto closely about the meetings he had with the school community to discuss closure. Mr Kitto acknowledged that, with the benefit of hindsight, his records of the telephone and other discussions he had with the school about its closure were not adequate.¹⁴² However, he recalled making numerous attempts to set up consultation meetings which were unsuccessful because, he said, the school board did not prioritise such discussions. He acknowledged that, after November 1995 and before the Minister's decision in principle was reached in July 1998, there were no meetings called by the Ministry specifically to discuss the issue of school closure. Rather, he said, the communications with the school about closure occurred in the course of discussions that were primarily about other matters involved in the ongoing operation of the school.¹⁴³

138. Document A7J, para 10

139. Ibid, para 12

140. Ibid, para 14

141. Ibid, para 15

142. Second hearing, tapes 7A, 7B

143. Ibid

Explaining the context, after late 1995, for the Ministry's discussions with the school about closure, Mr Kitto said that the school board was 'not in any mind or any hurry' to set a date to discuss closure to keep the section 154 consultation process going. He said it was 'quite understandable' that the board did not give priority to that consultation when there were many day-to-day practical matters it wanted to discuss first. In 1996, for example, the board was 'faced with having to continually find principals for the school' and the discussions he had with it were about such practical operational considerations as that, and the school bus. The Ministry was 'involved in the very practical considerations of keeping the school operational' he said, and, as a result, 'the communications we had were usually about practical day-to-day matters first and, perhaps in part, about closure'.¹⁴⁴

In the absence of a record of his own of the various discussions about closure that Mr Kitto recalled having with the school, he noted that the school logbook contains an entry for 6 March 1996, 'Visit by MOE. Graeme Kitto re closure procedure.' He also referred to a letter to the Minister written in October 1996 by Mokai kuia Marina Jacobs which, he said, showed that the school community was considering the issue of closure.¹⁴⁵

Another letter referred to by Mr Kitto was from the then chairperson of the school board to the Ministry's Hamilton district manager, dated 24 March 1998. It mentions a meeting held on 16 March 1998 with Mr Kitto and a Maori liaison officer from the Ministry. Mr Kitto's own written evidence of that meeting was that he and the Maori liaison officer attended the school at the invitation of the principal to discuss Maori language resourcing.¹⁴⁶ In his answers to claimant counsel, he said that he recalled closure being 'discussed quite specifically' at that meeting.¹⁴⁷

That recollection appears to be confirmed by the letter of 24 March 1998 from the board's chairperson which opens by saying that the board and whanau of the Mokai Kura met with the two Ministry officers 'to discuss the future and viability of Mokai Kura'.¹⁴⁸ However, it then states: 'We have been told your office is to make a recommendation to the Minister of Education by the end of term 2, on the future of the school *and why this school should remain open*' (emphasis added).¹⁴⁹ The chairperson then asks the Ministry to delay its recommendation to the Minister until after ERO has finalised its report on the next discretionary review of the school, due to be held at the end of May 1995. At that time, it is said, the school board will also make its own submissions to the Minister. The reason for asking for the delay is stated to be:

The Board of Trustees has made significant progress over the past year in all areas of School Management, Governance and Delivery of the Education Standards.

The measure of this progress is to be determined when the Education Review Office undertakes another discretionary review during the week 25–29 May 1998.¹⁵⁰

144. Second hearing, tapes 5B, 7A

145. Second hearing, tape 7A

146. Document A22, para 21

147. Second hearing, tape 7A

148. Document A7F

149. Ibid

150. Ibid

From Mr Kitto's evidence, it was apparent that, from at least late in 1995, he knew the board did not want the school to close. While he was courteous in his explanation of the board's reluctance to discuss the matter, Mrs Phillips' understanding, from briefings by the Hamilton office of the Ministry, is stated to be that the board refused to meet to discuss closure.¹⁵¹ Crown counsel said that the board declined to talk about closure, and asked 'where was the good faith in that?'¹⁵² Claimant counsel accepted that the board did not respond to the Ministry's letter of 7 November 1995 but submitted that the meeting in March 1996, where closure was discussed, showed that the board was prepared to discuss the issues.¹⁵³

Claimant counsel asked Mr Kitto whether he believed that, in the meetings he had with the school between March 1996 and March 1998, the Ministry discharged the obligations that arise when consulting Maori – such as those listed in the 30 August 1999 edition of the Ministry's *Tukutuku Korero*. Mr Kitto replied:

In any of our meetings, we would always seek to both provide information and to be involved in any discussion about the topic, and to do so to the best of our ability. So I see that as being something that should be common to all consultation – all people are to be given their due respect. To the best of my limited ability, I'll try to respond within the kawa of the meeting and understand as I best can. Yes, I think we made an honest effort to listen and to provide information as requested.¹⁵⁴

The effect of Crown counsel's closing submissions about the adequacy of the consultation with Mokai school was that, in all the circumstances – especially the board's reluctance to discuss closure – what the Ministry did was as much as could reasonably be done. Noting that section 154 of the Act requires the Minister to first consider and determine, after consultation with the board, if there is a reasonable basis for closure, Crown counsel said there were 'already several indicators of this by 1995'.¹⁵⁵ She then referred to the school having raised the issue of closure in 1993, and information on closure having been supplied on request at that stage. Noting that the school hui in October 1993 resulted in a consensus to keep the school open and 'go bilingual', Crown counsel then said:

The fact that discussions extended over a considerable space of time is indicative of the complex matters that had to be dealt with, changing circumstances, and community determination.¹⁵⁶

It was also submitted that, in addition to the times when the Ministry sought to consult and the board was not prepared to do so, there were periods of such difficulty for the school that closure was 'virtually the only course open'. However, 'intervening events', such as the appointments of new principals in 1994 and 1996 and a new board

151. Document A7, para 14

152. Document A30, para 128; second hearing, tape 15A

153. Document A29, para 2.91 second hearing, tape 12B

154. Second hearing, tape 7A

155. Document A30, para 118

156. Ibid, paras 119–120

chairperson in 1997, provided 'a window of opportunity for things to be turned around'.¹⁵⁷ As well, the frequent changes of board membership made it difficult for the Ministry to set up and maintain a liaison with the board.¹⁵⁸

Nevertheless, Crown counsel submitted, the Ministry did have discussions with the board, first, in August and October 1995 about the future of the school and then at the 14 November 1995 meeting with Mr Kitto where a flow chart on the process of closure was provided.¹⁵⁹ After that, Mr Kitto attempted to continue the consultation process, and was 'partially successful' – as demonstrated by the 6 March 1996 meeting which, Crown counsel said, was 'specifically to discuss closure'.¹⁶⁰ The 16 March 1998 meeting was also referred to, and the communications that 'would so often shift to the day to day management topics, such as transport', partly, at least, because of the board's 'refusal to address the possibility of closure'.¹⁶¹

Crown counsel said that, 'for the most part', Mr Kitto's requests 'were not responded to', and he accepted that this was 'completely understandable as he was aware that the community had debated the issue and did not want the school to be closed'.¹⁶² She said that it was 'inevitable that in such a situation the school, staff, board and community would be unwilling to engage in a process which could have an outcome which they were not prepared to consider, namely closure'.¹⁶³ Crown counsel also submitted that claimant counsel's questions of Crown witnesses, about the school being under pressure at the time of the most recent ERO reviews because of the discussions about the possibility of the school's closure, showed that the school community was very aware of, and was talking about, the issues during the relevant period.¹⁶⁴

Finally, Crown counsel placed weight on written communications between the Ministry and board by which information was exchanged. Important among these was the opportunity that was given to the board, and used by it in a response of 5 June 1998, to comment on the draft of the ministerial submission dated 24 July 1998.¹⁶⁵ That was the final written communication to occur before the Minister made the decision in principle to close the school, conveyed to the board by letter dated 27 July 1998.

3.9.4 27 July 1998 to 24 June 1999

The claimants did not place emphasis on the exchanges between the Ministry and school after the decision in principle to close the school was made. Claimant counsel submitted that, from that time, and for the reason that the decision in principle had been made, the school was not being consulted 'to generate alternative options and

157. Ibid, para 120

158. Ibid, para 121

159. Ibid, para 122

160. Ibid, para 123

161. Ibid, paras 125, 127

162. Ibid, para 124

163. Ibid

164. Document A30, para 128

165. Ibid, paras 127–128

outcomes other than closure'.¹⁶⁶ Instead, the threat of closure was then very real, so that what the school and community was responding to, through their written and oral input to the Minister and Ministry, was 'the Minister's request for clarification on certain issues'.¹⁶⁷

Crown counsel submitted that, after the decision in principle was made, the Ministry was 'careful to ensure that the Minister was fully informed on all relevant matters by seeking clarification on a number of issues raised by the ERO reports'.¹⁶⁸ Mrs Phillips' evidence explained that, as required by section 154 of the Education Act 1989, the Mokai school board was requested, by the Minister's decision in principle letter of 27 July 1998, to provide any arguments as to why the school should remain open. The board presented its response in person in Hamilton on 25 August 1998 and provided a written submission at the same time.¹⁶⁹ A Ministry submission to the Minister, dated 10 December 1998, presented the school's arguments. On 11 December 1998, the Minister of Education noted the board's arguments that there had been a number of recent improvements at the school and asked for clarification from it, by the end of February 1999, on four matters:

- ▶ the training, and the outcomes of it, that the board had undertaken with MultiServe and the New Zealand School Trustees Association;
- ▶ documentation on how the national education guidelines are being implemented;
- ▶ evidence of the monitoring of students' progress that has taken place since July 1998; and
- ▶ evidence that the board has an ongoing programme of self-review.¹⁷⁰

On 2 March 1999, Ministry staff attended a hui at the school to receive the board's written submission and to hear its views in reply to the Minister's request for clarification. The Ministry then prepared a submission and background paper for the Minister, dated 31 March 1999, attaching the board's written response to the four issues.¹⁷¹ After receiving all that information, the (now new) Minister wrote to the school board, on 24 June 1999, conveying his final decision to close the school as from 3 October 1999.

In the background paper accompanying the final submission from the Ministry to the Minister, dated 31 March 1999, the board's responses to the four issues listed above are summarised and commented on. The Tribunal notes that the final paragraph of that submission raises a matter that was canvassed at length by the claimants at the hearing of the claim, although under a different heading. The paragraph is headed 'Mana of Mokai' and it reads:

In written and oral presentations, the history of schooling in Mokai from the gifting of the land by Hitiri Paerata in 1901 and the desire to 'preserve the taonga of te reo o te

166. Document A29, para 3.48

167. Ibid, para 3.46

168. Document A30, para 128

169. Document A7, para 18

170. Document A7D

171. Document A7, paras 19–22

Maori' have been emphasised. The board of trustees' response of 24 August 1998 outlining its arguments in favour of the school staying open states that the Mokai 'marae is an integral part of the kura'. In the opinion of the Ministry, the mana of the Mokai marae derives from the *marae* and does not depend on the school staying open. [Emphasis in original.]¹⁷²

3.9.5 The Minister's consideration of alternative bilingual education

The claimants' challenges to the adequacy of the consultation process for informing the Crown of the importance of education in Mokai, and to the adequacy of the Crown's prior knowledge of this, became focused in the hearing on a particular question. That question was when did the Ministry, and so the Minister, first consider that the alternative education needed by Mokai children, if the school closed, was bilingual education at a level comparable to that provided at Mokai school?

In closing submissions, and in response to questions from the Tribunal, Crown counsel acknowledged that the Ministry's 24 July 1998 submission to the Minister, which led almost immediately to the decision in principle to close the school, did not give information about alternative bilingual education providers. Instead, that submission notes that:

Marotiri School and Tirohanga School are 8 and 12 kilometres away respectively from Mokai School. Their rolls may be affected if Mokai School should close. In November 1995, on your behalf, the Ministry undertook consultation with the boards of trustees of these schools as required by section 157 of the Education Act 1989. The Board of Trustees of Tirohanga School had no comment to make, while the Board of Trustees of Marotiri School noted that the closure of Mokai School would remedy a transport difficulty being experienced by some families whose children have traditionally attended Marotiri School. The views of these schools remained the same when the Ministry consulted them again in July 1998.¹⁷³

That submission then notes the earlier quoted comments of the Mokai board, received by the Ministry on 5 June 1998. They were that Mokai school 'is offering a bilingual programme unlike its neighbours at Marotiri and Tirohanga' and that 'few students would be likely to attend either of these schools if Mokai School were closed'.¹⁷⁴ The submission does not, however, identify any schools in the area which do provide a bilingual education.

Claimant counsel asked Mr Kitto about the omission from the 24 July 1998 Ministry submission of any mention of alternative bilingual schools for the Mokai pupils. Mr Kitto said:

Perhaps . . . we should have been more explicit about saying it. Perhaps we took it for granted. We didn't see that as an issue. If that's what people wanted, that's fine. Then

¹⁷². Document A6E

¹⁷³. Document A7J, para 13. It seems that the 1995 consultation was with Tihoi and Marotiri schools: see section 3.9.3.

