

TE TAU IHU  
O TE WAKA A MAUI



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O TE WAKA A MAUI

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REPORT ON NORTHERN  
SOUTH ISLAND CLAIMS

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VOLUME III

WAI 785

WAITANGI TRIBUNAL REPORT 2008



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

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## CONTENTS

### VOLUME I

Letter of transmittal .....	xv
<b>CHAPTER 1: INTRODUCTION .....</b>	<b>1</b>
1.1 The Te Tau Ihu inquiry .....	2
1.2 Treaty principles .....	2
1.3 The Te Tau Ihu inquiry process .....	6
1.4 The inquiry district .....	8
1.5 The claims .....	10
1.6 The contents of the report .....	17
<b>CHAPTER 2: MAORI CUSTOMARY OCCUPATION IN TE TAU IHU .....</b>	<b>19</b>
2.1 Introduction .....	19
2.2 Customary rights in Te Tau Ihu .....	25
2.3 Occupation of Te Tau Ihu at 1820 .....	27
2.4 The southward migrations of the Kawhia and Taranaki iwi: a background .....	29
2.5 Tutepourangi's tuku whenua, circa 1825-27 .....	32
2.6 Tauga and conquest of Te Tau Ihu, circa 1827-32 .....	39
2.7 Migration after the battle of Haowhenua, circa 1834-36 .....	44
2.8 The 'overlordship' of Te Rauparaha and Ngati Toa interests on the eastern and western sides of Te Tau Ihu. ....	50
2.9 The consequences of the death of Te Puoho, circa 1837-39 .....	54
2.10 Settlement patterns at Te Tau Ihu at 1840 .....	58
2.11 The impact of the taua on the rights of Kurahaupo peoples .....	62
2.12 Balancing rights: Tribunal comment and analysis .....	77
<b>CHAPTER 3: TE TAU IHU IWI CUSTOMARY RIGHTS IN THE NGAI TAHU STATUTORY TAKIWA .....</b>	<b>87</b>
3.1 Introduction .....	87
3.2 The issue of boundaries in Maori custom .....	90
3.3 Customary rights in the statutory takiwa to circa 1820 .....	95
3.4 The impact of the northern invasions on customary rights in the takiwa to 1840 .....	115
3.5 Developing customary rights in the statutory takiwa, 1840-60 .....	127
3.6 Claimant and Crown submissions .....	141
3.7 Tribunal conclusions on the customary rights of Te Tau Ihu iwi in the takiwa .....	153

## CONTENTS

<b>CHAPTER 4: EARLY CROWN AND NEW ZEALAND COMPANY DEALINGS</b> . . . . .	165
4.1 Introduction . . . . .	165
4.2 First contacts . . . . .	166
4.3 Whalers and traders . . . . .	169
4.4 The arrival of the New Zealand Company, 1839 . . . . .	172
4.5 Signing the Treaty of Waitangi . . . . .	179
4.6 The Crown and the New Zealand Company. . . . .	181
4.7 The Spain commission . . . . .	183
4.8 The establishment of Nelson . . . . .	186
4.9 The Wairau conflict. . . . .	194
4.10 The aftermath of the Wairau incident. . . . .	197
4.11 Spain's Otaki hearing, 26 April 1843. . . . .	199
4.12 Meurant's mission, July–August 1844. . . . .	203
4.13 Spain's Nelson hearing, 19–21 August 1844. . . . .	204
4.14 The compensation payments and deeds of release . . . . .	210
4.15 Spain's Nelson award, 31 March 1845. . . . .	215
4.16 Fitzroy's Crown grant, 20 July 1845. . . . .	219
4.17 Claimant and Crown submissions . . . . .	221
4.18 The Crown's case . . . . .	228
4.19 Agreement between the parties. . . . .	232
4.20 Tribunal conclusions and findings . . . . .	234
4.21 Summary and conclusion. . . . .	277
<b>CHAPTER 5: GREY ASSERTS CONTROL</b> . . . . .	285
5.1 Introduction . . . . .	285
5.2 The Crown's Treaty duty . . . . .	286
5.3 Grey's military campaigns . . . . .	304
5.4 Grey's Maori land policy . . . . .	307
5.5 The abduction of Te Rauparaha. . . . .	309
5.6 The Wairau purchase, 1847. . . . .	314
5.7 Grey's 1848 Crown grant to the New Zealand Company. . . . .	350
5.8 The Waitohi purchase, 1848–50 . . . . .	354
5.9 Summary and conclusion. . . . .	373
<b>CHAPTER 6: CROWN CONTROL CONSOLIDATED</b> . . . . .	379
6.1 Introduction. . . . .	379
6.2 The imperial and colonial context . . . . .	380
6.3 The Pakawau purchase . . . . .	383
6.4 The Waipounamu purchase. . . . .	392
6.5 The Arahura purchase, 1860 . . . . .	490
6.6 The North Canterbury and Kaikoura purchases . . . . .	506
6.7 The impact of blanket purchasing on customary resource-use rights. . . . .	514
6.8 Summary and conclusion . . . . .	524

## CONTENTS

### VOLUME II

<b>CHAPTER 7: OCCUPATION AND LANDLESS NATIVES RESERVES</b> .....	533
7.1 Introduction .....	533
7.2 Occupation reserves and landless natives reserves: the issues .....	534
7.3 The making of reserves, 1842–60 .....	536
7.4 The legislative and administrative basis of reserves .....	541
7.5 The reserves created in Te Tau Ihu between 1847 and 1860 .....	553
7.6 The occupation reserves: legal submissions .....	624
7.7 Occupation reserves: Tribunal conclusions .....	635
7.8 Reserves created for ‘landless natives’ .....	657
7.9 Summary and conclusion .....	673
<b>CHAPTER 8: TE TAITAPU, RANGITOTO, WAKAPUAKA, AND THE NATIVE LAND COURT</b> .....	677
8.1 Introduction .....	677
8.2 Te Taitapu .....	682
8.3 Rangitoto .....	714
8.4 Wakapuaka .....	733
8.5 Wider Native Land Court issues .....	768
8.6 Summary and conclusion .....	784
<b>CHAPTER 9: THE NELSON AND MOTUEKA TENTHS</b> .....	787
9.1 Introduction .....	787
9.2 The tenths: the issues .....	789
9.3 The establishment and administration of the tenths .....	793
9.4 Public, Native, and Maori Trustees: agents of the Crown? .....	870
9.5 Crown responsibility nevertheless .....	898
9.6 The determination of title to the tenths .....	900
9.7 The Wakatu Incorporation .....	924
9.8 Summary .....	939
<b>CHAPTER 10: SOCIO-ECONOMIC ISSUES</b> .....	949
10.1 Introduction .....	949
10.2 Socio-economic matters: the issues .....	951
10.3 Population, 1840–2006 .....	952
10.4 1860–90 .....	959
10.5 1890–1920 .....	973
10.6 1920–c1960 .....	986
10.7 Legal submissions .....	1017
10.8 Tribunal conclusions .....	1022
10.9 Summary of findings .....	1031
10.10 Summary and conclusion .....	1033

## CONTENTS

### VOLUME III

<b>CHAPTER 11: NATURAL RESOURCES AND THE ENVIRONMENT</b> .....	1035
11.1 Introduction .....	1035
11.2 Issues .....	1039
11.3 Nga taonga .....	1040
11.4 Loss of access and control, and the modification of the environment, in the nineteenth century .....	1055
11.5 The Maori tribal economy and society in the twentieth century .....	1069
11.6 The modern resource management regime .....	1166
11.7 Restoration of a tribal base .....	1184
11.8 Legal submissions and findings .....	1188
<b>CHAPTER 12: WHANAU AND SPECIFIC CLAIMS</b> .....	1229
12.1 Introduction .....	1229
12.2 The Te Kotua whanau claim relating to Joseph Toms' old land claims .....	1231
12.3 The return of Whakarewa School lands .....	1245
12.4 Te Atiawa claims to Waikawa lands taken for public works .....	1266
12.5 The Stafford whanau (Ngati Rarua) claim regarding succession to Wainui sections 13 and 14 .....	1298
12.6 Ngati Tama's claim relating to the Wainui Bay urupa, Wainui Inlet, adjacent Mohua. . .	1301
12.7 Ngati Koata and Ngati Kua's claims in relation to Takapourewa (Stephens Island) . . .	1306
12.8 Other claims .....	1317
12.9 Summary and conclusion .....	1331
<b>CHAPTER 13: THE 1990 MAORI APPELLATE COURT DECISION AND THE SUBSEQUENT NGAI TAHU LEGISLATION</b> .....	1337
13.1 Background to the establishment of the Ngai Tahu statutory takiwa .....	1337
13.2 The claims of Te Tau Ihu .....	1342
13.3 The treaty of Waitangi Amendment Act 1988 .....	1343
13.4 The role of the Crown in the Maori Appellate Court hearing .....	1347
13.5 The Crown's treatment of Te Tau Ihu iwi rights in its negotiations with Ngai Tahu and in the enactment of the Ngai Tahu legislation in 1996 and 1998 .....	1350
<b>CHAPTER 14: CONCLUSION</b> .....	1359
14.1 Introduction .....	1359
14.2 The Treaty of Waitangi .....	1360
14.3 Breaches of the Treaty of Waitangi .....	1362
14.4 Who had customary rights? .....	1365
14.5 Did Te Tau Ihu iwi have customary rights in the Ngai Tahu takiwa? .....	1368
14.6 The Crown's failure to carry out its Treaty duty: generic issues .....	1372
14.7 The New Zealand Company and the Spain commission .....	1376
14.8 The Wairau conflict .....	1383

## CONTENTS

14.9	The Wairau purchase . . . . .	1383
14.10	The 1848 Crown grant to the New Zealand Company . . . . .	1390
14.11	The Waitohi purchase . . . . .	1390
14.12	The Pakawau purchase . . . . .	1392
14.13	The Waipounamu purchase . . . . .	1393
14.14	The Arahura purchase . . . . .	1404
14.15	The North Canterbury and Kaikoura purchases . . . . .	1406
14.16	The occupation reserves . . . . .	1407
14.17	Te Taitapu, Rangitoto, Wakapuaka, and the Native Land Court . . . . .	1411
14.18	The Nelson and Motueka tenths . . . . .	1417
14.19	Socio-economic issues . . . . .	1425
14.20	Natural resources and the environment . . . . .	1427
14.21	Whanau and specific claims . . . . .	1433
14.22	The 1990 Maori Appellate Court decision and the subsequent Ngai Tahu legislation. . . . .	1437
14.23	Recommendations . . . . .	1439
14.24	Conclusion . . . . .	1445
<b>APPENDIX: RECORD OF APPEARANCES . . . . .</b>		<b>1449</b>
The Tribunal . . . . .		1449
The counsel . . . . .		1449
Select bibliography . . . . .		1451

## LIST OF TABLES

1:	Schedule of hearings . . . . .	9
2:	Alienation of land reserved for Maori in Te Tau Ihu . . . . .	615
3:	Administration of the Nelson and Motueka reserves, 1840–56 . . . . .	802
4:	Nelson and Motueka reserves, 1842–83 . . . . .	803
5:	Trust administration, 1856–1977 . . . . .	814
6:	Nelson and Motueka reserves, 1967, 1975 . . . . .	830
7:	Sales, 1967–75 . . . . .	831
8:	Schedule of proposed apportionment of the 151,000 acres amongst the several hapu. . . . .	898
9:	Te Tau Ihu iwi, 2006 . . . . .	953
10:	Maori and non-Maori Te Tau Ihu population, 1843–1996 . . . . .	954
11:	1878 and 1881 censuses . . . . .	957
12:	1886 census . . . . .	958

## LIST OF FIGURES

1: Location map .....	xx
2: Maori place names .....	20
3: East coast place names .....	97
4: West Coast place names .....	105
5: New Zealand Company Kapiti deed, 1839 .....	175
6: New Zealand Company surveyors, Nelson, 1842 .....	188
7: The Wairau conflict, 1843 .....	197
8: The New Zealand Company Nelson grant, 1845 .....	220
9: The Wairau purchase, 1847 .....	318
10: The New Zealand Company Nelson grant, 1848 .....	348
11: The 1845 and 1848 Nelson grants and the 1847 Wairau purchase .....	352
12: Waitohi, 1848. Bird's eye view of Waitoi, 1848 .....	357
13: The Waitohi purchase, 1850 .....	358
14: The Pakawau purchase, 1852 .....	388
15: The Te Waipounamu purchase, 1853–56 .....	476
16: The North Canterbury purchase .....	507
17: The Kaikoura purchase .....	509
18: Pukatea–Wairau reserves .....	558
19: Queen Charlotte Sound reserves .....	565
20: Pelorus reserves .....	574
21: Croisilles–Whangamoā reserves .....	577
22: Whanganui–Pakawau reserves .....	585
23: Aorere–Parapara reserves .....	588
24: Takaka–Motupipi reserves .....	592
25: Marahau–Ligar Bay reserves .....	596
26: Kawatiri reserves .....	601
27: Te Tau Ihu occupation reserves .....	623
28: Te Taitapu, Rangitoto, and Wakapuaka .....	679
29: Wakapuaka–Whangamoā overlap .....	735
30: Wakapuaka Native Land Court hearing, 1937 .....	751
31: Nelson tenths .....	795
32: Motueka tenths .....	796
33: Whakarewa grants .....	808
34: Okoha .....	975
35: The Wairau development scheme .....	993
36: The Wairau River and lagoons .....	1081
37: Ngaruru .....	1095

## CONTENTS

38: Moawhitu Lagoon .....	1102
39: The Maitai River .....	1116
40: The Delaware Bay taiapure .....	1148
41: The Titi (Muttonbird) Islands .....	1158
42: Regional boundaries of the three unitary authorities .....	1170
43: Waikoropupu Springs .....	1178
44: Sites of significance for resource management claims .....	1216
45: Toms' Crown grants .....	1238
46: Waikawa rifle-range and marae .....	1268
47: Waikawa waterworks land (2C2) .....	1278
48: The Port Underwood road .....	1287
49: Waikawa Village .....	1295
50: Wainui sections 3, 13, and 14 .....	1299
51: Takapourewa .....	1307
52: Arapawa reserves .....	1319
53: Ngai Tahu takiwa .....	1355
54: Miriama Tahi of Ngati Rarua .....	1448

## ABBREVIATIONS

app	appendix	no	number
ATL	Alexander Turnbull Library	NRAIT	Ngati Rarua Atiawa Iwi Trust
CA	Court of Appeal	p, pp	page, pages
ch	chapter	para	paragraph
comp	compiler	PC	Privy Council
doc	document	pt	part
ed	edition, editor, edited by	ROI	record of inquiry
encl	enclosure	s, ss	section, sections (of a statute)
fn	footnote	sch	schedule
fol	folio	sec	section (of this report, a book, etc)
GIS	geographic information system	sess	session
intro	introduction	tbl	table
J	Justice	trans	translator
ltd	limited	v	and
MA	Department of Maori Affairs file, master of arts	VHS	video home system
MLCJ	Maori Land Court judge	vol	volume

## PUBLICATIONS

AC	<i>Appeal Cases (England)</i>
AJHR	<i>Appendix to the Journals of the House of Representatives</i>
AJLC	<i>Appendix to the Journals of the Legislative Council</i>
BPP	<i>British Parliamentary Papers: Colonies New Zealand</i> , 17 vols (Shannon: Irish University Press, 1968–69)
<i>Compendium</i>	Alexander Mackay, comp, <i>A Compendium of Official Documents Relative to Native Affairs in the South Island</i> , 2 vols (Wellington: Government Printer, 1872–73)
DNZB	<i>The Dictionary of New Zealand Biography</i> , 5 vols (Wellington: Department of Internal Affairs, 1990–2000)
HCA	<i>High Court of Australia</i>
HLC	<i>Clark's Reports, House of Lords (England)</i>
KB	<i>Law Reports, King's Bench Division (England)</i>
NZLR	<i>New Zealand Law Reports</i>
PRNZ	<i>Procedure Reports of New Zealand</i>
SCR	<i>Canada Law Reports, Supreme Court</i>
UKPC	<i>United Kingdom Privy Council</i>

'Wai' is a prefix used with Waitangi Tribunal claim numbers.

Unless otherwise stated, footnote references to claims, papers, and documents are to the Wai 785 (Te Tau Ihu) record of inquiry, a copy of which is available on request from the Waitangi Tribunal.

## CHAPTER 11

### NATURAL RESOURCES AND THE ENVIRONMENT

#### 11.1 INTRODUCTION

Te Tau Ihu is an area replete with natural resources. It is remarkable for its long coastline, which includes such features as the long shingle spit boulder bank at the Wairau in the south-east; the intricate drowned river valleys of the Marlborough Sounds, the shores of which are said to constitute 15 per cent of New Zealand's coastline; the numerous estuaries, inlets, and spits of Tasman and Golden Bays; and the extensive inlet punctuating the northern West Coast. There are numerous offshore islands, many large rivers and wetland areas, and countless streams and springs. All of these help to make up the naturally rich ecosystems of the region, in which abundant bird life, fish, shellfish, and plants have long flourished.<sup>1</sup>

In this chapter, we examine the effects of settlement and development on those resources. We give specific attention to the impact of Crown policies and legislation on the natural resources of foreshores, sea, rivers, wetlands, forests, and other habitats. In particular, we examine the exercise of customary rights to resources in those habitats, and the traditional economy and society based on mahinga kai, kai ika, and kaimoana. We also explore the cultural values that underpinned both those rights and the preferred Maori social organisation in Te Tau Ihu. These values, which are still vital to iwi today, include whanaungatanga, manaakitanga, and kaitiakitanga. We explore the extent to which Crown actions or inaction in relation to natural resources have prevented iwi from exercising their customary rights, maintaining their customary society and economy in accordance with their needs and preferences, and retaining a tribal base for future generations.

In considering these issues, we respond to the claims before us by addressing what we see as the generic concerns and by commenting on site-specific cases where we are able. We note that in some cases we are unable to address the specific issues beyond a level of generality, based on the evidence and submissions we received. In others, we are aware that Ngati Koata has put the same issues before the Wai 262 Tribunal with a greater degree of

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1. Cathy Marr, 'Crown–Maori Relations in Te Tau Ihu: Foreshores, Inland Waterways and Associated Mahinga Kai', report commissioned by the Treaty of Waitangi Research Unit on behalf of the Crown Forestry Rental Trust, 1999 (doc A61), pp1–4

detail. Our approach in this chapter is therefore to respond to the claims on the basis of the evidence before us.

We begin by introducing the issues that have arisen in the course of this inquiry before briefly reviewing the patterns of Maori use of these natural resources and considering how the Treaty protected such customary usage. We then proceed to examine the ways in which legislation and Government actions have impacted on this dimension of Maori life in Te Tau Ihu within the foreshores, rivers, wetlands, seas, forests, and other resource areas. We also consider the impact of Crown policies and practices on the natural resources of Te Tau Ihu, as far as we are able. Customary fisheries and kaimoana loomed large in the evidence of the claimants as the core of their customary economy for much of the period under review, so we have provided a detailed examination of those resources. Also, the modern management regime created under the Resource Management Act 1991 came in for concentrated criticism, so that too has received detailed attention. Finally, we determine the extent to which Te Tau Ihu Maori were prejudiced by any actions or inaction of the Crown in breach of the principles of the Treaty.

In examining these issues, we had difficulties in five areas:

- ▶ there was a lack of technical evidence on certain issues;
- ▶ the Crown provided no evidence;
- ▶ some closing submissions did not deal with significant issues raised during the inquiry, including the Crown's submissions;
- ▶ there have been new developments between the close of hearings and the Tribunal's report; and
- ▶ there were overlaps with other Tribunal inquiries, including the aquaculture reform inquiry, the urgent inquiry into the Crown's Foreshore and Seabed Bill of 2003, and the Wai 262 inquiry into claims relating to indigenous flora and fauna and Maori cultural and intellectual property.

We heard little evidence about environmental issues in the areas inside the Ngai Tahu statutory takiwa, where certain Te Tau Ihu groups had enjoyed customary rights. Submissions on matters south of this statutory boundary were restricted to the dispossession of land and rights. In the area north of the statutory takiwa, we note that the claimants singled out a number of site-specific issues as case studies. Evidence was presented from 2000 to 2003, which means that some information is out of date in relation to current resource management issues. Also, we lacked detailed technical evidence on some points, including marine farming and the fisheries management regime.

In part, this was because the Crown commissioned no evidence of relevance to any of the natural resource issues. Nor did it call witnesses from the Ministry for the Environment, DOC, or the Ministry of Fisheries. We did not hear from local or regional government either. In response, we directed the Crown to address a number of specific issues in its closing

submissions.<sup>2</sup> We note that the Crown did not make submissions on all the specific matters listed; apparently, it decided to deal with some issues in the Wai 262 inquiry. Some claimant counsel did not make detailed submissions on these points either, concentrating on other issues, although they had been a major concern of witnesses from all iwi. Ngati Apa, Rangitane, Ngati Rarua, and Ngati Toa, for example, made no submissions about the Resource Management Act and the modern resource management regime. Other than site-specific matters, however, we are satisfied that the arguments as raised by counsel for Te Atiawa, Ngati Koata, Ngati Kuia, and Ngati Tama in particular are representative of the general experience of iwi in Te Tau Ihu.

We heard closing submissions in 2004. In the length of time since the evidence was written and presented (and submissions made) there have been many developments relevant to the contemporary issues before us. Where possible, we have noted any such later developments. Our analysis will, however, be mainly confined to the issues as we heard them and the generic issues arising.

In particular, we note the enactment of the Foreshore and Seabed Act 2004 and the Maori Commercial Aquaculture Claims Settlement Act 2004. Issues relating to the customary ownership of the foreshore and seabed were dealt with in parallel to our inquiry by the Tribunal hearing urgent claims on the Foreshore and Seabed Bill. The Bill was amended and enacted in 2004, after the close of our hearings. In the absence of any submissions from parties on the revised Act, we are unable to comment on it. The Maori Commercial Aquaculture Claims Settlement Act removed our jurisdiction to deal with commercial aquaculture claims arising from matters after September 1992, but historical issues remained subject to our jurisdiction and we deal with these in section 11.5.4.

The Wai 262 claimants raised issues relating to the control of indigenous resources in 1991. Their issues are currently being explored in detail by the Tribunal investigating that claim, which is still to report. Some aspects of the indigenous flora and fauna claim were also raised by Ngati Koata and other claimants in Te Tau Ihu. Ngati Koata witnesses appended their Wai 262 briefs to their evidence in our inquiry. As noted above, the Crown appears to have left many matters to Wai 262, without making submissions in our inquiry. In May 2006, however, the Wai 262 Tribunal decided to limit its inquiry to contemporary issues, leaving historical claims to be dealt with in the district inquiries.<sup>3</sup> This decision was made after the close of our hearings. As a result, wherever necessary, we leave contemporary issues regarding DOC and other such matters to the Wai 262 inquiry, but we have attempted to report as fully as possible on the historical issues for the guidance of parties in their negotiations.

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2. Waitangi Tribunal, memorandum directing issues to be covered in Crown closing submissions, 27 November 2003 (paper 2.749)

3. Waitangi Tribunal, memorandum concerning historical claims, 2 May 2006 (Wai 262 ROI, paper 2.279)

Finally, we note important concessions from the Crown on some issues. First, the Crown conceded that its purchase and reserve policies in the 1840s and 1850s had deprived Te Tau Ihu iwi of ownership of – and access to – sufficient land and resources. It also conceded that the subsequent purchase of reserves ‘meant that over time many Maori in Te Tau Ihu were not left with sufficient land, or access to land to maintain their traditional economy’. As a result, the Treaty principle of options was breached. Maori were unable to develop in the Western economy or to continue to maintain their traditional economy, or (as preferred by many) to do both. Te Tau Ihu Maori suffered prejudice as a result.<sup>4</sup> In particular, the Crown accepted Dr Angela Ballara’s criticism, relying on an 1874 report by Alexander Mackay, that Maori were left with insufficient land and were ‘cut off from their other traditional sources of supply by close settlement around them’, and that both outcomes had been avoidable.<sup>5</sup>

In terms of social organisation and culture, the Crown conceded that the Treaty promises included the ‘preservation of tribalism’, the option to develop along customary lines from a traditional tribal base, or to ‘walk in both worlds’. The Crown conceded that its purchase of almost the entirety of Te Tau Ihu had had the prejudicial effect of limiting the ability of Maori to ‘maintain a tribal or collective way of life on tribal lands’.<sup>6</sup>

As we see it, these concessions cover a range of prejudice suffered by Te Tau Ihu Maori in the nineteenth and twentieth centuries, arising from the initial failure to reserve access to sufficient natural resources and mahinga kai for the traditional Maori economy and society. We made findings on this matter in chapter 6. In this chapter, we outline further relevant evidence in section 11.4, concentrating on Mackay’s many reports to the Government, which show the prejudice arising for Te Tau Ihu Maori as a result of these conceded Treaty breaches. The Crown accepted the claim that its purchases – in conjunction with settlement – cut Maori off from their traditional resources and damaged their ability to live tribally. It did not, however, concede either the Maori claim to still own the resources or the claim that the destruction of resources as a result of settlement was also its responsibility. We explore those matters in sections 11.4 and 11.5.

The Crown’s other significant concessions related to the Resource Management Act 1991 and the manner in which it has been implemented. In response to Te Atiawa’s closing submissions, the Crown accepted that, notwithstanding the Act’s Treaty reference, local authorities are not giving proper effect to their responsibilities under the Act, such as their duty of consultation. The Crown also conceded that Maori are inadequately funded to participate in resource management processes. Counsel argued:

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4. Crown counsel, closing submissions, 19 February 2004 (doc T16), p 116

5. Ibid, p 4

6. Ibid, p 116

In recognition of issues such as this the Ministry for the Environment, since the inception of the Act, has devoted significant resources to improving the practice of local authorities, and increasing the capacity of iwi and hapu to participate in processes under the Act.<sup>7</sup>

We deal with these and other modern resource management claims in section 11.6.

## 11.2 ISSUES

In April 2002, at an early stage of our inquiry, we posed the question: Has the Crown's management of conservation lands, waterways, and coastal areas been conducted with due consideration of Maori customary rights?<sup>8</sup>

Although we subsequently excluded environmental issues as a generic issue (for the purpose of the generic hearings week), we consider that the range of issues presented to us in subsequent hearings derives from that initial broad question.<sup>9</sup> As we see it, we must now address five questions in this chapter:

- ▶ What customary rights did the Treaty protect in relation to the lands, waterways, and coastal resources in Te Tau Ihu?
- ▶ Have these rights been constrained by the Crown?
- ▶ What have been the effects of the Crown's admitted breach of the Treaty principle of options on the ability of Te Tau Ihu iwi to maintain their customary economy, society, and culture in accordance with their needs and preferences?
- ▶ Has the Crown's management of natural resources adequately protected the resources of Te Tau Ihu Maori, and their ability to exercise customary rights of access, use, and management (kaitiakitanga)?
- ▶ Have Crown policy and practices recognised and respected the tino rangatiratanga of Te Tau Ihu Maori in relation to their customary resources? In particular, does the modern post-1991 resource management regime do so?

The first issue requires us to define as best as we can our understanding of Maori customary rights in relation to natural resources, waterways, and coastal areas. We do this by an exploration of the taonga as they were perceived and valued by Te Tau Ihu iwi (sec 11.3).

The second issue before us requires us to consider how customary rights in relation to natural resources, waterways, and coastal areas were constrained by the Crown. In other words, we consider whether (and how) Te Tau Ihu Maori lost those rights through loss

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7. Ibid, p159

8. Waitangi Tribunal, memorandum concerning hearing of generic issues, 3 April 2002 (paper 2.321), p 4

9. Waitangi Tribunal, memorandum following 3 May 2002 judicial conference, 8 May 2002 (paper 2.335), p 3

of land and through the legislative regime as it applied to the environment and its natural resources. We consider this issue in sections 11.4 and 11.5.

Our third issue involves an examination of the customary society and economy as it operated in Te Tau Ihu in the twentieth century. We explore the extent to which Maori have been able to express and maintain their core values of kaitiakitanga, whanaungatanga, and manaakitanga as they relate to customary resources. We have also considered the degree of prejudice in this respect, and the integral part that these resources play in restoring a tribal base for the future. We address these issues in sections 11.3, 11.5, and 11.7.

Our fourth set of issues can be articulated as a question about the impact of Crown policies on the availability of mahinga kai, kaimoana, sea fisheries, rongoa, and articles used for traditional crafts. These questions require us to think historically (since 1840 to around 1991) and to consider present-day policy and practice. At heart, this issue requires us to consider how loss of land, landscape modification, and resource pollution, as well as Crown restrictions, have impacted on access to, and utilisation of, natural resources. These matters are covered in sections 11.4, 11.5.3, 11.5.4, and 11.5.5.

Fifthly, we address the question: Have Crown policy and practices recognised and respected the tino rangatiratanga of Te Tau Ihu Maori in relation to their natural resources? Principally, this leads us to examine the operation of mechanisms provided by the Crown to enable Maori to exercise kaitiakitanga over traditional resources and to have a meaningful role in decision-making. We deal with the fisheries dimension of this question in section 11.5.4 and other contemporary resource management issues in section 11.6. As noted, however, we will not address matters with regard to DOC, which we leave to the Wai 262 inquiry, which heard more detailed evidence and submissions on the subject.

Finally, we consider the legal submissions of counsel for the claimants and for the Crown, and we make findings on whether the Treaty has been breached and, where it has, whether prejudice has been suffered. We then make recommendations for the removal of that prejudice. In some instances, we find the Crown to be on the verge of Treaty breach if immediate action is not taken, and we make suggestions as to what form that action might take. We deal with these matters in section 11.8.

### 11.3 NGA TAONGA

Traditional evidence and scientific research indicate that Maori have occupied Te Tau Ihu for at least 800 years. Many coastal areas have pa and seasonal camp sites with middens, ovens, gardening structures, and food-storage pits. These remains provide evidence for the diet and mode of life of Maori in the region. From the sea, they caught kai ika (finfish) such as cod, snapper, and shark. On the foreshore, they gathered kaimoana (shellfish) such as kina, paua, and mussels, as well as flatfish such as flounder. Seabirds, such as titi (shearwater

or muttonbird), were caught and eaten. From inland regions came kereru, waterfowl, and eels. Forests and swamps provided a range of vegetable foods, medicines, flax for weaving and binding, dyes for decoration, and logs for canoes and building. By using these natural resources, the people developed knowledge of seasonal fruiting, the life-cycles and migrations of birds and fish, and the patterns of winds, tides, and currents for offshore fishing.<sup>10</sup>

To assist food production, habitats were altered. Some bush margins were burned to enlarge gardens and cultivate fern roots, although, according to a recent map of changing forest cover in New Zealand, most forest in Te Tau Ihu remained intact by 1800.<sup>11</sup> Burn-offs were also used on islands in the Marlborough Sounds to clear vegetation for burrowing seabirds.<sup>12</sup> The main modification before 1800 had been the conversion of forest inland of Tasman Bay and on the east coast to scrub, fern, or grassland. The construction of low walls and soil modification enhanced crop growth.<sup>13</sup> Canals were dug between the lagoons and mudflats of the Wairau Estuary to facilitate fishing and trapping.<sup>14</sup> On the foreshore, kina, shellfish, and seaweed were transplanted to establish mahinga kai nearer home.<sup>15</sup> These canals, gardens, and transferrals were modifications of the environment, not thoroughgoing changes.

In general terms, Maori customary practices were informed by a set of beliefs about the relationship between people and their physical and spiritual environment. Kuepe Amohia-Mai-Taku-Kiri of Ngati Rarua told us that she would never forget the words of her auntie, Naki Kino:

She said to me ‘to be a Maori, you must respect nature and to live in harmony with the Atua, also extend the hand of hospitality to those who come in peace, for a Maori the future is the past. They look at nature with awe and wonder at its inspiring beauty, and give thanks to their Gods.’<sup>16</sup>

For some, the relationship is very personal, central to their identity. Kath Hemi of Ngati Apa said: ‘I believe I am a conservationist and an environmentalist. I relate with my world, as I am part of it, being born of Papatuanuku through Hine-ahu-one and Hine-nui-te-po.’<sup>17</sup>

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10. Marr, ‘Crown–Maori Relations’, pp 4–17

11. Atholl Anderson, ‘A Fragile Plenty: Pre-European Maori and the New Zealand Environment’, in *Environmental Histories of New Zealand*, edited by Eric Pawson and Tom Brooking (Melbourne: Oxford University Press, 2002), p 31, fig 2.4

12. *Draft Titi Island Nature Reserve Management Plan*, January 1982, extract, supplied by secretary, Marlborough Sounds Maritime Park Board, to Wildlife Service (Anthony Patete, comp, supporting documents to ‘D’Urville Island’, various dates (doc A32(a), doc GR))

13. Marr, ‘Crown–Maori Relations’, p 12

14. Hilary Mitchell and Maui John Mitchell, ‘Maori Customary Fishing in Te Tau Ihu’, report commissioned by the Ministry of Fisheries, 2002 (doc K3), pp 14–16

15. *Ibid*, p 89

16. Kuepe Amohia-Mai-Taku-Kiri, brief of evidence on behalf of Ngati Rarua (English version), 11 August 2000 (doc A90), p 6

17. Kath Hemi, brief of evidence for Wai 262, 1999 (doc N9, attachment c), p 3

Rita Powick, who was raised by her grandparents at Waikawa Pa, explained Te Atiawa's metaphysical relationship with the natural world. It is helpful to quote her evidence at length:

Prior to the arrival of the European Te Ati Awa exercised our authority, our own practises of control and management of natural resources. This practise was, and still is, strongly anchored in the knowledge and belief that the relationship of Te Ati Awa within the domains or Ranginui and Papatuanuku is one of interdependence and reciprocity.

As such Papatuanuku the Earth Mother is revered as the prime source of sustenance and nourishment. She is the ukaipo, the mother of all living things. An illustration of this intrinsic relationship is found within the following whakatauki (proverb):

*Ko Papatuanuku te matua o te tangata  
Papatuanuku is the parent of all mankind*

The interpretation being that Maori love their land as they would their own mother.

The importance and respect accorded to this relationship is further reflected in the following tikanga (custom) that continues to be observed by many of our Te Ati Awa people today. When a child is born the afterbirth or placenta (whenua), being the source of nourishment while the child was growing in the womb, and a living entity, is interred into the earth (whenua) as a means of being returned to Papatuanuku. This adds to, and reinforces, that procreative power within the womb of Papatuanuku (Earth Mother). Hence the importance of this relationship is highlighted with the word in Maori for both 'land' and 'placenta' being 'whenua'.

This tikanga also symbolises the expectation that as this child grows she in turn will continue to give and receive nourishment from Papatuanuku, thus exercising the practise of mana whenua, the power associated with the authority of the land, and the corresponding ability of this land to produce the bounties of nature. Hence the whakatauki:

*Te toto o te tangata, he kai; te oranga o te tangata, he whenua  
A person's blood is obtained from the food eaten, and it is from the land that sustenance is derived*

While Papatuanuku is observed with such respect and reverence, it is also important to acknowledge the role and realm of Ranginui, the sky parent and domain of the heavens. It is the recognition of this balance between Papatuanuku and Ranginui that establishes the balance of nature; the balance between night and day, between tapu and noa, between male and female, between life and death. This respect, along with the holistic way in which we view our world; where one aspect is related to, and impacts upon another, forms the basis of our relationship with the world and the elements around us.

Being immersed in this holistic relationship meant that our tupuna (ancestors) understood and appreciated the inter-relationships within the natural world. They possessed

intricate and detailed knowledge of the associated ecosystems. Like all indigenous peoples, their abilities to observe the very signs of nature that they depended on for sustenance and survival were strong.

While the depth of this knowledge has altered over years, due to the effects of colonisation, Te Ati Awa continues to exercise mana whenua over the land and natural resources within its rohe (region). This includes the traditional knowledge and customary practices that are such an essential and integral part of these resources. The ultimate obligation and responsibility was, and is, always to ensure that those resources are managed in cognisance of the customs of the past, in respect to provide food and sustenance for the present and in recognition to ensure that the needs of future generations be safeguarded.<sup>18</sup>

According to Professor Evelyn Stokes, Maori saw themselves as part of their environment, at one with it, not dominating it: 'this was a relationship that was both practical and spiritual, involving recognition and propitiation of ancestor gods'. Imbued in this world-view, Stokes recognised 'a sense of custodial occupation, that the environment should be maintained in a fit state for the generations to come.'<sup>19</sup> This is a concept embodied by the word 'kaitiakitanga'. Michael Park told us that the role of kaitiaki is the same today as it has always been; namely, to 'take care of the whenua, the moana, the natural resources and all other taonga, and to do so in a way that observes and protects the mauri of the rohe.'<sup>20</sup>

In Mr Park's view, this traditionally involved an active management of all resources in use by the tribe. In the 1840s, the whole of Te Tau Ihu was a 'managed garden'. He likened the practices of his tipuna to modern permaculture, which is 'centred around thinking and observation, a system aimed to design and create systems that imitate nature.'<sup>21</sup> A key aspect is that food production should be in large part self-renewing, using self-seeding crops and species high in nutrition and being located near to where people live. His tipuna managed their crops in a holistic way, rotating them and planting shrubs and trees around and among them to provide additional food, medicines for rongoa, and building materials. This included harakeke, titoki, and karaka. Through close and careful observation of nature and the seasons, the tipuna developed techniques and traditions that maintained and perpetuated their resources in a healthy state. Key to this was that resources should be used in a sustainable way, 'so they could be eaten today, tomorrow and the next season'. At Motueka, for example, these resources included plants for building, medicines, and manufacturing; birds for food and feathers (cloaks); and fish and shellfish for food.<sup>22</sup>

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18. Rita Powick, brief of evidence on behalf of Waikawa Resource Management, January 2003 (doc 117), pp 2-4

19. Evelyn Stokes, 'Contesting Resources: Maori, Pakeha and a Tenurial Revolution', in *Environmental Histories of New Zealand*, edited by Eric Pawson and Tom Brooking (Melbourne: Oxford University Press, 2002), pp 35, 36

20. Michael Park, brief of evidence on behalf of Te Atiawa, 26 November 2002 (doc G15), p 2

21. Ibid, pp 2-3

22. Ibid, pp 3-5

Nor was planting confined to apparently cultivated areas. Pingao, a golden sedge which used to grow plentifully on West Coast beaches, seemed 'wild' but was in fact seeded and planted by Ngati Apa.<sup>23</sup> Margaret Bond explained how an apparently natural-looking sequence of harakeke species at Redwood Pass was in fact artificial.<sup>24</sup> In a sense, 'gathering' is too passive a word for the use by Maori of forest resources, even where they had not actively planted or propagated species. The women of Ngati Apa, on expeditions in the bush, would tie up the fallen leaves of the kiekie (a vine prized for both weaving and kai) to prevent rotting or damage from introduced pests.<sup>25</sup>

In this characterisation of kaitiakitanga and tikanga, the people learnt from close observation and past mistakes. The tying up of kiekie leaves, for example, was partly a modern response to the infestation of possums and other new pests.<sup>26</sup> Some species such as moa were hunted to extinction in the early period, before a balance was achieved between humans and their new environment.<sup>27</sup> As Anna Hewitt and Dr Diana Morrow, the authors of a report on the customary use of natural resources by Te Atiawa, informed us:

This emphasis on sustainability and respect and reciprocity for the sacred world did not, however, mean that Maori themselves were incapable of environmental mismanagement. In gaining an understanding of their new environment, the colonising predecessors of Maori made mistakes along the way, burning off forests, for example, and hunting many bird species to extinction. The fact that such mistakes were made, however, served through time to strengthen rather than weaken adherence to traditional concepts centred around resource sustainability.<sup>28</sup>

Geoff Park observed:

Like many indigenous societies, Maori traditionally depended on a limited resource catchment, augmenting it by manipulating the landscape. Strong incentives to nurture and sustain biotic diversity were closely integrated with moral and religious belief systems.<sup>29</sup>

The lessons were hard-learned and passed from generation to generation, strictly applied even in a place such as the Wairau, famous for its abundant food supplies. In 1912, William Henry Skinner, whose informant was George Macdonald of Rangitane, wrote of the Wairau lagoons:

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23. Hemi, brief of evidence for Wai 262, pp 7–8

24. Margaret Bond, brief of evidence on behalf of Ngati Apa, 2003 (doc N4), pp 7–8

25. Hemi, brief of evidence for Wai 262, pp 4, 8

26. Ibid, p 4

27. Marr, 'Crown–Maori Relations', p 16; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), pp 45–46

28. Anna Hewitt and Diana Morrow, 'Te Atiawa and the Customary Use of Natural Resources in Te Tau Ihu, 1840–2000', report commissioned by the Te Atiawa Manawhenua ki te Tau Ihu Trust, 2000 (doc D5), pp 8–9

29. Geoff Park, *Nga Uruora: The Groves of Life: Ecology and History in a New Zealand Landscape* (Wellington: Victoria University Press, 1995), p 318

A closely regulated and scientific method of game laws, which, under the dread of the universal law of tapu, none dared or even thought of infringing, left them [local Maori] ever full and abundant game preserves, more than sufficient for their utmost wants. No waste was permitted, although there was such an abundance.<sup>30</sup>

This conservation ethic has been passed down to the present generation, as we discovered at our hearings, where many tangata whenua witnesses told us of their strict adherence to it today. Dr and Mrs Mitchell, in their 2002 study of customary fishing, which drew on over 100 interviews of tangata whenua from Te Tau Ihu, noted the 'strong conservation principles which required that only what was needed was to be taken, and that there be no waste'.<sup>31</sup>

Knowledge was gained incrementally and kaitiakitanga required practical solutions to real problems. Dean Walker, appearing for Te Atiawa, brought to life traditional practices by describing a journey from one mahinga kai area to another in Te Tau Ihu:

It was a movement from one food basket to another. Each of the food baskets described whether ocean, estuary, forest, river or lake provided a range of products, not only food but also materials for buildings, clothing, medicine, arts and other things. These food baskets had to be managed and maintained in such a way so that no more was taken than the taonga was able to supply in perpetuity, in modern parlance this being 'sustainable management'.<sup>32</sup>

If the resources were plundered, the cupboard would be bare on subsequent journeys. The practices associated with the exercise of kaitiakitanga included techniques to ensure that the mauri and productivity could be maintained. These included rahui, tapu, and methods of enhancement.<sup>33</sup>

We received a substantial body of evidence from tangata whenua, which supported their assertions that traditional patterns and rights of customary use and management continued into the twentieth century. It also reinforced the importance of these resources for subsistence purposes when other economic opportunities failed to materialise, the effects of land loss were felt, and the attrition of reserves continued. We will consider this evidence in greater detail below, but here we give a few examples of how customary rights and practices continued in the twentieth century.