¹⁷⁴. Ibid, para 15

that could be offered in other places. But we didn't sort of see it as a particular issue separate from the others. We accepted, as we do, if people want bilingual education, great, that is fine. That is the choice. As long as it's good education, then that's quite okay by us.¹⁷⁵

In closing submissions, Crown counsel submitted that the 'critical briefing' of the Minister was the one that occurred next, in March 1999. That briefing identified, in a 'landscape sheet' that was appended to the Ministry's submission, 'both the nearest alternative school for each child attending Mokai and the "nearest bilingual provider", a total of 6 alternatives, including the two nearest schools'¹⁷⁶ – Marotiri and Tirohanga, which do not teach bilingually. The Tribunal notes that the landscape sheet does not state the level of Maori language resourcing provided to the three schools that are identified as being the nearest bilingual providers. Nor does it give the distance in kilometres from each child's home to the two schools in Taupo that are among those three nearest bilingual providers. However, the sheet does note the travel times involved for each child in using bus services to get to and from those schools and the further time involved in getting them to and from the bus. For example, one entry relating to two children states that their travel time to the two Taupo schools is '7.40 am – 4.10 pm (+ time between home and service (ca 7km))'.¹⁷⁷

Mr Kitto's evidence included information about the level of te reo taught at seven schools within 30 kilometres of Mokai school.¹⁷⁸ Only four of the schools listed are shown to teach in te reo at a level sufficient to attract Maori language resourcing. (The lowest level, level 4, applies to schools that teach in te reo for less than 30 percent of class time.¹⁷⁹) The other three schools are listed as providing 'some te reo', with one of those schools listed as providing te reo for '1–2 hours per week'.¹⁸⁰

The Crown did not accept the claimants' allegation that the Crown took a narrow approach in considering the possible alternatives to State education located at Mokai.¹⁸¹ Emphasising the 'critical briefing' of March 1999, with its attached 'landscape sheet', Crown counsel stated:

The Minister was therefore well aware that the closure of Mokai school would not cut the children off from the opportunity to access education in te reo Maori and tikanga. The Minister was, moreover, confident that the alternative schools were providing an acceptable standard of education to their students. . . .

. . . consideration was given to the distance the children could have to travel to attend alternative schools and any costs to the whanau for that travel. Calculations were made and it was found that many of the children were travelling approximately the same distance to attend Mokai as they would to attend any of the possible alternatives. The Mokai bus was travelling a 71km circuit twice a day.¹⁸²

175. Second hearing, tape 6A

176. Document A6E, attachment 1; doc A30, para 42

177. Document A6E, attachment 1

178. Document A22, para 52

179. Document A21, para 23

180. Document A22, para 52

181. Document A30, para 41

182. Ibid, paras 43–44

3.10 CROWN POLICY FOR PROTECTING TE REO AND MATAURANGA MAORI

3.10.1 The framework provided by the Education Act 1989

Throughout their evidence, Ministry witnesses highlighted the Crown's commitment to protecting the taonga of Maori language and culture and improving the quality of the education provided to Maori children. The Education Act policies relevant to those goals were mentioned at the outset of this chapter. In her closing submissions, Crown counsel highlighted the provisions of the Act that:

- ▶ require school boards of trustees to take reasonable steps to discover and consider the views of the Maori communities in their geographical areas (s 62);
- ▶ deem school charters to contain the aim of developing policies and practices for their schools that reflect New Zealand's cultural diversity and the unique position of Maori culture (s 63(a)); and
- ▶ require every school board to take all reasonable steps to ensure that instruction in tikanga Maori and te reo Maori are provided for full-time students whose parents ask for it (s 63(b)).¹⁸³

Also highlighted were national education goals 9 and 10 (set out in section 3.3.2(1)), which promote Maori language and culture and must be implemented by all schools.¹⁸⁴ Reference was made too to the new national administration guideline (guideline 1(v)), which will, from 1 July 2000, require schools to develop policies, plans, and targets for improving the achievement of Maori students.¹⁸⁵

Summarising the evidence, Crown counsel listed five ways by which those policy statements are implemented and supported by the Crown:

- ▶ through the flexibility that is afforded to school boards to implement programmes in te reo Maori and to deliver the curriculum through the medium of Maori language and traditional knowledge;
- ▶ through the financial and professional support available to boards from providers funded through the Ministry of Education and through the special support programmes identified for Maori medium education;
- ▶ through the Ministry's active development of Maori curriculum statements which stem from and encompass a Maori world-view;
- ▶ through ERO's ability to independently review all schools' delivery of education including, through its Maori Reporting Services, its ability to review curricula delivered wholly in Maori; and
- ▶ through the strategic initiatives adopted by the Ministry (and underpinning school curriculum activities) to develop policies, programmes, and partnerships for and in collaboration with Maori and to provide and allocate funding for all such initiatives through Vote: Education.¹⁸⁶

183. Ibid, para 25

184. Ibid, paras 25–26

185. Ibid, paras 26–27

186. Ibid, para 28

The third of those matters was the subject of least oral evidence during the hearing. However, Crown counsel drew the Tribunal's attention to the Maori curriculum documents prepared by the Ministry, referring to them as a 'significant development of the curriculum for Maori in Maori' that are not merely translations of the 'Pakeha curriculum'.¹⁸⁷ Mr Brell had described the Maori medium curriculum as 'parallel to the Pakeha curriculum' but noted that the Maori arts curriculum was very different from the Pakeha arts curriculum.¹⁸⁸

The fifth matter listed above – the strategic initiatives adopted by the Ministry – was the main subject of Mr Brell's evidence. An outline of those initiatives is presented here because it provides part of the larger context for the Ministry's dealings with Mokai school. Mr Brell explained that while he was 'part of the [school's] closure process' in that his group was consulted and he was quite aware of what was happening, his responsibilities are such that he cannot take an intensive interest in such matters.¹⁸⁹

3.10.2 Ministry of Education strategic initiatives

The position held by Mr Brell, group manager Maori, was established in the Ministry in 1991. His role, as the leader of a group of six analysts and advisers, is to provide strategic oversight and leadership in Maori education across the Ministry and so across every level of the education sector from pre-school to tertiary. Mr Brell explained that this involves 'working closely inside the three main policy, implementation and operational groups of the Ministry' to 'bring a Maori dimension and consideration in all of this work'.¹⁹⁰ In addition, Mr Brell has responsibilities to work with other officials on education and joint projects, and with Maori education stakeholders involved in education developments and to advise the Minister and associate Ministers with responsibility for Maori education.¹⁹¹

Mr Brell said that, over the years, the Ministry of Education has been increasingly proactive in the development of a more strategic approach to Maori education and to improving the education system's responsiveness to Maori.¹⁹² He explained the overall goal of the Ministry's approach to be:

a highly effective education system providing a high quality education to Maori, an education of the quality that will equip all young people with the skills, knowledge and confidence to live successful lives anywhere in New Zealand or indeed the world. The education system provided to our children also needs to ensure that they are confident in their own identity, culture and language.¹⁹³

187. Second hearing, tape 13B

188. Second hearing, tape 3A

189. Second hearing, tape 1B

190. Document A20, para 5

191. Ibid, para 7

192. Ibid, para 8

193. Ibid, para 19

The three broad objectives guiding the Ministry's approach to attaining that goal are:

- ▶ support for and strengthening the growth of kura kaupapa Maori and kaupapa Maori education;
- ▶ provision for greater Maori involvement and authority in education; and
- ▶ enhancement of the success of Maori in the general school system.¹⁹⁴

In his brief of evidence and the appendix attached to it, Mr Brell gave examples and details, including funding details, about Ministry initiatives directed at each of those objectives. With regard to the first objective, Mr Brell highlighted the Ministry's efforts to recruit and train Maori medium teachers; to expand learning resources; to develop assessment in Maori medium education; and to develop curricula in Maori medium that reflect Maori culture and values.¹⁹⁵ On the development of assessment criteria, Mr Brell explained in answer to questions from the Tribunal that kura kaupapa Maori have not been running long enough to make any assessments but that some 'intermediate indicators' are that the children like to go to school, that truancy is down, and that there is parental support for the school.¹⁹⁶

In the second area – providing greater Maori involvement and authority in education – Mr Brell said that several paths are being followed, including the formal partnerships by means of the Maori schooling improvement initiatives (see sec 3.6.2). Other initiatives are concerned with finding ways for kura kaupapa Maori to have more authority and involvement in the development of kura; refocusing curriculum development to include a Maori world view; and reviewing education regulations 'to focus on more flexible governance, accountability and purchase arrangements to support Maori in their efforts to strengthen their education'.¹⁹⁷ On that last matter, Mr Brell stated, in response to questions from the Tribunal, that the 'one size fits all' governance model of Tomorrow's Schools does lead to problems for Maori education and there is a need to look at alternative governance models.¹⁹⁸

In the third area – raising the success of Maori in the general school system – Mr Brell pointed out that the majority of Maori receive their education in the general system (rather than in Maori medium). For that reason, a 'key strategy' is to build the responsiveness of the general education system to Maori. He explained that the Ministry has recently placed an increased focus on understanding the barriers to schools serving Maori students more effectively. The approach involves people close to the problem establishing the causes and determining effective responses and relies on links with health, welfare, and other policies which impact on Maori. Mr Brell also said that developmental and consultative approaches to working with parents and communities are likely to work better for schools. He gave as examples the new policy on school suspension and the forthcoming guidelines on consultation with Maori. Referring to the new national administration guideline that will come into effect on

194. Ibid, para 10

195. Ibid, para 11

196. Second hearing, tape 2A

197. Document A20, paras 13–14

198. Second hearing, tape 3A

1 July 2000, which requires all schools to have strategies to address the needs of Maori students (see sec 3.3.2), Mr Brell said it will be supported by a 'better flow of quality information both to schools and Maori'. To that end, a new liaison and advisory support service will be established for schools and for Maori parents.¹⁹⁹

In light of Mr Brell's reference to consultation with Maori, claimant counsel questioned him about the principles that should guide the Ministry's consultation with Maori communities. Counsel referred to the 30 August 1999 edition of the Ministry's publication *Tukutuku Korero*, which outlines forthcoming guidelines for consultation between schools and Maori communities. One of the guidelines states 'Do not come with all the answers; provide the opportunity for Maori to identify the issues and direction'.²⁰⁰ When asked if that guideline should apply to the Ministry when consulting Maori communities, Mr Brell replied that it should because:

our behaviour had to be encouraging of Maori starting to take and to encourage responsibility for these sorts of things and the intent of this is to help encourage that understanding that it takes time to build those kinds of things within communities, and also within organisations like ourselves.²⁰¹

Mr Brell also agreed with claimant counsel that, for consultation to be effective, it must be inclusive and 'a two way street'.²⁰²

With regard to the Ministry's various efforts to pursue the three objectives for improving Maori education, Mr Brell was very careful to explain that change takes time. He gave as one reason for this the need to improve Ministry, and wider Government, responsiveness to the needs of Maori. In his words:

The Ministry continues to develop structures and tools to improve consultation and communication with Maori, to understand Maori education issues, and to improve the responsiveness of our research and policy advice to meet the needs of Maori.²⁰³

Mr Brell noted that the involvement of Maori will be integral to the success of these developments and that 'many of the answers to education success rest within local communities'.²⁰⁴ The challenge, he said, is to find the best path to the goal of high quality education for Maori children.²⁰⁵

Another reason given by Mr Brell for the time that is needed to bring about change in the education of Maori children is that quality standards need to be developed for the delivery of education in tikanga and te reo Maori. He emphasised that the quality of education to be delivered to Maori children cannot be compromised and that the standards to be developed must, at the very least, be commensurate with what is expected for all students.²⁰⁶ As well, community involvement must be developed by

199. Document A20, paras 15–16

200. Document A18, app B

201. Second hearing, tape 1B

202. Ibid

203. Document A20, para 17

204. Ibid, paras 18–19

205. Ibid, paras 19–20

206. Ibid, paras 22–23

finding 'effective ways of empowering parents and communities' so that their involvement will 'enhance, not impair, the quality of education which the children receive'.²⁰⁷ On this point, Mr Brell referred to the fact that for every hour primary school children spend in school classes, they will spend eight hours outside class. Therefore, the 'importance of the role of the community in this extra-curriculum area should not be underestimated'.²⁰⁸

With regard to schools with a strong focus on te reo and tikanga Maori, Mr Brell said there are 'considerable challenges for teachers and parents to establish a strong foundation in the core language and cognitive skills'.²⁰⁹ He then noted evidence of an understanding, within many kura kaupapa, that proficiency in both English and Maori is important to the development of well-educated students. With regard to te reo and tikanga Maori, Mr Brell emphasised that the formal and informal processes of the marae, and their integration with education, are 'critical to the formal process of education'.²¹⁰ He said that integrating all parts of the education sector into the life of the marae is more effective than relying simply on the education sector. However, Mr Brell noted that there is a point 'where the responsibility to provide intimate local tikanga must be given over to the community. This will be more successful if the children's grasp of te reo is of a high standard and their education has included broad exposure to tikanga'.²¹¹

Relevant to these matters are claimant counsel's questions to Mr Brell about whether the Ministry's view of the education quality and viability of a Maori school is influenced by such 'wider considerations' as the school's links with the community and the role it plays in delivering tikanga. Mr Brell said that those are relevant features that must be weighed up by the Ministry. However, he noted, a primary school is only a part of quite a significant education system and, ideally, all parts of it should contribute to strengthening tikanga.²¹²

Another part of the reason for Mr Brell's warning that improvements in the education of Maori children will take time relates to the resources available to Maori medium education. The main challenge here, Mr Brell said, is to 'meet increasing demand for an education in Maori without compromising the quality of that education' when there are numerous factors complicating the situation. He listed 10 such factors, including:

- ▶ a diminishing pool of native speakers;
- ▶ a Maori medium teaching force which has a wide range of language proficiency, from beginners to fluent speakers; and
- ▶ the increased demands for professional development and new learning and teaching resources as a result of the introduction of a new Maori medium curriculum over the last 10 years;

207. Ibid, paras 26–27

208. Ibid, para 28

209. Ibid, para 29 (p 9)

210. Ibid, para 30 (p 9)

211. Ibid, para 31 (pp 9–10)

212. Second hearing, tape 1B

- ▶ increased demands from iwi wanting to protect their own linguistic characteristics by making and using their own resources; and
- ▶ tensions of priority as between the revitalisation of Maori language and the improvement of Maori education generally.²¹³

On that last matter, Mr Brell's clear message was that a balance needs to be achieved between the focus on Maori language and the 'overriding importance of a quality education'. The 'key constraint' for the Crown in working to achieve this balance in Maori medium education:

is a general lack of expertise and capability in the education system to help build the necessary resources to ensure a good education in Maori. A similar constraint affects iwi and hapu. Overcoming this cannot be achieved overnight.²¹⁴

In hindsight, Mr Brell said:

had the Crown responded more vigorously in the mid-seventies when the first bilingual school was opened in Ruatoki, and when there was a larger pool of native speakers than now exists, and later, in the early eighties in response to kohanga reo, then the situation could have been different today.²¹⁵

3.11 CONCLUSION

In her closing submissions, Crown counsel outlined the Crown's understanding of the claim:

The closure of Mokai School is said to be a breach of the Treaty. The cause of this breach ... is that the closure of Mokai School denies their children access to an education in te reo Maori and matauranga Maori at the place of their choice, Mokai. They do not acknowledge that there are any relevant considerations that would modify the right they claim ... even though their children can access an education in Maori language and culture in bilingual or immersion programmes at schools within travelling distance.

... The claimants do not appear to accept that there is any onus on the elected board of trustees of the school to demonstrate its capacity to provide the necessary governance and management to ensure that the school is a successful one. Their position is that, irrespective of the failure of the school to provide a balanced curriculum and coherent learning for the children, the board has no responsibility for this, they have a right to expect the provision of State education at Mokai. They maintain this position, irrespective of the viability of the school itself or the viability of the overall network of schools. They take that position despite the documented difficulties of the school to meet its basic statutory obligations. They allege that the failures of the school are the fault of the system: the load was too heavy for the principal;

213. Document A20, para 30 (pp 10–11)

214. Ibid, para 35

215. Ibid, para 36

support was not available; the Crown did not adequately intervene in the board's exercise of its responsibilities to govern and manage the school.

They assert that Article 2 of the Treaty supports an argument that a community such as that at Mokai has an absolute right ... to receive a State education which accommodates that community's interests in the taonga of the Maori language and traditional knowledge and customs, disregarding all other considerations. They further assert that that right extends to [the] delivery of that education in the context of the particular identity and place of that community.²¹⁶

In response to that interpretation of the claim, the Crown's position is that there is an onus on it to provide education that enables and empowers Maori to protect and enhance those values which they identify as taonga. That obligation, however, does not override all other relevant considerations.²¹⁷ Accordingly:

It was reasonable and responsible for the Minister to close the school, as he could not be satisfied that ... the students would receive quality education. There was not an appropriate alternative to closure which the Ministry could provide and which would have enabled mainstream State education to continue to be delivered at Mokai. The Ministry could not, for example, impose the obligations of a satellite at Mokai on another board of trustees. There were, however, alternative State schools within the area where the children could access te reo Maori me ona tikanga, in accordance with the wishes of the parents and community.

... As the Minister stated in his letter to the Board, closing Mokai School was not an easy decision to make. He recognised that the school was a central focus of the community. However the place of the school in the life of the community could not come before the best interests of the students.²¹⁸

216. Document A30, paras 8–10

217. Ibid, para 135

218. Ibid, paras 137–138

CHAPTER 4

THE PRINCIPLES OF THE TREATY APPLIED TO THE CLAIM

4.1 INTRODUCTION

The claim in its final form identifies the school's closure, and the consultation undertaken in the closure process, as involving breaches of the Crown's Treaty responsibilities. The closure is challenged on the basis that the Minister's decision was made without due regard to its effects on Mokai tino rangatiratanga and the taonga of te reo and matauranga Maori. The claimants submitted that, had these matters been duly considered, the Minister may still have decided to close the school. Due consideration, however, would have involved the Minister and his advisers giving serious attention to all reasonable means by which education could be delivered to the children of Mokai in their own community as opposed to closing the school, which diminished Mokai tino rangatiratanga and protection of the taonga that are part of that identity and autonomy.

The claimants' challenge to the consultation that was undertaken under section 154 of the Education Act 1989 is directed at the sufficiency of the Ministry's efforts to engage in an exchange of ideas with the school community about the wider range of issues that the community considered relevant. It was submitted that, had the consultation met the Treaty partnership standard, the Mokai community would have had the opportunity to identify the issues, directions, and possible solutions and outcomes.¹ The claimants believe that, if that had occurred, the Ministry and the Minister could not have misunderstood the importance of the school to the children, community, and very identity of Mokai. As a result, they would have explored with the community the options that might preserve and strengthen the school's unique capacity to meet the complementary requirements of the education system and the Mokai community.

Both claims, therefore, rest on the quality of the interactions between the Crown and the school community and their adequacy for meeting the relevant Treaty standards. Within the constraints of the evidence presented at the urgent hearing of the claim, and the time-frame within which it is desirable that the Tribunal report, we may not have considered all the parties' recent and past efforts that are relevant to the issues raised. Despite those constraints, we consider that there is clear evidence that, in its dealings with the school, the Crown's conduct did not conform with the Treaty

1. Document A29, para 3.48

principles discussed in chapter 1 of this report. Indeed, the nature of the gulf between the parties' views of the Treaty's relevance to their dealings provides a strong indication that the Crown's responsibilities, arising from the principles of rangatiratanga, partnership, active protection of taonga, and kawanatanga, are unlikely to have been met.

The interactions between the Crown and Mokai school were explored in most depth at the hearings in relation to the consultation undertaken as part of the process by which a school can be closed by the Minister of Education. We consider this matter first.

4.2 CONSULTATION IN THE SCHOOL CLOSURE PROCESS

4.2.1 The Treaty standards

Claimant counsel submitted that the consultation undertaken by the Ministry did not meet the requirements of section 154 of the Education Act, let alone those superimposed by the Treaty. It is not our task to determine the legality of the consultation process. Rather, our focus is on the standards for consultation that proceed from the Treaty principle of partnership and whether they were met in all the circumstances.

The purpose and effect of the consultation that may be required when Treaty interests are involved has been explained many times, including in the now well-known passage from the judgment of Justice Richardson in the Lands case, which was cited by both counsel in this claim. Rejecting the idea that what is involved is 'an absolute open-ended and formless duty to consult', His Honour stated:

the responsibility of one Treaty partner to act in good faith, fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say that it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to have acted reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some, extensive consultation and cooperation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.²

Crown counsel submitted that the consultation undertaken by the Ministry under section 154 of the Education Act was carried out consistently with the principles adopted by the Court of Appeal in the Treaty context.³ She also drew to the Tribunal's attention two very pragmatic judicial accounts of what is involved in consultation. The first is the statement that 'consultation is an intermediate situation involving

2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 683

3. Document A30, paras 130, 131

meaningful discussion’.⁴ The second is the explanation that ‘Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done’.⁵

4.2.2 The context for consultation: Mokai tino rangatiratanga

In assessing the consultation that was undertaken, our starting point is the fact that the Crown, in its arguments, did not acknowledge the Mokai community’s tino rangatiratanga. This indicates that it misunderstood the nature of the community with which it was dealing and so the context within which Mokai Primary School operated. And that context had become of increasing importance to the community, as it saw fresh opportunities to strengthen its children and, therefore, itself through the education system’s adoption of the Tomorrow’s Schools regime. The board’s decision, in late 1993, that the school would teach bilingually was a significant step towards harnessing those opportunities. The decision three years later to appoint ‘one of its own’ as the permanent principal represented another major step towards ensuring progress through, in the words of the whakatauki, ‘moving rapidly forwards into the past’. In fact, the dedication of Mrs Koopu during the 2½ years she served as principal before the school’s closure, and the community’s recognition and appreciation of her efforts, marked her appointment as the turning point from which the Mokai community could see its vision for the school starting to become a reality.

That matter is relevant to the different time-frames within which the claimants and the Crown viewed the school’s performance. To the claimants, the appointment of Mrs Koopu late in 1996 – nearly a year after the Ministry initiated the consultation required by section 154 of the Education Act – represented a new beginning for the school. As each step was seen to be taken in the plan to improve the education of Mokai children and optimise the role of the school in the life of the community – and despite the setbacks and the distance still left to travel – the community’s commitment to the school was strengthened. That made it seem fair that the school’s achievements and its problems should be considered as from late 1996, and with full awareness of the legacy of difficulties that the school community needed to tackle to comply with all the Crown’s requirements for successful education delivery. To the Crown, however, Mrs Koopu’s appointment as principal was one of a number of ‘windows of opportunity’ in a much larger chain of unsatisfactory events that dated back to 1991 and continued through to 1999.

4.2.3 The context: mixed messages and inadequate information

The Tribunal considers that the relationship between the Ministry and the school community from late 1995 through to July 1998 (when the decision in principle to close the school was made) was fraught with the risk of mixed messages being

4. Per Justice McGechan (HC), cited on appeal in *Wellington International Airport Limited v Air New Zealand* [1993] 1 NZLR 671, 675 (CA)

5. Per Justice McGechan, *West Coast United Council v Prebble* (1988) 12 NZTPA 399, 405 (HC)

received by the community. In that period, the Ministry, through Mr Kitto, was making attempts to discuss the closure of the school with the community. Meantime, the community was taking what it saw as significant steps towards strengthening the school, and at least some of these were regarded by the Crown as offering ‘windows of opportunity’ for the school’s future success. And throughout those events, the Ministry, through Mr Kitto, was engaging with the school on matters of day-to-day importance to its operations.

Mr Kitto told the Tribunal that school closure is usually the result of an approach to the Ministry from the school concerned. In that situation, the closure process is undertaken in an atmosphere in which the school community is generally supportive of the outcome. One consequence is that the main purpose of the section 154 consultation is to ensure the children are placed in other schools with the minimum of disruption and inconvenience. This was not the situation with Mokai Primary School as was clear to the Ministry, at least from late 1995. Mr Kitto indicated that, in his experience, it was not usual for closure to be effected against the wishes of the school community.⁶

The Tribunal considers that the community’s opposition to closure should have rung ‘warning bells’ for the Ministry, alerting it to the need to take special care to approach the consultation process in a well-structured manner, perhaps even including steps that would not be needed in a school-initiated closure process. The evidence reveals that this did not happen. Mr Kitto acknowledged that his written records of discussions with the Mokai school community were inadequate, that the only time there had been a specific meeting called to discuss closure with the school community was in November 1995. Crown counsel acknowledged that his superiors in the Ministry had not taken steps to become involved in face-to-face discussions with the community.⁷

Further, although the Ministry may have believed that the situation did not involve any considerations of tino rangatiratanga or its connections with the taonga of Maori language and knowledge, it was very aware that the Mokai school community is a Maori community. Its publication of factors that are important when consulting Maori reveals an awareness that the different world views of Maori and non-Maori may affect not only the process but also the substance of consultation discussions.⁸ Among the factors identified in *Tukutuku Korero* for any school that is initiating consultation with a Maori community are that the school should:

- ▶ ensure that everyone has a clear understanding of what the consultation seeks to achieve. In particular, be clear about what the constraints are, and what can be delivered.
- ▶ consult as early as possible and make sure that people receive the information they need to participate.
- ▶ not come with all the answers; provide the opportunity for Maori to identify the issues and direction.

6. Second hearing, tape 7B

7. Second hearing, tape 14B

8. Document A18, app B

- ▶ give people adequate time to consider the issues and to respond.
- ▶ show that the school recognises and values people's contributions. Parents should be given feedback about their views and suggestions. They must see that consultation results in change, or, if ideas have not been acted on, the reasons for that.
- ▶ understand that Maori consultation and decision making processes may need to occur outside of the school consultation processes, and provide time for this to happen.

It is our view that these factors, which are in essence concerned to avoid the risk and consequences of cross-cultural misunderstanding, were not sufficiently heeded by the Ministry in its own efforts to consult the Mokai school community about the possible closure of the school. These matters provide the backdrop for the following more detailed consideration of the consultation between the Ministry and the Mokai school community on the matter of the school's closure. Our consideration is structured according to the features of consultation that were identified by Justice McGechan in the *West Coast United Council* case (see sec 4.2.1).

4.2.4 'The statement of a proposal not yet finally decided upon'

The letter to the school of 7 November 1995, from the acting senior manager of the Ministry's national operations (see sec 3.9.2), did not contain a final proposal to close the school. Closure was, however, the only possibility advanced. The letter refers several times to the possibility of the school's closure, in the course of recording section 154's requirements and the Minister's direction that the Ministry consult with the school board. It does not refer to any other possibilities at all. The letter also records, as the reasons for the Minister's direction, the low roll of the school and the curriculum's encouragement of 'balanced programmes where students learn in a variety of social settings'. That last passage contains a further allusion to the low roll of the school. Mr Kitto explained to the Tribunal that very small schools have difficulty providing their students with the range of social interactions that are needed in education.⁹

The information supplied by the Ministry to the Tribunal about the number of students enrolled at Mokai school in the last term of 1995 was said to be unreliable. From the information about student numbers in the school terms on either side of the final term of 1995, it seems safe to estimate that, in the five terms from term 3 1995 until term 3 1996, the maximum number of students enrolled at any one time was 14 and that, most often, there were between 11 and 13 students.¹⁰

At the meeting on 14 November 1995, where Mr Kitto delivered the letter to the school community, he provided a flow chart on the school closure process. One month later he wrote to the board, attaching a copy of 'a statement confirming arrangements agreed last night by the boards of trustees of Tihoi and Marotiri

9. Second hearing, tape 5B

10. Document A25(1), p 6

Schools’.¹¹ From the flow chart, the board would have recognised that Mr Kitto had met with those schools because of the requirements of section 157 of the Education Act, as part of the closure consultation process. The letter asked the board to specify a date on which Mr Kitto could meet with it ‘to continue the consultation process’.

In our view, these events indicate that the consultation in which the Ministry sought to engage the school community about the closure of Mokai Primary School got off to a bad start. The bald statements in the 7 November letter, delivered with Mr Kitto’s school closure flow chart, and his consultation with nearby schools within the next month, could well have led the school community to believe that closure of the school was the only possibility in the Ministry’s mind and that it was making all speed to make it a reality. From the wording of the 7 November letter too, the community could well have believed that the level of the school roll was the primary reason for the Minister’s concerns.