Matthew Love and James Mark, for example, spoke of living with their grandparents at Waikawa. They recalled gathering shellfish with their grandmother and going on expeditions to gather berries and kiekie at Kumutoto and Torea (now scenic reserve land).<sup>34</sup> Antoni Bunt, who was brought up at Te Awaiti in the Tory Channel, spoke of diving for paua and

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30. William Henry Skinner, 'Ancient Maori Canals, Marlborough NZ', *Journal of the Polynesian Society*, vol 21, no 3 (September 1912), pp 105–108 (Mitchell and Mitchell, 'Customary Fishing', p 16)

31. Mitchell and Mitchell, 'Customary Fishing', p 99

32. Dean Walker, brief of evidence on behalf of Te Atiawa, 2002 (doc G28), p 7

33. Ibid

34. Matthew Love, brief of evidence on behalf of Wai 851, 1 August 2003 (doc Q13); James Mark, brief of evidence on behalf of Wai 851, 1 August 2003 (doc Q14)

kina, catching titi (muttonbirds) and tuere (hagfish or blind eels), and gathering mussels. He said that ‘shellfish, fish and birds were considered staple elements of the Te Atiawa diet.’ Mr Bunt also described their role as kaitiaki: ‘We have always used and observed the traditional management practices of our tipuna while harvesting kaimoana to ensure that stocks remain healthy and abundant’. But this kaitiaki role had, he argued, ‘been eroded by many years of legislation and procedures’.<sup>35</sup>

Christopher Love told us that ‘the customary practices for gathering and preparing kaimoana are well known. This knowledge has traditionally been passed down from generation to generation, ensuring the cultural survival of Te Atiawa.’<sup>36</sup> Benjamin Hippolite described the difficult life of his whanau on Rangitoto (D’Urville Island) when the weather was bad and they could not fish and had to rely on wheat and dried fish from earlier catches.<sup>37</sup> James Elkington described how he was trained by his father and uncles to catch titi on the small islands around Rangitoto and kereru on the main island.<sup>38</sup> Andrew Stephens noted that, when his father was a boy at Wakapuaka Estuary, there had been an abundance of seafood, eels, and rongoa.<sup>39</sup> Keri Stephens described the foods his family continued to harvest in Wakatu and Waimea: whitebait, koura, shellfish, sea lettuce, and fin fish.<sup>40</sup> Mairangi Reiher spoke of life at Motueka, where her family grew crops but relied on seafood and met their customary obligations by sending dried eels and kaimoana to Parihaka.<sup>41</sup>

Some speakers alluded to the poverty that they and their ancestors had suffered, which was exacerbated by disasters ranging from the severe flooding of the reserve lands near the Wairau River mouth to the blight that affected potato and kumara crops on Rangitoto around the turn of the twentieth century.<sup>42</sup> We discussed privations of this kind in chapter 10, but here we emphasise that, as a consequence of poverty, people often relied heavily on kaimoana for sustenance.

Efforts were made to practise traditional guardianship, even in situations where people felt powerless to protect resources from external forces. Claimants spoke of the ways in which they continued to follow traditional methods of management. Oriwa Solomon, who had lived at Whangarae in the Croisilles Harbour, said his father knew that the optimum time to gather scallops was when they were both shoaling and in roe. At other times, they

35. Antoni Bunt, brief of evidence on behalf of Te Atiawa, 10 January 2003 (doc 122), pp 6–8

36. Christopher Love, brief of evidence on behalf of Te Atiawa, 10 January 2003 (doc 118), p 4

37. Benjamin Turi Hippolite, brief of evidence on behalf of Ngati Toa, 11 June 2003 (doc P15), pp 4–5

38. James Elkington, brief of evidence on behalf of Ngati Koata, not dated (doc B34), paras 95–97; James Elkington, brief of evidence for Wai 262, 1999 (doc B34, attachment A), paras 66–74, 87–91

39. Andrew Stephens, brief of evidence on behalf of Ngati Tama, 26 February 2003 (doc K37)

40. Miriam Clark, ‘Mahinga Kai and Customary Use Areas of Ngati Tama Manawhenua ki te Tau Ihu in Wakatu and Waimea’, report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust in association with the Crown Forestry Rental Trust, 2000 (doc K2), p 36

41. Mairangi Reiher, brief of evidence on behalf of Te Atiawa, 2002 (doc G16), pp 6–7

42. Counsel for Rangitane, closing submissions, 5 February 2004 (doc T4), p 39; counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), p 177; Anthony Patete, ‘D’Urville Island (Rangitoto ki te Tonga) in the Northern South Island’, report commissioned by the Waitangi Tribunal, 1997 (doc A32), pp 189, 198

were too thin, even if the season had been declared open: 'We were taught a tikanga for living with the environment.'<sup>43</sup> James Elkington described the transplanting of kaimoana, a practice he had continued after learning it from 'the old people'. Not all shellfish species, he said, were self-grown at Rangitoto; some existed because they were transplanted, nurtured, maintained, and harvested at the appropriate times with the least damage: 'We put cockles and pipi in a bay, and put a rahui on taking them until we saw the quantity developing. Then we knew that they had spat and were growing and a new lot had spat, and so we would only take the rahui off when we had a good supply going.'<sup>44</sup>

Nohorua Kotua, giving evidence for Ngati Koata, told us that, when the kai became short on Rangitoto, people moved to another place to let the mahinga kai regenerate. However, by the time of his mother's generation (pre-1940s), they were running out of places to move to.<sup>45</sup> Later, they used the rivers around Nelson and Waimea for eeling. He explained his understanding of their rights as follows:

It was always told and understood that we had full use of the rivers, no one could stop us from going onto those rivers because they were part of our rohe. This was the way our iwi talked about these rivers – from the Whangamoia Heads right through to Waimea. We didn't need to go beyond there because all the food we needed was within these rivers.<sup>46</sup>

Puhanga Tupaea, in her evidence for Ngati Koata, similarly referred to life on Rangitoto and at Nelson, where they got what they needed from their environment – food, rongoa, and flax. 'We didn't just use the resources immediately around where we were living at the time, we used to make trips all around Te Tau Ihu to gather what we needed.'<sup>47</sup> This included eeling on the island at Moawhitu, gathering kaimoana at Nelson and other sites, collecting rongoa at Matapihi Beach, and muttonbirding on the small islands outside of Madsen and the Trios Islands.<sup>48</sup>

Witnesses also spoke of their concerns about sustainability. Such concerns are not new. In 1888, Ngati Koata on Rangitoto became so anxious about the depletion of their deep-water fisheries that they petitioned the Government. Again, in 1903, they submitted a petition requesting a fishing reserve around Rangitoto and the Croisilles, because 'we know that the fish are not so numerous as in past years, because of the number of the Europeans working fish'. They wanted fishing stopped completely at times, 'in accordance with Maori custom of former days', in order for stocks to recover for the future benefit of both Maori and Pakeha. Shellfish stocks would be managed also.<sup>49</sup> Neither petition was successful. In 1938, there

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43. Oriwa Solomon, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P17), pp 3, 10–11

44. J Elkington, brief of evidence on behalf of Ngati Koata, paras 37, 43

45. Nohorua Kotua, brief of evidence on behalf of Ngati Koata, 2001 (doc B14), para 8

46. *Ibid.*, para 35

47. Puhanga Patricia Tupaea, brief of evidence on behalf of Ngati Koata, 1 February 2001 (doc B15), para 57

48. *Ibid.*, paras 63, 65–70, 72, and attachments

49. Patete, 'D'Urville Island', pp 211, 212; Marr, 'Crown–Maori Relations', pp 148–149

were again concerns about the decline in the fish stock due to improved technology and bigger boats.<sup>50</sup>

These efforts to protect natural resources have continued down through the generations and have been illustrated by the activities of iwi in the 1980s and 1990s, as described in Miriam Clark's evidence for Ngati Tama.<sup>51</sup> We heard similar evidence from Trina Mitchell, Ursula Passl, Jane Du Feu, Dean Walker, and many others, which we will explore further later in this chapter.

The Maori people of Te Tau Ihu needed customary food supplies for their sheer physical survival in the nineteenth and much of the twentieth centuries. We will return to this point in more detail later. There were times when people would literally have starved without it. That helps to explain why this part of the culture has been more resilient in Te Tau Ihu, when, as we explained in chapter 10, other parts (such as te reo) have been less so. Similarly, the more isolated Maori communities, for whom trips to the doctor were impractical or even impossible, survived through their rongoa. Priscilla Paul, who grew up on Rangitoto in the 1940s, explained that doctors were simply too far away to be anything other than a last resort. Rongoa was the dominant form of medicine and health care on the island. Even so, the practice of rongoa was not immune to the pressure to conform after she left the isolated environment of D'Urville Island. The knowledge was not discussed openly in the 'Pakeha world' of the time, and was less practised and less complete as a result, but it has nonetheless been passed to her generation (and from her to her descendants).<sup>52</sup> For Luckie Macdonald of Rangitane, growing up in the Wairau, rongoa was still preferred and doctor visits were rare in the 1960s and 1970s. If they did have to go to the doctor, they could only pay in whitebait.<sup>53</sup>

Customary gathering of kai and rongoa was required for physical survival for much of the twentieth century. As a result, core aspects of the tangata whenua's way of life in Te Tau Ihu resisted acculturation from the surrounding Pakeha majority. We found the evidence of Ropata Stevens for Ngati Rarua particularly helpful in explaining this point. He told us about the life of his grandfather, Warena Tiwini, who was born in Motueka in 1876 and lived there most of his life. He grew up speaking Maori but was educated at Nelson College:

My grandfather faced the pressures of the two worlds in which he had been brought up and in which he lived. On the one hand, he was definitely Maori. He spoke te reo, gathered food from the landscape in accordance with traditional practices and occupied papakainga land. Warena understood the process and value of manaakitanga and was a good provider

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50. Patete, 'D'Urville Island', p 212

51. Miriam Clark, 'Kaitiakitanga: Ngati Tama Manawhenua ki te Tau Ihu', report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust in association with the Crown Forestry Rental Trust, 1999 (doc A48), pp 15, 18–19, 25–35

52. Priscilla Paul, brief of evidence for Wai 262, 1999 (doc B17, attachment A), pp 16–18

53. Luckie McDonald, brief of evidence on behalf of Rangitane, 22 April 2003 (doc M8), pp 15, 18

and host. This important practice was part of his upbringing, part of the tradition of being Ngati Rarua. Kai was never short and he still kept a large garden right up to this death . . . My grandfather also practiced rongoa . . .<sup>54</sup>

Even so, the 'pressure of assimilation faced by my grandfather from living in a predominantly pakeha community must have been intense and too difficult to resist.'<sup>55</sup> He did not speak te reo in front of his children or let them learn it. 'He never publicly asserted his Maoriness and I believe this was to save from becoming isolated from the community that he worked so hard to be a part of.'<sup>56</sup> The exception to this was the gathering of customary foods:

my father told me of a story from his childhood (late 1920s) which for him showed the difference between grandfather's efforts to fit in and the community's acceptance of these efforts. Once, he was on a horse drawn dray with his father and members of his whanau, driving through town, down the main street of Motueka heading towards the beach to collect kaimoana. The community knew when they saw my grandfather with his whanau heading in that direction, the time must be close to low tide, as this was a regular activity. A pakeha called mockingly from the footpath in a big booming voice 'Hello Warren, going down to the old Maori butcher shop eh' [.]. My father could sense the sarcasm in the voice of the pakeha and willed his father to answer him in the same contemptuous manner. A group of pakeha standing close by laughed at the wisecrack. But being the gentleman he was, my Grandfather replied 'Yes Mr Smith, when the tide is out, the table is set' [.]. My father became furious, as the group of pakeha laughed even louder. He could only glare at them, as they continued on their journey. Many more such occasions of ridicule and innuendo were to be witnessed over the years by my father as he grew up.<sup>57</sup>

We heard similar evidence from others.<sup>58</sup> Audrey McLaren, who grew up in the Westport area in the 1930s, explained her father's attitude: 'When I was young and things Maori came up, Dad used to say, you don't need to know that, and he would stop the conversation. So we didn't learn much about being Maori.' He did, however, pass on his knowledge and skills relating to fishing and the sea.<sup>59</sup>

The necessity of fishing and gathering shellfish for sheer survival helps to explain its determined transmission from generation to generation in Te Tau Ihu. But customary resources are more than a means of meeting physical needs. They are central to the core Maori values

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54. Ropata Stephens, brief of evidence on behalf of Ngati Rarua, 2001 (doc B19), pp 5-6

55. Ibid, p 6

56. Ibid, p 7

57. Ibid

58. See, for example, Lee Luke, brief of evidence on behalf of Ngati Rarua, 11 August 2000 (doc A88), pp 2-4; Paul Morgan, brief of evidence on behalf of Ngati Rarua, 2001 (doc B11), pp 5-6

59. Audrey McLaren, brief of evidence on behalf of Ngati Apa, 2003 (doc N3), pp 7-8

of kaitiakitanga, whanaungatanga, and manaakitanga, and to the identity of Maori as tribal peoples.

These core values endure despite loss of language and knowledge. Peggy Whitton described the centrality of fishing and gathering seafood in the life of her whanau at Golden Bay. She explained that they were carried out according to rules passed down from the old people, including the core tenet that only enough was taken to feed family and friends, that kaimoana was never shelled or cleaned on the spot lest the kaimoana move away, and so forth.<sup>60</sup> She also told us, however, that life there ‘was not based on Maori tikanga as there were so few Maori there and everyone lived a European lifestyle.’<sup>61</sup> John Ward-Holmes and Margaret Little, who also lived in Golden Bay, agreed that there had been a loss of te reo and tikanga but offered a different perspective. ‘Despite everything,’ they said, ‘our family and whanau have always been Maori, have always lived by sets of Maori values and practices and continue to try to do so today.’<sup>62</sup>

June Robinson, in her evidence for Ngati Apa, explained that she grew up on the West Coast in the 1940s and 1950s, fortunate to have parents and grandparents who passed on their skills and knowledge in the traditional Maori way:

One thing we all learned from our parents and grandparents was respect for the environment through traditional conservation practices. We learnt the right times for preparing, sowing and harvesting and recognising when rahui should be placed on resources . . . We also learnt that when you went to gather kai you only took as much as you needed ie sufficient to provide for every household . . . It was not until we were older that we realised that what we had learnt was the Maori way of life and living. Although we did not have te reo we were raised in what I consider was a sound grounding in tikanga and kawa.<sup>63</sup>

Central to this were the concepts of kaitiakitanga, whanaungatanga, and manaakitanga. Whanaungatanga involves aroha ‘in its truest sense’ and respect for elders and for all others: ‘we learnt to share everything with whanau and whanaunga. To awhi each other and to manaaki our manuhiri.’ This involved not only catching or gathering food for ‘every household’ but also taking in and feeding anyone who came and always taking kai as koha when they went anywhere.<sup>64</sup> As Kath Hemi explained: ‘your kai and its care was your mana.’<sup>65</sup> In part, that mana came from generosity to outsiders as well as to whanau. Paul Morgan explained the practice of manaakitanga and how his grandmother was always helping and feeding Maori workers who came to Motueka for seasonal work in the tobacco industry:

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60. Peggy Whitton, brief of evidence on behalf of Te Atiawa, 26 November 2002 (doc G13), pp 6–7

61. *Ibid*, p 3

62. Margaret Louise Ward-Holmes Little and John Tahana Ward-Holmes, brief of evidence on behalf of Ngati Tama, 2003 (doc K19), p 4

63. June Robinson, brief of evidence on behalf of Ngati Apa, 2003 (doc N8), pp 14, 16

64. *Ibid*, pp 16–17; see also Mitchell and Mitchell, ‘Customary Fishing’, p 80

65. Kath Hemi, brief of evidence on behalf of Ngati Apa, 25 March 2003 (doc N9), p 24

She was far too generous with the money she spent on them. She did this, however, because that's how the old people acted. You awahi visitors, nurture them, provide for them and whatever you had you gave. This was done as part of your responsibilities as tangata whenua.<sup>66</sup>

Such values were carefully instilled in succeeding generations by 'the old people'. Oriwa Solomon told us how Ngati Toa and Ngati Koata made regular visits to each other in the 1950s and 1960s as part of the 'living tradition of whanaungatanga that our parent's generation were trying to instil in us.'<sup>67</sup> These values survive today through the ability of scattered descendants to return home to their turangawaewae. Priscilla Paul of Ngati Koata told us that, although she has not lived on Rangitoto since she was 14, her grandmother's people return there regularly: the 'importance of whanau and whanaungatanga continues today . . . we need it, we thrive on it, it's part of our mauri, our very being . . . we can't exist without it.'<sup>68</sup>

These values were common to all the iwi who appeared before the Tribunal. As manuhiri, we were always given a warm welcome and fed well with the kai of the place where we were hosted. Mr Macdonald described how, growing up in the 1960s and early 1970s, his whanau stayed regularly with relatives at the Wairau, Nelson, Queen Charlotte Sound, the West Coast, Rangitoto, Te Hora, and Kaikoura, and in the North Island, and hosted their whanaunga in their turn. 'The kai depended on the guest.' Each of those places was known for particular valued kai. Even whanau had specialities – Mr Macdonald's whanau, being from the Wairau, was known for bringing pumpkins, potatoes, and fruit.<sup>69</sup>

Oriwa Solomon explained for Ngati Toa:

We were known as providers of tuere and traded our tuere up in Taranaki. We were known as providers of big hui and when the 28th Maori Battalion returned to Wellington in 1945, we were the only Maori people capable of hosting such an extraordinarily large gathering.<sup>70</sup>

Priscilla Paul noted for Ngati Koata:

We are a coastal people, so we take pride in our ability to provide for those others who do not have. We take pride in supplying kaimoana for functions, wherever that function may be. Kaimoana is Ngati Koata's koha to other iwi. It is known amongst Maori that Ngati Koata are providers of kaimoana at functions we attend.<sup>71</sup>

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66. Morgan, brief of evidence, p 5

67. Solomon, brief of evidence, p 7

68. Paul, brief of evidence for Wai 262, p 16

69. L McDonald, brief of evidence, p 16

70. Solomon, brief of evidence, p 9

71. Paul, brief of evidence for Wai 262, p 24

Connie Joseph gave evidence for Te Atiawa, explaining that, when there was a tangi, the people of Waikawa Pa were expected to provide kaimoana. 'Waikawa was known for its kaimoana,' she told us, while 'other areas such as the Wairau were known for their eels or Kaingawai (rotten corn).'<sup>72</sup> Ngati Apa take pride in their ability to provide distinctive delicacies, including karengo (a type of kelp). At Omaka Marae in Golden Bay: 'we always had karengo and karaka berries available for our manuhiri. These were the greatest kai that we could supply, and it was a sign of our mana over our rohe that we could provide it for our manuhiri.'<sup>73</sup>

These things are central to iwi identity. For Maori people, the inability to place their renowned foods on the table is very distressing and entails a loss of mana. Many witnesses emphasised this during our hearings. In his evidence for Te Atiawa, Dean Walker (who has worked very closely with the iwi on resource management issues) observed:

As birds no longer make their seasonal pilgrimage from one food basket to the next neither do the people. The food baskets are no longer intact, the birds and fish are much reduced or vanished and the resources on the journey are for the most part the property of someone else. Opportunities to practice kaitiakitanga and harvest from mahinga kai are similarly much reduced or non-existent. This severance of connection to these resources has led to a loss of mana on the part of Te Tau Ihu iwi and is a source of embarrassment to tangata whenua. The inability to provide traditional food and other cultural resources for whanau and manuhiri (whether from the ocean, the forests or from rivers) causes a sense of burning grief and impotency in the people.<sup>74</sup>

Richard Bradley told us at the Rangitane hearing that one of the key ways in which his iwi relate to their world is through manaakitanga:

Our traditions record that the sole purpose for the migration of our Tupuna to these lands was due to the apparent cornucopia of kai made possible by the range of ecosystems. The generous range of Kai available to residents and visitors alike measured the wealth of the hapu or Iwi. The availability of both freshwater and seawater species was managed carefully as any imbalance would have serious consequences for an Iwi's mana. This has continued to the present day where this week you will see Koura and Karengo from O-Tu-Whero, Tuna from up Rotoiti, Scallops from Tai Tapu and Kina from Kura Te Au. Generosity to a fault is something in which Rangitane has always sought to excel in.<sup>75</sup>

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72. Connie Joseph, brief of evidence on behalf of Te Atiawa, 2003 (doc 19), p 5

73. Hemi, brief of evidence for Wai 262, p 9

74. Walker, brief of evidence, p 11

75. Richard Bradley, brief of evidence on behalf of Rangitane, 22 April 2003 (doc M2), pp 14–15

Although we tasted many of the delicacies of Te Tau Ihu at our hearings, Lewis Wilson advised at the Ngati Kuia hearing that they had had to purchase some of the kaimoana for their week.<sup>76</sup> Alan Riwaka warned us during our site visit to Tory Channel that resources were so scarce that Te Atiawa have to supply many marae from there, not just their own, and they are having to dive deeper and deeper to find their kai. The day that Te Atiawa can no longer supply paua and kina for hui and tangi 'is going to be a very sad day, and that's coming up quickly if we don't get in there and have something done about this now'.<sup>77</sup> The depletion and degradation of resources and sites results not merely in a loss of mana, important and painful as that is; it causes harm and grief for the kaitiaki. They suffer with the land and feel acutely their failure as its guardians.<sup>78</sup>

There is another important aspect to consider. Albert McLaren, speaking for Ngati Apa, explained that it is in part through kaitiakitanga – working actively with DOC to care for the land – that his iwi maintain links with their whenua.<sup>79</sup> Some of the evidence in our hearings was to the effect that, with the loss of almost all their land, it is largely by fishing that the iwi of Te Tau Ihu still keep their fires alight (ahi kaa) today in their rohe. In his evidence for Ngati Rarua, Anaru Luke put to us that he and his whanau maintain their ahi kaa at Wairau Pa by returning regularly to fish. Even though they had to move away when he was very young, they continue to go back and fish there today as 'people from that place', continuing the practice of previous generations.<sup>80</sup>

This is not merely the case for whanau that have moved away from their whenua. Raymond Smith told us that, as an iwi, Ngati Kuia maintain their ahi kaa roa by 'the maintenance of our knowledge and fishing practices of our tupuna'.<sup>81</sup> This is made possible by an accumulated pool of knowledge 'handed down by our tupuna to us, and that in turn is being handed down to the generations to come'. For this to happen, however, they have to actually be able to 'harvest, maintain and protect nga Tamariki o Tangaroa'. He explained how he had learnt the tikanga for fishing, including the dangers and the vital knowledge of weather patterns, tidal movements, reefs, underwater rocks, fishing grounds, and the fundamentals of fishing. 'It's still a common practice for myself to acknowledge Tangaroa before entering the water as well as returning the first fish to his domain and I teach these things to my children even if they want to keep it. We never take more than is necessary.' Kina, cockles, and pipi are 'the ideal species for teaching our tamariki the traditions around gathering kaimoana in a safe environment. When the tide is out the table is set'.<sup>82</sup>

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76. Lewis Wilson, brief of evidence on behalf of Ngati Kuia, 23 March 2003 (doc L13), p 4

77. Alan Riwaka, oral evidence, seventh hearing, 27–31 January 2003 (transcript 4.7, p 102)

78. M Park, brief of evidence, pp 4–5

79. Albert (Sonny) McLaren, brief of evidence on behalf of Ngati Apa, 2003 (doc N5), p 17

80. Anaru Luke, brief of evidence on behalf of Ngati Rarua, 11 August 2000 (doc A87), pp 2, 3–5

81. Raymond Smith, brief of evidence on behalf of Ngati Kuia, 20 March 2003 (doc L14), p 10

82. Smith, brief of evidence, pp 6–9

All this is under threat:

Like many iwi in this area, Ngati Kuia have been very disturbed by the declining numbers of stock in all species of kaimoana in our rohe. In one generation we have gone from being able to go to nearly any location in our rohe and be guaranteed a good customary catch, to following commercial fishermen and being lucky to catch the necessary amounts needed.<sup>83</sup>

Ngati Kuia fear the loss of their ability to maintain ahi kaa in much of their rohe if they lose their customary fisheries.

Other iwi share this concern. Oriwa Solomon, for example, told us how Raukawa Moana (Cook Strait) is 'integral to Ngati Toa's identity'.<sup>84</sup> They fished its waters and the waters of Te Tau Ihu, asserting their mana and gaining further mana from the resultant customary exchanges and displays of wealth. Ngati Toa have maintained their fishing traditions 'up to and as far as they have been able to' – for them, it is a vital 'expression of Ngati Toa's ongoing mana'.<sup>85</sup> The loss of land has made it both harder to access fisheries and all the more important to do so:

The fact that Ngati Toa was dispossessed (almost entirely) of their lands in the Wairau and in other southern areas significantly hindered Ngati Toa's ability to fish traditional fisheries. Nevertheless, we have continued to take fish in traditional fisheries areas. This has been on the basis that it is a customary iwi right . . . These rights of ownership [of fisheries] have never been forfeited.<sup>86</sup>

Priscilla Paul argued that loss of land has compelled Ngati Koata to travel very far and wide to get resources, sometimes crossing into the rohe of other iwi. It is essential, therefore, that they maintain rangatiratanga over all 'known food sources'.<sup>87</sup>

In John Mitchell's evidence, this is a large part of why the tangata whenua have clung so tenaciously to their tiny, isolated, and unfarmable reserves. After the land alienations of the 1850s and the sale of Taitapu in 1883, Ngati Rarua had two small reserves at West Whanganui through which they could 'retain at least some remnant of their former mana, and from which they could maintain some form of kaitiakitanga over the rich mahinga kai of the Inlet and outer coastal waters, and over their urupa and other waahi tapu'.<sup>88</sup> By the generosity and whanaungatanga of the owners, these lands became a fishing and camping base for Ngati Rarua, Ngati Tama, and Te Atiawa.<sup>89</sup> Fishing was so central to the value of the

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83. Smith, brief of evidence, p 9

84. Solomon, brief of evidence, p 8

85. Ibid, pp 9–10

86. Ibid, p 12

87. Priscilla Paul, brief of evidence on behalf of Ngati Koata, not dated (doc B17), p 11

88. Hilary Mitchell and Maui John Mitchell, 'Te Tai Tapu', report commissioned by the Waitangi Tribunal, 1995 (doc A25), p 80

89. Maui John Mitchell, commentary on video presentation, 3 March 2003 (doc K49), p 5

blocks that the iwi fought hard to prevent a marine reserve being established over the West Whanganui Inlet. If a total ban had been placed on fishing and the gathering of kaimoana, they felt that they may as well have abandoned their land interests there.<sup>90</sup> Thus, the exercise of customary fishing and gathering, and the exercise of kaititakitanga, have substituted in part for lost lands in the maintenance of mana and ahi kaa in a district.

The exercise of customary rights, and the values that those rights express and help to perpetuate, has continued to the present day. However, in his evidence for Ngati Toa, Matiu Rei told us:

While these practices may seem important it is my personal contention that they are fragments or residual expressions of rangatiratanga. They are the remains of our contact with the land and the sea in Te Tau Ihu and they reflect the oppression of subsistence, not the full and undisturbed possession of our lands and fisheries.<sup>91</sup>

We turn next to consider the impact of actions of the Crown on the customary rights and natural resources of the peoples of Te Tau Ihu.

#### **11.4 LOSS OF ACCESS AND CONTROL, AND THE MODIFICATION OF THE ENVIRONMENT, IN THE NINETEENTH CENTURY**

In chapters 5 to 7, we discussed how the ‘waste lands’ approach triumphed in New Zealand over the official recognition of the needs of Maori communities for wide areas of land (for cropping, hunting, fishing, and other resource-uses). Governor Grey’s provision of a large reserve at the Wairau expressly for the Maori customary economy in 1847, Kemp’s reservation of mahinga kai in his deed with Ngai Tahu in 1848; these mid-1840s practices were discontinued in the huge, ill-defined blanket purchases of Te Tau Ihu lands in the 1850s. We noted the Crown’s major concessions in our inquiry in respect of its purchasing and reserve policies. The Crown accepted the nineteenth-century criticism of one of its own officials, Alexander Mackay, that it could easily have provided properly for Maori in making reserves at the time of purchase but did not do so. Counsel noted that the Treaty principle of options had been breached. The Crown acknowledged that it purchased too much land and failed to reserve sufficient for Maori to continue their customary economy or to develop their lands for farming, or (preferably) to do both. Crown counsel accepted that Maori choices in this regard should not have been forced and that the Treaty breaches in its purchases and reserve-making had caused serious prejudice to the Maori people of Te Tau Ihu.

Parties are referred to our findings on these issues in chapters 5 to 7, particularly

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90. Ibid, p 6

91. Matiu Nohorua Te Rei, brief of evidence (no 1) on behalf of Ngati Toa, 9 June 2003 (doc p1), p 10

our findings in section 6.7. We do not intend to reiterate those findings here. For a full understanding of our position, however, this chapter must be read and understood in conjunction with section 6.7. The first and primary Treaty breach, in terms of customary rights to use, manage, and conserve natural resources, was the Crown's 'purchase' of almost the entirety of Te Tau Ihu in the 1850s. The failure to provide for the 'present and future needs' of the iwi when making reserves was part of that Treaty breach. Also, as we outlined in chapter 7, the reserves not only were inadequate but suffered steady attrition in the nineteenth and twentieth centuries. The only large, unpurchased blocks – Taitapu, Wakapuaka, and Rangitoto – were also alienated from iwi, as we explained in chapter 8.

Here, we revisit those issues only to the extent necessary to explore additional points with regard to natural resources and the environment. In this section, we look in more detail at the loss of access to – and control of – natural resources as a result of blanket purchasing and the attrition of reserves. We also examine evidence about the modification of the environment, which happened with the progress of settlement and economic development, and the degree to which the Crown took action to protect Maori interests. We then consider the extent of prejudice suffered by Te Tau Ihu iwi, and the continued operation of customary rights and the traditional economy in the twentieth century, albeit in a truncated form.

From the Crown's perspective, it was assumed that Maori had given up their entire rights within the purchase areas, including all customary interests that had not specifically been reserved to them. This was not the case on the ground, however, as Mackay and other officials soon reported to the Government. The Maori peoples of Te Tau Ihu continued to carry out their customary resource-use and management until actively prevented. As we have previously pointed out, the processes whereby the Crown completed the Waipounamu transactions were deeply flawed. Those flaws were such that the deeds, which were variously worded, cannot be relied upon to sustain the view that the iwi of Te Tau Ihu willingly and knowingly surrendered all customary rights to the natural resources for the areas contained within the blanket purchases. Our views in this respect were in accord with historian Cathy Marr, who prepared a report on those resources.<sup>92</sup> The historical evidence is to the effect that Maori did not understand the deeds that way. From the 1850s to the present day, the iwi of Te Tau Ihu have continued to assert and exercise their customary rights. In practical and legal terms, however, those rights have been circumscribed by the Crown. In particular, they have lost much of their access and control. The extent to which the unceded rights have survived at law is a matter which may be tested by the courts.

As we saw in the last chapter, in the first two decades after 1840 the benefits of European settlement anticipated by Te Tau Ihu Maori were to some extent realised. Not only did local iwi and hapu continue to enjoy almost unrestricted access to their customary lands, rivers,

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92. Marr, 'Crown–Maori Relations', pp 43–44

and coastline, but a new and profitable trade with the settlers was also developed. Maori appeared poised to reap the benefits of both worlds: ongoing access to their customary sites of mahinga kai, kaimoana, and other resources and successful participation in the new colonial economy based on feeding and otherwise supplying provisions to the early settlers. As James Belich has noted, given the extensive nature of early pastoralism, which might often involve no more than 'a few thousand sheep to a hundred thousand acres', the grazing of stock and gathering of mahinga kai on the same land was often possible. Even the spread of sheep, Belich adds, did not automatically mark the end of customary resource gathering.<sup>93</sup> But the enclosure of runs through fencing, the increasing freehold of the land and more intensive settlement, the encouraging of the draining of swamps, and the grazing of stock on more marginal pastoral lands did bring an end to the initial phase of shared land use. In the Te Tau Ihu district, the effects of this shift were beginning to be felt as early as the 1860s, although small pockets of shared land use continued for some time after that.

Te Tau Ihu Maori had long engaged in the barter and exchange of goods within and between their own hapu and iwi and beyond. That persisted into the early colonial era, and although the advent of Europeans also ushered in more direct forms of trade, gift exchanges persisted and sometimes involved Pakeha. The surveyor and explorer Thomas Brunner was witness to one customary exchange in the 1840s. His description of the scene illustrated the great importance of land and sea resources to the continuation of Maori cultural values and displays:

Potato planting is a regular feast among natives here, and all the good things are reserved for and produced on this occasion, the chiefs trying to outdo each other in liberality and profusion . . . There is great taste shown by the natives in the poha, or bag of preserved wekas; and I believe it is always made for a present, for which they expect a return. They very neatly tie the leaves of the raupo, or bulrush, round the poha. It is then placed on a three-legged stool, and mounted with a well and handsomely woven crown, made of feathers of the birds enclosed. The one I saw contained one hundred birds, and was given by Tipia to Ewi, being a present in return for one of moka, or dog-fish.<sup>94</sup>

The exchange of the resources of the interior (birds, eels, and so on) for the marine resources of coastal tribes was a common one. But explorers such as Brunner and Charles Heaphy were themselves almost entirely reliant upon local Maori in their journeys through the more rugged and remote parts of Te Tau Ihu. Indeed, the supposed 'discoveries' of new trails or tracks by such European adventurers often involved little more than being escorted

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93. James Belich, *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Auckland: Allen Lane, 1996), pp 226–227

94. Thomas Brunner, *Journal of An Expedition to Explore the Interior of the Middle Island of New Zealand* (Nelson: Nelson Examiner, 1848), p 54 (Hewitt and Morrow, 'Te Atiawa', pp 28–29)

through existing Maori trails by guides from local hapu intimately familiar with these areas.<sup>95</sup> Albert McLaren, raised by his grandmother in Westport in the 1940s, was told that these trails were ‘the footprints of the ancestors.’<sup>96</sup>

Besides showing explorers the best routes to travel, local Maori caught fish and birds for them and taught basic bushcraft skills about which plants and animals were edible, where they could be found, and how they could be cooked.<sup>97</sup> Pakeha travellers might be sustained off the land during their journeys through the hospitality and local knowledge of different hapu and iwi, but it was precisely the land and its resources which European surveyors and explorers had most often come to assess.

Such journeys would ultimately and, from the Maori perspective at least, perhaps unwittingly lead to the eventual loss of access to resources. But, as Ms Marr suggests, in the early years of European residence in the district, there were features of the New Zealand Company’s Nelson settlement which helped to mitigate or mask the negative effects of land loss. Initial European settlement was ‘characterised by a few coastal townships such as Nelson and a number of small, scattered farming communities such as at the Waimea.’<sup>98</sup> This coastally concentrated yet dispersed settlement pattern was reinforced by the company’s lottery system for choosing sections, along with a relatively high number of absentee land holders. One consequence, Ms Marr suggests, is that, even within the company settlements, Maori remained relatively free to continue to utilise the unoccupied sections.<sup>99</sup>

We noted above that customary harvesting and the gathering of resources could co-exist with a non-intensive form of pastoralism. This was sometimes aided by the fact that Maori made use of areas which were initially of little attraction to the incoming settlers. To the amazement of many European observers, for example, Maori sometimes preferred to plant their cultivations on steep slopes. The New Zealand Company surveyor JW Barnicoat described the practice at one settlement he visited in 1842:

We landed on the first beach after rounding Separation Point. Here we found a hut or two, but no inhabitants . . . One of the gardens of Indian corn was as steep as it was possible to climb – much steeper than a European cultivator would think of using. According to the native mode of loosening the earth [a] little and deserting their gardens after a year or two’s use they are able to occupy these ascents where according to our method of cultivation the soil would all be washed [away] in a winter or two into the valley below.<sup>100</sup>

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95. David Armstrong, ‘Ngati Apa ki te Ra To’, report commissioned by the Ngati Apa ki te Waipounamu Trust Claims Committee, June 1997 (doc A29), pp 45–46

96. Albert McLaren, brief of evidence, pp 11–14

97. Marr, ‘Crown–Maori Relations’, p 21

98. Ibid, p 50

99. Ibid, pp 50–51

100. JW Barnicoat, 30 August 1843, ‘Journal of a Voyage from Gravesend to Nelson, New Zealand, by Ship *Lord Auckland*’ (Hewitt and Morrow, ‘Te Atiawa’, p 20)

Although there were occasional disputes over specific resources, such as that which occurred at Motupipi in October 1842, when local Maori sought to actively obstruct what they considered the unauthorised extraction by Pakeha of coal and lime resources belonging to the hapu (discussed in chapter 4), there was also a degree of mutual accommodation and pragmatic flexibility. One factor that no doubt contributed to this was the extent to which the settlers were reliant upon Maori in the first years. It was not just explorers who relied upon the tribes for their foodstuffs. Te Tau Ihu Maori grew extensive crops of potatoes, kumara, and other vegetables to supply the settlers, as well as catching fish to sell to them, rearing pigs, and supplying building materials, flax, firewood, and many other essential items.<sup>101</sup>

By the end of the 1840s, the Nelson region was producing nearly one-third of New Zealand's crops and local Maori were responsible for the bulk of this output.<sup>102</sup> Given their relatively small population, that was a remarkable achievement, though it was also to be relatively short-lived as the settlers became more established and began to successfully cultivate crops and rear livestock themselves, reducing the demand for Maori produce in the 1850s.

There were other incipient threats to ongoing Maori access to the natural resources of Te Tau Ihu in the 1840s. From the outset, New Zealand Company settlers had commenced modifications to the natural environment, including the construction of a wharf at Nelson in 1841 (followed by several jetties), the draining of some swamps, and the use of small streams for flax and flour mills. On the whole, however, these developments were small in scale and could be accommodated within the framework of a sharing of resources that had been (as we discussed in chapter 4) the basic understanding of Te Tau Ihu Maori as to the nature of their relationship with the newcomers. Indeed, in some respects such developments served to reinforce the notion of a reciprocal relationship, since local hapu and iwi in many cases gained employment assisting with these kinds of works and themselves envisaged longer term benefits arising from the new facilities or environmental changes made.<sup>103</sup> They had themselves welcomed European settlement of the region because of the perceived economic opportunities it was expected to bring, but those opportunities inevitably also involved some sacrifices. It was all a question of finding the right balance.

For the first decade or so that balance clearly worked in favour of Te Tau Ihu Maori. With relatively few settlers and significant pockets of suitable pastoral or agricultural land readily available, estuaries and swamps that were essential sources of food supplies for local hapu were avoided by settlers in favour of better locations. The clearance of bush areas was similarly limited, and the inland lakes and rivers remained almost entirely under the exclusive control and occupation of local Maori. As Ms Marr notes:

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101. Marr, 'Crown-Maori Relations', p 51

102. Ibid, p 52

103. Ibid, pp 53-54

The first decade or more of settlement therefore appeared to confirm Maori expectations of small, scattered European settlements near the coast that provided markets for produce such as potatoes, pigs and flax. In turn the settlers provided sources of sought after goods such as nails, tools, equipment and cloth and new technologies. They did not seriously interfere with the use of waterways or the seasonal exploitation of mahinga kai.<sup>104</sup>

Massive Crown purchasing after 1847 combined with a niggardly approach to reserves from 1853 and the influx of many more settlers, some tempted by the lure of gold and others by the prospect of getting on to the land, brought about the first signs of a more destabilising era of change in which Maori access to natural resources would be eroded.

As we saw in chapter 10, by 1845 the non-Maori population of Te Tau Ihu already outstripped the estimated Maori population. The following two decades witnessed a spectacular increase in the European population, which tripled in the decade after 1849 and more than tripled again between 1858 and 1867. Meanwhile, given a declining Maori population through until the early twentieth century, the result was one in which local Maori were quickly dwarfed as a proportion of the total population of the district, resulting in their economic, political, and social marginalisation. There were further consequences as the huge increase in overall settler numbers resulted in greater pressure on the lands and resources of Te Tau Ihu. With a greater demand for land, Europeans began to push into the interior, while previously thinly scattered blocks of coastal settlement became more intensively settled in larger, contiguous zones. At the same time, the rate and pace of environmental modifications also intensified as settlers cast about for new lands suitable for pastoral and agricultural activities. By 1852, for example, 'the Wood' in Nelson had been entirely cleared, while further deliberate burn-offs or accidental fires had also destroyed large sections of bush elsewhere in the district.<sup>105</sup>

Several large gold rushes, commencing with Collingwood in 1857, brought an influx of miners into the district, and although many moved on in quick time, others became involved in various extractive industries, including coal mining and timber milling.<sup>106</sup> Both would have significant environmental impacts. But it was pastoralism, especially along the eastern seaboard of Marlborough, that was to dominate the colonial economy of the region and have the most significant impact on the ability of Te Tau Ihu iwi to access natural resources as before. In 1851, Nelson and Marlborough together accounted for nearly 40 per cent of the total sheep numbers in New Zealand, and although Canterbury and Otago had pulled ahead of this by the end of the decade, pastoralism remained a dominating feature of the local economy.<sup>107</sup> As noted previously, the more intensive nature of pastoral and

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104. Marr, 'Crown–Maori Relations', p 53

105. Ibid, p 60

106. Ibid

107. Alan Grey, *Aotearoa and New Zealand: A Historical Geography* (Christchurch: Canterbury University Press, 1994), pp 207–208

agricultural activity in the region from the 1850s saw more swamps drained, more rivers exploited for irrigation purposes, more exotic grasslands planted to replace existing bush or indigenous tussocks, and more fences erected to protect stock.

The consequences of these profound changes upon Te Tau Ihu Maori were first reported to the Government in 1863, when James Mackay observed that:

Since the greater portion of the Native lands in the Middle Island have been purchased by the Crown, the Natives have been confined to their reserves. One of the consequences of this, and of being hemmed in by settlers, is that they are now unable to breed or run the pigs which, at one time, formed a large item of their income, and a staple article of their food. The same reason will also prevent them from ever possessing any very large quantity of horned cattle, or sheep.<sup>108</sup>

The inadequacy of their reserves had thus seen Te Tau Ihu Maori almost literally squeezed out of the new colonial economy they had at one time dominated. The fundamental problem, as we saw in chapters 7 and 10, was the complete inadequacy of those reserves. Customary Maori resource use ranged over a wide area of land, with seasonal occupation often timed to maximise the harvesting of particular foods and cultivations shifted regularly to ensure optimum soil conditions. The small and fixed reserves intended to replace this system, though sometimes situated close to rivers in order to enable continued access to fisheries, lacked the flexibility to accommodate environmental changes. As Ms Marr notes:

Maori now had to cope with a number of ramifications: exhaustion of soil through over-cropping small areas, inflexibility of reserves if nearby markets should decline or move, losses of reserve land through flooding and changing of river beds or mouths, polluting of waterways by settlers, and so on.<sup>109</sup>

Alexander Mackay's detailed 1865 report into the various reserves, cited previously, confirmed the inadequacy of these and was littered with descriptions such as 'very indifferent', 'very worthless', 'rough', and 'very useless' to describe a number of the reserves.<sup>110</sup>

Mackay reported in 1872 that Te Tau Ihu Maori now paid little attention to agricultural operations, 'further than to raise a bare sufficiency for their own wants'. This stood in marked contrast to their formerly strong trade in pigs, potatoes, and other produce. Nor had this decline come about as a consequence of a shift in focus to the pastoral activities which now dominated the region. Indeed, as Mackay noted:

They own comparatively very few horses and cattle, and the breeding of pigs, which used to occupy their attention in former years, has fallen into disuse, excepting in a few localities,

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108. J Mackay to Native Secretary, 3 October 1863, *Compendium*, vol 2, p 138

109. Marr, 'Crown-Maori Relations', p 62

110. Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, pp 310-312

chiefly in consequence of their having no room to run them, owing to the gradual settlement of the country by the European population. The same reason will also prevent them from owning any number of sheep.

Since the sale of the bulk of their lands to the Crown, the Natives have been mostly confined to their reserves, which, although large in the aggregate for the number of persons to whom they belong, are small in comparison to the extent of land owned by them in former years, over which they could hunt or fish without hindrance or fear of transgressing some unknown law; now they can hardly keep an animal about them, without its becoming a source of anxiety, lest it involve them in some trouble with their European neighbours. The increase of civilization around them, besides curtailing their liberties, has also compelled the adoption of a different, and to them a more expensive mode of life, which, owing to their improvident habits, they find it very difficult to maintain.<sup>111</sup>

Without the strong market for agricultural goods which had formerly prevailed, and lacking sufficient lands to switch to pastoralism as many settlers had done, Te Tau Ihu Maori had been left in a precarious position, especially as their access to mahinga kai had also been greatly lessened as a consequence of the blanket Crown purchases and subsequent expansion in the areas of European settlement.

The process by which Maori access to mahinga kai and cultivations had steadily been eroded as a consequence of settlement was a theme to which Mackay returned in 1874. On this occasion, he reported to the Government that:

A much larger area is necessary to afford subsistence for a Maori than for a European, owing to the difference in their mode of tillage. The Native system of husbandry is a very exhaustive one to the soil, and so soon as it is worn out it becomes of no further use to them. This forms the chief cause of their impoverished condition. In former years, before the country was occupied by Europeans, they could roam all over it in search of edibles, but now they are hemmed in by civilization, and have no chance of obtaining the necessary supplies should the few acres they cultivate fail to produce a sufficiency. Every year as the settlement of the country progresses, the Natives are necessarily restricted to narrower and narrower limits, until they no longer possess the freedom adapted to their mode of life. The settlers hunt down, for pastime or other purposes, the birds which constituted their food, or, for purposes of improvement, drain the swamps and watercourses from which they obtained their supplies of fish; their ordinary subsistence failing them, and lacking the energy or ability to supplement their means of livelihood by labour, they lead a life of misery and semi-starvation.<sup>112</sup>

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111. Alexander Mackay, 'Report on the Condition of the Natives in the Provinces of Nelson and Marlborough and the County of Westland', AJHR, 1872, F-3, pp 17-18

112. Alexander Mackay to under-secretary, Native Department, 24 June 1874, AJHR, 1874, G-2C, p 2

If, in the 1840s, Te Tau Ihu Maori might almost be said to have had the best of both worlds, by the 1870s they had the worst of each, 'shut out of effective participation in new economic opportunities, and severely limited in their ability to continue with traditional practices.'<sup>113</sup>

Many Te Tau Ihu Maori had no alternative but to continue to try to live off the land and sea resources they were able to access as best as they could, both for subsistence purposes and as a key to the survival of cultural practices and knowledge systems that remained too vital to tribal identity to ever be lightly abandoned.<sup>114</sup> Their attempts to continue to harvest and gather the resources of the land and waterways came headlong against increasing Crown assertions of authority and control over foreshores, inland waterways, areas of scenic interest, and other sites. They also ran up against the delegation of control over many areas of interest to a number of local government and other agencies.

Mackay again highlighted this point with respect to the impact of one such authority when he observed in 1881 that:

A matter that has inflicted a serious injury on the Natives of late years, and for the most part ruined the value of the fishery easements granted by the Native Land Court, is the action of the Acclimatization societies in stocking many of the streams and lakes with imported fish. These fish are protected by special legislation, consequently the Natives are debarred from using nets for catching the whitebait in season, [n]or can they catch eels or other Native fish in these streams for fear of transgressing the law. They complain that, although they have a close season for eels, the Europeans catch them all the year round. In olden times the Natives had control of these matters, but the advent of the Europeans and the settlement of the country changed this state of affairs and destroyed the protection that formerly existed, consequently their *mahinga kai* (food-producing places) are rendered more worthless every year, and, in addition to this, on going fishing or bird-catching, they are frequently ordered off by the settlers if they happen to have no reserve in the locality. This state of affairs, combined with the injury done to their fisheries by the drainage of the country, inflicts a heavy loss on them annually and plunges them further into debt, or keeps them in a state of privation. All this is very harassing to a people who not long since owned the whole of the territory now occupied by another race, and it is not surprising that discontent prevails, or that progress or prosperity is impossible.<sup>115</sup>

In some few cases, it would appear that sympathetic farmers allowed Maori continuing access to their properties in order to practise customary harvesting so long as this did not unduly interfere with other operations on the farm. (Also, as we shall see later, Maori did not always ask permission or see the necessity to obey private 'owners'.) Often, the ownership of

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113. Marr, 'Crown-Maori Relations', p 66

114. Ibid; Hewitt and Morrow, 'Te Atiawa', pp 60-61

115. Alexander Mackay to under-secretary, Native Department, 6 May 1881, AJHR, 1881, G-8, p 16

a reserve in the locality was seen as sufficient licence to hunt or fish nearby. Officials such as Mackay also appeared to tolerate the exercise of customary rights on Crown land, since Maori exercised those rights openly and with the knowledge of officials, without rebuke or action to prevent them. However, officials remained resistant to any suggestions that Maori mahinga kai or other practices might be linked to ongoing customary claims to the ownership of the lands or waterways of Te Tau Ihu. As we saw in chapter 6, Mackay himself roundly rejected such a proposition in his inquiry into Maori claims there in 1874. Moreover, while Maori might be allowed access to go fishing on a farmer's property, the control over fish stocks previously exercised by local iwi and hapu had been usurped by acclimatisation societies, which were clothed with legal powers and Government backing. It was thus a question not just of lost rights of access or ownership but, at a more fundamental level, of the loss of tino rangatiratanga (authority) over the natural resources.

In 1883, some Te Tau Ihu iwi suffered further loss of access with the alienation of Taitapu and the granting of Wakapuaka into the sole ownership of Huria Matenga (and the assumption of control by her husband). These were the last two comparatively large pieces of land owned by Maori on the mainland. Taitapu had been valuable for its rich and extensive forest, flax, and fishing spots. To an extent, Maori had already been separated from the estate by its use as a goldfield, but after its sale thousands of hectares of native bush were felled, either as timber for farming and mining or for export. Beef farming was also developed in the area. Bush in other parts of the block survived because it was too scattered and access was too difficult for logging to be economical. After the sale, Riwai Turangapeke's successors still had two small pieces of land nearby, which served as a basis for access to resources in West Whanganui Inlet and the surrounding lands. In particular, the rich fishing resource survived intact and could be accessed from these lands. Ngati Tama and Te Atiawa had none, though, and they were, in the evidence of Dr and Mrs Mitchell, cut off from their former resources.<sup>116</sup>

In chapter 8, we discussed how Ngati Tama and others were evicted from Wakapuaka. In his evidence for Ngati Tama, Selwyn Katene noted that this dispossessed them not merely of their homes but also of their 'sustaining resources, including mahinga kai, birding, cultivation, gathering and fisheries resources'.<sup>117</sup> This was no small loss.

Nor was this loss (and those like it) confined to the immediate occupants of the land. Patricia Tupaea of Ngati Koata told us that the Wakapuaka court decision caused lasting bitterness and interrupted the cycle of relationships between iwi. Her people had gone regularly to Wakapuaka with kete of kaimoana and had come away with kete of kumara, but that all stopped. Although there were unusually bitter circumstances in this case, Mrs Tupaea explained that it was emblematic of how the ever-contracting land base affected all the iwi

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116. Mitchell and Mitchell, 'Te Tai Tapu', pp 80, 102–104, 115

117. Selwyn Katene, brief of evidence on behalf of Ngati Tama, February 2003 (doc K24), p 53

of Te Tau Ihu. An integral part of the Maori customary way of life, she explained, was the way in which relationships were nurtured and maintained. This included the use of wide-spread resources by 'the custom of taking gifts of kai and other koha' to the resource areas of one's relations and coming away with the resources of that place.<sup>118</sup>

There were key people and rangatira whose task it was to ensure that social and economic links were maintained, but the loss of land made it extremely difficult to survive in this way.<sup>119</sup> Mrs Tupaea said:

We had contact with other iwi and could make customary arrangements for access to their people and resources according to our customs and lore. It was and is a way of life sacred to us – that of [relationships with] other hapu and iwi. Their losses [of land] have affected us just as ours have affected them. That is a source of roimata [tears] for all of us.<sup>120</sup>

In 1884, the year after the loss of Taitapu in the west and Wakapuaka in the north, the Ngati Kuia people (who were confined to their tiny reserves in Marlborough) petitioned the Crown. As we discussed in chapter 7, the petition pointed out their landlessness and extreme poverty. Alexander Mackay was consulted by the Native Affairs Committee, once again drawing attention to a key dilemma for the Te Tau Ihu tribes: since 'their requirements are much greater than in former days, and the possibility of gaining a livelihood being much less, owing to their food supplies being cut off, or considerably interfered with by the occupation of the surrounding lands by the Europeans', he stated that 'it would be a considerate act towards these people if an additional area could be allotted them.'<sup>121</sup>

The parliamentary committee accepted Mackay's advice and reported:

That the Government be recommended to take into early consideration the position of the petitioners, the Committee believing their land is insufficient for their reasonable wants, and that a moderate provision for them should be made. It seems that the original grant amounted only to about 6½ acres per head, which was sufficient so long as the Natives had the run of the neighbouring unoccupied lands. The lands are now hemmed in by European occupiers, and they are thus confined absolutely to their own holdings. Their land also is subject to destructive floods, to their very great loss, and necessitating special help from the Commissioner [of Native Reserves]. Probably legislation may be needed to enable Government to carry out the recommendation here made.<sup>122</sup>

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118. Tupaea, brief of evidence on behalf of Ngati Koata, paras 29, 35–38

119. Ibid, paras 35–38

120. Ibid, paras 37–38

121. Alexander Mackay to under-secretary, Native Department, 20 September 1884 (David Alexander, 'Landless Natives Reserves in Nelson and Marlborough', report commissioned by the Crown Forestry Rental Trust, 1999 (doc A54), pp 14–15)

122. 'Report on Petition 32/1884 of Te One Hiporite and 20 Others', 28 October 1884 (Alexander, 'Landless Natives Reserves', p 15)

Further inquiry was held into the landlessness of Marlborough Maori and Commissioner Mackay again published findings on this issue in 1887:

They [Marlborough tribes] did not feel so much the want of an increased area in the early days while the country was only sparsely populated by the Europeans; but, as they are now hemmed in on all sides, and their requirements are much greater than in former times owing to their food supplies being cut off or considerably interfered with, they now find that the land set apart for them, for the reasons stated as well as other causes, is inadequate for their wants.<sup>123</sup>

It would be fair to say, therefore, that this issue was before the Government frequently in the 1870s and 1880s. As we saw in chapter 7, the process to create the eventual 'landless natives reserves' was slow, time-consuming, and ultimately ineffective. Nonetheless, it (in conjunction with the Ngai Tahu claims) kept this issue before the Government for the rest of the nineteenth century. In 1891, Mackay's royal commission reminded Parliament of the instructions from Lord Normanby and Earl Grey, discussed at length in chapters 5 and 6:

The principles enunciated by the Imperial authorities for the acquisition of the wilderness land of the Maoris were that, while on the one hand, the appropriation of tracts of land capable of supporting a large population was not to be stayed because an inconsiderable number of Natives had been accustomed to derive some portion of their subsistence from hunting and fishing on them; *on the other hand, the settlement of such lands would not have been allowed to deprive the Natives of these resources, without providing for them in some other way advantages fully equal to these they might lose* [Earl Grey]; and, furthermore, that all dealings with the Maoris for these lands must be conducted on the same principles of sincerity, justice, and good faith as must govern transactions with them for the recognition of Her Majesty's sovereignty of New Zealand, and that the Natives must not be *permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves, nor must they be required to cede any territory the retention of which by them would be essential or highly conducive to their comfort, safety, or subsistence* [Normanby]. [Emphasis in original.]<sup>124</sup>

Mackay concluded:

A great deal more could be said on this subject, but the foregoing quotations will probably suffice to show the views held by the Imperial Government as to the course that should be pursued in acquiring land from the Natives; but a perusal of the circumstances connected

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123. Alexander Mackay, 'Report on Native Land Claims in Marlborough', 9 May 1887 (Dr Grant Phillipson, *The Northern South Island: Part 2*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc A27), p 29)

124. 'Middle Island Native Claims: Further Reports by Mr Commissioner Mackay Relating Thereto', AJHR, 1891, G-7, p 4

with the acquisition of territory from the Natives in the South Island will indisputably prove that none of these principles were observed.<sup>125</sup>

Nor was Governor Grey forgotten: Mackay quoted at length from Grey's April 1847 dispatch, which we have cited in chapter 5, to the effect that Maori required sufficient lands for moving their crops, gathering fern roots, fishing, eeling, catching birds, hunting wild pigs, and 'such like pursuits', to deprive them of which would be to 'cut them off from some of the most important means of subsistence'. He also quoted other statements from Grey to similar effect.<sup>126</sup>

Mackay had made similar comments in his report on Ngai Tahu claims in 1888, reminding Parliament of Normanby's instructions and Governor Grey's statements about the need to reserve mahinga kai.<sup>127</sup> In that report, however, Commissioner Mackay found against Ngai Tahu's interpretation of the 1848 reservation of their mahinga kai, stating that, although it was how they understood the arrangement, the Government could never have intended to reserve a right for them to hunt and fish anywhere at will. In 1868, the Native Land Court had accepted that Ngai Tahu were entitled to the reservation of all cultivations, pipi-grounds, eel weirs, and fisheries under the terms of the deed but did not accept that it had also reserved all 'hunting-grounds and similar things'. This was not a decision derived from Maori custom but rather an application by the court of the waste lands doctrine (see ch 5). It argued that hunting grounds 'were never made property in the sense of appropriation by labour'.<sup>128</sup> Mackay commented:

The Maori view of the phrase is that it includes, besides their cultivations, the right of fishing, catching birds and rats, procuring berries and fern-root, over any portion of the lands within the [Kemp] block. Under this interpretation they would be entitled to roam at will over the whole country – a state of affairs that could not have been contemplated.<sup>129</sup>

So what, in Mackay's view, could the Government do to provide for its 1848 promise in the circumstances of the late nineteenth century? Fundamentally, the commissioner returned to the principles of Earl Grey, Normanby, and Governor Grey, as he understood them. The Government should provide enough land for Maori to genuinely prosper and to access their traditional food supplies, or to render these supplies unnecessary. He thought a reserve in the range of 150,000 acres might be sufficient, with the lion's share to be used for endowment purposes.<sup>130</sup>

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125. Ibid

126. 'Middle Island Native Claims: Report by Mr Commissioner Mackay Relating To', AJHR, 1891, G-7A, p 2

127. 'Report on Middle Island Native Land Question, by Mr Commissioner Mackay', AJHR, 1888, G-1, pp 4-5

128. Ibid, p 2

129. 'Report on Middle Island Native Land Question, by Mr Commissioner Mackay', AJHR, 1888, G-1, p 2

130. Ibid, pp 2-13

The matter of mahinga kai was considered in detail for Ngai Tahu because of Kemp's promise in the 1848 deed. As we have noted, Governor Grey's intentions to reserve a sufficiency for hunting, fishing, gathering, and cropping were not given the same official status in the Wairau deed, nor were they carried through to the Waipounamu purchase. Thus, although Te Tau Ihu iwi had the same view that their customary rights of hunting, fishing, and gathering had not been alienated, this received no attention from Mackay (other than his acceptance that that was how they survived, despite their inadequate reserves until settlement 'hemmed them in').

More official concern was therefore paid to the situation of Ngai Tahu, but many of Mackay's observations clearly applied to the whole of the South Island. When he reported, for example, that the advance of settlement was destroying the birds that Maori relied on for food, as well as the fish that once flourished in the drained swamps, lagoons, and lakes, this was obviously true for the whole island.

In chapter 7, we described the creation of the landless natives reserves and concluded that some proposed reserves were never allocated, and – of those that were eventually secured to Maori – they were in remote areas, unsuitable for farming or for making any kind of living. Thus, as a means of making good on the Crown's obligation to provide land for farming or economic utility, the reserves were entirely inadequate. We note here, however, that there was one positive outcome from the reserves that were actually created (and where Maori were able to get to them and retain ownership of them). They provided access to mahinga kai, so long as their owners had the means to get to them. Thus, Ngati Kuia and others have clung to tiny interests in remote pieces of land for as long as possible as a means of access to fishing, hunting, forest products, and kaimoana. Raymond Smith, for example, explained how his whanau lived an isolated existence on SILNA land at Port Gore. Having one whanau there served as a base for others to visit and access their own land and the resources of the area.<sup>131</sup> This included valued fisheries. Similarly, efforts to farm land at Te Mapou and Raetihi failed, but these sections could still be used for hunting.<sup>132</sup> Thus, the landless natives reserves did provide some additional access to mahinga kai.

So what does this evidence show? In the 1870s, 1880s, and 1890s, the Government's attention was drawn to the following facts. Te Tau Ihu Maori had too little land and were living in poverty, despite the fact that their needs could and should have been provided for at the time of purchase. Their requirement of large tracts of land, for the practice of shifting agriculture, the gathering of forest products, the hunting of birds and wild pigs, fishing, and the development of pastoral farming, was known and ought to have been provided for at the time of purchase. With insufficient land for farming, Te Tau Ihu Maori continued to

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131. R Smith, brief of evidence, p 4

132. Alexander, 'Landless Natives Reserves', p 186

range across Te Tau Ihu, camping to hunt, gather, and fish as they had always done. Their ability to do so was being curtailed as settlers took up and occupied the 'sold' lands, which Maori had continued to use in the meantime. It was also being significantly affected by the draining of waterways, including swamps and lagoons. It was being damaged too by other environmental modifications, including river works and the 'acclimatisation' of new species (especially fish). The bird and freshwater fish populations of the South Island were being decimated by settlement, to the detriment of those Maori dependent on them for survival. All this was known to the Government.

Its solution – the landless natives reserves – proved entirely inadequate as an economic remedy but did give some additional access to mahinga kai (for Marlborough iwi only). The Government, in Mackay's evidence, accepted Maori hunting, fishing, and camping on Crown land in practice until it could be on-sold to settlers but denied that this arose from any surviving Maori rights. As a result, when title was passed to settlers Maori access to particular and valued mahinga kai was not provided for by easements or other means available in British law. This precaution could have been taken at the time, as per some of the fisheries easements secured for Ngai Tahu in the Native Land Court. Of course, as Mackay noted, such easements did not prevent landowners from draining waterways and destroying fisheries. In the Ngai Tahu Tribunal's view, it is still possible to provide such legal protections for access to Crown land today.<sup>133</sup>

We turn next to a survey of the Maori customary economy in Te Tau Ihu in the early twentieth century, tracing the prejudicial effects of the Crown's failure to protect the interests of Maori in their customary resources or to remedy its nineteenth-century Treaty breaches. What had Maori lost and how were they able to survive?

### 11.5 THE MAORI TRIBAL ECONOMY AND SOCIETY IN THE TWENTIETH CENTURY

As we described in chapter 10, many Te Tau Ihu Maori had to leave their rohe in search of work, because of landlessness and the unavailability of regular employment opportunities in Nelson and Marlborough. The remainder survived largely by seasonal work but it was a cash-poor economy. If they stayed on their turangawaewae, their ancestral lands and waters, then the whanau had to be fed from the produce of sea and land. The sea in particular, with its kai ika and its kaimoana, provided the staples of the Maori diet for much of the twentieth century. We heard detailed evidence from many tangata whenua describing the cultural, social, and economic dimensions of their lives in that century. Naturally, their focus was on

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<sup>133</sup>. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 3, p918

the minority who managed to stay living in Te Tau Ihu, as they were the core remnants who maintained *ahi kaa* for all the others. They adapted to their changing situation and environment, continuing the traditional Maori economy in a truncated form as circumstances allowed. Some changes were freely chosen, others were forced on the *iwi* by factors outside their control. These included some of the longer term consequences of nineteenth-century Treaty breaches.

As the Crown conceded, it had failed to permit the retention of (or of access to) sufficient resources for Maori to maintain their customary economy. The consequences continued to work themselves out in the twentieth century. There were further changes and modifications to cope with as well: the draining or alteration of waterways, the clearance of forests, and industrial development – all continued apace. Also, as we found in chapter 7, access was reduced even further by the continuing alienation of reserves. Maori dependence on the less-modified coast and sea fishing increased as a result. For much of the century, there was a fundamental clash of values over the coast. Estuaries, mudflats, and their shellfish were not valued by the settlers who controlled local bodies. They became the prime locations for rubbish dumps, sewage outlets, and reclamations. A change in local tastes, as well as export opportunities, saw a dramatic change from the 1960s on. Suddenly, Pakeha wanted shellfish for consumption and export. At the same time, a truly dramatic upsurge in all parts of the fishing industry, including commercial and recreational fishing and marine farming, had a drastic impact on the *kai ika* and *kaimoana* that was sustaining the Maori people of Te Tau Ihu in both economic and cultural terms. The stage was set for a dramatic showdown in the 1980s and 1990s.

In sections 11.5.1 and 11.5.2, we outline evidence and issues regarding the Maori tribal economy and society as it operated in Te Tau Ihu in the twentieth century. These sections form part of the basis for our findings on prejudice in section 11.8. In section 11.5.3, we explore the extensive evidence that we received about the loss of access to – and control of – customary resources. In particular, we examine the loss of access that occurred from the continuing attrition of reserves in the twentieth century. We also consider the Crown's regulation and management of resources, its delegation of authority to settler-dominated local boards, and the question of whether Maori interests received the Crown's active protection. We look at conflicting views of who 'owns' the resources and discuss the continuous exercise of customary rights and authority by Te Tau Ihu *iwi*, insofar as circumstances have permitted. In section 11.5.4, we assess issues regarding the single-most important resource, the claimants' customary fisheries. Finally, in section 11.5.5, we examine the claims of Ngati Koata and Ngati Kuia with respect to seabirds and the exercise of customary rights on island sanctuaries. We then turn, in section 11.6, to the modern resource management regime.

### 11.5.1 The contraction of the Maori economic and cultural base: the prejudicial effects of nineteenth-century Treaty breaches?

For the Maori people of Te Tau Ihu, the main impact of nineteenth-century changes was inland, with the clearance of land for pastoral farming and the draining or alteration of swamps, rivers, and streams. As a result, some valued species had disappeared altogether by the beginning of the twentieth century. The claimants gave us the example of the upokororo (grayling), which appears to have been drastically affected by the stocking of rivers with sporting fish. In his evidence for Te Atiawa, Dean Walker stated: 'Exotic fish such as trout were introduced and shortly after the upokororo ceased to be.'<sup>134</sup> Michael Park also referred to the fact that his ancestors used to catch upokororo in the Motueka River but that the effects of settlement on the river have rendered it extinct.<sup>135</sup> This matches the observations of scientists. The Maitai River, for example, remained a valued source of eels in the twentieth century. In 1870, James Hector had also described shoals of upokororo, a 'highly esteemed' food species, in the river.<sup>136</sup> But a scientist from the Marine Department noted in 1949 that the upokororo underwent a dramatic decline and virtually disappeared from the river in the 1870s as a result of the introduction of trout.<sup>137</sup>

Similarly, the kokopu ('native trout') could rarely be found by the 1940s. Joe Mason, in his evidence for Ngati Kuia, explained how it was caught occasionally in the quiet waters of creeks in the upper reaches of Anakoha: 'This was a special treat because of the esteem and rarity of this food source.'<sup>138</sup>

We note also that the wish to protect their oyster beds from over-fishing and destruction was one of the key goals of a petition from Ngati Koata in 1903. The tribe wanted to exclude commercial fishing by outsiders, keeping the waters of Rangitoto and French Pass for the local iwi and their resident European neighbours. Most at risk, as they warned the Government, were their oysters: 'And within these seas there are edible sea products other than the fish; (there are) Oysters, Mussels, Pauas, Pipis, and Kinas: the thing most largely worked by the Europeans is the Oyster; therefore we also derive benefit from these things.'<sup>139</sup> The Government did not grant Ngati Koata's request, as we will discuss below.

In their oral evidence to this Tribunal, none of the Ngati Koata witnesses who grew up in the 1930s and 1940s recalled eating oysters as part of their kaimoana.<sup>140</sup> The only Ngati

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134. Walker, brief of evidence, p 10

135. M Park, brief of evidence, p 13

136. J Hector, 'On the Salmonidae of New Zealand', 25 June 1870, *Transactions of the New Zealand Institute*, vol 3, 1870, pp 134-135

137. K Radway Allen, 'The New Zealand Grayling - A Vanishing Species', *Tuatara*, vol 2, no 1 (March 1949), pp 23, 25-26

138. Waihaere Joe Mason, brief of evidence on behalf of Ngati Kuia, 21 March 2003 (doc L10), p 12

139. 'Petition of Rewi Maaka and 29 Others', 15 September 1903 (Mitchell and Mitchell, 'Customary Fishing', p 63)

140. See the briefs of evidence from Ngati Koata witnesses (in the B series) and also the transcript of the Ngati Koata hearing, transcript 4.3.

Koata witness to mention oysters at all was James Elkington, who referred to eating some that had been specially planted on the banks of Greville Harbour.<sup>141</sup> Similarly, they were not mentioned by any of the Rangitoto respondents in Dr and Mrs Mitchell's study, other than one reference to Pacific oysters being now available in a lot of places.<sup>142</sup> It appears, therefore, that the fears expressed in the petition of 1903 had come true soon after, at least as far as the traditional oyster fishery was concerned. Thus, while customary food continued to sustain the tribe, some vital components of it had disappeared or were very hard to obtain.

In terms of fisheries, it seems that the main impact was either on certain species, as with the upokororo or Ngati Koata's oysters, or on certain valued fishing places. Examples of the latter include various streams that dried up as a result of river works. Michael Park explained that the Motueka River was a highly valued fishery, harvested for inanga, kokopu, tuna (eels), and upokororo. It was also a valuable means of transport, allowing mobility to gather kai upstream and to transport materials for use or trade. Smaller streams and channels to the west of the river ran past Te Atiawa kainga, bringing water and kai 'right to our front door'.<sup>143</sup> But in the late 1880s, the local government altered the course of the river and these streams dried up. Mr Park told us that Te Atiawa lost both their fisheries and their fresh water for their domestic use (including their now vital vegetable gardens). Change continued in the twentieth century. The Motueka and Riwaka Rivers still run to the sea, as they have always done, but their wairua and water quality have been compromised. Pollution, agricultural runoff, and exotic forestry have all harmed these rivers, and the privatising of riparian lands has restricted access to them for fishing. The upokororo have become extinct, and it is now 'difficult to get a feed of eel or whitebait'.<sup>144</sup>

On the whole, however, the tangata whenua's evidence is to the effect that they continued to obtain a sufficient supply of two freshwater staples, eels and inanga (whitebait), for much of the twentieth century. All witnesses agreed on this point. Swamps were drained, rivers were modified, trout were introduced, and the ability to fish in certain places or ways was restricted. We will consider this further below, when we explore the various complaints that were made to the Crown. Nonetheless, the people were able to get their freshwater kai in sufficient quantities for survival, for the meeting of customary obligations (hui, tangi, and gift-exchange), and for the transmission of the all-important traditional knowledge and tikanga to succeeding generations. This remained the case until the 1960s, after which a dramatic change took place. Similarly, the tangata whenua evidence shows that sea fishing and the gathering of kaimoana was sufficient for the needs of those Te Tau Ihu people who were able to stay on their ancestral lands. Indeed, the coastal food sources became the mainstay of their physical survival. Such resources were not significantly reduced by settlement

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141. J Elkington, brief of evidence for Wai 262, para 39

142. Mitchell and Mitchell, 'Customary Fishing', tbl 6.4

143. M Park, brief of evidence, p 12

144. Ibid, p 13

until the second half of the century. Again, however, there were important site-specific and species-specific exceptions.

For Maori, the real impact for much of the century, it seems, was not on the fisheries but on the lands and forests. The oral evidence shows that the collecting of berries and other fruit from the forests, as an important part of physical survival, continued only where there was bush large and close enough to sustain such gathering. It was a regular part of the diet on Rangitoto, for example, but not elsewhere in Te Tau Ihu by the 1930s. Even so, forest products remained a valued food resource to the people. Ngati Kuia fought hard for the right to take karaka berries (as well as seabirds and fish) from the island sanctuaries (see sec 11.5.5). But, on the mainland, the practice was limited by deforestation, which increased the dependence on the surviving fish and kaimoana stocks. Although customary foods remained the key to survival in a cash-poor economy, the range and extent of those foods had undergone a significant contraction.

In the nineteenth century, the iwi of Te Tau Ihu depended on their forests to meet a range of economic, social, and cultural needs. In terms of the economy, the various plants provided food, both for the people and for the birds, which in their turn were vital to economic and cultural needs. As well as providing a range of fruits and the staple fern root, plants were important sources of building and manufacturing materials and of medicines for Maori health practices (rongoa). The weaving of forest products for clothing, floor mats, implements, and decorative arts was important for survival, for cultural exchanges between iwi, and for the mana displayed in marae buildings and decoration. These needs did not disappear with the rich forest habitat, which sustained many species of trees and plants, as well as the forest birds. Depending on time and transport, Maori ranged far and wide across Te Tau Ihu to obtain dwindling resources in the early to mid twentieth century. As Patricia Tupaea, who grew up in the 1930s, told us:

When we were living on Rangitoto and Nelson we used to get everything we needed to survive from around us – our food, our rongoa and our flax to make things with. We didn't just use the resources immediately around where we were living at the time, we used to make trips all around Te Tau Ihu to gather what we needed.<sup>145</sup>

Some resources, however, were simply gone or very scarce. Even on Rangitoto, the tawhara (fruit of the kiekie) was scarce. Patricia Tupaea explained that it was still a common food there for her grandmother's generation.<sup>146</sup> Alfred Elkington, however, who grew up on the island in the 1930s, told us: 'In my time there were very few places left to go to get them. The only place to get them was the Pakeha property – but they let us get them, and their children would tell us when they were ready to eat.'<sup>147</sup>

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145. Tupaea, brief of evidence on behalf of Ngati Koata, para 57

146. Puhanga Patricia Tupaea, brief of evidence for Wai 262, 1999 (doc B15, attachment A), para 62

147. Alfred Madsen Elkington, brief of evidence for Wai 262, 1999 (doc B31, attachment A), p 12

Priscilla Paul told us that she believes the tawhara has now gone completely from the Ngati Koata rohe.<sup>148</sup> It is still highly prized. Ngati Kuia hunting expeditions, in search of wild pork and deer, would always search for it in April and May.<sup>149</sup>

Karaka berries are also strongly valued. Kath Hemi told us how these berries were a special food for manaakitanga at Omaka Marae.<sup>150</sup> Tiemi Waaka told us of the karaka trees at Port Gore and Okoha, which are known as 'Te Karaka o Kupe' because the famed Maori explorer is believed to have planted them. Some of those trees still survive and are carefully guarded.<sup>151</sup> Waihaere (Joe) Mason grew up at Ruapaka in the 1940s and 1950s:

Uncle Emerson Mason would bring the occasional bag of karaka berries for us from Anakoha. We soaked the berries for about three weeks in the creek before drying. They have a strong, slightly bitter, nutty flavour. Our main berry-bearing tree is still there but is dying.<sup>152</sup>

The home vegetable gardens spoken of by many of the claimants may well have provided an effective substitute for the fruits of the forest, at least in terms of food supplies. June Robinson told us:

Traditionally the Mahuika whanau are known and have been written about for their gardens. My grandfather Hoani the 2nd was no exception. Gardening was a necessity of life, but they also enjoyed it. That is something that the elders in the whanau took responsibility for; they were known for it in the Kawatiri. It was passed on generation after generation . . .<sup>153</sup>

These kinds of home gardens were incorporated in the customary way of life. Te Maata Gilbert told us that his grandfather was a tohunga with a strict tikanga for gardening: 'We do that today – following the way he planted and gave back the first of the crops to Papatuanuku.'<sup>154</sup> Tiemi Waaka, who grew up at Okoha in Pelorus Sound in the 1930s, explained that all the families had maara (gardens) and that they were worked communally. The gardens covered about four or five acres and included fruit trees planted by their Pakeha ancestors.<sup>155</sup>

Garden vegetables could be supplemented by those wild greens that were still commonly available. The key issue was one of access, which we will consider further below. Paul Morgan described how his grandmother and her whanau were able to survive on a small farm of 15 to 18 acres at Motueka in the 1920s and 1930s. 'Although they had a bit of land of

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148. Paul, brief of evidence for Wai 262, pp 17–18

149. W Mason, brief of evidence, p 10

150. Hemi, brief of evidence for Wai 262

151. Tiemi Waaka, brief of evidence on behalf of Ngati Kuia, 26 March 2003 (doc L6), p 6

152. W Mason, brief of evidence, p 10

153. Robinson, brief of evidence, p 8

154. Te Mataa Hineone Mokena-Gilbert, brief of evidence on behalf of Ngati Tama, 2003 (doc K28), p 6

155. Waaka, brief of evidence, p 3

their own, generally they were poor.<sup>156</sup> But in those days, ‘you could live out of your garden and there was still strong mahinga kai in terms of puha, watercress and seafood. Aside from basics like flour, tea and sugar, our families survived [with] little need of the grocery store.’<sup>157</sup> The grocery bill would be paid when a cheque arrived from the Nelson tenths.

Amoroa Luke of Ngati Rarua, who grew up at Wairau Pa in the 1940s and 1950s, told us:

We always had vegetables, and not only us, everybody. And everybody shared with each other. What we didn’t have in our garden we got from our relations in the Pa. If there were any shortages in the garden, then there was things like puha, watercress, pohata (wild turnip tops) and fern roots. Those things were always plentiful. We didn’t really go hungry, especially the children and the men. The women made sure that those people were fed first, that was the custom.<sup>158</sup>

Vegetable gardens could not, however, substitute for rongoa in the same way that they could substitute for the gathering of kai. Nor could they sustain the spiritual relationship with Tane and his children, so valued by our witnesses’ elders as they were growing up.<sup>159</sup>

Even so, the claimants did their best to replace the old way of cultivating – cropping next to or in the forests and wetlands, interspersing vegetable crops with others like harakeke, and moving on after a few years – with the new-style homestead gardens. Vegetables were crucial, but some whanau also tried to cultivate harakeke and species valued for rongoa. Judith Billens explained that Te Atiawa brought several species of flax with them from Taranaki and that her grandmother was active in planting these all over the Takaka district, as well as cultivating them in domestic gardens. These flax plots are still maintained in various whanau gardens today.<sup>160</sup>

New species were adapted and incorporated into rongoa – Wiremu Stafford, for example, told us how onion juice was used to treat earache.<sup>161</sup> In the absence of accessible forest, the kinds of herbs and plants that could be grown in gardens became the mainstay of rongoa. At Te Hora, Ngati Kuia planted koromiko trees and had ‘a garden of medicinal native plants in the hills at the back of Te Hora Pa.’<sup>162</sup> On Rangitoto, there was still bush for gathering rongoa in the traditional way. In Janice Manson’s evidence, there was also enough bush at Pariwhakaoho in the 1950s for her father to teach her the uses of the edible and medicinal plants.<sup>163</sup>

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156. Morgan, brief of evidence, p 5

157. Ibid

158. Amoroa Luke, brief of evidence (no 2) on behalf of Ngati Rarua, 11 August 2000 (doc A89), p 4

159. See, for example, Paul, brief of evidence for Wai 262, p 18; A Elkington, brief of evidence for Wai 262, pp 14–16; Mark Moses, brief of evidence on behalf of Ngati Kuia, 25 March 2003 (doc L5), p 29

160. Judith Merenako Billens, brief of evidence on behalf of Te Atiawa, 2002 (doc G10), pp 4–5

161. Wiremu Tapata Stafford, brief of evidence on behalf of Ngati Rarua, 11 August 2000 (doc A85), p 14

162. Tom Wilson, brief of evidence on behalf of Ngati Kuia, 21 March 2003 (doc L11), p 8

163. Janice Manson, oral evidence, 3 March 1999 (Leanne Manson, brief of evidence on behalf of Ngati Tama, 28 February 2003 (doc K39), p 6)

Small reserves in isolated areas provided this kind of opportunity for those with surviving land interests. Oriwa Solomon, who grew up at Takapuwahia, described how generations of his whanau learnt to live off the bush when they stayed in their whare at Whangarae (Croisilles).<sup>164</sup> Not so at Wairau Pa by the 1920s. Wiremu Stafford explained: 'Maori medicine was not really available because there were no native trees in the area. The nearest bush was about 10 miles away in the Pukaka Valley, so it was a matter of using leaves and plants around the garden.'<sup>165</sup>

For most of the Maori people of Te Tau Ihu, the forests no longer provided for their economic or cultural needs in the twentieth century. This was particularly so because the dramatic decline in bird populations resulted in restrictions on hunting. Not only were the birds' habitat and food supply disappearing, but the remnant populations were protected by legislation from hunting. There were already restrictions on taking some native birds by the end of the nineteenth century, and this was extended by legislation in the 1920s (making kereru absolutely protected, for example) and was consolidated in the Wildlife Act of 1953.<sup>166</sup>

The large part that birds played in the traditional economy was interrupted early by settlement, land clearance, pests (such as Norway rats), and other factors. Michael Park explained the consequences for Te Atiawa in the Motueka district. There were, he told us, a series of raised beach ridges along the Motueka foreshore. Harakeke, pingao, and manuka grew there, providing shelter for large cultivations. Small raupo-lined streams from the swamp forests supported whitebait and eels. Kiwi and weka fed on the ground. Tui, kereru, kaka, and other birds visited seasonally. Te Atiawa harvested, ate, and preserved these birds and used their feathers for korowai. Now, most of the land is in private ownership and very little of the original vegetation and wildlife remains – the birds have all but disappeared, having made way for residential subdivision, farms, and exotic forestry.<sup>167</sup>

There were two important areas of lowland forest at Motueka, with smaller areas around Riwaka. Today, the trees and birds are gone, as are the forest islands that used to function as stepping stones for the migrating birds. Large swamps and swamp forests existed in Riwaka and Moutere. As well as the forest trees, there were supplejack, kiekie, and mamaku. Raupo and harakeke bordered the swamps, which contained eels and whitebait. There were also many bird species. Today, very little of this swamp and forest remains – it was logged and drained and turned into pasture. This, argued Mr Park, resulted in a great loss of food and material resources to Te Atiawa.<sup>168</sup> We also heard similar evidence from Patrick Park, for whom these forests and their rongoa and birds are now a tribal memory: 'I have been told

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164. Solomon, brief of evidence, pp 3–4

165. W Stafford, brief of evidence (11 August 2000), p 13

166. Marr, 'Crown–Maori Relations', pp 139–141

167. M Park, brief of evidence, pp 5–6

168. Ibid, pp 6–7

that tui, weka, kaka, kakariki, kereru, pukeko and kiwi were abundant in years gone by. Our whanau has many cloaks made from these feathers.<sup>169</sup>

The loss of birds had cultural as well as economic consequences. Once, many fine korowai (cloaks) were made in Te Tau Ihu. Janice Manson, whose oral evidence was submitted to us by her daughter, explained that her grandmother used to make korowai from feathers but the art has been lost in her whanau.<sup>170</sup> Also, some birds were important in rongoa – the oil of the weka, for example, was a highly prized medicine.<sup>171</sup> Janice Manson explained that there was no absolute necessity to take kereru by the 1960s – ‘we were not starving’ – but her father did take a weka every now and then to use the oil for his arthritis.<sup>172</sup>

Birds could also hold great spiritual significance as kaitiaki: ‘Kahu the hawk is our kaitiaki and at our reunion in 1991 followed us wherever we went. I feel comfort from seeing them amongst us especially when we are at home in Puramahoi, or in unknown territory.’<sup>173</sup>

Mark Moses told us that Ngati Kuia elders spoke of eating pukeko, weka, tui, and kereru. Kereru was either shot or taken by traditional trapping methods. They tried to keep as many trees as possible on their tiny reserves: ‘My Toro from Okoha told me that they would not cut down the Miro trees as they supplied them with Kereru.’<sup>174</sup> Place names such as Pigeon Ridge, which was famous for kereru, show the importance of this food source in the cultural landscape: ‘Our maunga at Te Hora, Tutu-mapou, is named from the act of putting a Tutu bird snare in the Mapou tree to capture birds. There are many places like this throughout our rohe.’<sup>175</sup> But such names are losing their meaning as the tikanga and korero associated with them ceases to be a reality.