We believe that the consultation process would have been much more constructively initiated had the Ministry included in its letter of 7 November 1995 an invitation to the school to discuss all the issues relating to its future and an undertaking that the Ministry would provide information about all possible alternative options. It would also have been more constructive had the Ministry made plain that Ministry officers other than Mr Kitto, including his seniors and Maori officers, would be available to discuss that information once the school community had the chance to absorb it. Had that occurred, we believe it would have led to discussions about the school’s future that were informative for both parties. For example, had the community learned at that time about satellite schooling (which involves closing the school but reopening it in another guise), it may have been in a position to pursue that option when its roll increased in 1998. It appears to the Tribunal, however, that by the time the community learned about satelliting, the school roll was again too low to make it a realistic option.

It was apparent that Ministry witnesses who had the information about the larger picture of school support and intervention strategies of which closure is a part, either never met with the school community or had not considered it necessary to volunteer that information. One example is provided by the fact that the question of a commissioner for the school was discussed informally in the Hamilton office of the Ministry, with some involvement from ERO but without the knowledge of either the Ministry district manager or the school. And yet, as Mr Brell observed (and the Tribunal can confirm from its own much more advantaged information-gathering role at the hearing), finding one’s way around the education system is not an easy matter. For a school community already under substantial pressure, it would be extremely difficult to muster the resources needed to make a meaningful appraisal of the options other than closure that might be available.

No doubt the Ministry did not want to raise what it regarded as false hopes through its discussions with the school community. But granted that the prospect of closure was regarded so seriously by the community, we consider that ‘a meaningful

11. Document A7E

discussion' about it (see sec 4.2.1) could not occur in isolation from a discussion of the larger context of the other support and intervention strategies that might be available. The Ministry had the information about that larger context as well as its opinions that no other option was appropriate for Mokai school. Without the information, however, the school community could neither ask for the Ministry's opinions nor see its reasons for them. As a result, it could not approach any discussions with the Ministry in a manner that would make most plain the community's reasons for holding different opinions about the relevance of any options other than school closure.

The manner in which the section 154 consultation process began, and the patchy course of its subsequent conduct, provide no basis for believing that any alternatives to the school's closure were ever seriously canvassed between the Ministry and the school community. Claimant counsel submitted that, had the Ministry approached the consultation appropriately, the process might have resulted in discussion about school support projects; combining the board of Mokai school with another local school board to share administrative resources; satellite schooling; correspondence, home, and special character schooling; and the use of the ministerial interventions of a commissioner and directed specialist assistance.¹² At the Tribunal hearing, it was clear that the school community was still not well informed about most of those possibilities.

In our view, the Ministry's belief that it was not its responsibility, as part of the section 154 consultation process, to volunteer information to the community that would provide the context for a discussion of all the issues involved undermined the very purpose of that process. It effectively limited the possibility of discussion to the issues that the Ministry saw as being relevant. The result, as we explain below, was that both parties missed the opportunity to hear and understand each other's views of the issues involved in the situation.

4.2.5 'Listening to what others have to say'

The Crown emphasised that the school community did not want to discuss closure and, at least for some period, refused to do so. It was said to be an inevitable result of this that any closure discussions that did take place between Mr Kitto and the school would occur in the context of discussions about other matters. It was also said that the Ministry took care to hear what the community had to say through inviting its written communications. One example was that the Ministry invited the community to comment on the draft submission prepared by the Ministry for the Minister which, in its final form dated 24 July 1998, led very rapidly to the Minister's decision in principle to close the school.

The Tribunal agrees that the 'stand off' was almost inevitable – but because of the manner in which the consultation process began more than any other factor. We accept that, with the consultation having got off to the start that it did, it would not

12. Document A29, para 3.49

have been easy for the Ministry to retrieve the situation. It appears, however, that the Ministry made no considered attempts to retrieve it, for example by bringing in officers other than Mr Kitto to try to generate discussions at a more constructive level. In our view, Mr Kitto's role as the Ministry's sole closure representative was virtually untenable in light of his other responsibilities in relation to the school. The Ministry's attitude appears to have been that 'having begun this consultation process, we will continue with it no matter what'. In effect, in our view, the Ministry 'continued' the process by waiting for time to pass and then, when the ERO reports of December 1997 and mid-1998 revealed ongoing problems in the school's governance and management, took action to step up the closure process to its next stage.

We do not accept Crown counsel's submission that 'the fact that discussions extended over a considerable period of time is indicative of the complex matters that had to be dealt with'.¹³ The evidence shows that there were few discussions in the lengthy period before the decision in principle was made. As well, the exchanges that occurred were characterised by a lack of relevant information on both sides. The school community did not understand the larger context provided by the range of school support and intervention strategies and the Ministry's views of why any options other than closure were inappropriate. The Ministry did not understand the community's views about the importance of the school and so did not consider any other options in light of that understanding. As well, the school community believed that there had been material changes to the school's circumstances since the original direction to consult. That is why claimant counsel described as 'historical' any exchanges that occurred between the Ministry and the school over closure before late 1996.

Therefore, while the length of time involved in the first stage of the statutory consultation process (from November 1995 until July 1998) might, in other situations, be highly desirable and productive, this was not the case for the Ministry and the Mokai school community. In our view, what occurred was not a lengthy consultation process. Rather, for both parties, it was a lengthy period of uncertainty about each other's views and their implications.

Accordingly, we do not consider credible the Crown's suggestion that the situation was in some way improved by discussions that took place even earlier – in the period that predated the statutory consultation process and, more importantly for the claimants, predated by an even longer time the 'new beginning' of the school. Nor do we consider the situation was salvaged by the increase, after July 1998, in the number and focus of the discussions and communications between the Ministry and school community about the school's closure. In light of what had gone before, we consider that, during that final stage of events, the school community was simply responding to issues that the Crown alone had identified and prioritised.

13. Document A30, para 120

4.2.6 ‘Considering their responses and then deciding what will be done’

The next factor identified by Justice McGechan as an essential feature of consultation is that the views of others are considered before a decision is made. We believe that the school’s views on the issues raised by the prospect of the school’s closure could not be considered by the Minister before the closure decision was made in June 1999, for the simple reason that those views had not been properly sought, discussed, and understood at any earlier time. One indication of this state of affairs is provided by the Ministry’s final submission to the Minister, of 31 March 1999. It is recorded there, as the final point in the background paper accompanying the submission, that the written and oral presentations made by the school community on 2 March 1999 emphasised the history of schooling at Mokai and the desire to ‘preserve the taonga of te reo o te Maori’. It is also recorded that, in August 1998, the school board had given as a reason for the school staying open that the Mokai ‘marae is an integral part of the kura’. The submission then concludes with the bare comment: ‘In the opinion of the Ministry, the mana of the Mokai marae derives from the *marae* and does not depend on the school staying open’ (emphasis in original).¹⁴

In our view, that cursory account of the Mokai school community’s views of the importance of the school to its children and, therefore, the identity of Mokai, and the Ministry’s contradiction (without reasons) of the validity of part of that account supports claimant counsel’s submissions about the quality of the consultation after the Minister’s decision in principle was made. He submitted that the Ministry was focused only on the issues it considered to be relevant to the school’s closure and did not, at this stage any more than earlier, engage with the underlying reasons for the community’s desire to discuss other options and its opposition to closure. Therefore, in effect, what the Ministry regarded as sufficient consultation was a process by which it merely conveyed to the Minister the school community’s opposition to closure.

As well, it appeared to the Tribunal that, as a result of hearing the claimants’ evidence, Crown witnesses gained fresh insights into the underlying reasons for the school community’s concerns about a wide range of matters. These included matters the Crown knew had been of concern to the school for some time (such as its decile ranking and students’ travel costs) as well as matters that had been raised more recently (such as the criteria for appointment of a commissioner, for satellite schooling, and for joining an iwi-based schooling improvement initiative). One example was Karen Sewell’s comment that, from her reading of the ERO reports on the school, she detected an underlying element in ERO’s view of the appropriateness of appointing a commissioner to the school: its concern that to recommend a commissioner would damage what she described as the ‘mana’ of the Mokai community and school board.¹⁵ Another was Mr Kitto’s statement, in response to questions from the Tribunal, that it was fair to question the implications of tino rangatiratanga for the very existence of Mokai school because there is a conflict between rangatiratanga and ministerial closure against the wishes of the community.¹⁶

14. Document A6E

15. Second hearing, tape 8B

16. Second hearing, tape 7B

To the Tribunal, such statements demonstrated Crown witnesses' candour and willingness to engage with the issues raised by the claim at the same time as they suggested that, prior to the Tribunal hearing, their agencies had not seriously engaged with them in connection with their lengthy interactions with the Mokai school and community.

4.2.7 The Ministry's consideration of alternative bilingual education

We believe that the issue of the Minister's awareness of other schools in the area that provide bilingual education provides the most concrete example of the deficiencies in the Ministry's consultation with the Mokai school community. It was not until March 1999 that the Ministry informed the Minister of the existence of other schools in the area that teach bilingually. The Minister's decision in principle to close the school, reached some seven months earlier, was based on the Ministry's submission of 24 July 1998. The submission contains brief information about the two schools closest to Mokai. It also notes the comments of the Mokai school board (the full text of which was attached to the submission) that neither of those schools provides a bilingual programme and that Mokai children would be unlikely to attend them.

Mr Kitto said that the Ministry 'perhaps . . . should have been more explicit' about alternative providers of bilingual education but that this was not seen as 'a particular issue separate from the others'. He explained further that, as long as 'it's good education, then that's quite ok by us'.¹⁷ The Tribunal inferred from this that the Ministry assumed that any other school in the area could provide a bilingual education of a satisfactory quality if bilingual education were wanted by the parents of children enrolled there, including the parents of children at Mokai Primary School who would need to enrol elsewhere if the school closed. As a result, it was unnecessary for the Ministry to give specific consideration to the question of which schools in the area were already providing bilingual education.

That inference is consistent with the Ministry's response to a question that the Tribunal, after hearing the claimants' evidence, asked the Crown to address in its evidence. The Tribunal asked what are the policies of the Ministry, in a school closure situation, where, for any reason, 'the children's needs are not likely to be met by the closest schools in the area'.

The Ministry's response highlighted the fact that the question assumes that the closest school 'may not meet the learning needs of certain students'. However, it said: 'all state schools have an obligation to meet the learning needs of their students. Once students are enrolled, they and their parents become part of that school's community.'¹⁸ The provisions of the Education Act which require schools to meet their students' learning needs were then cited, including section 63(b), which deems all school charters to contain the aim of:

17. Second hearing, tape 6A

18. Document A25(1), p 10

taking all reasonable steps to ensure that instruction in tikanga Maori (Maori culture) and te reo Maori (the Maori language) are provided for full-time students whose parents ask for it.

Even putting to one side the place of ‘local content’ in bilingual education, the Tribunal considers that the Crown’s position – that any school in the vicinity of Mokai should provide bilingual instruction if asked by the parents of children enrolled there – seems idealistic in light of its own identification (especially in Mr Brell’s evidence) of the many obstacles to the delivery of Maori medium education. Those obstacles suggest that it would have been practical – even if not strictly required by the Act – for the Ministry to have advised the Minister, before the decision in principle to close the school was made, of all the schools in the area that were already providing bilingual instruction at a Maori language resourcing level comparable to that of Mokai school. We note that the fact of that resourcing, and its level, would seem to be the best indicator of a school’s ability to teach bilingually in a manner that incorporates matauranga Maori. It would also have been practical, in our view, in light of the socio-economic circumstances of the families of the children enrolled at Mokai school, for the Ministry to have advised the Minister at that stage how travel subsidy rules would apply if the children attended other schools. We consider further that, apart from being practical, such an approach would have demonstrated the Ministry’s concern that the Crown’s Treaty duty actively to protect the taonga of Maori language and knowledge had been a focus of its consideration of the school’s future.

Plainly, the Ministry did not do any of those things before the Minister made the decision in principle to close the school. It consulted only the two nearest schools, neither of which receives Maori language resourcing and both of which were described to the Tribunal as offering ‘some te reo’ which, in the case of one school was clarified to mean ‘1–2 hours per week’.¹⁹ Further, the Ministry was not persuaded to modify its approach even after receiving the letter from the Mokai school board chairperson, containing comments on the Ministry’s draft submission to the Minister. That letter stated that few Mokai school students would attend either of the two nearest schools and indicated that the reason was that neither school offered a bilingual programme.

At the Tribunal hearing, the Crown submitted that the ‘critical briefing’ of the Minister occurred in March 1999 when information was provided by the Ministry, in the form of a ‘landscape sheet’, about the nearest ‘bilingual provider’ to the home of each child then enrolled at Mokai school. The landscape sheet does not identify the level or levels of Maori language resourcing received by the three schools identified as being the nearest bilingual providers, although the fact that one school is a kura kaupapa Maori would have made the fact of its Maori immersion teaching plain to the Minister. Further, no evidence was given that any of those three schools had been consulted by the Ministry on the basis that their rolls might be affected by the closure of Mokai school. This cannot have alleviated the Mokai school community’s anxiety

19. Document A22, para 52

and uncertainty about the alternative prospects for the education of their children should the school be closed. Even by the time of the hearing, for example, it was evident that the community was not well informed about its students' eligibility, in terms of their fluency in te reo, for enrolment at the kura kaupapa Maori in Taupo. That school was one of three bilingual providers identified by the Ministry's landscape sheet.

In the result then, the closure process had advanced right to the stage at which the Minister's final decision was required before the Ministry advised him of the existence of three schools, one in Mangakino and two in Taupo, that provide bilingual programmes. Even then, the Ministry did not specify the levels of Maori language resourcing received by those three schools, to enable a comparison to be made with Mokai school's level. And, it seems, none of the three schools had been consulted about the possibility of enrolling children from Mokai school so that, at least, the Mokai community could consider those schools' responses in its own discussions about the future of Mokai school.