Faced with the necessity of survival, however, not all Maori communities could afford to keep even small patches of bush on their reserves. We heard evidence from Wiremu Stafford that Ngati Rarua had to log a piece of land called ‘Maori Bush’ in the 1930s, partly for building materials.<sup>176</sup> Tiemi Walker recalled that his people had to fell timber for money and also for building and fencing. His grandfather cut down the timber on their land at Okoha. The bush was quite dense when he was young, but the good timber was felled and sold. The timber industry also provided employment at the mills.<sup>177</sup> The Brownlee Timber Company milled Te Hoiere from the 1890s to 1915, significantly reducing native timber in the Sounds. Though this provided employment for some, work was always in short supply.

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169. Patrick David Takarangi Park, brief of evidence on behalf of Te Atiawa, 2002 (doc G26), pp 14–15

170. Janice Manson, oral evidence, 3 March 1999 (L Manson, brief of evidence, p 6)

171. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, p 888

172. Janice Manson, oral evidence, 3 March 1999 (L Manson, brief of evidence, p 6)

173. Ibid

174. Moses, brief of evidence, p 29

175. Ibid

176. W Stafford, brief of evidence (11 August 2000), pp 12–13

177. Waaka, brief of evidence, pp 4–5

Shearing, fishing, forestry, farm work, and road work predominated, much of which was seasonal. Some scrub cutting was also available.<sup>178</sup>

Cathy Marr described the dilemma facing Te Tau Ihu Maori on their small reserves:

They showed a willingness to participate in farming, and in doing so their interests would have become closer to those of river and drainage boards, but they were often prevented from effective participation in farming by the poor quality purchase reserves they were given. Maori also wanted to be able to set aside some land, apart from land for farming, on which they could continue to manage and harvest traditional resources and collect preferred food, and in the process maintain and pass on knowledge and a sense of iwi identity and mana. However given the inadequacy of their reserves, Maori were required to make difficult or impossible decisions: many were of such poor quality they were only useful for access to or protection of traditional resources and this limited Maori to at best a precarious subsistence living. If they attempted to farm reserves, moreover, they risked not only destroying traditional mahinga kai but the areas could well turn out to be unfarmable anyway.<sup>179</sup>

In any case, the Government had instituted bans on hunting kereru and other forest birds by the time our tangata whenua witnesses were growing up (from the 1920s onwards). In 1913, a royal commission enunciated the 'broad principle' that 'no forest land . . . which is suitable for farm land, shall be permitted to remain under forest.'<sup>180</sup> The dangers of erosion and other environmental hazards were recognised from the 1870s (including the need to conserve a timber resource) and the scenery preservation movement sought to preserve native bush, but only where it did not breach the 1913 'broad principle' – in other words, where the land could not possibly be used for farming.<sup>181</sup> Maori protested that the protection of native birds therefore took the form of banning their consumption for food (which was important to Maori), rather than preventing the destruction of their habitat. The Government's consistent response was to restrict hunting but to facilitate land clearance for farming.<sup>182</sup>

We will return to this issue below, when we consider the extent to which the Crown protected Maori interests in their customary food supplies. Here, we note it as the context for our evidence on Maori birding in the twentieth century. The birds were in scarce supply, even endangered, as a result of deforestation and other environmental modification. But

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178. W Mason, brief of evidence, p 13

179. Marr, 'Crown–Maori Relations', p 106

180. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*. 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 625

181. Ibid, pp 624–627, 636–637; see also commissioner of Crown lands, 'Suggested Scenic Reserves – D'Urville Island', 30 August 1910 (Patete, supporting documents, doc GR)

182. Geoff Park, *Effective Exclusion? An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912–1983* (Wellington: Waitangi Tribunal, 2001), pp 389–491

there were still some species available to fulfil cultural needs and obligations. We heard a lot of evidence about forest birds, particularly the kereru, from the tangata whenua.

In her evidence for Ngati Koata, Priscilla Paul explained that the use of the kereru was strictly controlled in her grandfather's time and that no more was taken than was absolutely needed, so as to preserve the resource. But 'Pakeha law' has since prevailed, and in her own time there were wardens who acted as 'spies' – 'we had to show them what was in our bags in case we had kereru in there.'<sup>183</sup> Even so, a few birds were still taken on Rangitoto in the 1940s when one of the elders, such as her grandmother, had a great craving for it. Other than that, the wardens were successful.<sup>184</sup> Mrs Paul concluded: 'It is sad that this has happened to our customary foods. The old people grew up with kereru and titi. It was their soul food – they would get hungry for a particular taste, because it was a taste they grew up with, that they knew, understood and hungered for.'<sup>185</sup>

Alfred Elkington's evidence was in agreement on this point. He grew up on Rangitoto in the 1930s and remembered that his grandparents gathered kereru in season 'all the time'. Like all forest activities, this was governed by karakia and strict tikanga to preserve the resource. During his own youth, however, only one or two birds were taken (in season and by traditional methods). Mr Elkington described how the elders hungered for this traditional food and how he only ever caught a bird or two for a particular uncle.<sup>186</sup> When the birds had grown fat on miro berries, 'I would climb out and grab it, take it home to my Uncle, and tears would come into his eyes.'<sup>187</sup> Another uncle, Turi Elkington, was in charge of the reserve and policed the birds quite strictly.<sup>188</sup>

Mr Elkington argued:

The kereru is another resource taken out of our control. From my understanding the prohibition against taking kereru was not put in place because we were killing the kereru off, but because there was a lack of food for them as a result of farmers cutting down trees, and because of the detrimental effect of possums. The kereru did not need protection from us – we had a long tradition of protecting the kereru.<sup>189</sup>

In the Pelorus Sound, Ngati Kuia hunted kereru in the 1940s, but, in the words of Joe Mason, 'not extravagantly – "just a taste"'.<sup>190</sup> The purpose was, however, not for consumption but as a part of the tribe's obligations of manaakitanga. The kereru were always offered

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183. Paul, brief of evidence for Wai 262, p 26

184. Ibid

185. Ibid, p 28

186. A Elkington, brief of evidence for Wai 262, pp 21–22

187. Ibid, p 21

188. Ibid, p 22

189. Ibid

190. W Mason, brief of evidence, p 10

to guests. Because they were so prized, and also taken so sparingly, ‘there was always much squabbling over who got what.’<sup>191</sup>

Ariana Rene, who lived with her husband on Rangitoto in the 1950s, referred to the occasional, secret taking of kereru in that decade. The main focus of hunting was wild pork, but the men:

would always come back with a pigeon . . . When the miro berries were ripe in May, then we’d get them. We knew that it was illegal to catch pigeons, and that there was quite a penalty if you were caught. So I was always frightened. I always used to think that the feathers were so beautiful, and that I’d love to keep the feather to weave in as part of a basket. I never did though, because I was afraid I’d be asked where I’d got those feathers from. So we had to get rid of them – we used to put them in the garden and burn them.<sup>192</sup>

This situation seems to have changed by the 1960s. Janice Manson, who grew up in Golden Bay, stated: ‘We never tasted the kereru because we knew not to break the law and we loved the birds anyway, and we were not starving.’<sup>193</sup> No one mentioned taking the kereru in modern times. In part, this must be because the generations for whom it was ‘soul food’ have passed away, and the tangata whenua today have grown up cut off from this aspect of their heritage.

As well as forest birds, waterfowl were affected quite drastically by the modification of the environment in the nineteenth and early twentieth centuries. The draining of wetlands had a major impact on the water birds valued by Maori, as also did hunting by settlers. By the 1890s, J Walling Handy reported that ‘the progress of drainage and the consequent extension of agriculture’ had made serious inroads on the native ducks of Marlborough.<sup>194</sup> But they remained a vital part of the Maori food supply. In 1907, the area around Mataora Lagoon was made a native game sanctuary, with hunting banned from this traditional mahinga kai. In 1908, Hapareta Pukekohatu wrote to the Government protesting about this and requesting the right to hunt ducks for food there as before – without success.<sup>195</sup>

Four years later, in 1912, William Henry Skinner published an article in the *Journal of the Polynesian Society*. In it, he described the Wairau lagoons, which were famous among Maori for their abundance of waterfowl and fish (see fig 36). In January to March, the paradise ducks were moulting and unable to fly, at which time they used to be caught in great numbers by the local iwi. Then, in April to May the grey ducks were in the same state and

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191. W Mason, brief of evidence, p 10

192. Ariana Rene, brief of evidence on behalf of Ngati Koata, 2001 (doc B18), paras 69–70

193. Janice Manson, oral evidence, 3 March 1999 (L Manson, brief of evidence, p 6)

194. J Walling Handy, ‘Notes on Some Species of New Zealand Birds,’ 21 August 1895, *Transactions and Proceedings of the New Zealand Institute*, vol 28, 1895, p 366

195. Cathy Marr, Robin Hodge, and Ben White, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna, 1840–1912* (Wellington: Waitangi Tribunal), 2001, pp 253–254

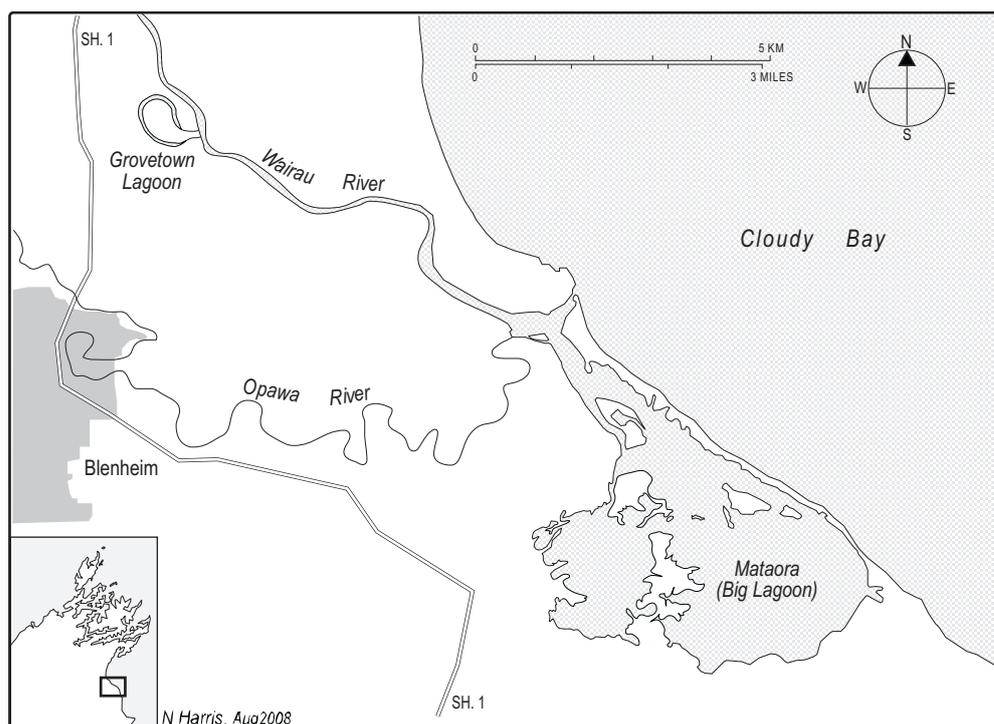


Figure 36: The Wairau River and lagoons

Source: *Heinemann New Zealand Atlas* (Auckland: Heinemann, 1987), pl 60

were herded and captured in the canals. At the ‘close of the duck season’, when sufficient had been taken for the winter requirements of the tribe and for ‘presents to distant friends and relatives’, a great feast was held and then the birds were stored in their own fat. Maori regulated their taking of birds by rahui and maintained a plentiful supply:

All this is now changed. The lagoons are there, the same practically in outline and extent as they have been for generations past, but, alas, the bird life no longer exists, or exists only in a very minor degree compared to what it was before the advent of the pakeha. Indiscriminate shooting and poaching in season and out of season, over what is nominally a ‘Native game preserve’ has harried the birds to the extent, that the once countless flocks of Paradise and grey ducks that roamed and bred in undisturbed possession for nine months out of the twelve over these fens and lagoons have fled, whence, it is hard to conjecture.<sup>196</sup>

Rangitane and Ngati Rarua witnesses in our inquiry referred to gathering eggs and shooting ducks for food at the Wairau, but the resource was clearly reduced from what it had once been.

196. Skinner, ‘Ancient Maori Canals’ (Mitchell and Mitchell, ‘Customary Fishing’, pp 16–17)

In 1921, Maori rights in the Wairau were further restricted when the acclimatisation societies asked for the hunting of grey ducks to be made subject to licensing, which the Government approved. In 1931, Ngati Toa, Ngati Rarua, and Rangitane petitioned Parliament, claiming that, among other things, the societies' rangers were interfering with their activities at the Wairau, 'with the result that we are deprived of the privilege enjoyed by elders, of fishing our Native fish and shooting our Native Game, known as Grey Duck'.<sup>197</sup> They asked Parliament to repeal the requirement for licences 'to shoot our Wild Grey Duck' (which they could not afford to pay).<sup>198</sup> This also had no success.

Albert McLaren shared Ngati Apa's grief about the loss of birds with the Tribunal. He told us his grandmother's stories about the trails across Te Tau Ihu and that the tribe, especially Kehu, had shared with Europeans their knowledge of forest lore, hunting and gathering, and traditional routes to Lake Rotoiti, Lake Rotoroa, and the West Coast. Bird life was very abundant until pastoralists burnt, clear felled, and drained the ancient vegetation of the lakes area to provide pasture for sheep and cattle. While the eels have survived this experience, the birds have not:

Today Lake Rotoiti is silent and bare, blue ducks hide away in secretive spots, kiwi have disappeared completely, and the South Island kokako, piopio and bush wren are extinct. Blue duck are now an endangered species and are in danger of extinction in this area. It has no other close relative in the world.<sup>199</sup>

By the Second World War, the customary practice of birding survived largely on the basis of seabirds, not the birds of the forest, and consisted mainly of taking muttonbirds (and the occasional penguin) from various islands around Rangitoto and in the Sounds. Kereru was still highly valued, but taken only very occasionally for particular kaumatua and kuia who craved the foods of their younger days. The practices of forest birding were remembered and used, but they could no longer sustain Maori communities in Te Tau Ihu. As with other customary foods, the dependence of local communities was increasingly on the coastline and sea, the area least affected by colonisation.

As with home gardens, there are some indications that domestic poultry came to substitute in part for forest birds and waterfowl in the Maori economy of Te Tau Ihu. Some witnesses referred to their reliance on chickens, and, in the evidence of Luckie Macdonald, they even became one of the foods for which the Wairau is now noted.<sup>200</sup> Poultry, however, could never have been raised in sufficient numbers to substitute entirely for the traditional place of birding in the economy, let alone the culturally specific value of certain wild species,

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197. Marr, 'Crown-Maori Relations', p144

198. Ibid

199. Albert McLaren, brief of evidence, pp11-16

200. L McDonald, brief of evidence, p16

including their use in rongoa, weaving, and the binding of generations by the transmission of knowledge and hunting methods.

There was also wild pork and deer, which supplemented the available food supplies. Pigs had been introduced and were already being exploited in Te Tau Ihu before the signing of the Treaty.<sup>201</sup> As discussed above, James Mackay had noted in 1863 that the reserves were too small for breeding and running pigs any more. It should be remembered that this was still a world without fences and that the iwi maintained extensive pig runs, which seemed 'wild' and therefore fair game to settlers. Maori made it clear, however, that 'wild' pigs were in fact their property.<sup>202</sup>

Although the iwi were no longer able to actively manage and trade this resource, they continued to hunt wild pigs in the unsettled parts of Te Tau Ihu. When the acclimatisation societies introduced deer, much harm was done to native vegetation, but an additional food source was established for Maori. Witnesses for Te Atiawa, Ngati Koata, Ngati Tama, Rangitane, Ngati Kuia, and Ngati Rarua all referred to the part that hunting played in their economy.<sup>203</sup> In addition to pigs and deer, some whanau kept a few sheep or cattle for consumption. Chris Love told us that his father carried out:

the customary gathering of kai o te whenua and kai o te moana at the times when it was required as he was as skilled at slaughtering a mutton as he was at being able to supply kina, wet fish or crayfish to the kai tables for such occasions as Weddings, Twenty-Firsts or Tangihanga.<sup>204</sup>

Mutton was thus incorporated into the customary economy by the 1930s. But these sources of meat were not predominant in the Maori economy, especially in the days before refrigeration (which came late to many in Te Tau Ihu). Fish and kaimoana remained the staples for most people – daily catches in the warmer seasons and dried or preserved in winter.<sup>205</sup>

Finally, there was a further element to the gathering of resources which should be noted. Some plant species, such as harakeke, grew in a variety of locations and habitats. Others, such as pingao, were found on dunes and near beaches. As best they could, tangata whenua propagated and planted valued flax species in the early part of the twentieth century.<sup>206</sup> The Maori people of Te Tau Ihu, therefore, were not entirely dependent on forest and swamp ecosystems for their valued plants. As a result, the witnesses in our inquiry told us that

201. Marr, 'Crown-Maori Relations', p 133

202. Ibid, p 52

203. See, for example, Joseph, brief of evidence, p 2; Paul, brief of evidence on behalf of Ngati Koata, p 6; Moses, brief of evidence, p 28; L McDonald, brief of evidence, pp 16, 20; Vern Stafford, brief of evidence on behalf of Ngati Rarua, 11 August 2000 (doc A84), p 7; Te Maunu Paul Stephens, brief of evidence on behalf of Ngati Tama, 13 February 2003 (doc K31), p 4; MJ Mitchell, commentary on video presentation, p 5

204. Christopher Love, brief of evidence, p 3

205. T Stephens, brief of evidence, p 4

206. Hemi, brief of evidence for Wai 262, p 8

weaving – a key part of the customary economy and cultural base – survived the inroads of the nineteenth century and was still vital to their daily lives in the first half of the twentieth century.

In the absence of enough money, weaving was an important part of how the iwi survived on their small reserves. Kath Hemi, for example, explained how guests were fed from specially woven kete to disguise the absence of crockery. For her mother's generation, 'harakeke was everything – medicine, our clothing, thatching, string, everything'.<sup>207</sup> It was used in barter and in important cultural exchanges. When the Governor-General, Lord Bledisloe, visited Picton and Blenheim in 1935, he was presented with a carved chair. Mrs Hemi's mother and aunties did the taniko work, and the chair was gifted to the nation and is now in the whare runanga at Waitangi.<sup>208</sup> Patricia Tupaea told us of the same mix of practical uses and culturally significant exchanges: her grandmother wove whaariki (floor mats), kete for gathering kaimoana, and kawē (flax belts for attaching mutton birds during hunting). But the mana of Ngati Koata was maintained on important occasions: 'When John Arthur was betrothed to Aunty Ao, Aourutahi, the daughter of Manuirirangi of Taranaki, he received a manaia. My grandmother made 24 korowai [cloaks] to present to Aunty Ao's iwi as a koha, or dowry.'<sup>209</sup>

Until the 1940s, it seems clear from many witnesses that weaving continued to play a central role in the cash-poor Maori economy of Te Tau Ihu, and that there were sufficient plants available for it.<sup>210</sup> As a result, much of the tikanga and knowledge associated with the gathering, preparation, weaving, and dyeing of various species has survived, albeit in truncated form. A lot of flax was milled, however, and environmental modification seems to have made further and significant inroads into all the flax varieties in the second half of the century.<sup>211</sup> The question of access to surviving resources then became crucial. We will return to this point below.

### 11.5.2 The contraction of the customary society in Te Tau Ihu

Many tangata whenua witnesses described the continuation of cultural exchanges within and between groups, customary bartering, the maintenance of tribal relationships, and the centrality of customary resources to all of this. The ability to exercise customary rights of hunting, fishing, and gathering underpinned society and the economy. For a snapshot of the situation before the Second World War, we rely on the evidence of Ariana Rene for Ngati

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207. Hemi, brief of evidence on behalf of Ngati Apa, p 23

208. Ibid

209. Tupaea, brief of evidence for Wai 262, para 81

210. See, for example, Hemi, brief of evidence on behalf of Ngati Apa; Joseph, brief of evidence; A Elkington, brief of evidence for Wai 262; Tupaea, brief of evidence for Wai 262; W Mason, brief of evidence; Amoroa Luke, brief of evidence (no 2)

211. W Mason, brief of evidence, p 9

Toa. Mrs Rene was born in Nelson in 1918. Describing life for her parents and her own generation, Mrs Rene explained that whakapapa relationships, arranged marriages to maintain those relationships, frequent visits, and customary exchanges all cemented ties between the iwi. Her parents travelled constantly, doing seasonal work and staying with various relations. Marriages were arranged in her own generation to strengthen ties with Ngati Rarua and to 'encourage and continue relationships between Ngati Toa and other iwi based in Te Tau Ihu.' As a result of this kind of active maintenance of relationships, links rather than divisions were the focus for iwi, reinforced by a process of regular visits and exchanges.<sup>212</sup>

People from the Wairau, for example, used to come and stay with her whanau on Rangitoto, do some fishing, and go home loaded up with kai. Her whanau in turn would go regularly to stay at the Wairau with the Macdonalds (Rangitane) and catch whitebait and pick the walnuts growing along the river. There were regular hui, tangi, and sporting events. But even more important, perhaps, was the seasonal work. Busloads of people from Te Tau Ihu went to stay at Porirua and go shearing. Then, busloads of men from Porirua would go down to the Wairau at hay-making time, and also to the Wairau and Motueka for harvesting and fruit picking. 'Nearly all the young people from here [Takapuwahia] used to go down to the Wairau in summer time.' This was regular until the Second World War, but after that the seasonal work started to die out and the regular exchanges became much smaller scale or stopped.<sup>213</sup>

At the same time, the men from Porirua would go to the Wairau every year to help plant and then dig potatoes. The Macdonalds sent tonnes of potatoes over to Porirua. Then, in March the Ngati Toa people in Porirua would catch and dry eels to send back in return, 'to make sure that they got the potatoes again the following year.'<sup>214</sup> When leaders like Mannie Macdonald and Hohepa Wineera died, however, the 'practice of taking goods and commodities backwards and forwards in such an organised way ceased.'<sup>215</sup> The contact and maintenance of connections still 'continues today, particularly for marriages and tangi' but not on the scale or of the kind that it was before the Second World War. Mrs Rene felt that the war itself was partly to blame – many leaders or potential leaders died or were traumatised. It left a gap, and many younger people have therefore grown up 'without so many of the older ones to help them understand aspects of their culture, such as their language, their history, their tikanga and their whakapapa.'<sup>216</sup>

Certain sites were key to this customary economy. Mrs Rene described how her father's whanau would travel to Greville Harbour and block the lake to take eels, sometimes to take back home for the whanau and other times to take to Motueka to exchange for apples with

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212. Ariana Rene, brief of evidence on behalf of Ngati Toa, 11 June 2003 (doc P19), pp 7–14, 18–23

213. *Ibid*, pp 18–23

214. *Ibid*, p 22

215. *Ibid*

216. *Ibid*, pp 23–24

their relations there. It was also a reliable source of eels for hui: 'If they were going out of town for a hui, they would go across to Moawhiti in their rowboats and get the eels from there. The exchange of food was an important part of visiting relations in Te Tau Ihu.'<sup>217</sup>

Fish was smoked and dried for taking to relations. 'The tradition of supplying kaimoana is still strong today,' she told us, 'although it's a bit more difficult because the kaimoana stocks are so much lower.'<sup>218</sup> Some places are better off – 'Even today, when people come from the island and there's fish on the table, we ask if it came from D'Urville.'<sup>219</sup> But the ability of Ngati Toa to meet their manaakitanga and whanaungatanga obligations has been under threat for some time:

For years and years Ngati Toa was noted for their table food. People who came to Takapuwahia always expected to be served with kina, paua, mussels or pipis because of our close association with the sea. But it was usual for Ngati Toa to have all those sorts of things on the table. But over the years all those kinds of food diminished and all these restrictions were put upon us – we couldn't serve up those kind of delicacies that Maori used to look forward to. That was very hard. You either had to go out of your traditional fishing areas to get the seafood or had to buy it. Usually there wasn't enough money to buy it, so you just had to make do with what you had. That was a bit degrading for Ngati Toa because once we used to provide those delicacies profusely.<sup>220</sup>

Amoroa Luke comes from a later generation. She was raised at Wairau Pa in the 1940s and 1950s. She told us that she 'grew up eating Maori food' – rotten corn, swan eggs, eels, ducks, fish, and potatoes. During her youth, the whanau ate whatever the 'old people' ate. 'These foods were part of our staple diet, I believe, because it was cheaper to go and get those things than to have to go and buy meat.'<sup>221</sup> Also important was the vegetable garden – everybody shared with each other, and customary foods such as puha and watercress were gathered to supplement the garden produce. Potatoes were dug and stored underground in a pit. 'A lot of our time was spent gathering food,' Mrs Luke explained. There was a good supply of eels, whitebait, and sea fish (from nearby Port Underwood and White's Bay). As well as regular fishing expeditions, her whanau went on hunting expeditions to get firewood, pork, and other food. Weaving was no longer practised, however, unlike in her mother's generation. Nor was it so necessary, since the people could obtain clothing without resorting to sugarbags and the like.<sup>222</sup>

The community remained close knit until the mid-1970s, when the whanau drifted

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217. Rene, brief of evidence, p 10

218. Ibid, p 17

219. Ibid

220. Ibid, p 18

221. Amoroa Luke, brief of evidence (no 2), p 4

222. Ibid, pp 2–7

apart and began to focus more on smaller, immediate family groups. This happened because people were moving away from the pa, either for work or because the land interests were becoming too fragmented for people to get building sections. Also, food sources had become depleted because of pollution – the Wairau River, for example, had become a dumping ground for waste.<sup>223</sup>

Mrs Luke's son, Lee Luke, gave evidence of a key transitional period for Te Tau Ihu Maori. Before the 1970s, the customary economy had continued in truncated form. New species and opportunities were adopted and incorporated. Old species disappeared. But the fundamental values of whanaungatanga and manaakitanga bound communities together, and there was a sufficient resource base for customary rights to remain quite central to people's lives.

Mr Luke was born in 1972 and lived at the Wairau Pa with about 10 other whanau until he was 24 years old. When he was growing up, he was told that the pa was less of a community than it used to be. Although the community still came together for tangi, other group activities were less common than 'the way that I had heard they used to.'<sup>224</sup> This was especially because the children had to go away for school, most of the adults worked elsewhere, and te reo was not spoken any more:

This seemed to impact on the food gathering that was occurring in the Pa. I don't think it went on as much as in the past. Traditional food was still being eaten in a reasonable quantity by the older generation and it was there if you wanted to eat it. But we no longer relied on it, and this changed attitudes towards food gathering. The older generation [now] gathered it and ate it because they loved it. Nevertheless, in our house we always had whitebait during whitebait season, and there were always eels and fish.

I don't think the techniques of food gathering were passed down as much as what it had been before my time. There are still people of my age group and even younger who know lots about gathering food at Wairau but then they would probably be a minority of my generation. Having said that, of those who know, they know quite a bit about that side of things.

I have learnt that over the generations, the increased mixing with Pakeha brings with it pressures to deny your origins. To deny who you are. I think these pressures have got stronger over the years and affect my generation the most.<sup>225</sup>

Mr Luke told us that his generation have all moved away from the pa. He expressed a hope that the younger people will show an interest in the iwi and step out of their now Pakeha comfort zone:

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223. Ibid, pp 9–10

224. L. Luke, brief of evidence, p 2

225. Ibid, pp 2–3

This is a hard thing for many living here in Te Tau Ihu, because they have come to accept that Maori are a minority and it is much easier to keep your head down and make a life for yourself in mainstream society. I wish more of us lived down the Pa once again and did a lot of those things that our whanau used to. The Pa is a sad lonely place now, and it's hard for anyone to move back there.<sup>226</sup>

One problem is that the sections are multiply owned and have so many owners that there is nowhere for people to move into or build.

In his evidence for Rangitane, Jeffrey Hynes took a different view. In particular, he felt that modernity could co-exist with tribal lifestyles were it not for the fact that their customary resources had become so scarce and depleted. He related the long history of Rangitane's occupation of the Wairau, from Te Huataki to the present day, and noted the impacts of settlement: 'Waterways, tributaries, creeks, wetlands and swamps have for the best part been drained of their valuable resources and replaced with culverts, water pump stations, cattle fords, and dams.'<sup>227</sup>

'The quantity and quality,' he told us, 'of the resources available in and around the Wairau River was known far and wide and used to adorn the tables of many tribal functions over the years.' But most of the alterations to waterways have happened without consent and have 'significantly impacted on the tribe's ability to maintain many of our traditions and customs.'<sup>228</sup> During his lifetime, the quality of the lower Wairau River has 'deteriorated considerably' and no longer possesses the quantity and quality it once did. In his view, causes include: sewage from the Spring Creek sewage pond entering the river; overflows from septic tanks; run off from riparian properties, including dairy farms; effluent and waste from dairy and other commercial operations; the construction of the 1963 Wairau diversion (which caused siltation and prevents the natural flushing of the river); and poor weed-management programmes.<sup>229</sup>

For over 40 years, Mr Hynes has continued some of the customary practices of 'generations of Rangitane' on the Wairau River and its tributaries, including some of the marine waterways of the Marlborough Sounds. He joined his father many times on fishing trips to catch eels at Grovetown, Wairau Pa, Tua Marina, and other areas. At tribal gatherings, he has heard stories of the abundance of fish and other resources. He remembers collecting eggs, whitebait, flounders, and sea fish all over the Wairau. He still fishes for whitebait in many small creeks running off the river. Much of the destruction has happened during his lifetime – eels were still plentiful during his childhood, but since then habitat destruction, commercial fishing, and a reduction in water quality have all contributed to a decline in the

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226. L Luke, brief of evidence, pp 5–6

227. Jeffrey Hynes, brief of evidence on behalf of Rangitane, 22 April 2003 (doc M12), p 4

228. Ibid

229. Ibid, pp 11–12

number and quality of eels. Grovetown sewage ends up in the lagoon and the Wairau River, for example.<sup>230</sup> This kind of resource depletion is still happening – up until only a few years ago, the Grovetown lagoon provided some of the best watercress in the district, but it has now diminished or disappeared in that area.<sup>231</sup>

Mr Hynes concluded:

[the] depletion of our customary kai areas has affected our ability to pass on traditional knowledge and we now have a generation of rangatahi who would rather eat out at McDonalds or Kentucky Fried Chicken not having experienced delicacies such as smoked tuna and watercress.<sup>232</sup>

In Mr Hynes' view, therefore, it is the ability of iwi to continue to exercise their rights and to transmit the all-important knowledge and skills to upcoming generations that has changed. Many other witnesses agreed with this argument. They explained that, even when they moved to the towns, such as Nelson, Picton, and Blenheim, the gathering of kai and rongoa continued on the beaches, in the bays, and in the nearby rivers and streams until prevented by the decline of resources.<sup>233</sup> While some accepted that social change was a factor, most blamed the destruction of resources rather than a change in their need or desire for them.

It seems to us that the evidence does support a view that customary fishing, kaimoana, and other food gathering is no longer necessary for sheer physical survival in the way that it was before the 1970s. Even so, as Dr and Mrs Mitchell ascertained from their research, it is still important to the economy of many Maori households today.<sup>234</sup> Also, the tangata whenua evidence is overwhelmingly to the effect that the iwi wish to retain their customary rights, and the cultural base that comes with them, and to transmit both to the next generation.

In social and cultural terms, though under greater threat than ever, the Maori customary economy continues today. Whether it will survive the next few decades is a matter in part for the Treaty settlements process, which is supposed to help restore a tribal base (see sec 11.7). We heard echoes of Mrs Rene's evidence in the korero of Hori Elkington, who was born in 1950 and told us that the connections across Cook Strait are still important to Ngati Toa and Ngati Koata today. When he was growing up, there were regular, lengthy visits between Porirua and Rangitoto. Now, he owns a fishing charter business based in Porirua and does some commercial fishing but also a lot of customary gathering of kaimoana for

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230. Ibid, p 6

231. Ibid, pp 5–6, 11–14

232. Ibid, p 5

233. See, for example, Kim Hippolite, brief of evidence on behalf of Ngati Kuia, 21 March 2003 (doc L12); Mitchell and Mitchell, 'Customary Fishing', p 107; Tupaea, brief of evidence on behalf of Ngati Koata; Carl Elkington, brief of evidence on behalf of Ngati Koata, 2 March 2001 (doc B24)

234. Mitchell and Mitchell, 'Customary Fishing', p 102

## 11.5.3

tangi and hui – mainly but not exclusively for Ngati Toa and Ngati Koata. It is also common for him to contact Ngati Koata and ask them to bring specific kinds of kaimoana to Porirua for hui or tangi, so that the local people can focus on gathering other species. That is not a new thing, and he often calls on the Ngati Koata trawler *Te Ruruku* to bring fish for a tangi at Takapuwhia. The preservation of these kinds of ongoing customary rights and relationships is, in his view, critical to the survival of the tribes in modern times.<sup>235</sup>

### 11.5.3 Further loss of access

Loss of access to natural resources and a clash of beliefs as to who owns or controls them have been a major grievance for Te Tau Ihu iwi in the twentieth century. As we saw in section 11.4, loss of access was already an issue in the nineteenth century. It continued after 1900, taking four main forms: the ongoing alienation of reserves; changing attitudes to ‘private’ property; an extension of Government controls and regulatory powers; and the damaging or destruction of particular, valued sites.

#### (1) Access through land ownership

Te Tau Ihu Maori clung to the ownership of tiny interests in isolated, uneconomic reserves, partly because this was their whenua and their last claim to turangawaewae but also because they provided access to vital natural resources. The Ngati Apa relationship with their land at Anamahanga (Port Gore) is a good example. Arohanui Fransen was born in Picton in 1939 and raised at Waikawa Pa and Motueka. Her mother was raised in the Sounds and, through Ngati Apa, had a small piece of land at Port Gore. The whanau built a sleepout and cookhouse in a fairly sheltered spot in Tunnel Bay, which they visited periodically (mainly on weekends) for fishing. Access by boat was not possible, because the whanau owned only small dinghies, so they travelled overland. Retaining ownership was not an issue because, she told us, the land was worthless to Pakeha and so no one wanted to go there. Her sister succeeded to this small piece of land and now pays the rates on it. This provides the wider group with access and they still go there periodically for fishing. Now, however, the land is very desirable – people want to lease land for mussel farms and temporary residences (associated with the marine farming).<sup>236</sup>

Te Tau Ihu Maori appear to have taken these kinds of interests into account when faced with pressure to sell. We do not have comprehensive evidence on the point, but the Rangitoto 4A block provides a useful example. It was a small (624-acre) isolated piece of land on Rangitoto, with some native bush and a steep cliffside. In the 1960s, the Crown wanted to add it to a planned scenic reserve, which would otherwise surround the land and leave it without access.

235. Hori Turi Elkington, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P6), p 11

236. Arohanui Fransen, brief of evidence on behalf of Ngati Apa, 2003 (doc N1), pp 3–4, 9–10, 14–15

A meeting of assembled owners was held in Blenheim on 9 August 1967, attended by four out of the 10 owners (with two proxies). The representative of the Department of Lands and Survey told the owners that their timber was uneconomic and that they would lose access, and the Crown did not want private land (a fire hazard) in the middle of its scenic reserve. The owners accepted that the land was not economic for farming or timber but wanted to establish its utility for exercising their customary rights. After a discussion, it was established that there was no 'native game' on the section, no baches for camping, and no access to the sea (it was too steep). Having considered those factors, the owners reluctantly agreed to sell the land to the Crown for a price set by the Government, on which the latter would not budge. The owners agreed that they simply could not get any use from this land. At the meeting, James Macdonald commented: 'I would not normally sell my land but this land is not very good . . . The Maoris are parting with their heritage piece by piece. We have had many big decisions to make. It is with great reluctance that we withdraw from D'Urville Island.'<sup>237</sup>

Some settlers were not very sympathetic to the idea that land should be retained for such reasons. As we discussed in chapter 7, a neighbouring farmer wanted to lease land from Te Mapou and Raetihi, landless natives' reserves at Croisilles, in the 1960s. The commissioner of Crown lands reported in 1963 that the farmer was alleging that 'the reserve land is lying more or less idle, and is a happy hunting ground for Maoris visiting the locality and wishing to indulge in irresponsible shooting. The adjoining owner's stock would of course suffer as a result of these exploits.'<sup>238</sup>

Maori efforts to farm this land had, in fact, been hampered by title problems (see ch 7). Nonetheless, there was land that was valuable mainly because it still provided access to the natural resources of districts acquired from Maori in the nineteenth century. John Mitchell assessed the situation in the south-west of our inquiry district, where the iwi had lost almost all of its land. With the sale of the Taitapu block, the only Maori land left in the south-west was two small reserves at West Whanganui (32 hectares at Kaikoha and 60 hectares at Rakopi-Toiere) which had been set aside for some Ngati Rarua back in the 1850s.