We consider that the Ministry's apparent reliance on section 63(b) of the Education Act for its view that any school in the area could provide relevant bilingual education to the children of Mokai does not provide a sufficient basis for its failure to take into account earlier, and act on, the practical likelihood that Mokai students might not attend either of the two schools closest to Mokai Primary School. Indeed we consider that, had the Ministry and Mokai school community discussed the reasons for the community's desire to keep the school open, then – and even if the Ministry still considered closure to be the only practicable option – the issue of which other schools in the area were likely to be most and least attractive to Mokai students would have been placed high on its list of matters relevant to the Minister's decision in principle. Legalities aside, that issue would have been seen to involve questions about the Crown's understanding of its Treaty responsibilities. The Minister needed to know about such questions.

4.2.8 The Tribunal's finding on consultation

From the sum of the evidence, we are in no doubt that the Minister's decision to close Mokai Primary School was, in effect, reached and imposed without any meaningful discussion of the school community's views. In all the circumstances, we consider the deficiencies in the Ministry's attempts to consult the community about a matter as vital to its children's, and so its own, future as the possible closure of the school to be of such a serious nature that the consultation failed to meet the standards required by the Treaty principle of partnership. One result is that the Ministry missed the opportunity to hear and understand the community's views about itself and the school. Had the Ministry's approach encouraged the airing of those views, we believe it would have been alerted to the need to give deeper thought to what claimant counsel described as the 'subtle and difficult issues' that were, instead, aired before the Tribunal.

4.3 THE SCHOOL'S CLOSURE

The result of the situation just described is that the school was closed without the Crown being aware of the Mokai community's views on how the principles of the Treaty relate to the school's place in the community. Our analysis of the Treaty principles in chapter 1 reveals that the Tribunal agrees with the claimants that Mokai tino rangatiratanga, and its exercise in relation to the taonga of te reo and matauranga Maori, are – or, more accurately, were – integrally involved in the school's operations. We consider that the Crown's closure of the school without regard to those matters is necessarily inconsistent with the requirements of 'quality kawanatanga' or 'good governance'.

We do not purport to have the answers as to how the Mokai community's interests might have and should have been balanced with those of the Crown in the particular circumstances involved in the claim. We note, however, claimant counsel's submission that, had the Crown given due consideration to the community's Treaty rights and responsibilities, a ministerial decision to close the school could still have been made. We also note that the claimants did not challenge the content of the national curriculum as in any way limiting the exercise of their Treaty rights and responsibilities. Instead, the curriculum's goals were seen to be compatible with Mokai children's needs and aspirations and so with those of the wider community. Indeed, more generally, the community saw the introduction of the Tomorrow's Schools regime as offering fresh opportunities to work together with the Crown to achieve common goals.

The result is that our finding of Treaty breach in connection with the school's closure does not amount to a challenge to the basic structure and nature of the education system. Rather, we consider that it calls for a fresh focus on how the various elements of the system may be more effectively tailored to respond to the interests of Maori communities that are recognised by the principles of the Treaty of Waitangi. Clearly, the Crown is already focusing on a range of relevant issues – but within the context of a different understanding of the Treaty principles' protection of the tino rangatiratanga of Maori communities and the implications of that for the protection of the taonga of te reo and matauranga Maori. One reason why we have presented the claimant evidence in some detail in chapter 2 of this report is that we consider it provides valuable insights into the elements of the education system that could benefit from closer scrutiny in the light of the Treaty principles we have described. That evidence suggests that the following matters are among the most important that warrant attention.

4.4 FRESH ATTENTION TO POLICY MATTERS

4.4.1 Support versus intervention in the 'one size fits all' governance model

From the sum of the evidence presented, the Tribunal is left with a sense that Mokai school was closed for being in the wrong place at the wrong time. Its location was

wrong because the sort of support that would very likely have been most beneficial to it in recent years was available only in other parts of New Zealand. As Mr Brell said, had Mokai school been on the East Coast, it would have been invited to join the schooling improvement initiative that has been established there. Its timing was wrong because the changes made to the school in its last years, which the claimants believed were substantial, did not counteract the trend that the Crown saw, over a longer period, of a school in serious difficulty.

These matters, of how the Crown supports schools in difficulty, and when and how it should intervene rather than continuing to rely on the school's use of support mechanisms, involve large and complex issues. We urge the Crown to explore them further with the fresh focus that we have found is needed. In particular, we believe that attention must be given to relieving the tension that exists between, on the one hand, the range of support and interventionist actions presently available and, on the other, the education system's 'one size fits all' governance model (with its devolution to school boards of substantial responsibilities and, as a consequence, independence).

The Tribunal considers that part of the tension is created by the limited mix of support and interventionist strategies currently available. For example, had Mokai school been able to bring in three years ago, at minimal cost to the school, a suitable person or people to provide intensive and direct hands-on assistance with such matters as curriculum planning and board self-review processes, we believe it may well have welcomed that opportunity, rather than regarding it as an affront to the board's independence and the community's identity. We also believe that the cost-effectiveness of such an option may compare favourably with that of the support that was provided.

Further, we consider that the Ministry's reluctance to use current interventionist strategies needs to be tested by open consultation with, not assumptions about, the particular communities whose schools may be affected. The Mokai school community may well have agreed two or three years ago to the appointment of a commissioner at the school – had it been fully apprised of the Crown's view of the school's problems and had it been given the opportunity to explain its own aspirations and concerns. In this, we concur with claimant counsel that it is inconsistent with a Maori community's tino rangatiratanga for the Crown to refrain from talking about interventions that could assist a school, and to refrain from intervening in the untested belief that the community would be affronted, only to watch matters 'drift' to the point where the Crown believes it has no choice but to close the school against the wishes of the community.

The other side of the tension-causing situation is the school governance model itself. The Ministry and ERO have raised questions about the suitability of this model for all schools in the recent papers and publications that were presented in evidence. Plainly, it is hoped that the schooling improvement initiatives now in place will reveal when and how possible alternatives to the model may be needed. We urge the Crown to give priority attention to this matter in conjunction with a review of the support and interventionist strategies now available to assist schools. The issue seems

sufficiently ripe for the piloting of alternative models in schools that are in serious difficulty but are beyond the reach of existing schooling improvement initiatives.

4.4.2 Education quality

The claimants were presented with a substantial difficulty in their efforts to challenge the Crown's assessment that the quality of education delivered at the school was so poor that, coupled with other factors relating to the school's viability, the decision to close the school was justified. The difficulty arises from the fact that the only formal measures of the quality of education delivered in New Zealand primary schools are the 'system-focused' measures applied by ERO and, without doubt, the school failed to measure up in those terms. The result is that the claimants could only present other kinds of evidence of the quality of the education delivered at Mokai Primary school and none of it could match the characteristics of the ERO assessments. Those assessments are based on nationally applicable criteria that are applied by independent and trained reviewers who have widespread knowledge of the operations of many schools. Further, their reviews of a particular school can be interpreted by the ERO in the context of all the information it has accumulated over the years about all schools.

Three kinds of evidence were presented by the claimants as alternative indicators of the quality of the education delivered at Mokai Primary School. First, there were the views of parents, board members, other community members, and one occasional teacher, who spoke of improvements they had seen in the school, the pupils, and the wider community as a result of the last principal's and board's efforts. The second kind of evidence consisted of more general information about New Zealand schools' operations in the Tomorrow's Schools environment. This included information presented by the Crown, such as the recent ERO publication *Small Primary Schools*. Thirdly, the claimants presented evidence, through members of the Mokai community as well as Mr Hogan and Te Iria Whiu, that questioned the appropriateness of the national assessment measures as the sole indicators of the quality of education delivered at Mokai Primary School, at least at the stage of development it had reached.

All of that evidence was challenged by the Crown on one or more of the following grounds: it was partial or ill-informed about educational goals and processes; it was not based on formal measures of assessing student progress or on reliable comparative assessments of the school as against other schools; it amounted to an attempt to excuse the claimants' lack of commitment or ability to achieve the nationally prescribed standards; or it suggested that Maori should be satisfied with a 'second-class' system of education when all social and economic indicators show that Maori deserve education of the very highest quality. In addition, as its Treaty arguments made plain, the Crown considered that the claimants had no greater reason or right, over and above any other school community, to challenge the Crown's measures of education quality.

Our analysis of the Treaty arguments made to us and the Treaty principles relevant to this claim indicates that the Crown has misunderstood the nature of the Treaty's

protection of tino rangatiratanga and its relationship with the taonga involved in education. In particular, our analysis indicates that the Crown has not given sufficient consideration to how it may fulfil its Treaty responsibilities by enhancing the tino rangatiratanga of a Maori community such as Mokai through the education of children into that community. One result, we believe, is that the questions raised by the claimants about the adequacy of the formal measures of education quality, particularly to capture all the matters of importance to a Maori community whose school is teaching te reo and matauranga, cannot be dismissed on the bases that were relied on by the Crown.

In saying that, we do not intend to minimise the gravity, in an education system that depends heavily on written evidence of compliance with the national educational guidelines, of inadequate thought or action within a school to the preparation of governance and management plans and the recording of the measures taken to implement them. Nor are we saying that in the Crown's dealings with a Maori community in the arena of State education, the community's views should be treated as a substitute for the current measures of the quality of education.

Naturally, nobody wants 'second class' solutions in the education of Maori children. But the definition of 'first class' solutions, and how they may best be reached from the current position, is a matter that can be arrived at only through an open exchange of views in a context where the respect that is due to each party is freely accorded. The evidence reveals that the Mokai school community has not been accorded that respect by the Crown. The underlying reason for that, we believe, makes it likely that other Maori communities will not have been given the opportunity to discuss the quality measures by which mainstream education is currently assessed. Indeed, when acknowledging the claimants' argument that due consideration of the Treaty could mean that the Minister might still have closed Mokai school, Crown counsel said that it was difficult for the Crown to see that 'the case for Mokai is inherently different from any other place where there may be a Maori community'.²⁰

In our view, the claimants' evidence of the school's achievements in areas they consider to be integral to quality education of their children, including the children's improved confidence and self-esteem and their enjoyment of learning, seem consistent with the 'intermediate indicators' of quality Maori medium education that were mentioned by Mr Brell (see sec 3.10.1).²¹ Further, the benefits to the Mokai community that were described as flowing from the school's approach seem consistent with 'quality kawanatanga' that enhances the values and relationships that sustain the Maori way of life. In light of these matters, we consider there must be room for prevailing definitions and measures of mainstream education quality to be better informed by the knowledge and experiences of Maori communities.

20. Second hearing, tape 13A

21. Second hearing, tape 1A

4.5 PREJUDICE SUFFERED BY THE CLAIMANTS

We are satisfied that the claim has been made out and that, as the result of the breaches of Treaty principles occasioned by the Crown's conduct, the claimants, Mr Osborne and Ms Adams, and their children who were enrolled at Mokai school before its closure have suffered prejudice. The claimants' children, and indeed all the children of Mokai, can no longer be educated in their own community where they are most likely to develop the confidence to manage their lives both within and outside it. An inevitable consequence, as the claimants' emphasised, is that Mokai tino rangatira-tanga is diminished.

4.6 THE CONTEXT FOR OUR RECOMMENDATIONS

We have given very close thought to the recommendations we might make in the situation that now exists – with Mokai Primary School closed and the children who were enrolled there right up to the point of its closure now attending other schools as is required by law. From the claimants' standpoint, the most important choice we have had to make is between recommending their preferred remedy, which is that the school reopen (or, technically, that the school be established again – see section 4.7), and recommending some other course of action that might put the situation to right.

The claimants sought as a recommendation, but only if the Tribunal did not recommend reopening the school, that the Ministry of Education in consultation with the Mokai community investigate all alternatives for the establishment of alternative schooling at Mokai – including satellite schooling, home schooling, correspondence schooling, a special character school, or a kura kaupapa.²² The evidence presented to the Tribunal suggests that the legal or funding rules that govern those options at present would effectively prevent the claimants from utilising most, if not all, of them.

The Tribunal has also considered further options other than reopening the school. One option is that the Ministry of Education take whatever steps are needed to ensure that any child of the Mokai hapu living in the Mokai area at any time be able to attend either Mangakino Area School or the kura kaupapa Maori in Taupo free of travel costs and any other costs that would not have been incurred if she or he was attending Mokai Primary School. Another option is that the Ministry take whatever steps are needed to ensure that one of the two schools closest to Mokai provides bilingual education of at least level 2 standard by the start of term 3 this year and that any child of Mokai living in the area of the seven hapu at any time be assisted to go to that school, again at no travel or other costs that would not have been incurred if they were attending Mokai Primary School. Plainly, those options would involve considerable effort by the Ministry and the Mokai community as well as others. From the evidence presented to the Tribunal, it seems that legislative change would also be needed to implement them.

22. Document A29, para 5.3.2

The difficulty of implementing such options is not, however, the major reason why we are unanimous in our decision to recommend the ‘reopening’ of Mokai Primary School on the terms outlined below. Rather, we believe that no other option can remedy the prejudice that has been suffered. Any course of action other than ‘reopening’ the school would, we consider, create a fresh grievance out of the one that we have found to be established. Therefore, we consider that the claimants are entitled to receive their preferred remedy – the chance for the Mokai community to continue its efforts to make Mokai Primary School a provider of high quality bilingual education to its children.

We are very aware that the governance and management problems that beset the school before its closure will not be cured simply by ‘reopening’ it. Indeed, the time that has elapsed since the school was closed may well compound some of those problems. The most obvious example is that it may now be difficult, as it was in the past, to attract a suitable principal to the school. However, with the community’s commitment to the school, and with the Ministry’s commitment to supporting it, we consider that, within a reasonable period of time, the school can be made to work to a standard that satisfies the expectations of all concerned.

In her evidence, Mrs Wall, the last chairperson of the board of trustees, stated that, given two years and appropriate human and financial assistance, the school community could achieve its plans for the school. Those plans may well seem overly ambitious to the Ministry. In particular, it may be sceptical of the community’s ability, without changes in employment or housing conditions in the area, to restore the roll of the school and maintain it at a suitable level.

We believe the truth of the matter is that neither the school community nor the Ministry is wholly ‘right’ in its view of Mokai school as it was or can be. Only sincere and open exchanges between them will lead to an agreed path for the future. We would observe, however, that we consider it unrealistic, in all the circumstances that were described to us, that the Crown should consider that the drop in enrolments in 1999 was not caused to a significant extent by the new factor that was injected into the school’s situation a few months earlier – the decision in principle to close the school. Equally, we would emphasise that the Mokai community must accept that the school’s viability depends, along with other factors, on its ability to maintain a stable core enrolment. Therefore, its commitment to the school’s future must be focused on achieving that, among other things. We believe the school community is now aware of the added practical importance, in light of the education system’s funding rules, of achieving and maintaining enrolments at a level that ensures that satelliting is a realistic option to ‘future-proof’ its children’s schooling into, and in, the Mokai community.

We are of the firm view that in order for the school to ‘reopen’, it needs immediate and extensive assistance from the Ministry to ensure that it has stronger governance and management systems than were in place at the time of its closure. Additional support should then be provided for a period which we would estimate to be at least two years. This is essential, we consider, to enable the school to meet, as quickly as possible, the requirements that are assessed by ERO and to enable the school to secure

the best possible base for providing education that is in accordance with both the community's knowledge of its children's needs and with the Crown's requirements of quality education.

As we have indicated, we believe that the Mokai school community and the Crown need to give further thought to the role of mainstream education in a Maori community that is bound together by whakapapa links, resident in its own area, and without any obvious 'sister' school close by. It seems to us that the capacity of such a community to educate its children in a manner that enhances local identity and the protection of the taonga of Maori language and traditional knowledge may be in danger of being 'lost' among the many competing priorities for attention that face the Ministry. Those competing priorities include promoting the undoubtedly valuable work of kura kaupapa Maori and iwi-based schooling improvement initiatives as well as promoting the capacity of all mainstream schools, including those with minority Maori enrolments, to respond to Maori children's needs.

Despite the 'battle for attention' that is posed by the various demands on Ministry resources, we believe it would be short-sighted if it did not foster all genuine attempts to discover the various formulae that must exist, as a result of their different circumstances, for the quality education of Maori children. It is clear that there is a considerable time ahead in which the Ministry will be unsure of the precise elements of all those formulae. Meantime, it would be wasteful of existing – albeit imperfect – resources, for schools and communities which share the Ministry's long-term vision to be discouraged from their efforts to find the elements that make education succeed for their children.

4.7 RECOMMENDATIONS RELEVANT TO MOKAI

We recommend that the school be 'reopened' as quickly as possible (ideally, to resume teaching during the second term of the school year 2000) subject only to the establishment of a board of trustees and its appointment of a Maori teaching principal who has the confidence of the school community. The logistics of this are provided for in the Education Act and we offer the following outline of what is required.

First, it must be noted that the Education Act provides that a school that has been closed cannot be reopened except by being established again under the Act (s 154(4)). Naturally, that provision assumes that the school was closed in accordance with the law, including the section 154 and section 157 provisions about consultation. It is our view that it would be far more constructive for the claimants and Crown to put aside their contest over this matter in favour of working together in reliance on the following provisions of the Act.

The establishment of a primary co-educational school is, by section 146 of the Act, effected by ministerial notice in the *Gazette*. The name of the school needs to be specified in the notice (s 147). Before the school opens and until such time as board members are elected as provided by sections 96 and 97 of the Act, a board of trustees

can be established under section 98. That section provides two options for obtaining the five ‘core members’ of the board: the Minister can appoint them or the ‘parents of students likely to be enrolled at the school in the year it opens or the next year’ can elect them. In addition to those five members, the principal or principal designate (when there is such a person) is a board member. So too is any person co-opted by the board (up to a maximum of four co-optees). Under section 98(2), the board as constituted in this way stays in office until the school is opened and elections are held (in accordance with section 96) for the parent representatives’ positions (and, if applicable, until elections are also held for the staff and student representative positions). Meantime, the ‘temporary board’ has all the powers of a school board and so can appoint a principal.

That outline is very general and we recommend that the school community be provided with independent legal advice, funded by the Crown, for the purposes of ensuring that its interests are protected during the process of establishing, as quickly as possible, a school at Mokai and an initial board of trustees.

We have given much thought to whether we might recommend that the establishment of a new school at Mokai should depend (in addition to the board appointing a Maori principal who is acceptable to the community) on the school obtaining a minimum number of enrolments within a specified time. We have decided not to recommend that additional condition because there is no such minimum imposed by the education system. Further, we believe it may take some time for word to spread that the school is open, what it is aiming to do, and how that will happen. We reiterate our earlier advice to the school community, however, that it should focus, among other things, on ensuring that the school’s roll will grow to, and remain constant at, numbers at least equal to its highest in recent years.

In addition, we recommend that the Ministry and the Mokai community should agree on the immediate appointment, at no cost to the school, of a suitable person who can assist the board to meet every aspect of the school governance requirements that are assessed by ERO. Among other necessary qualities and skills, that person should be equipped to take over the task of drafting documents for the board’s consideration and approval and setting in place systems to ensure future non-compliances do not occur in connection with the tasks undertaken. The first task in which the person should be engaged, together with the board and in consultation with the school community, is the drafting of a school charter that meets the requirements of the Education Act by clearly stating the community’s aims for the school. (As the school’s ‘mission’ evolves through its ongoing consultation with Ministry and ERO officers, the charter can and should be amended accordingly.) The priority of other tasks should be assessed by reference to the last three ERO reports on Mokai Primary School.

We envisage the role of this person as lasting for at least one full year on a part-time basis and we see them as a ‘trouble-shooter’ who will work closely with the board in its governance functions. If the framework of the Education Act does not accommodate the provision of such direct ‘hands-on’ assistance, we consider that its provision by the Crown can, and should, be arranged through a payment to the

school, made in recognition of the outcome of this claim, that will meet the costs involved.

We have considered, as an alternative to the above recommendation, that a commissioner be appointed to the school on its establishment, on terms that are acceptable to the school community. We believe that this is an inferior option because a commissioner, under section 109 of the Education Act, goes out of office seven days after a board of trustees is elected. Therefore, a commissioner is a 'sole operator' during his or her term of office, which means that the benefits of his or her expertise are not directly available, in a face-to-face way, to the board that will take over the school's governance.

With regard to the teaching at the school, the key to our next recommendation is that the Ministry provide support that is actively tailored to the needs of the principal and the children of the school. That support should be provided in as intensive a manner as is possible during the two years after the principal is appointed. To achieve this, the Ministry may well need to devise new support strategies.

Accordingly, we recommend that the Ministry and the school community consult as soon as possible after the principal is appointed, and regularly thereafter, for the purpose of considering the kinds of support that are needed, and that all possible steps then be taken by the Ministry to ensure that the support is provided at no cost to the school for the two years after its 'reopening'.

Among the kinds of support that will need to be considered are:

- ▶ direct assistance in compiling the plans and records that are needed to meet the requirements of the national curriculum and the school's charter;
- ▶ the provision of more principal's release time during the first two years after the school reopens;
- ▶ the provision of one-on-one training for the principal in any area with which she or he needs assistance;
- ▶ the obtaining of limited authorities to teach for community members actively involved in the school's programme and the provision of suitable training for their roles;
- ▶ assistance to increase the school's material teaching resources; and
- ▶ assistance to gauge whether there is potential for the school to be part of the Tuwharetoa or any other schooling improvement initiative whose aims match its needs.

As we noted earlier, we consider that an ongoing process of consultation between the school community and the Ministry of Education will be needed to devise and implement the best plan to rebuild and strengthen the new Mokai school, at least in the two years following its 'reopening'. We consider it necessary that senior officers from the Ministry, including Maori officers, be directly involved in that consultation. Senior ERO officers, including Maori officers, should be kept well informed about the ongoing consultation process and, as the school community desires, be directly involved in that process. We recommend that this occur.

4.8 FURTHER RECOMMENDATIONS

The claim raises a number of large questions about the adequacy of the range of school support and statutory interventionist measures presently available to schools in difficulty. It raises equally large questions about the suitability of the present governance model for all schools. The Ministry and ERO are now grappling with these issues, as is most plainly evidenced by their publications and the schooling improvement initiatives that have been established to date.

Within the context of the urgent hearing of a claim relating to one school, the Tribunal is not well placed to offer anything other than its earlier comments (see sec 4.4.1), and its encouragement, to the Crown in its efforts to extend and improve the range of support, intervention, and governance options available to assist schools in difficulty.

We believe, however, that the claim holds more specific lessons for the future in relation to:

- ▶ the Ministry's process for deciding to invoke, and then pursuing, statutory interventions in school operations; and
- ▶ consultation between the Ministry and Maori communities.

These matters were central to the present claim and relatively detailed evidence was presented about them. We consider it possible that, unless immediate action is taken by the Crown to attend to them, other school communities could be prejudiced in the way the Mokai community was. Accordingly, these are matters about which the Tribunal, under section 6(3) of the Treaty of Waitangi Act 1975, can and should make further comment and recommendations.

4.8.1 The process for invoking and utilising statutory interventions in schools

Our first concern here is with the apparently unstructured approach taken by the Ministry, with some involvement of ERO officers, to the questions of whether, when, and how to invoke the statutory interventions authorised by the Education Act 1989. One element of our concern is the fact that the school community was largely left out of the process and was not informed of the range of options available. The other element is that the Crown agencies did not appear to have a clearly thought-out approach to their responsibilities such as would be provided by a clear and written process defining the sequential steps to be taken before and during any intervention. The recent addition of section 64A to the Act increases the need, we believe, for the Ministry and ERO to be very clear on when and how each of the statutory interventions can and should be used.

We appreciate that the circumstances of schools in difficulty are variable, that each situation needs to be considered individually, and that, inevitably, judgement will be involved in determining the action to be taken in each situation. However, this does not, in our view, license an approach to a matter as serious as possible school closure that does not involve senior managers in the Ministry or documentation of the options considered and the reasons for the course of action decided upon. The

Minister needs, and school communities are entitled to expect, a more considered approach.

Further, and especially if interventions are pursued against the wishes of a school community, there must be clear processes in place for Ministry officers to follow to ensure not only that their statutory responsibilities are discharged correctly but also that the Crown's Treaty responsibilities are met. Whenever consultation with Maori communities is involved, for example, the Ministry would be well advised to follow the guidelines it has prepared for boards of trustees. More than that, it should be determined more precisely what those guidelines mean for the use of the interventions in terms of such matters as when consultation should begin; how it should be commenced; what information should be provided to school communities; and who should be directly involved in conducting the consultation on the Minister's behalf. Accordingly, we recommend that the Minister initiate a review of the policies and processes involved in determining when and what statutory interventions may be appropriate and the processes to be followed in implementing each of the interventions.

4.8.2 Consultation with Maori communities

The Tribunal is disturbed by the Crown's apparent lack of preparedness to recognise matters as fundamental to Maori social organisation as the rangatiratanga of hapu and the inevitable relationship of that authority and identity to the taonga of te reo and mautauranga Maori. In our view, Crown witnesses' avoidance of references to these matters, and its Treaty arguments which effectively denied them, pose a fundamental obstacle to successful interactions between the Crown and Maori communities. We consider that the common enterprise in which the Crown and Maori are engaged, in the education sphere as in so many others, is unlikely to be conducted consistently with Treaty principles if the Crown's approach is based, as in this claim, on false notions that serve to tilt the balance between kawanatanga and tino rangatiratanga firmly in favour of the Crown.

The most obvious example of this lay in the Crown's argument that its duty to protect the taonga of te reo and mautauranga Maori can, in effect, be understood and implemented without reference to the tino rangatiratanga of Maori communities as they exist 'on the ground'. Certainly, it is no easy matter to imagine the range of ways by which, in the education sphere (or other related spheres, such as social welfare, health, and housing), the balance between the rights and responsibilities of the Crown and Maori may be struck so as to give life to the Treaty's intent and purpose. However, we believe that the approach of the Crown serves to stifle the imagination that is needed: by protecting a falsely enlarged notion of kawanatanga, its capacity actively to protect Maori interests is necessarily diminished.

The Ministry's group manager Maori impressed upon the Tribunal the magnitude of the tasks involved in working to achieve the vision of high-quality education for Maori children. He and his small team are clearly working within and across the range of Ministry, other Government, and community organisations at as steady a pace as can be maintained in all the circumstances. We note that the new national

administration guideline, effective from 1 July 2000, will provide further impetus for all schools to respond to the needs of Maori children and communities. We appreciate that it may not be easy, nor necessarily the best strategy, to expand the Ministry's Maori group so that its work can be spread among more minds and hands. However, we believe that more can and needs to be done to step up the pace of evolution towards the vision of providing high quality education for Maori children in both mainstream and Maori immersion schools.

Accordingly, we recommend that the Minister of Education, through the Ministry and in consultation with Maori communities, explore additional strategies to increase the Ministry's and schools' responsiveness to the educational needs of Maori children (see further secs 4.4.1–4.4.2).

Finally, although we consider that the evidence does not provide sufficient grounds for Tribunal recommendations on these issues, we note our concerns about the following matters and our hope that the Crown will dedicate attention to them. They are:

- ▶ the limited range of direct 'hands-on' teaching and planning support that is available to sole-charge principals;
- ▶ the absence of incentives to attract and retain suitably skilled applicants to the position of principal of a sole-charge school; and
- ▶ the clarity of ERO reports on schools in difficulty, especially in prioritising ERO's concerns and explaining in plain language exactly what needs to be done to meet all the required standards.