Dr Mitchell explained that the descendants of the rangatira Riwai Turangapeke still own his old pa site, Toiere, at Rakopi today. It is visited several times a year by whanau from Motueka and elsewhere as a base to camp for fishing trips and to gather plants for weaving. Te Atiawa and Ngati Tama whanau from Golden Bay are allowed to be 'frequent campers at that Maori reserve site'.<sup>239</sup> As a result, the iwi:

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237. 'Statement of Proceedings of Meetings of Assembled Owners', 9 August 1967, CH270 15/2/2021 (Patete, supporting documents, doc D0), pp 2-3

238. Commissioner of Crown lands to director-general, 10 October 1963 (Alexander, 'Landless Natives Reserves', p186)

239. Mitchell and Mitchell, 'Te Tai Tapu', p109

## 11.5.3(1)

still retain strong spiritual ties to the district and visit as often as possible to hunt, fish, camp and relax i runga i te whenua me te moana wairua o o ratou tipuna. Most of the ancient occupation sites are known, as are their urupa and waahi tapu. Those tangata whenua who still reside in or frequently visit Golden Bay regard the coastal waters of Te Tai Tapu as one of their most important mahinga kai and a resource area for pingao, kiekie and harakeke in Te Tau Ihu.<sup>240</sup>

The land gave access to the surrounding resources for fishing and shellfish gathering in the West Whanganui Inlet, hunting pigs and deer in the hills above, catching whitebait in the streams feeding into the huge estuary, and gathering harakeke, kiekie, and pingao for weaving.<sup>241</sup>

The Kaikoha block is now owned by the Wakatu Incorporation and is subject to a perpetual lease. But relations with the lessee have always been excellent:

for many years whanau groups would stay in the shearers' quarters several times each year for long weekend fishing and hunting expeditions. By working the tides a huge range of delicacies could be caught, harvested or shot, thereby enabling the families to eke out their otherwise modest incomes from labouring jobs in the Bay. During the late 1940s and early 1950s my Dad and his Meihana cousins often brought large groups of manuhiri from the Cobb workforce who were on rare weekend leave. This gave the men – who were from all over New Zealand – a chance to enjoy catching and eating traditional seafood dishes which were otherwise unavailable for weeks at a time in the Cobb Valley.<sup>242</sup>

Thus, seemingly small land interests could, by their crucial location, enable many people to continue to exercise customary rights and to practise whanaungatanga, kaitiakitanga, and manaakitanga. What is notable in both instances, however, is that legal ownership of the land was no longer with the iwi. There are two ways of looking at it: on the one hand, the lessees or the individual Maori owners permitted access; on the other, they may have been recognising long-honoured rights in the area.

We were provided with several examples to consider. In evidence for Ngati Tama, Te Maunu Stephens explained how he was one of the few members of the tribe to be brought up at Wakapuaka. His whanau are the descendants of Mamae Matenga, through whom they inherited a small piece of land on the block. When he was growing up in the 1940s and 1950s, there was a steady flow of visitors. Now, the food resources are severely depleted, which is 'a great pity as some of my fondest memories are of whanau gatherings with relatives from Motueka, Golden Bay, Porirua, Wellington, the Sounds and other places, and

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240. Mitchell and Mitchell, 'Te Tai Tapu', p 115

241. MJ Mitchell, commentary on video presentation, pp 5–6

242. Ibid, p 6

we would have a great crowd on the beach dragging for fish – bonfires, hangi, music and laughter.<sup>243</sup>

By these customary relationships and arrangements, wider Te Tau Ihu communities continued to access resources on (or from) individually owned land. Even small pieces could thus provide access to large kaimoana and fishing resources. As we have already noted, Anaru Luke described how, by returning regularly to fish, his whanau maintained ahi kaa at the Wairau Pa after they no longer lived there.

Luckie Macdonald described a different situation for a block of land in the Pukaka area, where his whanau hunted, gathered manuka firewood, caught eels, and picnicked. His uncle was considered a trustee ‘on behalf of Rangitane’, but the land ended up in the private ownership of his descendants and is now in the hands of a forestry company, which has planted it in exotic timber. For a while, the whanau continued to go there and use the resources despite the padlocks on the gates, but in the end they had to give it up.<sup>244</sup>

Thus, the loss of a single piece of land, no matter how small or apparently uneconomic, could have a marked effect on the ahi kaa of Te Tau Ihu iwi. One of the most controversial alienations of the twentieth century was the acquisition of Ngaruru as a scenic reserve, which we have discussed in chapter 7. In the 1910s, the Government was very aware of the dependence of Te Tau Ihu iwi on their customary food supplies. The matter was a key issue in negotiations about muttonbirding and the offshore islands in that decade (see sec 11.5.5). Also, in 1914, a commission of inquiry on the landless natives reserves reported that most reserves could not be occupied by their proposed beneficiaries, who were surviving by a mix of fishing, shearing, and working on farms for Europeans.<sup>245</sup>

In 1915, the Marlborough Education Board forwarded a report to the Native Department noting that Maori at Waikawa Pa were in a state of poverty, living off ‘tea and bread’. The school inspector blamed the local iwi for it, saying: ‘The Maoris are even less enterprising than usual, as there are plenty of fish in the sea, if they would only go and catch them.’ They could also live off potatoes and maize. She reported that they were too transitory, too prone to go off and live with relatives elsewhere in the Sounds, unlike the Wairau Maori, who she considered a ‘better class and not so migratory.’<sup>246</sup>

Regardless of the inspector’s moral judgements about the customary economy, we note that the evidence from this decade is that the Government expected its Maori citizens to live off seasonal work, fishing, and cropping. The same was true throughout the first half

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243. T Stephens, brief of evidence, pp 4–5

244. L McDonald, brief of evidence, p 20

245. Patete, ‘D’Urville Island’, p 226

246. Secretary, Marlborough Education Board, to under-secretary, Native Affairs, 22 November 1915 (Jennifer Halder, ‘Historical Documents Relating to Maori Social and Economic Issues in the Northern South Island District’, 10 vols, report commissioned by the Crown Forestry Rental Trust, 1998 (doc A43), vol 10, pp 4538–4539)

of the twentieth century. This forms the context for the Government's role in the attrition of reserves that provided much-needed access to fisheries and other customary food supplies. It also explains the Government's agreement to reserve land for that purpose during its acquisition of most of Ngaruru in the 1920s.

Although the Government wanted the whole block as a scenic reserve and to provide for European yachties, the commissioner of Crown lands reported in 1912 that it was necessary to keep part of the reserve for local Maori as a "tauranga-waka" or fishing station, adjoining, in a sheltered bay, with wood and water sufficient for all their purposes.<sup>247</sup> Nonetheless, the commissioner was determined to 'secure this last beauty spot left in Tory Channel – combining good anchorage, wood and water – as a permanent reserve for Scenery'.<sup>248</sup>

The owners (Te Atiawa individuals) protested as follows:

These portions of land in question are very insignificant for the purpose of scenic reserve, but are of great value to us, not commercially, but for comfort purposes. The portions in question are used by us for camping grounds during the fishing seasons, and they are the only portion of Native land that is left for us to gather our wood from and earn a few shillings to keep us going. Take this privilege from us and you deprive us Natives of a living, and also wood required by us. We would respectfully point out to you, Sir, that practically all the Native land of any value to us has now been taken for Scenic or other purposes. If this continues, we would be completely depleted of every chance of obtaining firewood and assistance towards a livelihood. We would point out that no matter what monetary value you gave us in exchange, you cannot adequately reimburse us for the loss that we will suffer.<sup>249</sup>

This provides a rare example of surviving documentary evidence on the views of Maori about the attrition of their reserves. The commissioner of Crown lands provided a report on this objection. He argued that there was a shortage of coal and labour that winter, putting a premium on firewood:

and just because the natives have got a small royalty for a little timber along the shore, they rush to the conclusion that they should be paid at that rate for all the bush and scrub upon Ngaruru; this is absurd and only the usual native try-on. As for camping grounds, a reserve was especially kept for the natives and under jurisdiction I expect they could camp along the foreshore to fish even on a scenic reserve.<sup>250</sup>

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247. Commissioner of Crown lands to Under-Secretary for Lands, 16 December (Alexander Watson, brief of evidence on behalf of Te Atiawa 10 January 2003 (doc 11), app N)

248. Commissioner of Crown lands to Under-Secretary for Lands, 5 January 1913 (Watson, brief of evidence, app P)

249. Riwai Love and 14 others, Picton, to Minister of Public Works, 24 May 1920 (David Alexander, 'Reserves of Te Tau Ihu (Northern South Island)', 2 vols, report commissioned by the Crown Forestry Rental Trust, 1999 (doc A60), pp 350–351)

250. Commissioner of Crown lands to Under-Secretary for Lands, 16 August 1920 (Alexander, 'Reserves of Te Tau Ihu', vol 1, p 351)

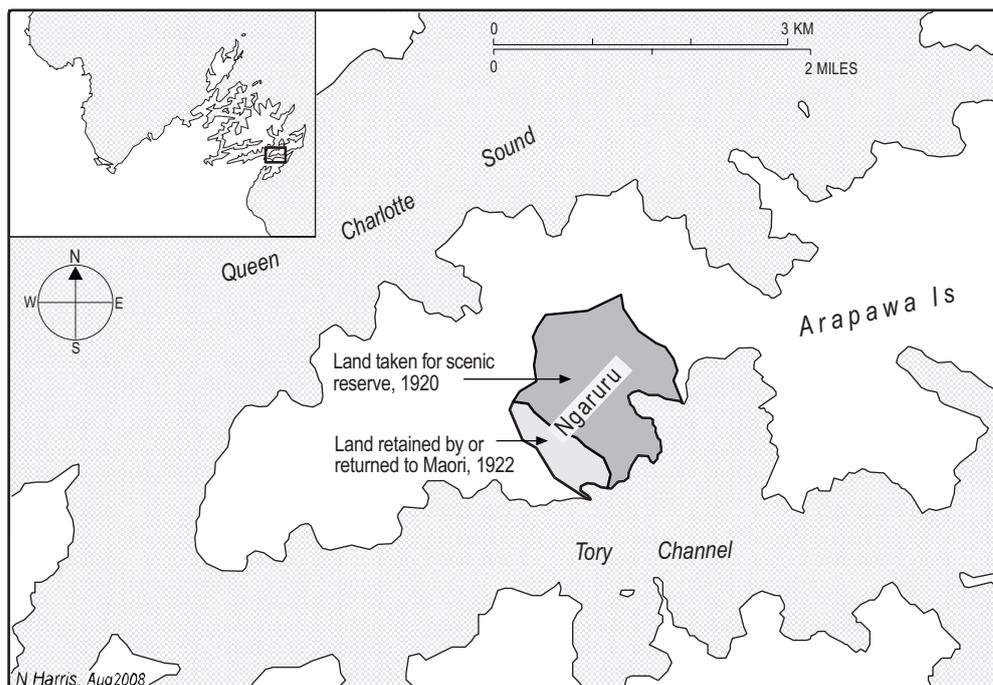


Figure 37: Ngaruru

Source: Moira Jackson and Associates Ltd, 'Te Atiawa: Western Te Tau Ihu Map Book', map book commissioned by the Crown Forestry Rental Trust, 2002 (doc G23)

The commissioner noted that the Maori owners had earlier objected to a road being put through this block, on the ground that it was beautiful scenic country that Maori had kept intact, so 'why should the white man attempt to spoil what the Maori has endeavoured to preserve'? But now the 'wily native wants to sell it for firewood at famine prices'.<sup>251</sup>

The Native Minister was consulted, and his department advised him that, if the owners were 'compensated and given camping and fishing facilities, they should not have any real grounds for objection'.<sup>252</sup> The Minister agreed, so the whole reserve except for three acres was taken in 1920. The Maori owners petitioned Parliament, pointing out that they were landless, and they also complained in the Maori Land Court that their three acres had no timber for firewood or for building purposes (especially for fencing posts). The Government eventually agreed to a larger reserve of 88 acres to include some timber.<sup>253</sup>

Te Atiawa witnesses told us that the customary use of Ngaruru continues today (see fig 37). Alexander Watson recited the history of the reserve and its great value to the owners.<sup>254</sup> John Bunt, who was raised in the 1930s and 1940s, told us that he used to gather

251. Ibid (pp 351–352)

252. Alexander, 'Reserves of Te Tau Ihu', p 352

253. Ibid, pp 352–353

254. Watson, brief of evidence, pp 19–30

supplejack at Ngaruru for making crayfish pots. His whanau also collected firewood there but used the resources in a sustainable fashion: ‘You could get firewood out at Ngaruru as well, my grandfather taught me that. Like everything else, we just took what we needed, and left the rest to grow for next time, or the next person who needed any.’<sup>255</sup>

In 1912, the Under-Secretary of Lands and Survey had noted that Ngaruru was ‘about the last fair-sized portion of the original forest now left in Tory Channel.’<sup>256</sup> This meant that the surviving Maori interest was particularly valuable, because, as Mr Bunt told us, it is very hard to find supplejack anymore, and most Maori have to try to get it from Department of Conservation land.<sup>257</sup>

Mr Bunt’s son, Antoni Bunt, told us how such customary rights are passed down to the next generation: ‘When dad was crayfishing we used to go up into Ngaruru bay and get “supplejack” to make the pots other times we would go around to Blumine Island. We used to collect the big land snail shells there as well.’<sup>258</sup> Even so, John Bunt felt that the skill and the knowledge of making crayfish pots are being lost, because it is too difficult for his people to get supplejack.<sup>259</sup>

The process of attrition of the reserves in the twentieth century, which we described in chapter 7, thus has an added significance for this chapter – each alienation had the potential to further reduce the ability of Te Tau Ihu iwi to sustain themselves by the exercise of their customary rights and practices. This was particularly so for the rich coastal resources that sustained the iwi, economically and culturally, for much of the century. Access to freshwater fishing seems to have been more practicable, as we shall see in the next section.

Ngati Kuia put it to us that the deprivation of access, rather than the depletion of finfish and kaimoana, is the main reason why they are struggling to maintain their tribal base today through fishing. Lewis Wilson told us:

Through alienation of our lands in the Sounds, our people are no longer living there. We now have very limited access to our traditional fishing grounds, the same fishing grounds that we were taught the methods of catching kaimoana. We are now losing the ability to pass these methods on to our kids.<sup>260</sup>

Mark Moses agreed:

We are a people whose history is connected to awa, roto and moana as it is to the whenua. A lack of access to waterways to gather kaimoana, including the lack of resources to facilitate

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255. John Bunt, brief of evidence on behalf of Te Atiawa, 10 January 2003 (doc 119), p16

256. Under-secretary to Minister in Charge of Scenery Preservation, 15 August 1912 (Watson, brief of evidence, app1)

257. J Bunt, brief of evidence, pp 15–16

258. A Bunt, brief of evidence on behalf of Te Atiawa, p7

259. J Bunt, brief of evidence, pp 15–16

260. L Wilson, brief of evidence, p 4

this affects ones ability to manaaki, both themselves and others, which affects ones oranga-tinana, hinengaro, whanaungatanga and wairua. It is hard to maintain ones knowledge and skills of the moana if one has limited access or resources with which to do it. This is the case of many Ngati Kuia whanau today.<sup>261</sup>

**(2) Loss of access through damage to, or destruction of, valued sites**

The Te Tau Ihu claimants raised grievances with us about their loss of access to mahinga kai, and the disruption of their customary rights to resources, through damage to or destruction of particular valued sites. They were especially concerned about a clash of values for much of the twentieth century, during which they saw estuaries, mudflats, and swamps as important mahinga kai, while Europeans saw such places as ugly, smelly, and useless, impediments to farming or natural sites for dumping rubbish and discharging waste. Rita Powick told us:

Foreshores and inland waterways throughout the rohe were subject to a series of alterations and developments conducted to satisfy the interests and needs of the settler community. Swamps and mudflats were regarded by most nineteenth century Pakeha to be of little value unless drained or modified to suit the needs of agricultural and pastoral farming. Waterways in towns were often treated as convenient drains for the disposal of waste, while foreshore and tidal areas were considered 'worthless' unless they were used for jetties or wharves. As a consequence, there was extensive estuary reclamation and wetland drainage, and rubbish and noxious waste was dumped in estuaries and foreshores. The ecological richness of estuaries and the fact that such areas were vital to Te Ati Awa for food, culture and the maintenance of traditional knowledge was not allowed to influence their development and/or destruction.<sup>262</sup>

There is fairly general agreement among historians that this was the case. Many such modifications, of course, were not direct actions of the Crown. We will explore the extent of Crown culpability in section 11.8.

The food resources of foreshore areas were at risk from the beginnings of European settlement in the region. At Nelson, for example, local authorities allowed sewage from the town to flow over the tidal flats of Nelson Haven and noxious waste from households and businesses to be dumped there. Despite recommendations for improvement by a sanitary commission in 1867, little was done until a municipal sewerage scheme was installed in 1908. Raw sewage still ran straight into the harbour, however. Oxidation ponds allowing for bacterial processes to convert wastes to gases and other products were not built until the 1970s.<sup>263</sup> Eventually, all the places for gathering kaimoana were reclaimed or polluted, forcing Te Tau

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261. Moses, brief of evidence, p 27

262. Powick, brief of evidence on behalf of Waikawa Resource Management, pp 4-5

263. Marr, 'Crown-Maori Relations', pp 91-92

Ihu Maori who had moved to the city to go elsewhere in search of kai.<sup>264</sup> Maori adapted as best they could. Living in Nelson in the 1950s, Benjamin Hippolite's whanau took advantage of the local fishing industry: 'We used to eat a lot of fish heads and a lot of fish bones which people would dump . . . We had to take turns in going down to the fisheries to pick up the fish-heads and the fish-bones, and that was our staple diet, that and rice.'<sup>265</sup>

The estuaries of the Moutere and Motueka Rivers were similarly polluted by human waste and by runoff from farms.<sup>266</sup> The freezing works at Stoke pumped waste into the Waimea Estuary.<sup>267</sup> At Mapua, also in the Waimea Estuary, shellfish were contaminated by agricultural chemicals, including 2,4,5-T, paraquat, and 2,4-D, manufactured by the Fruitgrowers Chemical Company from the 1930s until 1988. The Mapua site has been called 'one of the worst' contaminated places in New Zealand, and remedial work is still in progress.<sup>268</sup>

Some coastal locations valued as mahinga kai have been obliterated by reclamations for wharves and other uses, made possible when harbour boards were endowed by the Crown with large areas of foreshore.<sup>269</sup> The Picton Lagoon, a tidal arm of the Waitohi Inlet, was vested in the borough council in 1896 and part of it was subsequently reclaimed as a recreation reserve.<sup>270</sup> The construction of roads like Rocks Road between Port Nelson and Tahuna Beach (completed in 1899) provides another example of foreshore modification.<sup>271</sup>

Damage to sites could be very local and particular in its effects. We address Ngaire Noble's claim, Wai 921, in chapter 12. Here, we note that land taken from Waikawa 1 in the 1880s for a seaside road was in excess of requirements, leaving the beach and kaimoana intact. Mrs Noble's whanau continued to gather kaimoana until the 1920s, when the land was leased and houses built on it. Maori continued to 'trespass,' despite the opposition of the lessees, until finally prevented by pollution, 'as the sewage from the houses was let out directly into the water in front of the properties.'<sup>272</sup>

More recently, in the 1970s, the drastic modification of the Waikawa Stream and the construction of a marina at Waikawa Bay, described as 'once the largest and most productive tidal estuary in Queen Charlotte Sound,' destroyed at least two-thirds of the active kaimoana beds and estuary area.<sup>273</sup> Te Atiawa made representations to the port authorities in the 1990s when an extension to the marina was being planned but were not satisfied with the outcome. They were pleased, however, that a proposal to add floating jetties to an existing

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264. C Elkington, brief of evidence, paras 26–33

265. B Hippolite, brief of evidence on behalf of Ngati Toa, p 8

266. M Park, brief of evidence, p 6

267. Marr, 'Crown–Maori Relations,' p 122

268. Margot Butcher, 'Noxious Neighbours: The Battle of Mapua,' *North and South*, September 1993, p 84; Marr, 'Crown–Maori Relations,' p 122

269. Marr, 'Crown–Maori Relations,' pp 121, 122

270. *Ibid*, p 97

271. *Ibid*

272. Ngaire Noble, brief of evidence on behalf of Wai 921, February 2003 (doc 15), p 3

273. Hewitt and Morrow, 'Te Atiawa,' p 108

wharf was denied resource consent in 1993 on the ground that it would affect traditional food-gathering activities.<sup>274</sup>

Witnesses explained that the loss of a single, vital site like Waikawa Bay could have a huge impact on their ability to maintain *ahi kaa* and live in an area. In her study of the Queen Charlotte Sound reserves, Dr Morrow noted that one of the factors pushing Maori people out of the Sounds in the 1960s was the reduction of their still-vital food sources as a result of depletion and the further loss of access resulting from reserve alienation or site-destruction. She reported: 'Decreases in the amount of fish and other seafood, and/or difficulties over access to traditional fishing sites, could affect the quality of life and help to tip the scales in favour of moving to a more populous district.'<sup>275</sup>

In that situation, the loss of such a critical shellfishery as Waikawa Bay, so close to their main centre of population, had a significant impact on the Waikawa community. We heard complaints about it from Arohanui Fransen, Tamati Reeves, Connie Joseph, Rita Powick, and others. It was a strongly held grievance.<sup>276</sup>

We also heard evidence about the damage done to the customary fishing grounds of Te Atiawa and the shellfish beds at Shakespeare Bay near Picton. The foreshore there had been contaminated by effluent from the freezing works that had operated from the 1890s until 1984. From the 1960s, a sewer outfall also affected the bay. In the 1990s, a deep-water port facility and log-storage area were developed at the old freezing works site and on reclaimed land in the bay. The port authorities were granted permission by the Planning Tribunal to complete the project, one of the conditions being the relocation of shellfish beds. To some extent, Te Atiawa interests were taken into account in the planning process. The port company and iwi representatives negotiated an agreement in 1995 that limited the relocation to pipi and cockles. Compensation would be paid for the kaimoana that could not be relocated on ecological grounds (green lip and native mussels). However, this agreement was not given effect to because a formal variation of the conditions of consent would have taken further time. The shellfish beds were relocated in January 1996 in accordance with the earlier planning consent. Iwi members told us that they were neither involved in nor consulted about the actual relocating of the kaimoana and that the hastily arranged operation was largely unsuccessful.<sup>277</sup>

Another example of protracted foreshore contamination was the rubbish dump at Rototai on the Motupipi Estuary in Golden Bay, which was opened by the then county council in the 1940s. Leachates from heavy-metal salts, battery acid, agricultural chemicals, and petro-

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274. Powick, brief of evidence on behalf of Waikawa Resource Management, pp 22–23, 24–28

275. Dr Diana Morrow, 'A Legacy of Loss: Ngati Awa/Te Atiawa Reserves in Queen Charlotte Sound, 1856–c 1970', report commissioned by the Crown Forestry Rental Trust, 2000 (doc D6), p 146

276. See Fransen, brief of evidence; Tamati Charlie Reeves, brief of evidence on behalf of Te Atiawa, 2003 (doc 111); Joseph, brief of evidence; Powick, brief of evidence on behalf of Waikawa Resource Management

277. Powick, brief of evidence on behalf of Waikawa Resource Management, pp 19–22; Hewitt and Morrow, 'Te Atiawa', pp 112–114

chemicals seeped into the estuary and dispersed across the beaches in the vicinity for many decades. The Ministry of Transport required Rototai, an unauthorised dump, to cease operations in 1976. The site was closed, grassed, and planted, but some tipping still continued in 1992.<sup>278</sup> This, too, was a strongly felt grievance, because the Motopipi Estuary had been an important site for kaimoana.<sup>279</sup> Cathy Marr advised that it was common for rubbish dumps to be located on or adjacent to foreshores in Te Tau Ihu, contaminating fisheries and kaimoana.<sup>280</sup>

As these examples show, damage to shellfish resources by the pollution of particular, valued sites has frequently occurred in Te Tau Ihu. Although it is not the main cause of depletion and loss, it has had a significant impact on particular communities. Also, as several witnesses explained, there are many dimensions to the loss – food-gathering places played an important role not just in survival but in the ability to meet customary obligations and cultural needs, and in the identity and mana of iwi. The contamination has arisen in part from a clash of values and needs in terms of the foreshore environment. As Benjamin Hippolite commented, in his evidence for Ngati Toa:

I could never understand why government departments would send people around knocking in notices saying: ‘Don’t take kai-moana from here. The water is polluted’. I thought the right thing for them to do was go around knocking in signs which say, ‘Don’t pollute this beach. There is kai-moana here.’<sup>281</sup>

In recent times, as the Planning Tribunal noted in 1993, values have changed and many Pakeha would now share Maori ‘revulsion’ at the pollution of a site like the Motupipi Estuary.<sup>282</sup>

Pollution and reclamation were not the only causes of foreshore damage; many other practices have damaged kaimoana. For example, the shellfish beds at Wakapuaka Estuary are said to have been continually damaged by a number of activities: the continuing access across the estuary by vehicles, people, and animals; gravel and silt washed into the estuary as a result of forestry operations; unauthorised excavations near the estuary; and the downstream effects of a new subdivision.<sup>283</sup>

There is also a substantial body of evidence that the use of fast ferries in Tory Channel and Queen Charlotte Sound from December 1994 caused damage to mahinga kai on

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278. Ursula Passl, brief of evidence on behalf of Te Atiawa, 2002 (doc G6), p 32; Hewitt and Morrow, ‘Te Atiawa’, pp 148–153

279. See, for example, Whitton, brief of evidence; Mairangi Reiher, brief of evidence on behalf of Ngati Tama, 11 February 2003 (doc K15); Hewitt and Morrow, ‘Te Atiawa’, pp 152–153

280. Marr, ‘Crown–Maori Relations’, pp 91–92

281. B Hippolite, brief of evidence on behalf of Ngati Toa, p 12

282. Hewitt and Morrow, ‘Te Atiawa’, p 151

283. A Stephens, brief of evidence, pp 11–12

foreshores.<sup>284</sup> Te Atiawa made unsuccessful submissions to the Marlborough District Council and the Planning Tribunal on the destruction caused by the ferries' wash. They argued that significant areas of the foreshore fisheries, including paua and kina, had been destroyed (and that the wash had disturbed urupa).<sup>285</sup> John Bunt of Te Atiawa gave evidence based on his long experience with kina and paua in the Sounds. He explained that 'paua grow in shallow water but they come out of the water at low tide and the little ones grow under the rocks, to about the size of a fifty cent piece'. Since the fast ferries started to go past, 'the wash churned from the ferries has turned all those rocks over' and crushed the shellfish.<sup>286</sup> Another witness for Te Atiawa, Rita Powick, described the damage caused by the ferries as 'catastrophic'.<sup>287</sup> Although the Planning Tribunal did not accept this evidence, the fast ferries have since been withdrawn, ultimately because of speed restrictions imposed by the council.

Reclamation was not restricted to coastal sites. Ngati Koata raised with us the case of Moawhitu, the highly prized lagoon from which they obtained the bulk of their eels.<sup>288</sup> A number of witnesses, including James Elkington, Ariana Rene, Alfred Elkington, and Puhanga Tupaea, described how the eels were taken and their importance in Ngati Koata's customary economy. With the sale of the adjoining lands in the early twentieth century, Maori had to cross privately owned lands to use the lagoon and surrounding swamp. They retained land at one corner of the lagoon, which gave them access to the waters but not to the full area that they needed to trap the eels (see fig 38). Access did not appear to present a problem, as Ngati Koata continued to exercise their customary harvesting rights. Sometimes, the local farmer would come down with a horse and help drag their boat across the beach to the lagoon and back again. From 1948, however, the landowners began to drain and reclaim land, which both depleted the supply of eels and diminished the size of the lagoon, requiring Maori to cross private land to reach it.<sup>289</sup>

In 1976, part of the former lagoon and swamp area was set aside as a Maori reserve for the purpose of a fishing ground for the iwi of Ngati Koata.<sup>290</sup> This was a mechanism to regularise their former easement, although it was already noted that landscape modification had shrunk the lagoon and that the easement no longer provided legal access. The Government was aware of this and its response in 1971 was not to assist Maori to secure legal access but to contemplate buying their now-useless reserve.<sup>291</sup> The landowners had not challenged Maori access originally. However, as a result of changed ownership, Maori seeking to gain

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284. Hewitt and Morrow, 'Te Atiawa', pp 114–131

285. Marr, 'Crown–Maori Relations', p 131; Christopher Love, brief of evidence, pp 4, 8–16

286. J Bunt, brief of evidence, pp 12–13

287. Powick, brief of evidence on behalf of Waikawa Resource Management, p 17

288. Heather Bassett and Richard Kay, 'Nga Ture Kaupapa o Ngati Koata ki te Tonga, c 1820–1950', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A76), p 107

289. Bassett and Kay, 'Nga Ture Kaupapa', pp 110–112

290. Patete, 'D'Urville Island', p 185

291. Ibid

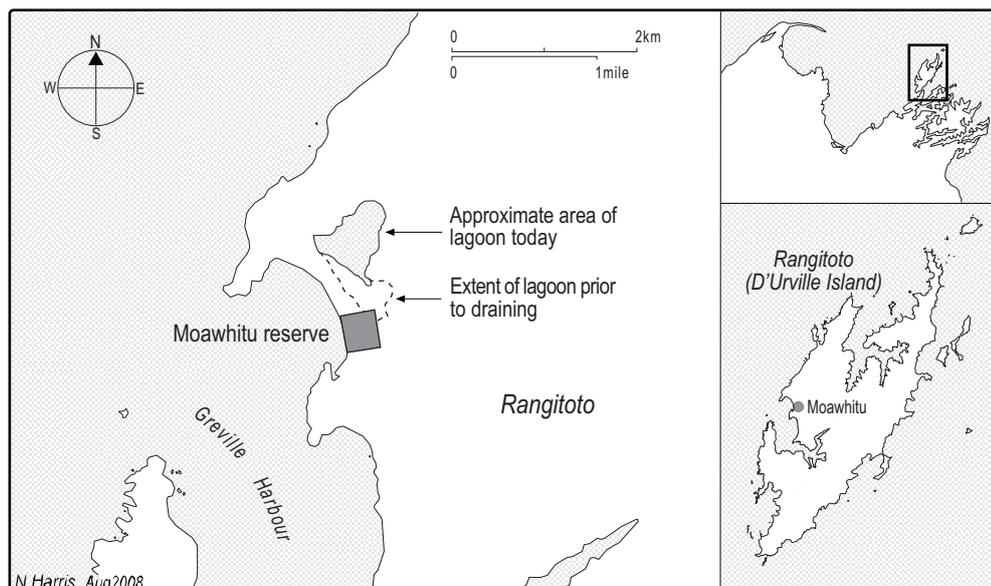


Figure 38: Moawhitu Lagoon

Source: Moira Jackson, Crown Forestry Rental Trust, and Terralink NZ Ltd, 'The Ngati Koata (Wai 566) GIS Map Book', map book, 2001 (doc c3), fig 10

access to the lagoon have faced difficulties. James Elkington told us that he had been denied access to the lake in 1994.<sup>292</sup> According to Heather Bassett and Richard Kay, this state of affairs was continuing five years later, with the result that the reserve could no longer serve its purpose.<sup>293</sup>

We note that in 2006, after our hearings, the 1797-hectare farm block containing the lagoon was purchased by the Nature Heritage Fund. We understand that the land is now part of the D'Urville Island scenic reserve, and that the department planned to open a campsite close to the beach in mid-2008.<sup>294</sup> We have no information as to the status of the Maori reserve gazetted in 1976 or on any consultation that may have occurred prior to the land being added to the scenic reserve. Because these events occurred after the hearings phase of our inquiry ended, we cannot say whether the reservation of the area surrounding the lagoon has further impinged on the ability of Maori to maintain access to, and exercise their customary rights in respect of the eels and other species in, the lagoon.

Moawhitu provides an example of how, although most Maori in Te Tau Ihu were still able to get a sufficient supply of eels until the 1970s, damage or destruction of particular

292. J Elkington, brief of evidence on behalf of Ngati Koata, para 64

293. The present-day location of the reserve in relation to the lagoon was graphically illustrated in figure 10 of Moira Jackson, Crown Forestry Rental Trust, and Terralink NZ Ltd, 'The Ngati Koata (Wai 566) GIS Map Book', map book, 2001 (doc c3).

294. Department of Conservation, *Conservation Action: Te Ngangahau ki te Kura Taiao* (Wellington: Department of Conservation, 2007)

prized sites had important local impacts. Ngati Koata lost their most prized eel fishery as a result of the draining of the swamp and lagoon, which greatly depleted the stocks and led to troubles over access. From then on, they had to journey across to the Waimea Plains and other areas to obtain eels from the rivers. The part that Moawhitu had played in maintaining their mana, and enabling customary exchanges of valuable foods, was gone.

Other waterways have been damaged or destroyed in the twentieth century, with cumulative effects on mahinga kai and also on the ability of Te Tau Ihu Maori to meet their customary obligations of whanaungatanga, manaakitanga, and kaitiakitanga. One of the most serious examples raised with us concerned the Wairau River and lagoons (see fig 36). Many Rangitane witnesses explained the centrality of the river to their lives, their identity as a tribal people, and their responsibilities as kaitiaki. We referred above to Jeffrey Hynes' evidence about the long history of damage to the river when we explained why Rangitane are finding it difficult to provide traditional foods for the transmission of knowledge and tribal values to their rangatahi.

Mr Hynes told us: 'As Kaitiaki of the Wairau River Rangitane tikanga requires that we maintain and protect this valuable taonga for future generations.'<sup>295</sup> Their ability to do so, however, has been profoundly affected by settlement and the environmental changes that it has brought. Mr Hynes described the modification and degradation of the river that he has seen in his lifetime, as well as the consequential reduction of fisheries and mahinga kai.<sup>296</sup> Judith Macdonald told us that the mouth of the Wairau River is polluted to such a degree that 'the Public Health Unit has had to place signs not to take kaimoana from these areas. The Marlborough District Council assisted with this project and believes they have met their treaty obligations ensuring that the signs are written also in Maori.'<sup>297</sup>

Also at issue are the Wairau lagoons, which Richard Bradley described as the 'Rangitane Vatican City', so sacred are they to the tribe.<sup>298</sup> Here, much of the damage has occurred in relatively recent times.<sup>299</sup> During the current resource management regime, for example, the Marlborough District Council granted consents for industrial discharge into the Grovetown Lagoon and continued the practice of pumping Grovetown sewage into the lagoon. Recent growth in horticulture and viticulture has also increased the pollution of the river and lagoons, to the point where eels and other species have been reduced, and some sites are, as mentioned above, hopelessly polluted. Mr Bradley told us that Rangitane have opposed many resource consents and practices that affect the river and lagoons but that their objections have been ignored. The iwi lacks the resources to take appeals to the Environment Court.<sup>300</sup> From their perspective, therefore, the Resource Management Act

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295. Hynes, brief of evidence, p 7

296. Ibid, pp 3-18

297. Judith Macdonald, brief of evidence on behalf of Rangitane, 10 March 2003 (doc M5), p 19

298. Bradley, brief of evidence, p 19

299. Philip Macdonald, brief of evidence on behalf of Rangitane, 10 March 2003 (doc M7), p 13

300. Bradley, brief of evidence, pp 40-44; Hynes, brief of evidence, pp 4-6, 11-16

## 11.5.3(3)

has not provided them with a greater ability to exercise their kaitiakitanga and protect the river. Although willing to work with others to achieve ‘carefully planned well thought out economic development’, the tribe feels that its values (and genuinely sustainable use of the environment) do not win out against commercial interests.<sup>301</sup>

On the positive side, there have been some recent moves towards restoration. Rangitane initiated a project to improve the flora and fauna and habitat of the Grovetown Lagoon and to try to return the waterway to its previous state. The district council has appointed a committee to administer, protect, and enhance the lagoon, chaired by Jeffrey Hynes.<sup>302</sup> Also, after the close of our hearings, Rangitane joined with the council and DOC in a council-funded project to restore the Vernon Lagoon (Mataora). The council acknowledged the harmful effect of flood-protection works in the 1960s, which cut the lagoon and canals off from the Wairau River. The project was to build a culvert to flood the wetlands again, which should begin to restore the lagoons as a breeding ground for eels and whitebait.<sup>303</sup>

The claimants gave us many other examples of damaged, reclaimed, or polluted waterways and wetlands of particular importance to them. Considered in conjunction with the loss of access as a result of the ongoing attrition of reserves, and the serious depletion in fisheries that has taken place since the 1960s, these various specific losses combined in a general pattern of loss, both economic and cultural.

**(3) Crown control of natural resources and the degree of its responsibility**

From the mid to late nineteenth century, the Crown assumed regulatory control and management of the natural resources of New Zealand. Birds, forests, fisheries, swamps, rivers, foreshores – all became subject to legislative and regulatory regimes. In some cases, actual control was delegated to local bodies. River and catchment boards, harbour boards, county councils, acclimatisation societies (later fish and game councils), and other bodies – some elected by rate-paying constituencies, some not – were given authority over the resources.

Ms Marr’s report provides a detailed history of this process. She demonstrated that the variety of bodies either appointed by the Crown or elected by ratepayers or, in the case of acclimatisation societies, by paid-up members did not represent Maori in Te Tau Ihu. Indeed, she argues that, because Maori found it so difficult to obtain money to pay rates (or refused to pay them), their interests were deliberately ignored by the infuriated ratepayers on road, river, and drainage boards. Broadly speaking, she concludes that the Maori people of Te Tau Ihu were excluded from these authorities – and from local government in general – before 1991, and that their interests were seldom, if ever, taken into account by those bodies.<sup>304</sup> One usual safeguard was missing. Normally, the Government ‘relied on the

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301. Hynes, brief of evidence, pp 8, 2–19

302. Ibid, p 16

303. Dan Hutchinson, ‘Wairau Bar Burial Site to be Restored at Council’s Cost’, *Press*, 19 January 2006

304. Marr, ‘Crown–Maori Relations’, pp 88–89, 93–94, 104–106, 109, 114, 117–118, 127–129, 134, 138, 143, 159, 161

Native Department becoming involved in local administration and therefore ameliorating the harshness of its impact on Maori, but it [the department] had a very light presence in Te Tau Ihu.<sup>305</sup>

At the same time, Ms Marr maintains that the ultimate responsibility remained with the Crown. In the first place, a large part of the region remained Crown land. Although this had facilitated Maori access and use in the nineteenth century, it appears to have changed in the twentieth century. The Government leased land to pastoralists for farming but later turned most Crown land into State forests for milling and catchment conservation. From the 1920s, the Forest Service took charge and fostered exotic forestry on marginal Crown land. The planting and milling of State forests did significant damage to the waterways and fisheries of Te Tau Ihu. The milling of indigenous forest and its replacement with exotics reduced the viability of native plant and bird populations. Further, the Forest Service had powers to restrict entry and prevent the taking of native species. From Ms Marr's research, the service did not protect or even consider the interests of Maori in waterways or native species on Crown land in Te Tau Ihu.<sup>306</sup>

Secondly, the Crown delegated 'substantial powers to Pakeha dominated agencies without requiring them to consider or protect Maori interests.'<sup>307</sup> Reclamations and fore-shore modification were authorised by statutes that granted land and control to harbour boards. Drainage of wetlands was encouraged, facilitated, and legislated for by the Crown. Modification of rivers and other waterways was enabled by establishing local boards and by authorising or carrying out public works. Land clearance and deforestation for pastoral farming was also encouraged in policy and legislation. Pollution, erosion, and flooding were unwanted but tolerated by-products of the process. To a large extent, the State was the creature of the settlers and it served the interests of settlement.<sup>308</sup>

This is most clearly illustrated, perhaps, in arguments over birding. By the turn of the twentieth century, there was some pressure in Parliament to prevent the decline or extinction of native birds. The Crown imposed various protections to stop or restrict the hunting of forest and (later) seabirds, with the object of conserving remnant populations. But, for much of the century, it refused to interfere with the destruction of habitat and food supplies, which was admitted to be the primary cause of the birds' decline.

In 1895, objecting to hunting restrictions, Ngapuhi leader Hone Heke Ngapua pointed out that 'the birds suffered because settlers cut down the bush, not because of hunting.'<sup>309</sup> Geoff Park, an ecological historian, noted the following interchange in Parliament in 1907, during the debate on the Animals Protection Bill:

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305. Ibid, p 88

306. Ibid, pp 75–81

307. Ibid, p 82

308. See Marr, 'Crown–Maori Relations'

309. G Park, *Effective Exclusion*, p 400

During the debate the Minister of Lands, Thomas Mackenzie, stated the Crown's intention that the new Act would 'in a short time . . . absolutely protect our beautiful native birds'. His appeal 'to the Native race to give us all the support they can' and that 'they ought to unite with the Europeans in protecting that which is really so delightful and beautiful' met with disdain from the member for Northern Maori. 'What about the freeholders,' asked Hone Heke [Ngapua], 'who want the land in order to knock the bush down?'

'Notwithstanding the Treaty of Waitangi,' Mackenzie replied, deflecting Heke's question, 'we have reached the stage in this country that if the Natives will not assist in protecting that which is so beautiful, then the laws of the country will have to do so.' Heke responded that when it came to conserving indigenous birds, 'the Natives are the only ones who do it.'

Heke persisted, asking: 'What was the area of bush country that has been knocked down by the settlers?' Mackenzie's answer left no doubt as to the Crown's intentions vis-à-vis Maori in the new landscape being constructed: 'We will not discuss the area that has been knocked down. We will say that the Europeans have been considerate to the Natives in reserving the fiord country [a reference to Fiordland National Park].'<sup>310</sup>

As we noted above, Government policy in 1913 was that 'no forest land . . . which is suitable for farm land, shall be permitted to remain under forest.'<sup>311</sup> The State was a settler State. In 1910, for example, the Secretary for Lands requested a report on the suitability of creating scenic reserves on Rangitoto. The local commissioner of Crown lands replied that the island was 'all hills' and heavily forested, with the exception of a mineral belt towards the southern end that was covered with manuka scrub. He understood that most of the island was leased to Europeans and noted with approval that very 'extensive improvements have been carried out in the way of felling bush, grassing, fencing and erecting buildings.'<sup>312</sup> Large portions of the island were suitable for pastoralism. There were also many points of scenic beauty, undevelopable and therefore appropriate for scenic reserves: 'there are certainly large parts of the island well adapted for pastoral purposes and [therefore] too valuable to be reserved for scenery, but there are also parts not of much value except for scenic purposes.'<sup>313</sup>

These views were fairly typical of Government attitudes in the first half of the twentieth century. In 1951, for example, concern was expressed about the drainage of Whakaki Lagoon (between Nuhaka and Wairoa) and its likely effect on hunting and fishing. The Secretary for Internal Affairs told his Conservator of Wildlife that, 'if, as stated, the area of lagoon when drained will make rich agricultural land, it is obvious that this department cannot oppose it.'<sup>314</sup>

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310. G Park, *Effective Exclusion*, p 401

311. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 2, p 625

312. Commissioner of Crown lands, 'Suggested Scenic Reserves – D'Urville Island', 30 August 1910 (Patete, supporting documents, doc 0Y), p 1

313. Ibid, p 2

314. Secretary for Internal Affairs to Conservator of Wildlife, 15 August 1951 (G Park, *Effective Exclusion*, p 63)

On the other hand, at least there was a Conservator of Wildlife by this time. We note the findings of the Mohaka ki Ahuriri Tribunal that the Crown was aware of environmental problems and damage much earlier than it acted on them. The dangers of erosion and other problems were recognised from the 1870s, including the need to conserve a timber resource for both catchment protection and a timber trade. Also, the scenery preservation movement sought to preserve native bush where it did not breach the 1913 'broad principle' – in other words, where the land could not possibly be used for farming. There was also a growing desire to preserve native species, especially birds, from about 1890, and this was reflected in the animals protection legislation. But there was no concerted conservation movement until the First World War. The dangers of acclimatising exotic species were realised when they got out of hand (such as rabbits in the 1880s), but the Government was slow to introduce control measures.<sup>315</sup>

The Mohaka ki Ahuriri Tribunal concluded that 'the Crown was tardy – by several decades – in beginning to take effective measures to address the problems of environmental degradation.'<sup>316</sup> Governments knew enough in the first half of the twentieth century to have controlled and minimised the impacts of land clearance and pollution.<sup>317</sup>

Ultimately, the Soil Conservation and Rivers Control Act 1941 and the Wildlife Act 1953 were passed mid-century, reflecting a growing shift in policy and attitudes. Because reforestation to prevent erosion started quite late and after so much clearance, it was a matter of reforesting with exotic rather than indigenous species. Also, the policy shift was only partial – the Crown continued to provide fertiliser subsidies and to encourage the development of marginal lands for farming in the second half of the twentieth century, with ongoing and cumulative results. On the other hand, efforts to control and reduce the harmful effects of pests on native bush and birds got serious after the 1953 wildlife legislation.<sup>318</sup> Thus, the settler State was not monolithic in its attitude to development, especially in the twentieth century. There was room to accommodate other interests (including Maori interests), provided those interests were known to the Government and there was a political will to do so.

For Te Tau Ihu, the facts as established by Ms Marr are that:

- ▶ the Crown authorised and facilitated the modification of the environment in the interests of settlement; and
- ▶ Maori interests, where they differed from settlers', were not represented in or protected by the agencies set up to oversee and carry out the modifications.

She further demonstrated the consequences for Te Tau Ihu Maori, in the form of drained wetlands, cleared forests, modified waterways, polluted sites, and reclamations.<sup>319</sup>

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315. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 2, pp 624–627

316. *Ibid*, p 636

317. *Ibid*, p 637

318. *Ibid*, pp 624–627

319. Marr, 'Crown–Maori Relations', p 86

## 11.5.3(3)

The Crown did not challenge this evidence in cross-examination, nor in submissions.<sup>320</sup> It did, however, dispute the notion that environmental modification or pollution are breaches of the Treaty simply because they happened. Rather, counsel argued that modifying the environment is an inevitable part of development, as is some degree of pollution. It was not reasonable to expect that the Crown could or should have maintained a pollution-free environment. What was required was for the Crown to balance interests fairly – something, counsel argued, that is now done by the Resource Management Act 1991. The Crown did not accept, therefore, that it was at fault because land has been reclaimed and marinas built. It is necessary to prove more than that these things happened.<sup>321</sup>

Two questions arise from the Crown's argument:

- ▶ Was the Crown aware of a Maori interest in the natural resources of Te Tau Ihu requiring its active protection?
- ▶ If the Crown was aware of such an interest, did it balance matters fairly so as to protect the Maori interest?

It will be apparent from section 11.4 that the Crown was fully aware of such an interest in the nineteenth century. It was brought to the attention of successive governments in the 1870s, 1880s, and 1890s by the reports of officials and commissions of inquiry and by petitions and parliamentary investigations. There is no doubting that the Crown was fully aware of the importance of customary food supplies to the survival of Maori and of their claimed rights to their mahinga kai. It is also evident that the Crown took no action to protect those interests in the nineteenth century. At best, some of the more remote landless natives reserves provided additional access to mahinga kai. A review of the evidence shows that this was by accident rather than by design. Otherwise, the Government did none of the things within its power to protect Maori interests. As noted, it could have reserved sufficient land for both Maori farming and access to mahinga kai. This may have entailed repurchasing valued sites by the 1890s, which the Liberal Government was willing to do for settlers in the busting up of the great estates (see ch 7). Further, it could have used easements or other legal instruments for protecting Maori access to select mahinga kai when it granted title to settlers. We note that some such easements were created for Ngai Tahu as a result of the reservation of their mahinga kai in the Kemp deed.<sup>322</sup>

Much of the harm to inland forests, wetlands, and waterways had already occurred by the mid-twentieth century (see sec 11.5.1). Maori survived during this period on their sea fisheries and kaimoana, supplemented by eels and whitebait, garden produce, poultry, wild pigs, forest products where possible, and cash from mainly seasonal work. The historical

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320. Crown counsel, cross-examination of Cathy Marr, eighth hearing, 17–19 February 2003 (transcript 4.8, pp 63–66); Crown counsel, closing submissions

321. Crown counsel, closing submissions, pp 157–163

322. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, pp 941–942

evidence in our inquiry shows that the Crown was fully aware of the dependence of Maori on these resources throughout the period.

Of all the historians who appeared before the Tribunal, only one reported an instance of Te Tau Ihu Maori informing the Crown that they no longer needed such food supplies. In his evidence for Ngati Apa, David Armstrong noted a 1923 petition from Hoani Mahuika and the people of Kawatiri in which they told the Government that their ancestors had occupied their lands for generations 'as camping places to facilitate the securing of food supplies; as sites to snare birds, catch eels and other foods, to dig fern roots and also to fell trees for the making of canoes.' The lands 'still bear traces of their having been used for such purposes . . . right up to such times as the advances of civilisation among your petitioners made unnecessary such methods of securing such food supplies.'<sup>323</sup>

Apart from this one instance, all other information to the Government seems to have stressed the degree of Maori dependence on their customary resources. Matiu Rei referred to this as the 'oppression of subsistence,' with iwi unable either to develop or to retain full interests in their lands and resources.<sup>324</sup> In many of its communications with the Government, the iwi complained about the assumption of control by the Crown or its agencies, and the various laws and policies which were interfering with its rights.

In order to answer the question as to whether the Crown was aware of an interest requiring its protection, we provide a brief survey of the information available to it from Te Tau Ihu in the first half of the century. In doing so, we note that this information was not received in a vacuum. There were many Maori complaints and representations from around the country at the same time, which thus provided a greater depth of knowledge for the Government, as this Tribunal has found, for example, in its report on the Hauraki claims.<sup>325</sup> The Tribunal now has reports covering many areas of the country, as well as its Rangahaua Whanui research programme, and its Wai 262 research publications. These show a significant volume of petitions, correspondence, and representations from iwi about their customary rights to natural resources and about the infringement of those rights by central or local government action, environmental modification, and loss of access or control. That serves as the national context for Te Tau Ihu claims on these matters.

To take one example: the Rekohu Tribunal found that the importance of seabirds as a customary food source and the need to protect the resource and Maori rights of harvest were raised with the Government by Chatham Islands iwi from the 1930s to the 1970s.<sup>326</sup>

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323. 'Petition of Hoani Mahuika and Others', August 1923 (Armstrong, 'Ngati Apa ki te Ra To', p 88). A copy of the petition is reproduced in David Armstrong, comp, supporting documents to 'Ngati Apa ki te Ra To', various dates (doc A29(a)), p 221.

324. Rei, brief of evidence (no 1), p 10

325. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 3, pp 1099–1159

326. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), pp 266–267

## 11.5.3(3)

This was at the same time as representations from – and negotiations with – Te Tau Ihu iwi over muttonbirding (sec 11.5.5).

There were also knowledgeable members of Parliament and Government who spoke on such matters. Indeed, it emerged from our inquiry that the Government did not merely know of Maori dependence on customary resources – for the first half of the century, it relied on it. In chapter 10, we explained how for a long time pensions were lower for Maori in anticipation that they could live off the land, no matter their circumstances (that is, whether they actually had access to resources or not).

In 1934, Sir Apirana Ngata described that Maori communities ‘depended very largely for food-supply on their community cultivations eked out by supplies taken from river, sea, lake, and bush.’<sup>327</sup> In fact, his development schemes were designed with just such food supplies in mind. The Minister expected Maori to survive on customary food resources, enabling him to pay them for development work at a lower rate, conserving money for the furtherance of the schemes as a whole.<sup>328</sup> We note, however, that there was only one development scheme in Te Tau Ihu – the surviving reserved land was too small and scattered for Maori of this district to benefit from the opportunity.<sup>329</sup> In their case, either they would continue to survive on customary resources and seasonal work (for so long as either lasted) or they would have to leave their turangawaewae.

A Minister like Ngata, of course, was aware of the full range of resources required by Maori. Earlier, in 1922, he had told a kuia in respect of the Treaty:

The Queen did not do anything to take away the rights of the Maori over his lands, instead she made the ownership permanent and truly established. This is the reason, dear old lady, you appear before the Maori Land Court to show your rights, whether of land not yet clothed with title, or by long occupation, when you related the trails, the fern root hills, the tawhara (kiekie fruit) swamps or other token and relics of your ancestors . . .<sup>330</sup>

Ngata knew – none better – that these customary resources were not just relics of the ancestors but an ongoing heritage and a necessity for twentieth-century Maori. Nor was the issue forgotten after Ngata’s time. In 1950, Ngata’s successor in the Eastern Maori seat, Tiaki Omana, reminded Parliament of the importance of perserving Maori fisheries and shellfish grounds for food.<sup>331</sup>

In Te Tau Ihu, the reliance of Maori on their customary resources was brought to the attention of the Government in a variety of ways. In particular, health officers and inspectors, school inspectors, and other officials reported the dependence of Te Tau Ihu communities

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327. G Park, *Effective Exclusion*, p 13

328. AJHR, 1931, G-10, pp xi-xiii, xx

329. Patete, supporting documents, doc vZ, p 1

330. Apirana Ngata, *Te Tiriti o Waitangi* (Hastings: Stickins and Bryant, 1922) (G Park, *Effective Exclusion*, p 14)

331. NZPD, 1950, vol 292, p 3627

on fish and shellfish. We were given many such examples.<sup>332</sup> It was also noted by a commission of inquiry in 1914, which reported that most of the landless natives reserves could not be occupied by their proposed beneficiaries, who were having to survive by a mix of fishing and engaging in seasonal work on European farms.<sup>333</sup>

The issue also came up from time to time when the Government sought to acquire land, usually for scenic reserves. We have already described the correspondence and struggle over Ngaruru in the 1920s. We have also referred to the case of Te Mapou and Raetihi in the 1960s. To those, we could add the examples of Pukatea and Whatamonga Bay in the 1950s. In both cases, Maori wanted to keep the land for fishing purposes. The extent to which they needed to do so – and should be allowed to do so – then occupied the attention of various Government departments, including Maori Affairs.<sup>334</sup>

As well as official reports, there were a number of letters and petitions from Te Tau Ihu Maori. Birding was one of the major issues in their approaches to the Crown. As we shall see in section 11.5.5, there were protracted negotiations between the Government and Te Tau Ihu iwi throughout the century, focused on the latter's wish to access offshore islands for birding, fishing, and the gathering of forest products (especially karaka berries). These negotiations kept the issue of customary rights and the need for customary resources before the Government for much of the century.

Other correspondence and petitions focused on freshwater fishing rights, mainland birding (especially of waterfowl), forest products, sea fishing, and kaimoana. We provide some examples to show the range of information available to – and the rights asserted to – the Government.

In 1903, there was a petition from Ngati Koata seeking the protection of their sea and foreshore fisheries from overuse by Europeans. We were referred to this petition by many witnesses, and James Elkington provided a copy in his evidence. The tribe sought a reserve of their fisheries at the Croisilles (French Pass) and at Rangitoto, and the exclusion of European fishing boats, 'as they (the fish) will presently be very scarce, seeing that there is but a very small portion of the sea for the people residing at these places'. The number of European commercial fishers had already had an impact on these waters and there was no legal way to 'prevent (them from fishing) in the Maori seas of this neighbourhood'.<sup>335</sup>

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332. Dr Cybele Locke, "'The Poorest Tribe under the Heavens": Ngati Kuiu's Socio-Economic Circumstances, 1856–1950', report commissioned by the Crown Forestry Rental Trust, 2002 (doc L1), p 81; Bassett and Kay, 'Nga Ture Kaupapa', pp 232–235; David Young, 'Maori Society and the State Colonial and Post-colonial Te Tau Ihu, 1880–1960: A Survey of Official Archives', report commissioned by the Crown Forestry Rental Trust, 1999 (doc A52), pp 30–32, 64–66, 84, 86, 99–102, 122; Patete, 'D'Urville Island', pp 19, 197, 199, 201, 204

333. Patete, 'D'Urville Island', p 226

334. For Pukatea, see Tony Walzl, 'Pukatea Reserve (1860–1970)', report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc B7); for the reserves at Whatamonga Bay, see Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 287–298

335. 'Petition of Rewi Maaka and 23 Others', 15 September 1903 (James Elkington, comp, appendices to brief of evidence on behalf of Ngati Koata, various dates (doc B34(a)), doc 23)

The reserve was to be for Ngati Koata, their ‘relatives who are living close to, or together with them’ (presumably Ngati Kuia), and local Pakeha inhabitants. In particular, the tribe wanted the legal power to impose rahui – ‘to make sacred the said seas, so that the fish be not killed’ – for up to two or three years, which could presently be enforced among their own people but not commercial fishers. The tribe also wanted to reserve their kaimoana, especially the oysters being taken by commercial fishers. Ngati Koata looked to the future of both the fisheries, which they feared would be destroyed, and themselves, who they hoped would become very numerous in a hundred years’ time. They expressed their desire to ‘uphold the word of King Edward and His Mother Victoria’ – a reference to the Treaty – and its principle ‘that the Maoris may together grow in the benefits of the Europeans during the days and years to come; seeing that you Europeans know your means of obtaining money from the land and from the sea also.’<sup>336</sup>

The Native Affairs Committee referred the petition to the Government for consideration. Ms Marr explained that it was killed by the Marine Department, which reported: ‘There is no power to accede to the request of the Natives as the law does not provide for the reservation of fishing rights for their exclusive use.’<sup>337</sup> The Tribunal has already conducted an extensive examination of fishing law in its *Report on the Muriwhenua Fishing Claim* and *Ngai Tahu Sea Fisheries Report 1992*. We do not intend to repeat that discussion here, but we note that from 1900 (with the Maori Councils Act) there was in fact provision on the statute books for the reservation of Maori fishing grounds. This power existed in various forms from 1900 to 1962, but no such reservation, to the knowledge of the Tribunal, was ever made.<sup>338</sup>

In 1909, Pari Karaka wrote to the Government protesting at restrictions on whitebaiting:

It is a small matter of which I write to you, namely as to the fish in our fresh-waters. We are being prevented from catching Inanga, and are referred to the law affecting the Pakeha. (Asked to take out licenses.) If that be correct write and let us know. If this law is to operated against the Maori, let us know. My reason for writing to you is that if one of us happens to be caught fishing for Inanga in our own pools, a fine of £20 is to be imposed. Enough then. You yourself know of the law and of its provisions so far as the Maori are concerned; of the provisions of the Treaty of Waitangi, for instance. I have always been under the impression that that Treaty was what the Maori had to look to in matters of this nature.<sup>339</sup>

In the 1920s, there were further moves to acquire birding islands from Ngati Koata, with more discussion of the practice and necessity of birding among Te Tau Ihu Maori. Also, the

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336. ‘Petition of Rewi Maaka and 23 Others’, 15 September 1903 (James Elkington, comp, appendices to brief of evidence on behalf of Ngati Koata, various dates (doc B34(a)), doc 23)

337. Marr, ‘Crown–Maori Relations’, p149

338. Waitangi Tribunal, *Muriwhenua Fishing*, pp100–102

339. Pare Hori Karaka to James Carroll, Motueka, 25 September 1909 (Halder, ‘Historical Documents’, vol10, p4408)

story of the Ngaruru reserve (discussed above) played out in this decade. It will be recalled that the owners petitioned the Crown, explaining their extreme need for this small, surviving piece of land, which provided them with camp sites for fishing and wood for building and firewood. ‘We would point out,’ they wrote, ‘that no matter what monetary value you gave us in exchange, you cannot adequately reimburse us for the loss that we will suffer.’<sup>340</sup> The Government acknowledged that they needed to retain land for fishing and timber products and agreed to a small reservation of part of the block.

In 1931, Ngati Toa, Ngati Rarua, and Rangitane petitioned Parliament seeking the ‘free and undisturbed right of fishing for our Native fish, namely Flounders, Kahawai and Whitebait in the Wairau and Opawa Rivers, also the right to go and catch eels on the Mataora Lake, known as Big Lagoon.’ They asserted that:

from time immemorial, our elders down to ourselves have been catching these fish with nets, but today our nets are taken and confiscated by Rangers of the Acclimatization Society, with the result that we are deprived of the privilege enjoyed by elders, of fishing our Native fish and shooting our Native Game, known as Grey Duck.

They asked that they not be required to take out a licence to ‘give the Maori people the right to catch Whitebait in our Rivers and to shoot our Wild Grey Duck.’<sup>341</sup>

The Native Department response to this petition was to characterise it as a grievance:

which the Natives consider they have in not being permitted to freely fish in the sea waters and rivers. They partly found this claim upon the Treaty of Waitangi but the Supreme Court has held that they have no greater fishing rights than ordinary Europeans have.<sup>342</sup>

As Ms Marr notes: ‘There is no evidence of willing consideration of Maori interests, only the possibility of obligations now avoided through court decision.’<sup>343</sup> We note, as mentioned above, that there were nonetheless reports to the Government from officials that Maori were utterly dependent on their fisheries and kaimoana at this time.

In 1933, as we will discuss in section 11.5.5, Ngati Kuia petitioned the Crown, underlining their need to obtain customary foods (including birds, fish, and berries) from offshore islands, where such items could still be found.

In 1937, the secretary of the Wairau Pa branch of the Labour Party, Tinirau Piripi, wrote to Michael Savage, who was Native Minister at the time. He informed Savage that the Blenheim Angling Club and the Acclimatisation Society were trying to destroy all the eels in Marlborough rivers. The people of Wairau Pa strongly protested the destruction of ‘our

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340. Riwai Love and 14 others, Picton, to Minister of Public Works, 24 May 1920 (Alexander, ‘Reserves of Te Tau Ihu’, pp 350–351)

341. ‘Petition of Ngati Toa, Ngati Rarua, and Rangitane’, 1931 (Marr, ‘Crown–Maori Relations’, p 144)

342. Under-secretary, Native Department, to chairman, Native Affairs Committee, 6 August 1931 (Marr, ‘Crown–Maori Relations’, p 144)

343. Marr, ‘Crown–Maori Relations’, p 144

Native food the eel, and they asked the Government to protect their eel fisheries.<sup>344</sup> Savage referred the matter to the chief inspector of fisheries, who reported that acclimatisation societies had certain duties. If they were to carry those duties out properly, then they were 'quite right in aiming at the destruction of eels in their waters.' The law required the society to conserve acclimatised trout. The Blenheim Angling Club was also within its legal rights to destroy eels, because the laws protected trout, whereas eels were 'outside the law'.<sup>345</sup> He understood that eels either predated on trout or competed with them for food.<sup>346</sup>

Maori, on the other hand, were also correct that the eels were part of their food supply: 'if it were a question only of food production, it would probably be better to conserve the eels rather than the trout.' But, in order to be protected, native species had to be valued by the whole of society. Eels, the inspector wrote, 'are despised by most, and loathed by some, of the Pakeha inhabitants of the Dominion (which in my opinion is a matter of rather stupid prejudice) and are appreciated as food only by the natives and by a small percentage of the white population.' Even so, he believed that the Government had a moral obligation to conserve native fisheries. If Maori could prove that they habitually made use of eels in certain waters for food, then there was 'a good case for taking steps to conserve the eels in those waters where they have established fisheries'.<sup>347</sup> He recommended an inquiry as to whether Marlborough Maori fished casually for eels or whether they had organised fisheries.

The Marine Department wrote to Piripi requesting information on Maori eel fishing in Marlborough, including the location of established fisheries, the methods of fishing, and the main eeling seasons. No replies appear to have been received. Ms Marr suggests that the letter may not have reached him or that the Wairau Pa community may have been reluctant to divulge detailed information about the location of their fisheries to the Government when a perceived branch of that Government (the acclimatisation societies) were trying to destroy eels. In any case, the department did not pursue the matter further, noting their 'doubt whether there was very much of serious importance in the representations'.<sup>348</sup>

In 1938, the Government produced a report on the possible commercial fishing of eels in Marlborough. According to that report, the lower Wairau Valley had once been an important eel fishery for Maori, but there was 'today no established fishery, although small quantities are taken irregularly by Maoris near Tuamarina'.<sup>349</sup> Ms Marr questioned this finding, noting other evidence of the great importance of eels to Wairau Maori. The Government's report did acknowledge that Maori had been protesting the acclimatisation society removal of eels from streams. Under the current law, however, 'Maori have no exclusive rights to the

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344. Marr, 'Crown-Maori Relations', p145

345. Chief inspector of fisheries to secretary, Marine Department, 20 October 1937 (Marr, 'Crown-Maori Relations', p145)

346. Ibid

347. Ibid

348. Marr, 'Crown-Maori Relations', p146

349. Ibid

use of eels or whitebait'. Even so, the report recommended that commercial eeling should be limited to Maori in 'areas where there is reason to believe Maoris have been regularly fishing'.<sup>350</sup> Nothing seems to have come of this proposal, but it shows that, had the will to do so been present, there was capacity to acknowledge Maori fishing rights.

In the 1940s, a local newspaper, the *Nelson Evening Mail*, referred a query from Ben Hippolite to the Marine Department. We discuss Mr Hippolite's letter in detail in the next section. Here, we note that Te Tau Ihu Maori were encountering resistance to eeling in rivers and streams bounded by non-Maori landowners. Under the *ad medium filum aquae* rule, the beds of non-navigable rivers were owned to the middle line by riparian landowners. Te Tau Ihu Maori, however, claimed that the Treaty recognised their right to fish for eels in any river or stream. In their view, Pakeha owners' title held good against other Pakeha but not against Maori. Crown grants, it was held, could not take away Treaty rights. The Marine Department's response was by now typical: the courts held that the Treaty was enforceable only where its provisions had been recognised in statute.<sup>351</sup>

Throughout the first half of the century, the Government relied most often on a 1914 decision of the Court of Appeal, *Waipapakura v Hempton*:

In the instance quoted [Ben Hippolite's letter to the newspaper] it appears that the bed of the river is private property and therefore any person, whether Pakeha or Maori, would not be entitled to fish there without consent of the owner. 'Generally speaking the Maori has no greater rights than the Pakeha, both races being subject to the Fisheries Act, 1908, and the regulations thereunder. This was established by the Court of Appeal in 1914, in the case *Waipapakura v Hempton* (*NZ Law Reports*, vol 31, 1914, page 1065).<sup>352</sup>

In response, the newspaper assured its readers that the bed of the Maitai River was 'in some cases private property' and could not be accessed without permission, but that the question arose only outside the city boundary. Inside the city, the council owned land on one or both banks, making the river open to all citizens (see fig39). The Nelson Harbour Board 'controls the foreshore and has certain authority over what goes down the river so far as its effect on the harbour is concerned'.<sup>353</sup> Thus, two sets of rights were protected – those of the citizens of Nelson and those of the harbour board.

The Tribunal has discussed *Waipapakura v Hempton* in several reports. In the *Report on the Manukau Claim*, the Tribunal quoted the key finding of that case:

It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give an exclusive right to the Maoris, but if it meant to do so no

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350. Ibid

351. Ibid, p147

352. *Nelson Evening Mail*, 12 January 1943

353. Ibid

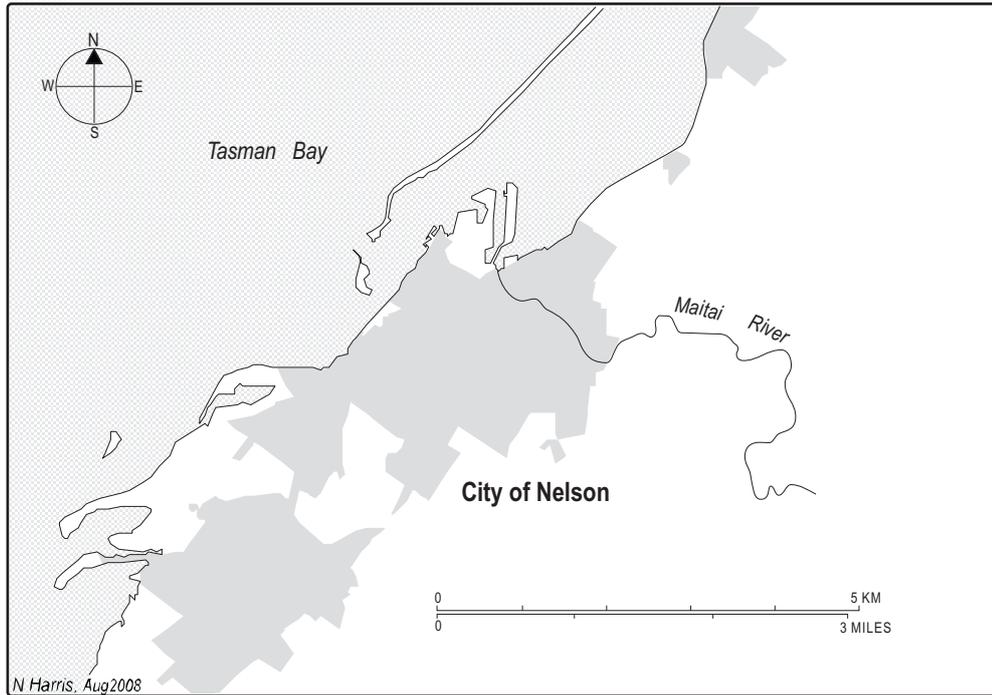


Figure 39: The Maitai River

Source: *Heinemann New Zealand Atlas* (Auckland: Heinemann, 1987), pl 59

legislation has been passed conferring the right, and in the absence of such both *Wi Parata v the Bishop of Wellington* 3 NZ Jur (NS) SC 72 and *Nireaha Tamaki v Baker* [1901] AC 561 are authorities for saying that until given by statute no such right can be enforced.<sup>354</sup>

This and other decisions were used to reject Maori Treaty claims in respect of customary resources. Ms Marr provides other instances for Maori elsewhere in the country, as well as for Te Tau Ihu, and the principle was even applied to Maori birding claims. In 1916, the Crown Law Office delivered its opinion: “The position is stronger against Maoris with regard to Native game than it is with regard to fish because “fisheries” are referred to in Article 11 of the Treaty of Waitangi while there is no reference to Native game or other food supplies in the Treaty.”<sup>355</sup>

In our inquiry, one of the claimants’ most pronounced grievances was their perception that the Crown invariably treated any assertion of fishing rights as an opportunity not for discussion or negotiation but for repression:

354. *Waipapakura v Hempton* (1914) 33 NZLR 1065 (Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 35)

355. G Park, *Effective Exclusion*, p 95

It was noted that the inevitable Crown reaction to any iwi/hapu attempt to assert rights is not to sensibly discuss how these can be accommodated within frameworks which are currently available, but rather a mustering of the forces of the State to deny any existence of such rights.<sup>356</sup>

This is certainly born out by the evidence available to us. As the Tribunal has noted in other reports, the Crown's responsibility was not to rely on such cases as *Waipapakura v Hempton* to defeat Maori rights but rather to protect and provide for those rights. If legislation was required, then it was the Crown's duty to enact it.<sup>357</sup> Ms Marr notes that, partly in response to repeated assurances that the Treaty conferred no rights unless confirmed in statute, members of Te Atiawa, Rangitane, Ngati Rarua, Ngati Kuia, and Ngati Koata signed the massive Ratana petition in the 1930s asking that the Treaty be placed on the statute books. This petition was turned down by the Government.<sup>358</sup>

What, in practical terms, could the Government have done to protect Maori rights of fishing and access to mahinga kai at this time? First, as noted, Maori fishing and other customary rights could have been given the protection of statute law. Secondly, acclimatisation societies were given authority to license fishing and to manage and protect fisheries. In its report *He Maunga Rongo*, the central North Island Tribunal noted that the same powers could have been given to Maori trust boards or equivalent tribal bodies.<sup>359</sup>

Thirdly, the Crown could have taken action to secure Maori access when it became aware of the issue. In his 1942 letter to the *Nelson Evening Mail*, Ben Hippolite noted that there had also been disputes among Pakeha over bathing and fishing rights in the Maitai River. Ms Marr described how the citizens of Nelson had 'long enjoyed the custom of using swimming holes in the river just outside the town boundaries that were technically in private ownership'.<sup>360</sup> This use had been unopposed for many years, but in about 1909 the owners had decided to fence off the access and subdivide the land. This caused an uproar in the Pakeha community about the loss of the 'de facto common right' to use the river. As a result of public pressure, the land with the swimming holes was eventually taken under the public works legislation in 1918. Ms Marr commented: 'The even longer Maori customary use of the river however received much less consideration.'<sup>361</sup>

How seriously was the Crown obliged to take the protection of Maori customary food supplies at this time, and the valued sites at which such supplies could be obtained? In its

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356. Mitchell and Mitchell, 'Customary Fishing', p 95

357. Waitangi Tribunal, *Muriwhenua Fishing*, p 226

358. Marr, 'Crown-Maori Relations', p 149

359. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, pp 1302-1303

360. Marr, 'Crown-Maori Relations', p 147

361. *Ibid*, p 148

*Kaipara Report*, the Tribunal noted a 1935 claim for compensation in the Native Land Court that arose from the reclamation of sand dunes. The Department of Public Works told the court that Maori could not continue to cross the dunes to reach the beach (and their kaimoana) if the works were to be protected. Judge Acheson found that the Government should have ‘gone to extreme trouble to provide at least one access route to the beach for food supplies’. The court had no power to compel the Works Department, because the land had already been taken by proclamation, but it accepted that Maori would suffer ‘serious hardship’ and ‘a big financial loss’ by being cut off from their food supplies. But there was no ‘adequate means whereby the Court could accurately estimate the damage done to each and every Native owner by reason of the taking away of access to the beach for food supplies’. The judge therefore advised the owners that their only remedy was to petition Parliament.<sup>362</sup>

Acheson observed that ‘the Treaty of Waitangi guaranteed to natives the rights of fisheries’ and that ‘the closing of access across the sandhills to the beach in effect and actual practice will entirely nullify the solemn promise given by the Treaty’. The alternative of access by the main road, involving 14 or 15 miles of travel instead of four, was not a ‘practicable access route for the great majority of the Natives’. But the legality of the Crown’s actions ‘prevents the Court from protecting the Natives in a manner which is of more importance to them than the mere assessment of damages’ – in other words, to protect their ongoing access to their food supplies rather than securing one-off compensation.<sup>363</sup>

Further, the court believed that it really was possible to provide Maori with an access route without endangering the reclamations and that the importance of the Maori interest was such that the Government should take the necessary steps: ‘The importance of such access for securing food supplies for Natives should challenge the Public Works Department to find a means of safely giving such access.’ Maori were not objecting in order to increase their compensation; they have ‘a genuine need for the access and will suffer real hardship by its loss. Very few of them will benefit by the reclamation. The Europeans [farmers threatened by wandering dunes] affected will benefit greatly.’<sup>364</sup>

It follows, therefore, that Maori customary rights to their food supplies required the active protection of the Crown. Acheson thought that the Government should go to ‘extreme trouble’ to do so. His court recognised the vital component that customary resources played in the survival of Maori communities in the first half of the twentieth century. In the *Kaipara* case, of course, a direct action on the part of a Government department was involved. We do not see the standard as any different for the multitude of reclamations and other activities by which valued mahinga kai were damaged or destroyed in *Te Tau Ihu*. As we have made clear in this section, the Maori interest in respect of their customary food

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362. Native Land Court, *Kaipara*, minute book 19, 10 May 1935 (Waitangi Tribunal, *The Kaipara Report* (Wellington: Legislation Direct, 2006), p 240)

363. *Ibid* (pp 240–241)

364. *Ibid* (p 241)

supplies was made very clear to the Government. The Crown was aware of that interest and the need to protect it, even where the damage could not be said to have been a direct action of a Crown agency.

We did not receive evidence of northern South Island petitions from the 1950s and 1960s, although, as noted, Maori fishing interests came up when the Crown wanted to acquire reserves. Also, birding and fishing rights on the offshore islands, and the importance of these food supplies to Te Tau Ihu Maori, continued to come before the Government in both decades. It seems, however, that many years of official rebuffs brought a halt to formal petitions. The only exception that we know of was Ngati Toa's petition in 1960 for the retention and protection of their ownership, fisheries, and kaimoana of Porirua Harbour.<sup>365</sup> While not concerned with our inquiry district, this petition did demonstrate the continued reliance of Te Tau Ihu iwi on their customary food supplies in this period, and Oriwa Solomon described interactions with the Crown about it in the 1950s.<sup>366</sup> There were also many approaches to the Government about customary fishing and such matters in the 1980s, as James Elkington and others described.<sup>367</sup>

From the 1970s, the Crown began to acknowledge in planning laws and other legislation that Maori had their own distinctive affinities with land and sea resources. This was the era of the land march, Bastion Point, and the creation of the Waitangi Tribunal. Political pressure bore fruit in 1977, when the Town and Country Planning Act required that the relationship of Maori with their ancestral lands and waters be recognised and provided for. Cultural factors were to be taken into account in planning and, where there was a significant amount of ancestral land, Maori could be co-opted to planning committees. The National Development Act 1979 gave environmental impact reports some status in planning processes. When these processes were tested, some protections for Maori were confirmed, as for instance in 1987, when the High Court made findings over ancestral land and found that Maori spiritual values were important in assessing water right applications.<sup>368</sup>

According to Ms Marr's evidence, however, Government agencies such as the Wildlife Service were slow to adapt. There was a growing awareness of conservation issues from the 1960s, and some Nelson Pakeha groups began to oppose new reclamations and the polluting of foreshores and estuaries. Their efforts at conserving or saving sites achieved some success in the 1970s and 1980s, especially when they worked with the Wildlife Service. But Ms Marr notes the 'invisibility of Maori concerns and interests' still from official files of this period. Conservation in Te Tau Ihu, therefore, took no account of Maori interests, especially their desire to keep using customary resources.<sup>369</sup>

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365. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), pp 36–37

366. Solomon, brief of evidence, p 10

367. See J Elkington, brief of evidence on behalf of Ngati Koata; J Elkington, brief of evidence for Wai 262

368. Marr, 'Crown–Maori Relations', p 130

369. *Ibid*, pp 127–128

As late as 1985, the Wildlife Service consulted with what it regarded as special interest groups over the Wakapuaka wetland. These included:

the Nelson Acclimatisation Society, the Ecology Division of the Department of Scientific and Industrial Research in Nelson, the Nelson Sand Yacht Club, the Nelson Motorcycle Club, the Wakapuaka Drainage Board, the Waimea County Council, the Royal Forest and Bird Protection Society, the Wakapuaka Ratepayers Association, the Pony Club, the Model Aeronautical Club, and the Cawthron Institute; but there is no mention of consultation with iwi, or even non-consultative consideration of Maori interests.<sup>370</sup>

Such a situation is unlikely to recur, however, because of changes in the late 1980s. They began with the preamble of the Environment Act 1986, which stated that one of the objectives of the Act was to ‘ensure that, in the management of natural and physical resources, full and balanced account was taken of the principles of the treaty of Waitangi’. The Conservation Act 1987, which established DOC to promote the conservation of New Zealand’s natural and historic resources and to manage conservation land, went further. More than simply requiring Maori interests to be taken into account, the Act was to ‘so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi’.<sup>371</sup> Finally, the Resource Management Act was passed in 1991, requiring serious consideration of Maori and the Treaty in all resource management and planning. The Crown argued that this suite of legislation can be seen as nothing less than a ‘partial statutory incorporation of Maori customary law into resource management decision-making’.<sup>372</sup> We address the modern resource management regime in section 11.6.

In sum, from the Waipounamu purchase of 1853–56 to the passage of the Conservation and Resource Management Acts, Te Tau Ihu Maori were almost entirely excluded from the management and control of natural resources. Ms Marr’s research of archival sources shows that their interests were not considered or protected by the Government agencies most involved in administering the large Crown estate in the twentieth century – the Forest Service and the Wildlife Service. Nor were their interests represented on or protected by the many boards and agencies empowered by the Crown to manage natural resources. Ms Marr showed how the road boards, drainage boards, river boards, catchment boards, harbour boards, national park boards, county councils, town councils, acclimatisation societies, and other bodies were controlled by ratepayers and settlers. They operated without concern for Maori interests and were sometimes actively hostile to them. As a result, Maori were excluded from the decisions that led to the draining of wetlands, the modification of rivers, the management of birds and forests and fisheries, the siting of rubbish dumps, the piping of sewage, and so forth.

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370. Marr, ‘Crown–Maori Relations’, pp 127–128

371. Conservation Act 1987, s 4

372. Crown counsel, closing submissions, p 156

While Te Tau Ihu Maori might well have welcomed development that protected their interests and have accepted the modification or destruction of some sites if given the choice, their interests were not consulted and they had no say in what was or was not done. As a result, they were deprived entirely of their tino rangatiratanga and they lost key sites, mahinga kai, and resources without recourse or compensation. The Government was aware of their essential need to exercise their customary rights and to access their customary resources during the period to 1970. (It was reminded of this through the 1970s and 1980s as well – James Elkington, for example, referred to Ngati Koata's efforts to secure ownership of various island fishing grounds in the 1980s.<sup>373</sup>)

We will return to issues of management and control in section 11.6, where we consider the modern resource management regime. Next, we turn to the conflict in twentieth-century Te Tau Ihu as to who owned customary resources, and the practical exercise of Maori rights on the ground.

#### **(4) Conflicting views on the ownership of natural resources**

Some witnesses described a gulf between Maori and the rest of the community as to the private ownership of land and what it means for access to natural resources. Many tangata whenua told us that they believed they had a right to access their fisheries and valued plants, no matter where they grew or whose land a waterway passed through. This is because, in their view, they never alienated their rights to fisheries, waterways, and taonga like harakeke, which they consider still belong to them.

There is a long history to such claims in Te Tau Ihu. Ngati Koata, for example, believe that their fishing rights are protected by the Treaty and have never been alienated. In her report on natural resources, Ms Marr referred to an incident in 1942, which focused attention on this issue.<sup>374</sup> On 21 December 1942, Ben Hippolite wrote to the *Nelson Evening Mail*:

On Saturday evening last, in company with two friends, Maoris like myself, I started eeling in the Maitai river, entering the river at the first road ford and proceeding along its bed and not on the adjoining land. Shortly afterwards a lady, whom I learned to be Miss Richardson, told us she owned the land and also the river, and that we must go away. I understand that it is quite correct that Miss Richardson, under her Crown grant, can keep all Pakehas off the river through her property, but is it not a fact that the Treaty of Waitangi guarantees to Maoris all their ancient fishing rights over the rivers, and that I and my friends were really quite within our rights in eeling where we did?

I am told there have been a lot of disputes among the Pakehas in the past over the Maitai river bathing and fishing rights. I do not wish to make any unpleasantness, but perhaps,

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373. J Elkington, brief of evidence for Wai 262, paras 61–62

374. Marr, 'Crown–Maori Relations', p 147

## 11.5.3(4)

Sir, you can tell me whether the case is as I think, and that our Maori treaty rights of 1840 cannot be wiped out by any Crown grant of later date.<sup>375</sup>

The editor referred this letter to the Marine Department and received the response quoted in the previous section; namely, that the riverbed was private property and Maori could not fish there without the consent of the owner. Maori, it was held, had ‘no greater rights than the Pakeha’ unless conferred by statute, as found in *Waipapakura v Hempton*.<sup>376</sup>

This position has never been accepted by Ngati Koata. Nohorua Kotua told us:

It was always told and understood that we had full use of the rivers, no one could stop us from going onto those rivers because they were part of our rohe. This was the way our iwi talked about these rivers – from the Whangamoia Heads right through to Waimea. We didn’t need to go beyond there because all the food we needed was within these rivers.