4.9 SUMMARY OF RECOMMENDATIONS

We recommend:

- ▶ That Mokai Primary School be 'reopened' (established again) as quickly as possible, ideally, to resume teaching during the second term of the school year 2000, subject only to:
 - the establishment of a board of trustees; and
 - the board's appointment of a Maori teaching principal who has the confidence of the school community (see sec 4.7).
- ▶ That the school community be provided with independent legal advice, funded by the Crown, for the purposes of ensuring that its interests are protected during the process of establishing, as quickly as possible, a school at Mokai and an initial board of trustees (see sec 4.7).
- ▶ That the Ministry and the Mokai community agree on the immediate appointment, at no cost to the school, of a suitable person who can assist the board to meet every aspect of the school governance requirements that are assessed by ERO (see sec 4.7).
- ▶ That the Ministry and the school community consult as soon as possible after the principal is appointed, and regularly thereafter, for the purpose of considering the kinds of support that are needed, and that all possible steps then be taken

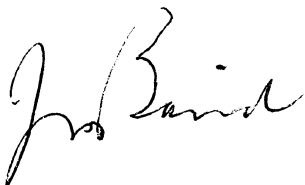
by the Ministry to ensure that the support is provided at no cost to the school during the two years after its 'reopening' (see sec 4.7).

- ▶ That, from at least the time of the school's 'reopening', regular consultation meetings take place between the Mokai school community and senior and Maori officers of the Ministry of Education (and with senior and Maori ERO officers involved or kept informed or both) for the purpose of providing assistance to the school, and its feedback to the Ministry and ERO, in connection with all aspects of the school's education delivery in accordance with its charter and other legal requirements (see sec 4.7).
- ▶ That the Minister initiate a review of the policies and processes involved in determining when and what statutory interventions may be appropriate and the processes to be followed in implementing each of the interventions (see sec 4.8.1).
- ▶ That the Minister of Education, through the Ministry and in consultation with Maori communities, explore additional strategies to increase the Ministry's and schools' responsiveness to the educational needs of Maori children (see secs 4.4.2, 4.8.2).

Dated at Wellington this 31st day of March 2000




J R Morris, presiding officer



J Baird, member



A Koopu, member



R Tahuparae, member



APPENDIX I

STATEMENT OF CLAIM

IN THE WAITANGI TRIBUNAL

WAI 789

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF MOHI MOSES HUIRAMA OSBORNE
and TE AROHA EMMA ADAMS

AMENDED STATEMENT OF CLAIM

The Claimants

1. This claim is lodged by MOHI MOSES HUIRAMA OSBORNE and TE AROHA EMMA ADAMS on behalf of themselves and their children who were enrolled at Mokai Primary School as at 3 October 1999 ('the claimants')

Background facts

2. Mokai Primary School is situated at Mokai, in the vicinity of Atiamuri in the Taupo district.
3. Mokai Primary School was a mainstream school that taught bilingually.
4. At the time of closure all pupils of the school were of Maori descent.
5. The land upon which Mokai Primary School is situated was gifted by certain tupuna in 1901 including inter alia Hitiri Te Paerata.
6. A school has been operating at Mokai since 1907.
7. Between October 1991–July 1998 there were a number of reviews and reports by the Educational Review Office ('ERO').

8. On 7 November 1995 the Ministry of Education ('MOE') wrote to the Board of Trustees ('BOT') outlining that the MOE were considering closure of the school.
9. Between 7 November 1995 and 7 July [1998] meetings took place between the BOT and MOE, further ERO reports were made and correspondence was exchanged between the MOE and BOT.
10. On 27 July 1998 the then Minister of Education ('the Minister') wrote advising the Chairperson of the BOT that the school should close. The Minister invited any submissions within 28 days as to why the school should remain open.
11. The then Chairperson of the BOT responded on 24 August 1998.
12. The Minister responded in writing on 11 December 1998 seeking clarification of certain matters.
13. A hui was held at Mokai Primary School on 2 March 1999 wherein further submissions were made to the MOE as to why the school should remain open.
14. On 24 June 1999 the Minister wrote to the Chairperson of the BOT indicating the school would close, effective as at 3 October 1999.
15. A *Gazette* notice was published to that effect on 1 July 1999.
16. A claim was filed before the Waitangi Tribunal on 29 July 1999.
17. The school was closed on 3 October 1999 pursuant to Section 154 of the Education Act 1989.
18. On 4 October 1999 an amendment to the statement of claim was filed with the Waitangi Tribunal.

First Cause of Action – Education Act 1989

19. Mokai Primary School was a mainstream primary school established under the Education Act 1989.
20. Closure of the school was carried out pursuant to Section 154 of the Education Act.
21. The Education Act 1989 contains no reference to the Treaty of Waitangi or Treaty principles, therefore the Treaty of Waitangi or Treaty principles are not directly enforceable.
22. This is a case in which the claimants assert that the following Articles of the Treaty and Treaty principles are breached:
 - (a) Article 2 – closure prevents access to te reo and matauranga Maori.

- (b) Breach of principles of the Treaty in particular:
 - (i) Failure to actively protect Maori interests.
 - (ii) Failure to adequately consult.

23. In the absence of a reference in the Education Act 1989 to the Treaty or Treaty principles, the Treaty and its principles are not directly enforceable.

24. The claimants allege that this is an omission on the part of the Crown inconsistent with the principles of the Treaty.

Second Cause of Action – Article 2 breach

25. Article 2 of the Treaty guaranteed to Maori te tino rangatiratanga over inter alia their taonga katoa.

26. Te reo and matauranga Maori are taonga.

27. Closure of Mokai Primary School has resulted in the following:

- (a) The children will no longer be taught te reo at Mokai Primary School.
- (b) The children will no longer be taught matauranga Maori at Mokai Primary School.
- (c) The children will have to be educated out of Mokai.
- (d) A loss of Mokai identity – Mokaitanga.

Third Cause of Action – Treaty Principles

28. Two of the recognised Treaty principles are:

- (a) The duty upon the Crown to actively protect Maori interests.
- (b) The duty upon the Crown to carry out adequate consultation with Maori.

29. That during the process of closure since initial notification on 7 November 1995, the MOE failed to:

- (a) Adequately consult with the BOT.
- (b) Adequately consult with affected parents.
- (c) Adequately consult with the Mokai community.
- (d) Ensure that adequate support was given to the Board of Trustees.
- (e) Ensure that adequate resources and support were made available to the pupils.
- (f) Failed to investigate alternative options for schooling at Mokai.

30. That in doing so the MOE failed to actively promote and protect taonga, they being te reo Maori and matauranga Maori.

Prejudicially affected

31. The claimants say that they have been, are and are likely to be prejudicially affected by the ordinances, acts, regulations, proclamations, notices and other statutory instruments and the policies, practices, acts or omissions of the Crown as set out in the statement of claim.

32. The claimants further state that the acts, regulations, orders, policies, practices and actions taken, omitted or adopted by or on behalf of the Crown referred to are and remain inconsistent with the terms and principles of the Treaty of Waitangi.

Recommendations sought

33. That the Education Act 1989 be amended to include a provision as follows:

‘Treaty of Waitangi—Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the Treaty of Waitangi and the principles of the Treaty of Waitangi.’

34. A finding that the closure of Mokai Primary School has resulted in a breach of Article 2 of the Treaty in that it denies children of the following:

- (a) The ability to be taught te reo at Mokai School.
- (b) The ability to access matauranga Maori at Mokai School.

35. A finding that the closure of Mokai School will result in a loss of Mokai identity – Mokaitanga

36. A finding that in closing the school, there has been a failure on the part of the Crown (through the MOE) to actively promote and protect taonga, they being te reo Maori and matauranga Maori.

37. That during the process of closure the Crown (through the MOE) failed to adequately consult with the BOT, the parents of children at Mokai Primary School and the wider Mokai community concerning the closure of Mokai Primary School.

38. A recommendation that the land upon which the Mokai Primary School is located and building and all assets seized by the MOE be made available to the Mokai community as the base for an educational institution.

39. A recommendation that the MOE, in consultation with the Mokai community investigate all alternatives for the establishment of primary schooling at Mokai including but not limited to:

- (i) Satellite schooling.
- (ii) Home schooling.
- (iii) Kura kaupapa.

40. If the Waitangi Tribunal do not make a recommendation as per paragraphs 38 and 39, recommendations as follows:

- (a) That the land upon which the Mokai Primary School is situated be returned to the successors in title of the original donors.
- (b) That all assets seized by the MOE pursuant to the closure process including school buildings be transferred to the successors in title of the original donors of the land.

APPENDIX II

RECORD OF INQUIRY

RECORD OF HEARINGS

THE TRIBUNAL

The Tribunal constituted to hear claim Wai 789, concerning the closure of the Mokai Primary School, comprised Joanne Morris (presiding), John Baird, Areta Koopu, and Rangitihi Tahuparae.

COUNSEL

Stephen Clark appeared for the Wai 789 claimants and was assisted by Tureiti Moxham. Briar Gordon appeared for the Crown and was assisted by Rachel Ennor and Kirsty Millard.

THE FIRST HEARING

The inquiry opened at Pakaketaiari Marae at Mokai on 23 November 1999. On 23 November, the opening submission of claimant counsel was received (doc A18), and evidence was received from, and spoken to by, Ruth Forshaw (doc A12); Jocelyn Kingi (doc A13); Mohi Osborne (docs A15, A15(a)); Tuhuriwai Rangikataua (doc A9); and Koti Te Hiko (doc A10). On 24 November, submissions were received from, and spoken to by, Te Aroha Adams (doc A14); Alan (Jim) Hogan (doc A11); and Haromi Koopu (doc A8). On 25 November, submissions were received from, and spoken to by, Mere Wall (doc A16) and Te Iria Whiu (doc A17).

THE SECOND HEARING

The second hearing commenced at Pakaketaiari Marae on 13 January 2000. On 13 January, the opening submission of Crown counsel was received (doc A26, also docs A25, A28), and evidence was received from, and spoken to by, Rawiri Brell (docs A20, A20(a)); Graeme Kitto (docs A22, A22(a), (b)); and Kathleen Phillips (doc A21). On 14 January, submissions were received from, and spoken to by, Ian Hill (doc A24); Graeme Kitto; and Karen Sewell (docs A23, A23(a), (b)). On 17 January, closing submissions were received from claimant counsel (doc A29) and Crown counsel (doc A30).

RECORD OF PROCEEDINGS**1. CLAIMS****1.1 Wai 789**

A claim by Mohi Moses Huirama Osborne and the Mokai Primary School board of trustees concerning the closure of the Mokai school, undated

(a) Amendment to claim 1.1, 3 October 1999

(b) Amended statement of claim, undated

2. PAPERS IN PROCEEDINGS

2.1 Direction of deputy chairperson registering claim 1.1, 6 August 1999

2.2 List of parties sent notice of claim 1.1, 11 August 1999

Declaration that notice of claim 1.1 given, 6 August 1999

2.3 Memorandum from claimant counsel to Tribunal requesting urgency, 28 July 1999

Ex parte application to the High Court at Hamilton for an interim injunction restraining the Crown from closing Mokai Primary School, 28 July 1999

Memorandum from claimant counsel to High Court at Hamilton concerning relief sought, 28 July 1999

Affidavit of Mohi Osborne in support of High Court application for interim injunction, 26 July 1999

Notice of High Court proceeding, 28 July 1999

Form for court order, undated

2.4 Direction of chairperson registering claim 1.1(a) and appointing Judge Richard Kearney to hear application for urgency, 14 October 1999

2.5 List of parties sent notice of claim 1.1(a), 15 October 1999

Declaration that notice of claim 1.1(a) given, 3 October 1999

2.6 Notice of conference to hear application for urgency, 15 October 1999

2.7 Direction of Judge Kearney granting application for urgency, 2 November 1999

2.8 Memorandum from Crown counsel to Tribunal concerning proposed date of first hearing, 4 November 1999

2.9 Facsimile from claimant counsel to Tribunal concerning proposed date of first hearing, 8 November 1999

2.10 Direction of chairperson constituting Tribunal of Joanne Morris (presiding), John Baird, Areta Koopu, and Rangitihi Tahuparae to hear claim, 10 November 1999

2.11 Notice of first hearing, 10 November 1999

List of parties sent notice of first hearing, 10 November 1999

Declaration that notice of first hearing given, 10 November 1999

2.12 Letter from Crown counsel to registrar requesting judicial conference to discuss first hearing, 11 November 1999

2.13 Facsimile from Tribunal to Crown counsel concerning hearing of claimant and Crown evidence, 12 November 1999

2.14 Letter from Crown counsel to registrar concerning first hearing and statement of claim, 12 November 1999

2.15 Direction of Tribunal registering claim 1.1(b), 25 November 1999

2.16 Memorandum of Tribunal concerning evidence to be provided, 29 November 1999

2.17 Memorandum from Crown counsel to Tribunal concerning second hearing, 1 December 1999

2.18 Facsimile from claimant counsel to Tribunal concerning second hearing, 3 December 1999

2.19 Directions of Tribunal concerning second hearing, 14 December 1999

2.20 Notice of second hearing, 14 December 1999

List of parties sent notice of second hearing, 16 December 1999

Declaration that notice of second hearing given, 15 December 1999

2.21 Brief of evidence of Alan (Jim) Hogan, 17 December 1999

Assorted claimant evidence requested by Tribunal, various dates

Covering letter from claimant counsel to Tribunal, 23 December 1999

2.22 Assorted Crown evidence requested by Tribunal, 24 December 1999

2.23 Memorandum from Crown counsel to Tribunal concerning insertion of Treaty clause into Education Act 1989, 20 January 2000

2.24 Memorandum of claimant counsel to Tribunal responding to paper 2.23, 21 January 2000

2.25 Memorandum from Crown counsel to Tribunal responding to paper 2.24, 23 February 2000

RECORD OF DOCUMENTS

A. TO END OF SECOND HEARING

A1 Affidavit of Mohi Osborne supporting application for urgent hearing, 21 October 1999

A2 Reasons for declining application for interim relief, 4 October 1999, Justice Hammond, High Court Hamilton M198/99

A3 Submissions of claimant counsel supporting application for urgency, 21 October 1999

A4 Facsimile from Minister of Maori Affairs to chairperson supporting application for urgency, 21 October 1999

A5 Submissions of Crown counsel concerning application for urgency, 21 October 1999

A6 Affidavit of Nicolas Smith, Minister of Education, 28 September 1999

A6A 'The National Education Guidelines', 26 March 1993, *New Zealand Gazette*, 1993, no 58, pp 1086–1087