We were surprised we had to have permission to eel in the Maitai River from Mrs Queenie Richardson, a Pakeha woman who owned the Maitai Valley and river bed as part of her title. We were not allowed to go onto that river without her permission. We always asked because she had the law on her side. One night when some of the family went up night eeling the police came and kicked them out because they didn’t have permission to be there. Mrs Richardson is the only person that I have ever heard of owning quite the same rights. We were exercising our rights, but we didn’t think we had to ask, because of the way we had been brought up and our beliefs about our rights to the rivers in the area. Our iwi had a very strong sense of our rights.<sup>377</sup>

In 1965, Priscilla Paul went on a resource-gathering expedition in the Waimea Plains with her Aunty Tuo, mainly to collect flax for weaving: ‘on the way home she took two eels from a privately owned river, saying “these are our eels” even though the land was in private ownership. She did not see them as belonging to the owners, but rather as a taonga for Ngati Koata.’<sup>378</sup>

Mrs Paul also went with her grandfather and whanau to catch eels and whitebait in the ‘rivers around Pelorus Bridge’:

We never had to ask anyone, we just went there because that’s where the kai was. We knew it was a Ngati Koata place because my father, Rangikapua, wouldn’t go to a place where he wasn’t allowed. My father had been eeling there all his life – they would have been eeling in the same places.<sup>379</sup>

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375. *Nelson Evening Mail*, 12 January 1943

376. *Ibid*

377. Kotua, brief of evidence, paras 35–36

378. Paul, brief of evidence for Wai 262, p 25

379. Paul, brief of evidence on behalf of Ngati Koata, p 10

During the Ngati Koata hearing in 2001, James Elkington was cross-examined by counsel for Ngati Tama:

Fergusson: So those comments you also made about foreshore and seabed in terms of return of ownership and recognition of status of both Koata and Te Tau Ihu iwi, would also extend to lakes and rivers in your view.

Elkington: Well, foreshore, seabed and the philosophy we have is from the mountains to the sea. The fact that the whitebait and the eels of Tangaroa go up the river, for me, gives us the key to go through.<sup>380</sup>

We heard most of our evidence on this point from Ngati Koata, but other tangata whenua witnesses had the same view of their rights in the twentieth century. Kath Hemi, in her evidence for Ngati Apa, told us: 'All of our gatherings of Mahinga kai were carried out with tikanga karakia, in a customary way, take what you need for the time. We fished or gathered wherever needed. There were no such thing as boundaries, but there was respect.'<sup>381</sup>

Amoroa Luke, who grew up at Wairau Pa in the 1940s and 1950s, said:

As I was growing up, we went all over the Wairau. To Port Underwood for fishing, to Tua Marina for eels, to Kokomiko for wood. In doing this, it was all still viewed as our land, our creeks, our rivers. You could go anywhere. I did not know where the boundaries were or things like that. That we could go anywhere said to me that our people owned it.<sup>382</sup>

Ropata Stephens grew up in Motueka in the 1950s and 1960s, and he held the same belief. His grandfather took him fishing and taught him all the right spots and methods, and one of his uncles acted as kaitiaki of the Motueka River: 'Growing up the impression I got was that the river belonged to our family. Uncle Tommy Morgan became the kaitiaki of the river and the Kumara area in terms of the fishing and collection of kai moana.'<sup>383</sup>

We heard similar evidence from Te Atiawa. John Katene was born in Motueka in 1951 and has lived there for most of his life. He told us: 'Eels and watercress were located in several creeks and we would often go onto people's land to get our traditional foods. This was never an issue for the farmers, as it was an accepted way of gathering food.'<sup>384</sup>

The Mitchells' study of customary fishing in Te Tau Ihu agrees with the witnesses in our inquiry, who held that, for the most part, private landowners do not prevent access for freshwater fishing. In some cases, access to specific customary sites has been restricted or denied, but 'most interviewees say that landowners as a whole are very willing to allow

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380. James Elkington, under cross-examination, third hearing, 26 February–2 March 2001 (transcript 4.3, p 157)

381. Hemi, brief of evidence on behalf of Ngati Apa, p 22

382. Amoroa Luke, brief of evidence (no 1) on behalf of Ngati Rarua, 16 August 2000 (doc A89(a)), p 4

383. Ropata Stephens, brief of evidence, p 13

384. John Peri Katene, brief of evidence on behalf of Te Atiawa, 2002 (doc G27), p 5

## 11.5.3(4)

access if permission is sought.<sup>385</sup> Of course, the need to seek permission was not necessarily accepted by witnesses such as those quoted above, who have been brought up believing that they have a right to fish in their waterways. Of course, Mrs Hemi noted that her people always acted with ‘respect’, and Ngati Koata affirmed that they contacted landowners as a ‘courtesy.’<sup>386</sup> For our purposes, we note a happy coincidence between the views of Te Tau Ihu Maori – that they should be able to take kai from waterways on private land – and many local farmers, who had no objection to their doing so.

The Ngati Koata claim was not limited to fishing rights. There is a long-held belief on the part of the iwi that they have the right to access harakeke, raupo, pingao, kiekie, puha, watercress, and other valued plants, whether they be on private or Crown land. This is especially the case where they have actively planted and maintained flax resources. Again, Priscilla Paul referred to her expedition with Aunty Tuo to the Waimea Plains in 1965:

She took us out to the Waimea Plains to gather her flax, but the bushes where the flax had traditionally been cultivated and harvested were now on private land. She said ‘this flax belongs to Maori, not Pakeha – we planted it’ – so in her view while the Pakeha owners owned the farm, we still owned the flax on the farm, and she was mad that she had to ask permission to use the flax. We did ask permission, and the owners let us get the flax. However, we should not have to ask for permission to use our taonga.<sup>387</sup>

Mrs Paul expanded on the interview between her auntie and the farmer:

The best flax grew in an area where there was a pakeha farm. We told the farmer that we were going to gather flax from his farm, and at first he told my Aunty Tuo that she couldn’t get it, because the land was his. Well, my Aunty Tuo told him exactly what she thought. She said to him ‘You own the farm, we own the flax.’ I guess the farmer couldn’t argue with that because after she’d told him that, he let us gather our flax from there.<sup>388</sup>

A number of witnesses told us that private landowners are often cooperative and permit them to take these kinds of resources from their farms. Keri Stephens, for example, said that there was no problem accessing traditional resources on their neighbours’ property – the neighbours ‘are very good in fact.’<sup>389</sup> But such arrangements are vulnerable to changes in circumstances. New owners may buy the property, for example, or current owners may decide to modify it. Permission for access may be readily obtained, but there is nothing to protect the resource itself. Te Marua, for example, is a site of great significance to Ngati Koata because their rangatira, Te Whetu, lived there. The people believe that his hair, which

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385. Mitchell and Mitchell, ‘Customary Fishing’, p 78

386. Hemi, brief of evidence on behalf of Ngati Apa, p 22; Bassett and Kay, ‘Nga Ture Kaupapa’, p 110

387. Paul, brief of evidence for Wai 262, pp 19–20

388. Paul, brief of evidence on behalf of Ngati Koata, p 9

389. Keri Stephens, oral history interviews, 4 August, 7 September 1999 (A Stephens, brief of evidence, p 5)

was buried there, has coloured the flax. They also obtained a special dye from Te Marua, but now they have to 'ask permission to use that Taonga as well'. The farmers agreed to their taking flax but have also drained much of the swamp so that the resource is now considerably smaller.<sup>390</sup>

Mrs Hemi gave us an example of kuta, a very rare weaving material, which she had found on two pieces of private land. In both cases, the owners agreed to her gathering some of it. But, when she returned six months later, she found that the stand of kuta on one of the properties, just out of Westport, had been bulldozed.<sup>391</sup>

Alfred Elkington told us that flax was 'as important to us as our seafood':

Our kete were part of our livelihood. Therefore, it was, and is still, important for us to have free access to flax, because in our view we still own it. Flax is extremely important still for our weaving traditions . . . There are areas which are off-limits to us, and prevent us getting flax unless we first get permission to do so. However, to me, the flax should still be available to us freely. In my view, nothing should be off-limits, because if I gather a plant, it is because I need it, not because I want to sell it. Private owners usually let us get flax from their land, but the very fact that we have to ask first is frustrating because they do not use it themselves.<sup>392</sup>

Ironically, the tangata whenua told us that it is easier for them to get their valued plants from private land than from Crown land, since the passage of the Conservation Act 1987. We received many complaints about the protection of plants on conservation land and the desire of iwi to access and use them in a sustainable manner.<sup>393</sup>

Tangata whenua also gather plants for food as well as for weaving, in exercise of their customary rights. Paul Morgan, in his evidence for Ngati Rarua, stressed that there were particular rights to do so on Maori land, even where it was leased:

up until the 1930's and 1940's the resident Maori were able to roam around the district for food gathering purposes. Although pakeha people were living on the land, there was still a general recognition that it was Maori land. The relationships were pretty easy going then and our people used the local food resources. They weren't taking things from the pakeha. The resident maori still saw the land as theirs. They were merely taking their own traditional food, puha, watercress, eels.<sup>394</sup>

But the food gathering efforts were not restricted to Maori land. Luckie Macdonald, who grew up in the 1960s, told us that his parents had 'many posses for watercress'. There was a

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390. Paul, brief of evidence for Wai 262, p 20

391. Hemi, brief of evidence for Wai 262, p 9

392. A Elkington, brief of evidence for Wai 262, pp 11-12

393. See, for example, Hemi, brief of evidence for Wai 262; A Elkington, brief of evidence for Wai 262

394. Morgan, brief of evidence, pp 10-11

place on Rapaura Road where the whanau ‘climbed through a fence down into a creek’ to gather watercress. They had been there many times, but one time there was a new house across from the creek and new owners who ordered them to leave. The whanau refused to do so and continued to gather their kai: ‘The next time we went back the whole patch had been sprayed, everything was dead. Today virtually all areas for watercress are on private land, sprayed and/or drained.’<sup>395</sup>

The evidence available to us suggests that Te Tau Ihu Maori have continuously asserted and exercised their customary rights to fish and to gather plants (for food, weaving, and rongoa), sometimes on private land as well as Crown land. Many farmers have been sympathetic, particularly with regard to resources that are of no use to them. But while the right has been exercised, it has not been protected from the destruction of resources (which are at the mercy of landowners) or the refusal of permission. This issue was not new in the twentieth century – as we discussed above, Alexander Mackay reported it to the Crown in the previous century as well. What was new, especially in the second half of the twentieth century, was the scale of destruction. By the time of our hearings, the claimants reported an enormous reduction in accessible native plants for weaving, food, and rongoa.

On this point, we received evidence from many witnesses. The modification of New Zealand’s land and waterways has continued throughout the twentieth century. Bush clearance, swamp drainage, river diversions, and other deliberate acts have occurred alongside ongoing and cumulative pollution from agricultural and industrial runoff. Some of it has been comparatively recent – the development of intensive viticulture in recent years, for example, has intensified environmental damage. Two of the primary food sources affected were the wild watercress and puha that were so abundant for the claimants in the first half of the century. Judith Billens explained why she no longer gathers watercress: ‘I suppose there is some in Nelson, but I don’t think I’d like to eat it, with the sprays, the pesticides and all the pollution. It’s a problem these days to find uncontaminated foods that we traditionally ate.’<sup>396</sup>

Mr Macdonald has seen all his whanau’s gathering places disappear since the 1960s.<sup>397</sup> Mr Hynes pointed to Grovetown Lagoon as an example – it used to provide some of the best watercress in the Wairau district but the cress has now diminished or disappeared from there.<sup>398</sup> The same thing happened at Wakapuaka. In Keri Stephens’ evidence, Ngati Tama have taken to cultivating what was once a food for gathering, and ‘now we have that back again . . . we have a nice patch there.’<sup>399</sup> The farming of watercress on tribal land may be a partial solution.

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395. L McDonald, brief of evidence, p18

396. Billens, brief of evidence, p 9

397. L McDonald, brief of evidence, p 18

398. Hynes, brief of evidence, p 5

399. Keri Stephens, oral history interviews, 4 August, 7 September 1999 (A Stephens, brief of evidence, p 4)

Witnesses for Ngati Apa and Ngati Koata spoke of the near-disappearance of many of their traditional resources for rongoa and weaving. Mrs Hemi provided a detailed survey of Ngati Apa's ability to access these taonga. She explained that kiekie, a parasitic vine which is valued both for kai and for weaving, was easily accessible to her mother's generation but not today. Most of it appears to survive on conservation land. Harakeke was also more accessible earlier in the century, although they sometimes had to travel over to Marlborough to the Wairau River and the Para Swamp. The Wairau flax was greatly reduced by a river diversion in the 1960s, and a rahui was placed on it in 1980, which weavers from all the iwi respect. There is harakeke on conservation land, but Ngati Apa are mainly able to get enough from private land, even though it is scarce. Pingao, which requires a beach habitat, is now rare in the South Island. It is used for tukutuku panels and whakairo, so is a valued taonga. Pingao, like harakeke, was actively seeded and planted by Maori in Mrs Hemi's mother's time. It can still be found in Westport and on the West Coast, mainly on conservation land. Kuta is also very rare and now mainly found in odd patches on private land.<sup>400</sup>

As with watercress, part of the solution for Ngati Apa is the active cultivation of plants like harakeke. Mrs Hemi's daughter, Margaret Bond, explained that Ngati Apa have been assisted by the Crown in this. The Government donated land for the establishment of Omaka Marae, and Landcorp has assisted them with the planting and establishment of harakeke there.<sup>401</sup> Lincoln University is part of this trial of 36 varieties of harakeke. The Marlborough Conservation Board, of which Mrs Hemi was a member, has planted pingao at White's Bay. Other experiences have not been so positive. Mrs Hemi told us that pingao and kiekie, as parasites, are not valued and protected as they should be on conservation land. Also, her request to transplant kuta has been turned down by the department because of a risk of 'transplanting bugs from the other area.'<sup>402</sup> Even so, the active propagating of valued plants is, in Ngati Apa's view, a practicable solution to the present problem.

We heard similar evidence from Ngati Koata. Puhanga Tupaea told us:

Many of the areas where we traditionally gathered rongoa and our kiekie and harakeke for weaving are now depleted, and some are farms. Pollution has also had an effect on our native plants, and many are now under individual land ownership. Our lifestyle has been dismantled, and so our use of rongoa has somewhat diminished. The importance of rongoa has not.<sup>403</sup>

The weaving of tukutuku panels for Whakatu Marae was an important example of what has been lost. It was decided to use coloured plastic instead of kiekie, partly because they

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400. Hemi, brief of evidence for Wai 262, pp 4–12

401. Bond, brief of evidence, pp 9–10

402. Hemi, brief of evidence for Wai 262, pp 7–13

403. Tupaea, brief of evidence for Wai 262, para 74

## 11.5.3(4)

did not want to ‘put a strain on the kiekie resources that are there. A 24 inch square of tuku-tuku would require a few plants, the whole wharenuī many.’<sup>404</sup>

Priscilla Paul was particularly concerned about how much land on Rangitoto has become part of the conservation estate:

After that, we were allowed to go in the reserves but were not allowed to collect our plants. We had to collect all our plants from bush elsewhere. Also, all our kiekie for plaiting and weaving was on DOC reserve land, and so it became inaccessible to us to collect and use in our customary manner. In my view, if I need to go into a reserve to get a plant to use in a customary manner, a law should not restrict me getting them. If there is a particular species growing in a reserve which we need and it only grows there – we should be able to exercise our rangatiratanga and our customary rights to go in and get it. The control exercised by DOC preventing our traditional use of plants affects our rangatiratanga. We no longer have the control of where we go for our customary practices in respect of rongoa and kai in the bush. We always had that control. We have lost knowledge of, for example, the best places to collect a certain plant, because of the restrictions on our access. Our laws were overlooked by the government. We have feared the sanctions of the Pakeha laws imposed on us, but to me, this impacts on our rangatiratanga.<sup>405</sup>

Mrs Hemi’s view was representative when she concluded:

I do not want to make submissions to the deciders. We must be involved in the decision making where it may affect our taonga . . . To get any of our traditional foods or plants out of a reserve or park I have to get permission from the government. It does not look or feel right. It is an affront to our mana.<sup>406</sup>

It should not be assumed from this that the claimants do not value their relationship with DOC or the opportunities for kaitiakitanga that its work now offers. Albert McLaren, also appearing for Ngati Apa, pointed out that the iwi support the department and its nature recovery project at Lake Rotoiti. The reintroduction of kaka has been a great success, and there is now consideration of reintroducing kiwi to the park. Ngati Apa are very involved, he told us, and want to see ever greater conservation in their role as kaitiaki. This exercise of kaitiakitanga maintains Ngati Apa’s link to the natural resources of their rohe, a link that has survived uninterrupted since the time of their tupuna. Maori philosophy has always seen the forests as ‘natural gardens’, which ‘like most they needed to be tended’. This makes it easy for Maori to participate in programmes to eradicate pests and replant native forest.<sup>407</sup>

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404. Tupaea, brief of evidence for Wai 262, para 97

405. Paul, brief of evidence for Wai 262, p 19

406. Hemi, brief of evidence for Wai 262, p 10

407. Albert McLaren, brief of evidence, pp 13–17

Thus, the Ngati Apa ki te Waipounamu Trust ‘fully supports all endeavours by DOC to ensure the preservation and conservation of our taonga.’<sup>408</sup>

For many, the problem comes down to a clash of core values about the nature of ‘conservation.’ Both Maori and the Crown use that word, but they mean different things by it. Michael Park explained that the existence and work of the department has improved Crown–iwi relationships in the last 10 years but that the Conservation Act and Wildlife Act reflect a peculiarly Western conservation ethic, which differs in a fundamental way from that of Maori:

Such legislation is founded in a conservation worldview based on a preservationist ethic. Te Atiawa’s worldview is one of conservation in which natural resources are protected but within a context that includes human use. Such different worldviews between DOC and Te Atiawa make it very difficult to progress the relationship to one of partnership. Te Atiawa’s relationship with DOC will only be really symbolic until the legislation is inclusive of the worldviews of tangata whenua.<sup>409</sup>

There will always be debate over what is ‘sustainable.’ Mrs Hemi stressed that the long-term preservation of the resource takes precedence over its use. That is why she has secured a permanent rahui over harakeke on part of the Wairau River and a five-year rahui at Tennyson Inlet.<sup>410</sup> She also told us that she has served on conservation and park boards and is concerned for the ‘ongoing value of the nation.’<sup>411</sup>

Officially, DOC has come some way to meet the views of tangata whenua. To take one example, the 2006 draft management plan for Abel Tasman National Park (issued after the close of our hearings) acknowledges that some species were planted and cultivated there by iwi and provides for the customary use of plants and animals on a ‘case-by-case’ basis. A permit has to be obtained each time from the Minister of Conservation. It can be granted where there is an established tradition of use, the preservation of the species is not adversely affected, the effects on national park values ‘are not significant’, and the taking is consistent with legislation and the management plan. Access to ‘maintain and use’ harakeke, for example, is considered consistent with the plan, so long as it does not ‘adversely affect the values of the park.’ To meet these conditions, the take has to be ‘minimal’ and to have no adverse effect on ecological values or the viability of a species. Eeling, on the other hand, is not permitted in the park because the long-fin eels are a ‘threatened species in long-term decline nation-wide.’ Also, use of the resources by iwi from outside the rohe must be approved first by the tangata whenua.<sup>412</sup>

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408. Ibid, p14

409. M Park, brief of evidence, pp 15–16

410. Hemi, brief of evidence on behalf of Ngati Apa, p 22

411. Hemi, brief of evidence for Wai 262, p 3

412. *Abel Tasman National Park Draft Management Plan*, 2006, pp 48–50, 139

## 11.5.3(4)

We received no evidence from the Crown as to its process for deciding whether or not to grant permits. It supplied us with no information on the extent to which DOC works with the tangata whenua in coming to a decision. The evidence from Ngati Apa and Ngati Koata is that they are entirely excluded – they are applicants, not deciders. Mrs Hemi compared this situation to the role she plays in granting permits for customary fishing. She told us:

All of our gatherings of Mahinga kai were carried out with tikanga karakia, in a customary way, take what you need for the time. We fished or gathered wherever needed there were no such thing as boundaries, but there was respect. With this upbringing it is easy for me today to issue permits for customary take.<sup>413</sup>

So, the question arises: Why cannot kaumatua issue permits for gathering special taonga for weaving, just as they do for customary fishing? Or, in the alternative: Why are such permits not the subject of a due process for joint departmental–iwi decision-making?

As noted in section 11.1, we do not intend to traverse claims about DOC in any detail in this chapter. Nonetheless, we have considered the question of access to customary resources, and the ability to exercise customary rights of hunting and gathering, in some detail. The rights are highly valued and they do not stop at the borders of conservation land, any more than they stop at the boundaries of private land. The irony for the claimants is that they have greater success in obtaining reasonable access and use from private owners than they do from their Treaty partner.

We will return to this issue below, where we consider the question of restoring a tribal base for the iwi of Te Tau Ihu. We note here the emphasis in Ngati Apa's evidence on restoration: the restoration of habitat, the active cultivation of valued plants inside and outside the conservation estate, and working in partnership with the Crown on both matters. Effective Crown assistance, as Margaret Bond told us, has made a significant difference to the ability of Ngati Apa weavers to preserve their matauranga today and to pass it to the next generation.<sup>414</sup> It seems clear, however, that true restoration cannot be achieved without at least some access to taonga currently located in the conservation estate.

Given the massive environmental destruction that has happened in the twentieth century and the serious impairment of the ability of Te Tau Ihu iwi to exercise their customary rights and to preserve a tribal base for the coming generation, those iwi are looking to restore as much as possible of what has been lost. We turn next to consider the single most important component of the Maori customary economy in the northern South Island – the customary fisheries.

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413. Hemi, brief of evidence on behalf of Ngati Apa, p 22

414. Bond, brief of evidence

#### 11.5.4 Fishing and kaimoana

A critical blow to the Maori economic and cultural base in Te Tau Ihu is the depletion of fisheries that has taken place since the 1960s. We received a wealth of evidence about the importance of fishing and gathering shellfish (both sea and freshwater) in the Maori economy of Te Tau Ihu in the twentieth century. Many tangata whenua witnesses described how those who stayed in the rural areas had to survive on seasonal incomes, if they had money at all. Food, clothing, building materials, and other needs had to be met from the land and sea. Even those who moved to Nelson, Blenheim, and other urban or semi-urban areas still relied on fish and kaimoana to feed their families. We also had the benefit of a detailed study of customary fisheries by Dr and Mrs Mitchell, based on over 100 interviews with tangata whenua of the region.

The evidence indicates that, although certain valued sites were damaged or destroyed, and some treasured species were eradicated, the tangata whenua had sufficient access to freshwater food supplies (mainly eels and whitebait), sea fisheries (especially cod), and kaimoana for their survival. As we discussed in section 11.3, this survival has to be evaluated in both physical (economic) and cultural terms. The role of fishing in the transmission of cultural knowledge, the maintenance of tribal cohesion and community mores, and the practise of whanaungatanga, manaakitanga, and kaitiakitanga were all demonstrated in the evidence before us.

##### (1) *The depletion of customary fisheries*

The importance of customary fishing in the midst of poverty is summed up in the oral evidence of Keri Stephens, supplied to us by his son:

The Maori never gave away any of [the land's] kaimoana and kai, they never did that, it was the most precious thing to them, the most important thing to my people was food, because that was survival. We may not have had pants or underpants but we always had kai. And they never gave that away.<sup>415</sup>

Puhanga Tuapaea told us: 'We would eat like kings.'<sup>416</sup> We were presented with tribal pepeha by several witnesses, but one English-language saying was common to many: 'When the tide is out, the table is set.' This reflects the centrality of kaimoana to the iwi of Te Tau Ihu.

We could recite many examples of the reliance of iwi on fish and shellfish, which was the core of their customary economy. Without it, many people would literally have starved. Nor was this just the case during the depression years – Maori families in Te Tau Ihu remained dependent on fish and kaimoana until at least the 1970s. Most Maori settlement

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415. Keri Stephens, oral history interviews, 4 August, 7 September 1999 (A Stephens, brief of evidence, p 4)

416. Tupaea, brief of evidence for Wai 262, para 51

## 11.5.4(1)

was concentrated on the coast, which (for much of the century) was the environment least modified by colonisation. Also, as we have already said, there were still enough eels and whitebait, despite river modifications and the elimination of wetlands, to provide freshwater food for Te Tau Ihu Maori. All witnesses agreed that this was mainly the case until the 1960s.

Since then, the situation has undergone a fairly dramatic change. Dr and Mrs Mitchell concluded:

Up until recent times Maori of Te Tau Ihu relied heavily and sometimes entirely on fish and shellfish as the staple protein in their diet. Fish and shellfish (both marine and freshwater) were available in considerable quantity and variety close to all Maori settlements, and even to those who lived in Nelson City and Blenheim . . . Strong conservation values, whanau values, and spiritual values dictated fishing practice. The ability to catch or gather fish and shellfish saved some families from starvation during difficult economic circumstances. Unfortunately, Maori are no longer able to pursue their traditional fishing practices in most areas of Te Tau Ihu. Inland waterways and estuaries have been damaged and polluted to such an extent that many traditional fishing grounds no longer exist. Commercial eeling has stripped many rivers and creeks. Foreshores and seabeds have been modified so that they no longer support shellfish. Commercial exploitation of finfish, paua, kina and crayfish has decimated fishstocks, and recreational fishing and illegal activities continue to do so. Aue!<sup>417</sup>

The harm to Maori customary fishing is one of the most powerful grievances of the Te Tau Ihu people. At hearing after hearing, we heard witnesses describe how the fisheries of their younger days have been depleted, to the point where they can no longer rely on them for sustenance or the fulfilment of customary obligations. To give one example of many, Ropata Stephens of Ngati Rarua told us that the Motueka River is no longer the good eel fishery that it was in his youth: 'It didn't have the resources that we thought were always there. Being such a small Maori community, we didn't take from it very often, so when we needed to catch a big feed, that capability wasn't there anymore.'<sup>418</sup>

The Mitchells confirmed that, for major tangi in 2002, attempts were made across Te Tau Ihu 'to provide quantities of eels, although that resource is now so badly depleted that only modest numbers were taken.'<sup>419</sup> The Mitchells attribute the decline in customary fisheries to a number of interrelated and cumulative causes. From their research, they argued that freshwater fisheries have been devastated by a combination of:

- ▶ commercial eeling;
- ▶ the loss of wetlands (through drainage and reclamation);

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417. Mitchell and Mitchell, 'Customary Fishing', p107

418. Ropata Stephens, brief of evidence, pp 13-14

419. Mitchell and Mitchell, 'Customary Fishing', p105

- ▶ the silting up of rivers and estuaries because of land clearance and land use;
- ▶ the diversion of waterways and various other river works;
- ▶ domestic (sewage), agricultural, horticultural, and industrial pollution;
- ▶ the spraying and stripping of riverbanks and stream banks, which has destroyed habitat (especially breeding habitat);
- ▶ increased water consumption, so that (among other things) tributary streams dry up more than they used to;
- ▶ the introduction of exotic plant and fish species in competition with native species; and
- ▶ competition from other users.<sup>420</sup>

The kaimoana in our inquiry region has also, in the claimants' evidence, been 'decimated' in recent decades. The Mitchells note the following factors:

- ▶ the destruction of habitat through reclamation, the construction of marinas and other foreshore structures, and the transformation of the foreshore through destructive forces such as ferry wash;
- ▶ the pollution of many habitats through sewage disposal, stormwater disposal, oil spills, the siting of rubbish dumps, runoff (agricultural, horticultural, and industrial), and a series of shoreline industries and activities (such as boat building and maintenance);
- ▶ the spread of exotic plants and shellfish (such as the Pacific oyster), some of which have displaced native species;
- ▶ commercial harvesting, particularly in inappropriate ways and amounts, with no thought given to long-term sustainability (such as the commercial dredging of kina);
- ▶ increased competition from recreational harvesters, who have grown in numbers and are now very mobile and can get to more places than they used to;
- ▶ improved technology for diving;
- ▶ illegal poaching – especially of paua and crayfish but also of kina; and
- ▶ the growing practice of freezing kaimoana, which means that greater quantities are taken.<sup>421</sup>

Marine finfish have become increasingly difficult to catch. Some of the tangata whenua interviewed by the Mitchells lamented that they finally have better access to boats but now there are few fish left to catch. Others said that those with skills and knowledge can still make good catches but that they have to go further and further out into Cook Strait to do so.

Reasons given for the decline of the finfish resource include:

- ▶ commercial fishing, which has sometimes resulted in serious overfishing;
- ▶ the expansion of both the domestic demand (because of a change in the New Zealand diet) and export markets for fish;

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420. Ibid, pp 77–78

421. Ibid, p 78

## 11.5.4(1)

- ▶ the population increase and an extraordinary growth in recreational fishing, exacerbated by how easy it is for modern pleasure boats to get to fishing grounds;
- ▶ the number of charter and tourist vessels carrying large numbers of passengers, each of whom is allowed to fish to the recreational limit; and
- ▶ the loss of breeding grounds such as estuaries and lagoons.<sup>422</sup>

In particular, the claimants feel that our inquiry region has huge areas of coastline that are comparatively sheltered, are very beautiful, have a large number of holiday baches, and are a popular tourist destination. All of these factors mean that Te Tau Ihu fisheries have been particularly hard hit by recreational and charter vessel fishing.<sup>423</sup> Over all, the iwi feel that there is insufficient regulation and monitoring of recreational fishing and inadequate education of communities in the need to conserve fish stocks. In the Mitchells' findings, recreational fishing is now viewed as the worst threat to stock levels. Not only is it relatively unregulated, but it is also hard to enforce compliance. There is a perception that commercial and customary fishing are now more tightly regulated and have to keep records that recreational fishers escape.<sup>424</sup>

But, as John Bunt told us, policing recreational fishing is difficult and may not be the answer. He expressed concern that overfishing is not a problem from which Maori are free. An attitude has developed that customary controls on iwi fishing are pointless if others simply take what they wish, and some people feel that they should be able to exercise their rights regardless of longer-term conservation.<sup>425</sup> Dr and Mrs Mitchell told us that the kaumatua who have the authority to issue permits for customary fishing have been shocked at the greed of some individuals. They exercise their powers responsibly and refuse to issue permits in such instances, and also have to keep records of catches so as to maintain accountability. This often involves checking catches personally when the fishing party returns.<sup>426</sup> Mr Bunt argued that the long-term solution may lie in the official powers now available to Maori to regulate whole fisheries (rather than just their own activities).<sup>427</sup> We will return to this point below, where we consider the legislative provision for mataitai and taiapure reserves.

Many witnesses argued that their ability to provide for their whanau, their communities, and, in particular, their cultural obligations of whanaungatanga and manaakitanga is now at risk. For the same reason, their ability to maintain their tribal base and to transmit key knowledge and skills to future generations is also threatened. Their ability to exercise kai-tiakitanga has also been reduced.

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422. Mitchell and Mitchell, 'Customary Fishing', pp 78–79

423. Ibid, p 79

424. Ibid, p 94; see also J Bunt, brief of evidence

425. J Bunt, brief of evidence, pp 18–20

426. Mitchell and Mitchell, 'Customary Fishing', p 92; tbl 6.9, pp 3, 9

427. J Bunt, brief of evidence, pp 18–21

We provide an example of each of these threats. Dr and Mrs Mitchell highlighted the role of customary fishing in both maintaining the culture and socialising the next generation. Many tangata whenua recalled large picnics-cum-food gathering expeditions, often lasting a weekend or longer, in which the whanau would catch and gather seafood and harvest a range of materials for traditional activities. Wild pigs and deer were hunted, birds and eggs taken, pingao, kiekie, harakeke, and other plants gathered, mushrooms and wild fruit picked, and chestnuts collected. The communal aspect of dragnetting was important, and these expeditions helped maintain the kotahitanga of whanau and hapu. They were occasions which distant family members often returned home to participate in. And they also cemented the community afterwards, as fish catches were distributed to whanau and friends on the way home.<sup>428</sup>

There are a number of reasons why such gatherings are now rare. These include the 'pressures of modern life and the dispersal of family members'.<sup>429</sup> But an important factor, in the evidence of Ngati Tama, is the depletion of the resources that sustained such practices. We heard how Keri Stephens re-established a Ngati Tama presence on the land at Wakapuaka in the 1990s. He moved on to Wakapuaka 1A, built a home, and 'attracted back dozens of whanaunga, many of whom had never visited the place before – our Taranaki, Porirua, Paraparaumu and Otaki cousins started coming back to stay with him, and to visit the urupa'.<sup>430</sup> When Keri Stephens was tragically killed, Moetu Stephens built his own bach there to keep this up.

But Te Maunu Stephens explained that a key component was missing for the re-establishment of whanaungatanga as he had known it at Wakapuaka. Growing up in the 1940s and 1950s, the whanau had lived off the land for food, supplementing his father's income from work on the Nelson wharves. There was produce from the small farm but also pigs and deer in the hills for hunting, while the estuary and sea teemed with fish and shellfish. The estuary had huge beds of cockles, pipi, pupu, and other kaimoana, which would be gathered with the horse and cart and a 'big piece of wire mesh'. In five minutes, they could fork enough cockles and pipi onto the mesh to 'feed half the tribe'. At low tide, paua, mussels, and crayfish were plentiful on the rocks below the house. This exemplified a favourite saying of his father, Reuben Stephens: 'when the tide is out the table is set'.<sup>431</sup>

In addition to kaimoana, flounder, snapper, and other finfish swarmed in the bay. One drag with the net was enough to feed the whanau and any visitors. To catch crayfish, they would shoot a goat and anchor the carcass among the rocks for a few hours – 'we'd drag it up and pluck off the crayfish which had become entangled in the wool'. There was no over-fishing – only enough was taken for the needs of whanau and friends. In any case, there was

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428. Mitchell and Mitchell, 'Customary Fishing', p 103

429. Ibid, p 80

430. Moetu Thomas Stephens, brief of evidence on behalf of Ngati Tama, 12 February 2003 (doc K36), pp 4–5

431. T Stephens, brief of evidence, p 4

no refrigeration and the resource was plentiful, so there was no need to take more than the day's requirements. But, before the whanau left in 1968, there were already signs of change. Commercial trawlers had begun to overfish the bay and, by kicking up huge clouds of mud and sand, they were destroying the shellfish habitats.<sup>432</sup>

Mr Stephens concluded:

I understand that often you can fish for hours now and not catch anything off the beach or the rocks. That is a great pity as some of my fondest memories are of whanau gatherings with relatives from Motueka, Golden Bay, Porirua, Wellington, the Sounds and other places, and we would have a great crowd on the beach dragging for fish – bonfires, hangi, music and laughter.<sup>433</sup>

Such gatherings, with their opportunity to practise and strengthen whanaungatanga, can no longer take place at Wakapuaka (until the resource is restored), although people are gathering again for other reasons.

Also, many claimants told us that their ability to practise their manaakitanga is under threat or has been damaged. We have already cited a number of examples in this chapter. We add here the view of Rita Powick, who told us that the depletion of resources in Totaranui and in particular Kura Te Au (Tory Channel) has had a significant impact on Te Atiawa:

The difficulty in providing food from this area for our own people's table was one major issue [whanaungatanga]. The need and desire to manaaki manuhiri (act hospitably to visitors) in the provision of food such as kina (sea egg), paua (abalone), and tuere (blind eel) for which we as Te Ati Awa are renowned in the country . . . The ability to host our visitors in such a way was a necessity that we were more and more unable to meet.<sup>434</sup>

In terms of kaitiakitanga, many Maori communities continued to manage, conserve, enhance, and replenish their kaimoana 'gardens' for much of the century.<sup>435</sup> This was especially so because many bays and beaches were too remote to attract casual visitors. Also, before the 1970s, New Zealanders were somewhat contemptuous of 'Maori food', especially shellfish, leaving these species to the care and regulation of Maori communities.<sup>436</sup> It was 'ours to look after', as Priscilla Paul put it.<sup>437</sup>

A change since the 1970s has shocked witnesses such as Athalie Park of Te Atiawa, who told us:

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432. T Stephens, brief of evidence, p 4

433. Ibid, pp 4–5

434. Powick, brief of evidence on behalf of Waikawa Resource Management, p 17

435. James Elkington to D Oliver, Marlborough County Council, 31 July 1989 (James Elkington, appendices to brief of evidence, doc 6)

436. Morgan, brief of evidence, p 7; Mitchell and Mitchell, 'Customary Fishing', p 77; Waitangi Tribunal, *Muriwhenua Fishing*, p 113

437. Paul, brief of evidence for Wai 262, p 26

The difference between then and now was that we, the Maori families, were the only ones to eat shellfish back then, and now, everyone has adopted it as a food. But the problem is that even though other people have adopted it as a food, they haven't adopted the important gathering practices that go with it so that it is sustainable. It's dreadful the way our beaches are being absolutely ruined by people who come and take every single thing off the beach – all day, all night. They go out in wetsuits, with lines. It's like you almost have to guard the beaches!<sup>438</sup>

Even so, the cumulative impact of environmental modification and overfishing seems to have been greatest on freshwater fisheries. The old staples – eels and whitebait – are now in decline. We heard evidence to this effect from many witnesses.<sup>439</sup>

Some marine fish and shellfish species, as well as certain valued sites, are still in relatively good condition and can provide for iwi needs. John Bunt, for example, who is a professional fisher with many years' experience, told us that the quota management system has allowed the recovery of crayfish in the Sounds. Similarly, Judith Billens has found that kina, paua, and mussels are starting to recover in Golden Bay, although the resource is still depleted:

It's great to know that this food is coming back to Golden Bay, but even though kina and paua are coming back, the fish is not plentiful out there, not like it used to be. Globally, things have changed. Huge fishing boats are coming to New Zealand waters, and this is affecting both our coastline and fish stocks. This means that we've got to look after every little bit that we have. Maori know how to look after fishing grounds, we've been looking after them for generations. It's like looking after your veggie garden, you must look after the harvest in the sea in the same way. This is not being done properly, and that's part of the reason why we find it very difficult to get kaimoana.<sup>440</sup>

Also, in John Bunt's evidence, species not much in demand for commercial fishing, such as moki, tarakihi, and butterfish, are 'doing all right'. Other wet fish, such as kahawai, warehou, and mackerel, however, have disappeared from the Sounds fisheries. 'You used to be able to gather heaps of mackerel', Mr Bunt told us, but not any more.<sup>441</sup> As we noted earlier, Alan Riwaka pointed out the depleted state of the Tory Channel fishery during our site visit. Supplies of kaimoana to meet customary obligations at tangi, hui, and other significant events now require deeper and deeper diving. The day that Te Atiawa can no longer supply

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438. Athalie Eleanor Te Uira Park, brief of evidence on behalf of Te Atiawa, 2002 (doc G7), pp 14–15

439. See, for example, Anaru Luke, brief of evidence; Ropata Stephens, brief of evidence; A Stephens, brief of evidence; Graeme Norton, brief of evidence on behalf of Rangitane, 22 April 2003 (doc M1); L McDonald, brief of evidence; Hynes, brief of evidence; W Mason, brief of evidence; L Wilson, brief of evidence; M Park, brief of evidence

440. Billens, brief of evidence, p 8

441. J Bunt, brief of evidence, pp 13–15

paua and kina ‘is going to be a very sad day, and that’s coming up quickly if we don’t get in there and have something done about this now.’<sup>442</sup>

The Mitchells’ study, which took place in 2002, indicated that the consumption of finfish and seafood is still an important component of the household economy for many Te Tau Ihu Maori and that they are still able to supply most of their needs through the recreational fishing regulations. In other words, sufficient quantities are still being caught for consumption. This should be qualified, however, by the point which emerged clearly in our inquiry, which is that certain sites can no longer be accessed and certain valued species have gone from the table, while many others are considered under threat. Similarly, the Mitchells concluded that customary obligations at hui and tangi can be met by special permits and that sufficient quantities were still being caught for the major events of 2001–02. Again, this was subject to the same qualifications. The main exception was freshwater fish – eels were considered so depleted that only a very modest number were authorised and caught.<sup>443</sup> In Mr Riwaka’s evidence, certain key sites such as Tory Channel are having to supply the needs of all the marae across Te Tau Ihu. There are also flow-on effects – the iwi believe that overfishing is primarily responsible for the massive decline in seabirds, which have lost the surface fish on which they used to feed.

Most of the witnesses agreed that the Government’s management of the fisheries is ultimately responsible for the plight in which they find themselves. Jane Du Feu, for example, gave evidence typical of many when she argued that eels had adapted to almost any environmental change in sufficient numbers for customary fishing, until the advent of commercial eeling in the 1960s. After that, the resource declined.<sup>444</sup> Witnesses such as John and Antoni Bunt, Christopher Love, Judith Macdonald, Raymond Smith, Rita Powick, and many others blamed the Government’s regulation of fisheries (both commercial and recreational) for the failure to conserve the resource.<sup>445</sup> Also at fault were the local authorities that had allowed (or even carried out) the damaging or polluting of key sites.<sup>446</sup> Ultimately, the claimants view that as the Crown’s responsibility too.