A6B Letter from Minister of Education to chairperson, Mokai Primary School board of trustees, notifying decision in principle to close school, 27 July 1998

A6C Letter from chairperson, Mokai Primary School board of trustees, to district manager national operations, Ministry of Education, concerning proposed closure of school, 24 August 1998

A6D Letter from Minister of Education to chairperson, Mokai Primary School board of trustees, in response to document A6C, 11 December 1998

A6E 'Consideration of Closure of Mokai School', Ministry of Education ministerial submission S98/1584, 31 March 1999 (with attachments)

A6F Letter from Minister of Education to chairperson, Mokai Primary School board of trustees, confirming closure of school, 24 June 1999

A6G Ministerial notice declaring closure of Mokai School, 24 June 1999

A6H 'Closure of Mokai School (1830) Notice', 24 June 1999, *New Zealand Gazette*, 1999, no 79, p 1825

A7 Affidavit of Kathleen Phillips, 29 September 1999

A7A 'Discretionary Assurance Audit Report for Mokai Primary School', Education Review Office report, 22 April 1994

Form entitled 'Response to Discretionary Assurance Audit Report Actions Required', undated

A7B 'Consideration of the Future of Mokai School', Ministry of Education ministerial submission S95/0721, 19 October 1995

A7C Letter from Graeme Kitto (for manager national operations), Ministry of Education, to principal, Mokai Primary School, concerning procedures for closure of schools, 22 September 1993

- A7D** Letter from acting senior manager national operations, Ministry of Education, to chairperson, Mokai Primary School board of trustees, concerning proposed closure of school, 7 November 1995
- A7E** Letter from Graeme Kitto (for manager national operations), Ministry of Education, to chairperson, Mokai Primary School board of trustees, concerning consultation process, 11 December 1995
- A7F** Letter from chairperson, Mokai Primary School board of trustees, to district manager national operations, Ministry of Education, requesting the Ministry delay its recommendation on closure until after a forthcoming ERO review, 24 March 1998
- A7G** Letter from Graeme Kitto (for manager national operations), Ministry of Education, to chairperson, Mokai Primary School board of trustees, in response to document A7F, 13 May 1998
- ‘Consideration of Closure of Mokai School’, draft Ministry of Education ministerial submission, undated
- A7H** Facsimile from chairperson, Mokai Primary School board of trustees, to Graeme Kitto, Ministry of Education, giving board of trustees’ response to draft ministerial submission, 5 June 1998
- A7I** ‘Confirmed Discretionary Review Report for Mokai School’, Education Review Office report, 14 July 1998
- A7J** ‘Consideration of Closure of Mokai School’, Ministry of Education ministerial submission s98/0148, 24 July 1999
- A7K** Mokai Primary School board of trustees, ‘Charter Framework’, 1990
- A7L** Untitled Education Review Office report on Mokai Primary School, 1991
- A7M** ‘Confirmed Assurance Audit Report for Mokai Primary School’, Education Review Office report, 4 October 1993
- A7N** ‘Confirmed Discretionary Assurance Audit Report for Mokai School’, Education Review Office report, 25 July 1994
- A7O** ‘Confirmed Assurance Audit Report for Mokai Primary School’, Education Review Office report, 31 January 1997
- A7P** ‘Confirmed Discretionary Assurance Audit Report for Mokai School’, Education Review Office report, 23 December 1997
- Form entitled ‘Resonse to Discretionary Accountability Report Actions Required’, 19 January 1998
- A7Q** Education development initiative memorandum of agreement between the boards of trustees of Tihoi and Marotiri Primary Schools and the Ministry of Education concerning closure of Tihoi school, December 1995
- A7R** ‘Confirmed Accountability Review Report for Tirohanga School’, Education Review Office report, 16 October 1998, p 2
- ‘Confirmed Audit Report for Mangakino School’, Education Review Office report, January 1996, pp 2–3
- ‘Confirmed Audit Report for Tauhara School’, Education Review Office report, February 1997, p 2
- ‘Confirmed Accountability Review Report for Marotiri School’, Education Review Office report, 16 July 1999, p 2
- ‘Te Purongo o Te Tatari Kawenga Takohanga: Te Kura Kaupapa Maori o Whakarewa i Te Reo ki Tuwharetoa’, Education Review Office report, 3 February 1998, p 12

A78 Ministry of Education, *School Transport: What You Need to Know*, Wellington, Ministry of Education, 1997, pp 1, 4, 5, 9, 12

A8 Brief of evidence of Haromi Koopu, 19 November 1999

A9 Brief of evidence of Tuhuriwai Rangikataua, 19 November 1999

A10 Brief of evidence of Koti Te Hiko, 19 November 1999

A11 Brief of evidence of Alan (Jim) Hogan, 19 November 1999

A12 Brief of evidence of Ruth Forshaw, 22 November 1999

A13 Brief of evidence of Jocelyn Kingi, 19 November 1999

A14 Brief of evidence of Te Aroha Adams, 19 November 1999

A15 Brief of evidence of Mohi Osborne, 19 November 1999

(a) Affidavit of Mohi Osborne in support of High Court application for interim injunction, 26 July 1999

A16 Brief of evidence of Mere Wall, 19 November 1999

(a) Affidavit of Mere Wall in support of High Court application for judicial review, 15 September 1999

(b) Affidavit of Mere Wall in support of High Court application for judicial review, 30 September 1999

A17 Brief of evidence of Te Iria Whiu, 19 November 1999

A18 Opening submissions of claimant counsel, 23 November 1999

A19 Rosemary Johnson, *Board as the Employer: Employing School Personnel*, MultiServe Education Trust, undated

Sections 78, 78A, 79, 80, 81, 105C, 105D, 201A, 201B, 201C of, and the sixth schedule to, the Education Act 1964 (taken from unidentified CCH publication), undated

MultiServe Education Trust, 'Strategic Planning: A Process', flow chart, 1998

Ian Gardiner, *Schools and their Legal Requirements: A Practical and Common Sense Approach to Legal Obligations and Requirements in Managing a School*, MultiServe Education Trust, undated

MultiServe Education Trust, *Resourcing School Operations: Understanding School Finances*, MultiServe Education Trust, undated

Ian Gardiner, *Student's Learning Environment: Managing School Property – Board and Crown Responsibility*, MultiServe Education Trust, undated

A20 Brief of evidence of Rawiri Brell, 24 December 1999

(a) Appendix to document A20

A21 Brief of evidence of Kathleen Phillips, December 1999

A22 Brief of evidence of Graeme Kitto, 24 December 1999

- (a) Excerpts from two unnamed documents concerning social studies in the New Zealand curriculum, undated
- (b) Page of logbook showing entries from 29 January to March 11 (no year specified)

A23 Brief of evidence of Karen Sewell, 19 January 2000

- (a) Diagram entitled 'School Governance Model', undated
Diagram entitled 'Lines of Responsibility within ERO', undated
Education Review Office, *Departmental Forecast Report for the Year Ending 30 June 2000*, Wellington, Education Review Office, 1999
- (b) Handwritten addition to document A23, January 2000

A24 Brief of evidence of Ian Hill, 7 January 2000

A25

- (1) Page entitled 'Crown Responses to Waitangi Tribunal Questions', undated
- (2) New Zealand Government, *Tomorrow's Schools: The Reform of Education Administration in New Zealand*, Wellington, New Zealand Government Printing Office, August 1988
- (3) Table entitled 'ERO Reports, 1991–1999, Mokai School', undated
- (3A) Untitled Education Review Office report on Mokai Primary School, 1991
- (3B) 'Confirmed Assurance Audit Report for Mokai Primary School', Education Review Office report, 4 October 1993
- (3C) 'Confirmed Discretionary Assurance Audit Report for Mokai Primary School', Education Review Office report, 22 April 1994
- (3D) 'Confirmed Discretionary Assurance Audit Report for Mokai School', Education Review Office report, 25 July 1994
- (3E) 'Confirmed Assurance Audit Report for Mokai Primary School', Education Review Office report, 31 January 1997
- (3F) 'Confirmed Discretionary Assurance Audit Report for Mokai School', Education Review Office report, 23 December 1997
- (3G) 'Confirmed Discretionary Review Report for Mokai School', Education Review Office report, 14 July 1998, pp 1–5
- (4A) 'Principal's Report, 1 January 1991–31 December 1991', report presented to the Mokai Primary School annual general meeting, 11 August 1992
- (4B) 'Principal's Report, 1 January 1992–31 December 1992', report presented to the Mokai Primary School annual general meeting, 28 July 1993
- (4C) Handwritten document on Mokai Primary School letterhead entitled 'Chairperson's Report 1993', 1993
Handwritten document on Mokai Primary School letterhead entitled 'Principal's Report 1993', 1993
- (4D) Handwritten document entitled 'Mokai Primary School BOT: Chairperson's Report 1994', 1994
Handwritten document on Mokai Primary School letterhead entitled '1994 Principal's Annual Report', 1994

A25—continued

- (4E) Letter from Sheila Richmond, Ministry of Education, to chairperson, Mokai Primary School board of trustees, concerning submission of 1995 annual report, 2 July 1996
- (4F) 'Chairmans Report', report presented to the Mokai Primary School board of trustees' annual general meeting, 30 May 1997
- Document entitled 'Principal's Report for the Year Ending 31 December 1997', 7 May 1997
- (4G) Document entitled 'Mokai School: Chairperson's Report', 31 December 1997
- Document entitled 'Mokai School: Principal's Report', 31 December 1997
- (4H) Document entitled 'Mokai School: Chairperson's Report', undated
- Document entitled 'Mokai School: Principal's Report', undated
- (5) Sections 60A, 61, 62, 63, 75, 76, 147, 154, 155, 155A, and 156 of the Education Act 1989
- (6) 'The National Education Guidelines', 26 March 1993, *New Zealand Gazette*, 1993, no 58, pp 1086–1087
- (7) 'Notice Amending the National Administration Guidelines', 22 November 1999, *New Zealand Gazette*, 25 November 1999, no 177, pp 4229–4230
- (8) Education Review Office, *Good Practice in Far North Schools*, Wellington, Education Review Office, 1999
- (9) Ministry of Education, *The New Zealand Curriculum Framework*, Wellington, Learning Media: Ministry of Education, 1993
- (10) Letter from chairperson, Mokai Primary School board of trustees, to district manager national operations, Ministry of Education, concerning proposed closure of school, 24 August 1998
- (11) Table entitled 'Options for Maori Language Learning for Mokai School Students when the School Closes', undated
- Table entitled 'Mokai School: Access to Alternative Bilingual Education', undated
- (12) Letter from Minister of Education to chairperson, Mokai Primary School board of trustees, confirming closure of school, 24 June 1999
- 'Closure of Mokai School (1830) Notice', 24 June 1999, *New Zealand Gazette*, 1999, no 79, p 1825
- (13) Affidavit of Nicolas Smith, Minister of Education, 28 September 1999, pp 1, 10–12
- (14) Mary Sinclair, 'Schools Support Project: An Overview of the Ministry Safety Net for Schools at Risk and our Proactive Schooling Improvement Strategy to Minimise Risk Occurring', Ministry of Education presentation to Skill New Zealand, 4 November 1999
- Document entitled 'Schooling Improvement Projects', undated
- (15) Assorted tables concerning Mokai Primary School rolls, various dates
- (16) Ministry of Education, *Education Circular*, 1999, no 37 (8 November 1999)
- (17) Table entitled 'Schools near Mokai', undated
- Hand-drawn road map of Taupo and environs, showing Mokai
- (18) Mokai Primary School board of trustees, 'Charter Framework', 1990
- (19) Mokai Primary School logbook, p 129
- (20) Letter from Graeme Kitto, Ministry of Education, to principal, Mokai Primary School, concerning procedures for closure of schools, 22 September 1993
- (21) Minutes of hui held to discuss Mokai Primary School roll, 22 February 1999
- (22) Document entitled 'Summary of Support Made Available to Board and Principal of Mokai School', undated
- Multipage table entitled 'Chronology of Events', undated

(23) Lester Flockton and Terry Crooks, 'Mathematics Assessment Results, 1997', University of Otago Education Assessment Research Unit National Education Monitoring Report 9, 1998

Terry Crooks and Lester Flockton, 'Listening and Viewing Assessment Results, 1998', University of Otago Education Assessment Research Unit National Education Monitoring Report 10, 1999

(24) Education Review Office, *Small Primary Schools*, Wellington, Education Review Office, 1999

(25) Education Review Office, *Improving Schooling on the East Coast*, Wellington, Education Review Office, October 1997

(26) Education Review Office, *School Governance and Student Achievement*, Wellington, Education Review Office, June 1999

(27) Education Review Office, *Good Schools – Poor Schools*, Wellington, Education Review Office, 1998

(28) *Te Rehita*, Teacher Registration Board newsletter, October 1999, p 1
Sections 130A to 130H of the Education Act 1989

(29) Two-page table entitled 'Schools Closed since 1 October 1989', 28 September 1999
Table entitled 'Schools Closed since 1 October 1989', 15 November 1999

A26 Opening submissions of Crown counsel, 13 January 2000

A27 Vacant

A28 'Landmark Agreement between Tuwharetoa and Ministry of Education Heading into Next Millennium', joint press release of Ministry of Education and Tuwharetoa Trust Board, undated

A29 Closing submissions of claimant counsel, 17 January 2000

A30 Closing submissions of Crown counsel, 17 January 2000

APPENDIX III

THE TREATY OF WAITANGI

The following versions of the Treaty are taken from
the first schedule to the Treaty of Waitangi Act 1975

THE TEXT IN ENGLISH

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and

undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W HOBSON Lieutenant Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[Here follow signatures, dates, etc.]

THE TEXT IN MAORI

KO WIKITORIA, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

KO TE TUATAHI

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.

KO TE TUARUA

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangitira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangtiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

KO TE TUATORU

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) WILLIAM HOBSON,
Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waiangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.