The fishing industry was not very significant in New Zealand until the late nineteenth century, when trawlers, refrigeration, and improved infrastructure enabled it to get properly underway. The Government passed legislation to establish closed seasons or places, minimum fish sizes, and other controls to prevent depletion.<sup>447</sup> There were some localised declines of stock but otherwise the industry grew slowly until the 1960s.<sup>448</sup> In 1937, the

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442. Alan Riwaka, oral evidence, seventh hearing, 27–31 January 2003 (transcript 4.7, p 102)

443. Mitchell and Mitchell, ‘Customary Fishing’, pp 77–79, 103–107

444. Jane Lucretia Du Feu, brief of evidence on behalf of Te Atiawa, 2 December 2002 (doc G30), pp 12–13

445. J Bunt, brief of evidence; A Bunt, brief of evidence on behalf of Te Atiawa; J Macdonald; R Smith, brief of evidence; Powick, brief of evidence on behalf of Waikawa Resource Management

446. Mitchell and Mitchell, ‘Customary Fishing’, p 94

447. Waitangi Tribunal, *Muriwhenua Fishing*, p 86

448. Patete, ‘D’Urville Island’, p 212

Government introduced licensing and additional regulation of fishing methods and places. The result was that fisheries were in fact under-exploited, so the industry was delicensed in 1963. The Government wanted to encourage exports and economic growth, and in particular more exploitation of the deep-sea fisheries. The growth of domestic fishing (and more foreign fishing boats) meant a massive upsurge in the industry. By the late 1970s, it was generally agreed that the nation's inshore fisheries were becoming seriously depleted.<sup>449</sup> The Te Tau Ihu district was no exception.<sup>450</sup>

In the 1980s, the Government moved to exclude foreign vessels by establishing a 200-mile exclusive economic zone, which gave a further boost to the local fishing industry. Despite the refocusing on offshore fishing, some inshore stocks remained seriously depleted. The Government took action with a moratorium in 1983, which ultimately led to the establishment of the quota management system. Since the 1990s, most fishing (commercial, recreational, and customary) is managed through this quota system, with the Government setting total allowable catches for each species.<sup>451</sup> The key to the policy of all governments since the 1980s has been the sustainable use of fisheries.

In our inquiry, the general consensus among claimant witnesses was that the Government's management of this system is ultimately to blame for failing to arrest the decline of their customary fisheries. John Bunt, for example, told the Tribunal that Te Atiawa have been arguing with Ministry of Fisheries officials since the 1980s, trying to get the Government to protect customary fisheries from being depleted and destroyed by overfishing.<sup>452</sup> He maintained that, 'If you look back in the [Ministry of Fisheries] records, you'll see Te Atiawa has always been arguing with [the Ministry] about the overfishing and the effect this has had on the fish. We've been pointing it out for ages.'<sup>453</sup>

Unfortunately, the Crown chose not to provide evidence or submissions on this issue. We do not, therefore, have evidence from the Ministry of Fisheries as to:

- ▶ how it sets its total allowable catches;
- ▶ the degree of consultation it carries out with iwi in terms of the effects of total allowable catches on their customary resources or their fishing sites of particular significance; or
- ▶ the technical information that it holds on the state and sustainability of Te Tau Ihu fisheries.

We are left with the observations of tangata whenua, many of whom have fished these waters for decades and some of whom are professional fishers and divers. Ngati Kuia put

449. Waitangi Tribunal, *Muriwhenua Fishing*, pp 109–112, 223

450. Marr, 'Crown–Maori Relations', pp 149–150

451. Waitangi Tribunal, *Muriwhenua Fishing*, pp 109–112, 117–118

452. J Bunt, brief of evidence, p 18

453. *Ibid*, p 21

to us the following extract from the Planning Authority's *Proposed Marlborough Sounds Maritime Planning Scheme* of 1988, which states:

Management policy should also take into account historical knowledge (probably oral) relevant to fisheries management. This would be in contrast to current practice which assumes a right to take resources unless indisputable scientific data demonstrates irreparable damage [is] being done. Traditional knowledge may be no less significant if it is based on repeated observations of the same phenomena. Because of the longer time base, the period of observation by Maori people may provide a more substantiated basis for management policies than the relatively haphazard, short term and isolated studies of modern fisheries research. The principal difference is that in the absence of written records, the orally transmitted policies of rahui, tapu and other customary rights and practices are more apparent than the data on which they are based. In contrast modern scientific practice requires rigorous testing and challenging of data before management policies are derived and applied.<sup>454</sup>

We agree with this point. John Bunt, for example, who has been fishing in the Marlborough Sounds all his life, observed that the commercial taking of paua in the Sounds became a 'slaughter' in the 1980s and 1990s. It has now tapered off owing to their scarcity. Mr Bunt blamed the Ministry for what he considered to be poor management and a failure to conserve the fishery.<sup>455</sup> He described the consequence:

Within the last twelve months, I took two of my grandchildren out to the Sounds, out to Wiki Rock. We anchored up the boat and took out the dinghy, to collect some paua, but when I was out with my grandchildren, we got one, that was all – and it was a flat calm day too. These kids have lost their heritage, and I put that down to bad management.<sup>456</sup>

This agreed with the observations of many others.

In our view, the evidence of so many witnesses that their valued species of freshwater and marine fish and shellfish are in substantial decline cannot be lightly set aside. There are a number of causes, but overfishing by (or competition with) commercial and recreational users is clearly one of the most substantial. For inland waterways, habitat modification and environmental damage are probably the main causes, although we accept that eels remained plentiful until commercial eeling was introduced. Also, as we saw above, particular coastal sites have been lost to iwi through pollution, reclamation, and other destructive impacts. Mostly, though, the kaimoana and kai ika of the coasts of Te Tau Ihu have been depleted by overfishing. In the claimants' view, their customary fisheries are at serious risk. We accept

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454. Planning Authority, *Proposed Marlborough Sounds Maritime Planning Scheme*, 1988, extract (Ronald Sutherland, brief of evidence on behalf of Ngati Kuia, 7 March 2003 (doc L3), sch 3, p 39)

455. J Bunt, brief of evidence, pp 11–12

456. Ibid, p 12

that there is cause for alarm. The Crown's management of fisheries has resulted in, or at the least has not prevented (as it should have) a significant decline of the customary fisheries.

From the evidence of James Elkington and other witnesses, we also reached the view that there is insufficient dialogue between Maori and the Ministry, and insufficient provision for Maori interests to be protected in decision-making. Interestingly, Mr Elkington concentrated on his iwi's successes. In the 1980s, overseas fishers were licensed to catch tuere, skin them, and dry the skins for use in the Korean leather industry. The fishers were dumping the meat, which was a waste of an important cultural food, so a Ngati Koata delegation approached the Ministry and asked for the meat to at least be supplied to local marae. The Ministry cancelled the permit when the Koreans refused to stop dumping the meat. Another example of a positive iwi intervention was the attempt to introduce Californian pink abalone to New Zealand waters for the sole purpose of commercial fishing and plans to introduce new paua species to replace smaller paua in Rangitoto waters – again, iwi were successful in persuading the Ministry not to approve these proposals. A third example was the Ministry's intention to increase the total allowable catch for kina, aimed specifically at the Rangitoto fishery, which Ngati Koata successfully opposed because of the impact it would have on their customary fishery.<sup>457</sup>

Mr Elkington concluded:

That we were successful in these instances does not diminish – but demonstrates – the need and obligation to recognise our authority: not to depend on unpaid people being alert enough to draw these potential disasters to the attention of those who would – but for that – have made damaging decisions.<sup>458</sup>

He also noted:

It is a huge effort to keep an eye on these things, and to make submissions. We have few resources to devote to the task, and even if we had these, we – Maori – should be making decisions, not submissions. The Treaty seems to me to be clear on the point . . . We should not be at the mercy of others, nor have to make desperate submissions to others including the Crown, where our native species are concerned. That is not rangatiratanga.<sup>459</sup>

As we have already noted, we did not hear from the Ministry or receive evidence about any systems it may have put in place for consulting Maori or involving them in regional decision-making. But we note, from the evidence of James Elkington and others, that the system is not working from the claimants' perspective. Partnership needs to be provided for in decisions about fisheries where those impact on Maori interests.

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457. J Elkington, brief of evidence for Wai 262, paras 28–32, 46–48, 54–55

458. Ibid, para 48

459. J Elkington, brief of evidence for Wai 262, paras 32, 55

There are two further points to consider: the extent to which the claimants can now take over the management of all users of their customary fisheries by means of the Government's provision for taiapure and mataitai reserves. Also, we need to examine the regulatory framework for customary fishing outside such reserves and to assess the extent to which it provides for the tino rangatiratanga of Te Tau Ihu iwi.

**(2) *The customary fisheries regulations***

As the Tribunal found in its *Ngai Tahu Sea Fisheries Report 1992*, the Government passed a Maori Fisheries Act in 1989 to 'make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi'. This was the first significant recognition of Maori fishing rights since the Treaty was signed in 1840.<sup>460</sup> It meant that there was now formally a place for Maori participation in the commercial utilisation of fishery resources, and potentially in the management of the resource.

With regard to non-commercial fishing, the Maori Fisheries Act 1989 made new provision for Maori management of traditional customary fisheries. This recognition of kaitiakitanga was reaffirmed by the comprehensive Fisheries Act 1996, under which regulations could be made 'recognising and providing for customary food gathering by Maori and the special relationship between tangata whenua and places of importance for customary food gathering'.<sup>461</sup> Section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 required the Minister of Fisheries to consult with tangata whenua to develop policies and programmes for their use and management practices and their customary fishing.<sup>462</sup> Miriam Clark explained that there were 2½ years of negotiations between the Minister and the South Island iwi. There were two Te Tau Ihu representatives in the negotiations, including Fred Te Miha of Ngati Tama. In 1998, agreement was reached and the South Island (Customary Fishing) Regulations were established.<sup>463</sup>

These regulations provided for the devolution to tangata whenua of management authority for customary non-commercial fishing. In effect, they were an attempt to formalise traditional regulatory procedures as closely as possible. Maori could nominate tangata tiaki (guardians), who would be responsible for issuing customary fishing authorisations or restrictions, and specify the boundaries of their rohe moana (coastal marine area) within which the tangata tiaki would have jurisdiction.<sup>464</sup>

Judith Macdonald, in her evidence for Rangitane, explained that the customary fishing regulations do not yet apply in all areas, because iwi have not been able to agree on the extent of their respective mana moana. There are dispute resolution processes, which, at

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

461. Fisheries Act 1996, s186

462. Crown counsel, further closing submissions, 14 May 2004 (paper 2.795)

463. Clark, 'Mahinga Kai', p 37

464. Clark, 'Kaitiakitanga', p 40

the time of hearing, were still in progress.<sup>465</sup> For those iwi who were unable to use the new regulations, the Fisheries (Amateur Fishing) Regulations 1986 were still in force. Regulation 27 provided for authorised kaumatua to issue permits for fishing and gathering kaimoana, but this was restricted to particular cultural obligations (such as for hui and tangi). Approved representatives of Maori committees, marae committees, runanga, or trust boards may issue permits for takings.<sup>466</sup> Both sets of regulations, however, were still subject to overall fisheries management and total allowable catches to ensure sustainability.

There were a variety of views about the regulatory regime. One perspective was presented by Lewis Wilson in his evidence for Ngati Kuia. He objected to having to get 'a permit to exercise the customary right that my family and tipuna have been exercising for hundreds of years'.<sup>467</sup> Although the permit comes from a kaumatua, Mr Wilson's evidence reflected the reality that the regulations cannot fully approximate to custom as it has long operated in Te Tau Ihu. While some fishing was larger scale and governed by kaumatua for the whole community, much other customary fishing was carried out at a whanu level and, unless there was a rahui, the whanau of Te Tau Ihu were not used to authority being exercised over their gathering of kaimoana.

Benjamin Hippolite took a different view. He recognised the need for regulation, and that the alternative was the issuing of permits by officials. He told us that the system does provide for rangatiratanga:

When we have hui, we have to apply for a permit to get more than we are allowed at law through the quota system. If it wasn't for people like Jim Elkington and others, permits would have to come from DOC – but permits are now from our local kaumatua under the fishing regulations. Anything short of this does not acknowledge our tino rangatiratanga.<sup>468</sup>

Dr and Mrs Mitchell found that the majority of their interviewees did not really know about or understand the regulations. They simply continued to fish and gather kaimoana as they had always done. For those who were aware of the regulations, they were considered 'a good management tool'.<sup>469</sup> There was concern, however, over the degree to which fishing for the extended family (whanaungatanga) is permitted. It will be recalled that much fishing in Te Tau Ihu was for others. Alfred Elkington told us:

We never caught food for ourselves. My uncles taught me that. If you were catching something then you caught it for the other families that never came out, or were unable to. So when you went to catch fish everybody had fish, whether you went or whether other

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465. J Macdonald, brief of evidence, p 11

466. Crown counsel, further closing submissions, p 3

467. L Wilson, brief of evidence, p 4

468. Benjamin Turi Hippolite, brief of evidence on behalf of Ngati Koata, 12 March 2001 (doc B36), p 11

469. Mitchell and Mitchell, 'Customary Fishing', p 91

## 11.5.4(2)

members of the family went. You knew when they came home that you were going to get some fish too.<sup>470</sup>

In the view of some tangata whenua, the regulations work for large-scale special occasions, but do not provide for this kind of traditional practice. For example, food-gatherers trying to supply extended whanau on a regular basis either need a customary permit each time to avoid breaching the recreational regulations, or the whanau needs to send a larger group to do the fishing (and thus stay within the amateur regulations).<sup>471</sup> One respondent from Rangitoto told Dr Mitchell: ‘Present limits of 6 cod per person inadequate – we have objected to [the Ministry of Fisheries] – that our iwi will all be in jail. When we go out we are fishing for our whanau – several families around our bays have to be supplied.’<sup>472</sup>

Those claimants who had concerns about the regulations were mainly worried that the system did not provide for certain customary practices. When they impose rahui to protect a resource, for example, they would like such rahui enforced against all fishers, not just their own people. Also, they feel that the regulations do not provide for the customary preserving and storing of kai. Instead of just harvesting on an occasion-by-occasion basis, there should be flexibility for marae to harvest in bulk for the ‘inevitable’ calls of tangi and large hui.<sup>473</sup> Antoni Bunt told us:

A traditional activity such as the storage of kaimoana has been further eroded as a result of regulation interpretation. It is illegal to store product for tangi . . . because no date can be identified. As mentioned earlier we did store kaimoana and this tradition must be allowed to continue unimpeded.<sup>474</sup>

Finally, the regulations do not allow for customary practices such as the exchange of fish for local resources within the district or for valued resources from tribes in other regions. As we discussed earlier, from the evidence of Ariana Rene and others, this was a major dimension of customary life in Te Tau Ihu. Dr and Mrs Mitchell reported: ‘A number confirmed that they continue to carry out these practices, even though they are likely to be breaking laws to do so.’<sup>475</sup>

From the evidence available to us, we accept that the storing of kai was a customary practice. Fish and kaimoana were regularly dried and preserved for future use. One whanau told us that they had special kaimoana beds that were maintained for use in an emergency, for unexpected parties of visitors. Otherwise, those beds were not touched. We also heard

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470. A Elkington, brief of evidence for Wai 262, p 17

471. Mitchell and Mitchell, ‘Customary Fishing’, p 91

472. Ibid, tbl 6.9, p 4

473. Mitchell and Mitchell, ‘Customary Fishing’, pp 91–92

474. A Bunt, brief of evidence on behalf of Te Atiawa, p 17

475. Mitchell and Mitchell, ‘Customary Fishing’, p 95

much evidence of how fish and kaimoana featured in customary exchanges, both within the district and with relatives or other iwi from outside the area.

Although the Crown did not present evidence on these issues, we note its submission that there is provision in the Fisheries Act for the Minister to temporarily close or restrict the use of any fisheries waters at the request of tangata whenua. This allows specifically for replenishment and certainly provides for rahui.<sup>476</sup> Section 186A of the Fisheries Act, inserted in 1998, provides for the Minister to close waters for up to two years, 'if he or she is satisfied that it will recognise and make provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing rights'. It does not quite do what the claimants ask, since the decision is made by the Crown after consultation with commercial and other interests. Also, while it restricts or bans fishing activities, it does not close waters entirely (as may be the case with some rahui).<sup>477</sup> In principle, however, it provides a means for rahui to be imposed outside taiapure and mataitai, in partnership with the Crown.

The Crown also submitted that the storing of kai is permissible under the regulations, so long as the tangata tiaki accept it as a customary practice.<sup>478</sup> In Antoni Bunt's evidence, that is not how the regulations are being interpreted, so some corrective work may be required. The Crown's submission did not address the issue of exchanging fish or kaimoana as part of traditional cultural obligations and customary exchanges. It appears to us, however, that the matter turns on the interpretation of section 186 of the Fisheries Act, which states that customary fishing is not to be for the purposes of 'pecuniary gain or trade'. Further, the Act defines the taking of fish for 'sale' (commercial fishing) to include 'every method of disposition for valuable consideration, including barter'.<sup>479</sup> It appears, therefore, that – intentionally or unintentionally – the Government has made this part of the customary economy illegal unless it is carried out under a commercial fishing permit.

Overall, it appears that the customary fishing regulations have been accepted by the claimants, except for concerns that particular customary practices have been omitted.

### **(3) Mataitai and taiapure**

In addition to the regulatory regime, the Government created an opportunity for tangata whenua to resume the management of valued customary fishing places. There are two options. The first is to create mataitai reserves, with kaitiaki managing all non-commercial fishing activity through the making of bylaws. The tangata tiaki can issue permits for customary fishing and can also authorise non-Maori recreational fishing or gathering.

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476. Crown counsel, further closing submissions, p 4

477. Fisheries Act 1996, s186A

478. Crown counsel, further closing submissions, p 3

479. Fisheries Act 1996, ss 2, 186

## 11.5.4(3)

Commercial fishing is banned unless permitted by the tangata tiaki. Bylaws, however, are recommendatory only, unless approved by the Minister.

The Maori fisheries legislation of 1989 also introduced the concept of 'taiapure' as part of the Act's stated intention to 'make better provision for the recognition of rangatiratanga and of the rights secured in relation to fisheries by Article 2 of the Treaty of Waitangi'.<sup>480</sup> A taiapure enables the management of an area by its various users under the initiative or tino rangatiratanga of Maori. In the words of the Fisheries Act 1996, taiapure could be declared in respect of 'estuarine or littoral coastal waters that have customarily been of special significance to any iwi or hapu either as a source of food; or for spiritual or cultural reasons'.<sup>481</sup> Management of the taiapure would be facilitated by a management committee embracing the spectrum of users (not all of whom need be Maori). They would be appointed on the basis of nominations from the local Maori community and could recommend to the Minister the making of regulations for the conservation and management of the fish, aquatic life, or seaweed in the taiapure.

In their report on customary fishing, the Mitchells found that taiapure and mataitai reserves had general support among Te Tau Ihu Maori as good management tools for customary fisheries.<sup>482</sup> This accords with the evidence that we heard from tangata whenua. Jane Du Feu, for example, in her evidence for Te Atiawa, argued that both forms of reserve were capable of providing for kaitiakitanga.<sup>483</sup> Mrs Hemi told us: 'The practice of mataitai using traditional conservation methods is a continuation of what we have always done under the Treaty . . . If we have mataitai and taiapure in place then we would not be as concerned about the [marine] reserves.'<sup>484</sup>

There were differing views on which was the better option. John Bunt told us that he much preferred the proposal of a mataitai for Tory Channel, not a taiapure, because the latter would mean 'it is managed by somebody else, not Te Atiawa, who are the kaitiaki'.<sup>485</sup> Active education is needed, he suggested, to inform the public that mataitai are just a management tool and that non-Maori will not be shut out from fishing when stocks have recovered. He also felt that it was possible to get local community support for a mataitai in Tory Channel.<sup>486</sup> Both Te Atiawa and Ngati Koata have applied to establish mataitai.

The Mitchells, however, found that most of their respondents thought that taiapure were the better option. This was because taiapure required the wider community to be involved in their establishment and management. Community support meant a much greater chance

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480. Waitangi Tribunal, *Ngai Tahu Sea Fisheries*, p 241

481. Fisheries Act 1996, s 174

482. Mitchell and Mitchell, 'Customary Fishing', p 91

483. Du Feu, brief of evidence (December 2002), p 3

484. Hemi, brief of evidence for Wai 262, pp 11–12

485. J Bunt, brief of evidence, pp 18–19

486. Ibid, pp 19–21

of the general acceptance of any special regulations that were needed.<sup>487</sup> This is in accord with the evidence we received from Ngati Tama.<sup>488</sup> All the same, a strong iwi presence was seen as necessary on the management committee to ensure that interest groups did not capture control of the taiapure.

In his evidence for Ngati Koata, James Elkington reminded us that taiapure and mataitai are only part of the picture. Maori can now manage customary fishing themselves and can oversee 'limited and discrete areas' by establishing taiapure or mataitai, 'after a fairly convoluted process in which the final decision is made by ministers/the Crown'. But, in his view, these structures 'provide very limited authority despite the increasing prominence of Maori institutions and Maori commercial fishing in New Zealand'.<sup>489</sup> Mr Elkington proposed a fuller partnership with the Ministry of Fisheries, in which Te Tau Ihu Maori would have a strong say in the management of fisheries as a whole in their region.

Was Mr Elkington's characterisation of the process as 'fairly convoluted' correct? At the close of our hearings, only one taiapure had been established in Te Tau Ihu and no mataitai (although applications were in process). As at 31 July 2008, it was still the case that no more taiapure or mataitai had been set up.<sup>490</sup> The long journey for establishing the Wakapuaka Delaware Bay taiapure (see fig 40) was explained by Moetu Stephens. In his view, taiapure provide for community-managed local fisheries under kaupapa Maori. For that reason, Ngati Tama and their whanaunga wanted to establish a taiapure at Delaware Bay as soon as the Maori Fisheries Act 1989 was passed. They felt that the depleted state of most fish stocks made it urgent for them to secure control and management.<sup>491</sup> Public consultation on the proposal began in 1993.<sup>492</sup>

In the mid-1990s, however, the Forest and Bird Society began to campaign for a marine reserve, which alarmed Ngati Tama and the owners of the Wakapuaka 1B Incorporation. Though concerned about the poor state of fisheries at Cable Bay and Delaware Bay, the prospect of a total lockout forever was seen as a potential disaster: 'They said that if we were not going to be able to try to catch fish off our own coast, then we might as well give up the land as well.'<sup>493</sup> So Ngati Tama sought iwi and public support for a nine-kilometre long taiapure from Cable Bay to Whangamoia Head. They obtained support from Ngati Koata and the kaumatua council of Te Runanganui, and received no objections from Ngati Kuia. The Ngati Tama trust and the incorporation worked together and obtained public support, as well as support from the Ministry of Fisheries.<sup>494</sup>

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487. Mitchell and Mitchell, 'Customary Fishing', p 91

488. Editorial, *The Nelson Mail*, 3 October 1996 (M Stephens, brief of evidence, app 4)

489. J Elkington, brief of evidence for Wai 262, para 129

490. Ministry of Fisheries, 'The State of our Fisheries, 2008', <http://www.fish.govt.nz>

491. M Stephens, brief of evidence, p 7

492. Clark, 'Kaitiakitanga', p 37

493. M Stephens, brief of evidence, p 7

494. *Ibid*, pp 8-10

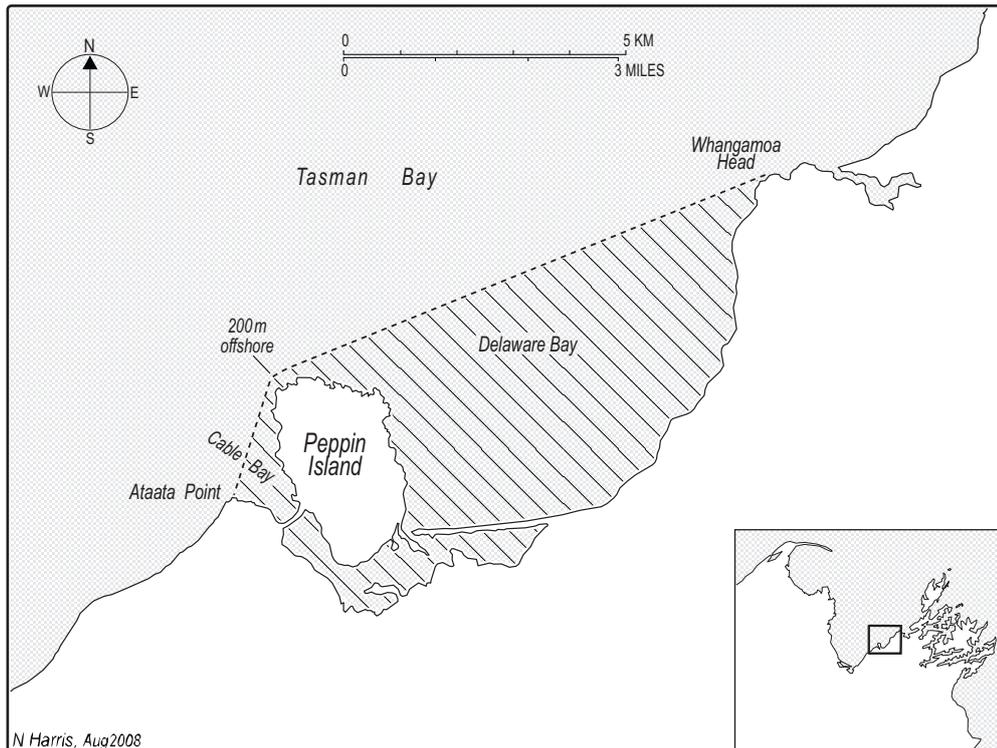


Figure 40: The Delaware Bay taiapure

Source: Nelson City Council, *Nelson State of the Environment Report* (Nelson: Nelson City Council, 2003)

The next step was to set up an establishment committee representing various interests, which had to work through complex proposals for boundaries, catch limits for recreational takes (including a zero take for paua for at least a decade), possible enhancement programmes for scallops, paua, and seaweeds, and levels of take for customary Maori fishing. These issues were worked through, with all interest groups eventually agreeing to compromise, and the formal application was lodged in 1997. This was publicly notified by the Ministry, submissions were received (including objections from some commercial fishing interests), and the result was further negotiations. It took some time to negotiate agreement but there was ultimate success when the Maori Land Court held a special hearing in 2000, at which the various interest groups expressed their support. Although a national commercial fishing body objected, the local commercial fishing interests supported the proposal. Judge Carter therefore supported the application, but it waited in the Maori Affairs Department for another year. Finally, the Minister of Maori Affairs signed off on it in April 2001 – after a battle at the Maori fisheries conference, according to Mr Stephens.<sup>495</sup>

495. M Stephens, brief of evidence, pp 10–12

The application then returned to the Ministry of Fisheries, where it was delayed until early 2002, when the Ministry announced that a taiapure could be gazetted. A public blessing, attended by all the interested groups and a large number of supporters, established the taiapure on 21 March 2002. The next step was to set up a management committee. At the time Mr Stephens gave us his evidence (February 2003), they had been waiting nine months for the various ministries to approve their nominees for the management committee. Thus, although the taiapure existed in theory, it had not really started to operate.<sup>496</sup> The management committee was officially appointed soon after.

Moetu Stephens summed up the experience as follows: Ngati Tama are committed to kaitiakitanga, which includes the protection and enhancement of customary resources. The iwi trust had tried to use the statutory systems now available to it through which they believe that they can exercise kaitiakitanga. Yet, the processes available are very slow and difficult, partly because, in their view, Government departments are under-resourced to deal with Maori matters. He concluded:

If our experience is typical, then it is little wonder that so few Taiapure and Mahinga Mataitai have been established around the country. This is a great pity, because these fishery management systems offer by far the best options for involving the public in the management of in-shore fisheries, for the benefit of all.<sup>497</sup>

Five years after Mr Stephens gave his evidence, no further taiapure or mataitai have been created in Te Tau Ihu.

In sum, the evidence before us is that the claimants are mainly satisfied with the customary fishing regulations, with the proviso that they be amended to provide more fully for certain customary practices and so long as tangata whenua can obtain more of a voice in the management of fisheries as a whole in their rohe. They also welcome taiapure and mataitai as a means for them to exercise tino rangatiratanga over especially valued fishing places, in partnership with other users and the community. It seems, however, that it is prohibitively difficult to establish them. The record of one taiapure in almost 20 years (since the Maori Fisheries Act of 1989) and no mataitai at all is a matter of serious concern to this Tribunal.

#### **(4) Marine farming**

The claimants presented considerable evidence about marine farming during our inquiry. Many witnesses spoke of the important part that transplanting, reseeding, and enhancing kaimoana played in their customary economy. Favoured species, such as a special kind of paua at Wakapuaka, were even brought all the way from Taranaki.<sup>498</sup> Most customary

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496. Ibid, pp 12–13

497. Ibid, p 14

498. Mitchell and Mitchell, 'Customary Fishing', p 89

## 11.5.4(4)

aquaculture, however, was more localised in focus. To give one example, George Matene told us in his evidence for Te Atiawa:

One of the most interesting methods of marine farming I ever saw was a set up introduced by my mother in law Tinipere Riwai Tahuaroa over 50 years ago. She would make several circles of rocks three feet in circumference and 24 inches high along the low spring tide level. Within these circles, she would place smaller rocks with green lip mussels attached to them, and then leave these mussels to breed and grow within the safety of these rock walls. After a certain period of time, she would go down and harvest these mussels. They really took off in this environment, some were over 8 inches in length, and they were fat and full of meat. Our families have been marine farming for generations – now our traditional practice just has a fancy name.<sup>499</sup>

The claimants' long practice of traditional aquaculture was recognised by the Tribunal in its report *Ahu Moana: The Aquaculture and Marine Farming Report*.<sup>500</sup> It is important to note that this practice has continued to the present day in some parts of Te Tau Ihu.

Broadly speaking, the claimants in our inquiry made the following points:

- ▶ Marine farms were set up in customary fishing grounds, thus taking away long-established rights to gather kaimoana and to fish without any compensation.<sup>501</sup>
- ▶ Marine farming is an important development opportunity for iwi, but lack of capital and a hostile decision-making regime has prevented them from taking advantage of this opportunity to the fullest extent.<sup>502</sup>
- ▶ Marine farming is closely akin to customary practices of transplanting and enhancing kaimoana, and is a logical extension of those practices.<sup>503</sup>
- ▶ Marine farming, like any iwi venture, is not a purely commercial matter – they want to use it in part to provide kai for customary events and to enhance or aid the recovery of certain species, and not simply or only for the 'purpose of sale'.<sup>504</sup>
- ▶ In customary terms, the tangata whenua exercised tino rangatiratanga over, and ownership of, the foreshore and seabed of Te Tau Ihu, and they are therefore entitled as of right to a share of that space for the purposes of marine farming.<sup>505</sup>

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499. George Te Ao Mahauariki Matene, brief of evidence on behalf of Te Atiawa, January 2003 (doc 15), pp 4–5

500. Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), pp 30–31, 57–62

501. See, for example, A Bunt, brief of evidence on behalf of Te Atiawa

502. See, for example, Bradley, brief of evidence

503. See, for example, J Elkington, brief of evidence on behalf of Ngati Koata

504. See, for example, Antoni Bunt, brief of evidence on behalf of Totaranui Ltd, 10 January 2003 (doc 123). Commercial aquaculture is defined in section 4 of the Maori Commercial Aquaculture Settlement Act 2004 as 'an aquaculture activity undertaken for the purpose of sale'.

505. See, for example, J Elkington, brief of evidence on behalf of Ngati Koata, attachments; J Elkington, appendices to brief of evidence

Some of these issues were settled after the completion of our hearings. In 2004, the Government enacted the Maori Commercial Aquaculture Claims Settlement Act. Briefly, the Act set out the Crown's commitment to provide iwi with 20 per cent of all new space set aside for aquaculture from 1 January 2005 and the equivalent of 20 per cent of the space that had been created between 21 September 1992 and 31 December 2004 ('pre-commencement space'). The Government has to meet its pre-commencement space commitment by 2014 or commute it to a financial equivalent. The settlement does not cover 'historical' claims about aquaculture (that is, those relating to marine farming before 21 September 1992), which remain to be dealt with in the historical claims process.<sup>506</sup>

Section 6 of the Maori Commercial Aquaculture Claims Settlement Act removes the Tribunal's jurisdiction to inquire into all claims 'in respect of commercial aquaculture activities arising on or after 21 September 1992 in the coastal marine area' and in respect of the 'rights and interests of Maori in commercial aquaculture activities' from the same date. It also removes the Tribunal's jurisdiction to consider the 'quantification or the adequacy of the benefits to Maori provided by or under this Act'.<sup>507</sup> In essence, we are confined to addressing any issues with regard to commercial aquaculture that arose before September 1992, and any issues relating to non-commercial aquaculture activities.

The claimants in our inquiry, however, presented their evidence before the settlement and had not framed it so as to clearly distinguish matters before and after September 1992. From the detailed evidence of Ronald Sutherland for Ngati Kuia, it seems clear that the majority of marine farms in Te Tau Ihu were established after 1991.<sup>508</sup> The lion's share of the issue, it seems, relates to the period covered by the settlement. Nonetheless, we did not receive evidence that allows us to quantify the number of farms, or the number of hectares included in those farms, before September 1992. Mr Sutherland suggested that the earlier farms tended to be larger – it is only more recent developments that have enabled smaller farms to be economic.<sup>509</sup> After the close of our hearings, Fred Te Miha and John Morgan presented a paper at the 2008 Maori fisheries conference. They stated that there are 5500 hectares of space for aquaculture in the Tasman district, all of it established after September 1992. In Marlborough, however, there are around 3000 hectares of marine farms, of which just under half were established before September 1992.<sup>510</sup> These figures have not been tested in evidence before us, but we accept them as a guide.

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506. Minister of Fisheries, 'Maori Commercial Aquaculture Settlement: Consultation on a Plan to Fulfil the Crown's Settlement Obligations', June 2008, pp 1–2; Ministry of Fisheries, *Details of the Maori Commercial Aquaculture Claims Settlement*, <http://www.fish.govt.nz>

507. Maori Commercial Aquaculture Claims Settlement Act 2004, s 6

508. Sutherland, brief of evidence, pp 8–16

509. *Ibid*, p 10

510. John Te Miha (Ngati Tama Manawhenua ki Te Tau Ihu Trust) and John Morgan (Ngati Rarua Iwi Trust), 'Notes on Powerpoint Presentation "Aquaculture in Te Tau Ihu"', Maori Fisheries Conference, April 2008, <http://www.manamoana.co.nz/presentations.html>

Several claimant witnesses complained that marine farms had been established in sites where the adjoining land had waahi tapu, which were desecrated thereby, or had been established on valuable fishing grounds. No compensation was paid, as the Government did not recognise their fisheries and kaimoana beds as properties. But we were not provided with details as to the particular sites complained of or whether these farms were set up before or after 1992.<sup>511</sup> According to Dr Morrow and Ms Hewitt, there were many unsuccessful Maori complaints to the Ministry of Agriculture and Fisheries in the 1980s, but only one success. The latter was the prevention of marine farming on an important mahinga kai at Pariwhakaoho, which won permanent success with the support of the Minister of Maori Affairs, Doug Kidd, in 1991.<sup>512</sup>

Mr Sutherland made two relevant points on this issue. First, he argued that most marine farms in the Marlborough Sounds are for mussels and salmon, both of which tend to be placed over sites described as ‘mud’, and which tend to be low in species and species diversity.<sup>513</sup> He confirmed in cross-examination that such sites were not likely to be areas of high value for customary fishing.<sup>514</sup> On the other hand, he noted that the Government accepted Maori claims about the loss of kaimoana in 1988, when the Marlborough Harbour Board issued its proposed maritime planning scheme. The scheme required all marine farms to preserve an inshore zone of 50 metres to allow for customary food gathering, in the belief that most shellfish species of importance to Maori were located in that area.<sup>515</sup> In the event, however, the plan did not become operative, and Mr Sutherland argued that, although it provided the possibility of protecting sites of significance to Maori (or other Maori interests), nothing concrete was done. In part, the proposed plan was overtaken by the Resource Management Act 1991 and the reorganisation of local government in the early 1990s.<sup>516</sup>

The other aspect of the issue is the pre-1992 development opportunity. It is not a new idea that Maori should be assisted to enter marine farming. Although the Marine Farming Act itself passed with little debate in 1971, we note that some of the issues had already been thrashed out in the discussion of the Rock Oyster Farming Act of 1964. Colin Moyle, the member for Manukau, suggested that financial aid would be vital to setting up that industry. ‘In particular,’ he argued, ‘I am sure our Maori people will be most anxious to know whether they will be eligible to be assisted in an industry of this nature.’<sup>517</sup> He returned to the point later:

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511. See, for example, A Bunt, brief of evidence on behalf of Te Atiawa, pp 10–15

512. Hewitt and Morrow, ‘Te Atiawa’, pp 154–155; see also Clark, ‘Kaitiakitanga’, pp 26–31

513. Sutherland, brief of evidence, p 6

514. Ronald Sutherland, under cross-examination, tenth hearing, 6–11 April 2003 (transcript 4.10, p 229)

515. Sutherland, brief of evidence, p 14; Ronald Sutherland, under cross-examination, tenth hearing, 6–11 April 2003 (transcript 4.10, pp 228–229)

516. Sutherland, brief of evidence, pp 15–16

517. Colin Moyle, NZPD, 1964, vol 341, p 3115

To what extent is the Government prepared to assist the industry with capital, and to what extent will those who engage in pioneering this industry be protected against the risks they must take in establishing the industry? Again, how can we be sure that our Maori people in Northland will be given every opportunity to engage in this industry?<sup>518</sup>

This suggestion was supported by the member for Southern Maori, Sir Eruera Tirikatene-Sullivan, who wanted Maori assisted into the industry. He also called for an information campaign to enable Maori with coastal land to understand both the impacts on them of setting up oyster farms and the opportunity for them to participate:

I know this is a private enterprise field, and naturally it will attract investors, but I am wondering whether there will be any avenue whereby Maoris who have a certain amount of knowledge yet possibly only a little or no money will be able to obtain financial assistance.<sup>519</sup>

The Government's response was fairly typical of the times. The Minister of Marine assured Parliament that Maori would have 'equal rights with anybody else to establish their own farms.'<sup>520</sup> As the Tribunal found in its report on central North Island claims, this was true only where there was a genuinely level playing field.<sup>521</sup> Lewis Wilson told us that the old European families in the Marlborough Sounds all got marine farms because their economic success from farming gave them the capital to get started. Ngati Kuia, on the other hand, were virtually landless and, as a result, comparatively without capital. He argued that, if Ngati Kuia had kept enough land for economic success, they too would have had the capital for marine farming.<sup>522</sup> Richard Bradley made the same point for Rangitane.<sup>523</sup> Mr Sutherland agreed that access to capital was a key pre-requisite for getting into the industry.<sup>524</sup> It would not have been impossible for the Government to assist Te Tau Ihu Maori to overcome this barrier to marine farming between 1971 and 1992. It was too easy a response to say that they had 'equal rights' with everyone else. As far as we are aware, no assistance was provided to Maori. Some iwi do appear to have entered the marine farming industry in the 1990s, partly on the back of the commercial fishing settlement, but that is outside the scope of our inquiry.

We also examined the parliamentary debates about the Marine Farming Act 1971 to see if any thought was given to protecting Maori interests in their kaimoana beds and their customary fisheries. One of the themes in the debate on the Rock Oyster Farming Bill in 1964

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518. Ibid

519. Ibid, p 3126

520. Ibid, p 3130

521. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 890-914

522. L. Wilson, brief of evidence, pp 6-7

523. Bradley, brief of evidence, pp 44, 48

524. Sutherland, brief of evidence, p 9

## 11.5.4(4)

was the potential for oyster farming to harm the rights of those who would lose access to current shellfish beds. This included the general public as a whole, and those Maori whose valued beds might be affected by the siting of farms. The Minister of Marine argued that the Bill provided for the advertising of intended marine farm sites and the opportunity for members of the public to object to them. The Minister would then decide whether to uphold the objection. This process, he said, should enable that any 'claim to traditional rights of Maoris can be resolved' before a decision was made to grant a lease.<sup>525</sup> One month would be allowed for objections. We note, however, that the 'traditional rights of Maoris' was not included specifically in the grounds on which the Minister could decline an application.<sup>526</sup> This was also the case for the Marine Farming Act 1971.

Applicants were required to notify interested parties directly. These were specified in the Act as harbour boards, adjoining landowners, and various other parties, but Maori were conspicuous by their absence. It would have been entirely possible in the 1970s to have specified that applicants notify the relevant local Maori committee or tribal executive, or even the Maori Affairs Department, had the Crown equated the protection of Maori 'traditional rights' with a special interest in the siting of marine farms. Care was taken to protect the mining industry's interests – those with mining interests were added to the people who had to be notified under the new Act, and mining was added to the grounds on which an application could be turned down. Maori would be notified only if they were adjoining landowners.<sup>527</sup>

Nonetheless, Matiu Rata, the member for Northern Maori, tried to include protection for all natural kaimoana beds in the 1971 Act. He argued that provision should be made for marine farming applications not to interfere with the public rights of access to, and the gathering of, shellfish, or with natural stocks. The life cycle of the natural stocks must be maintained. Marine farms should be sited only in places where the rights of people to gather shellfish were not affected. It is clear that Rata intended that Maori rights to gather shellfish be protected in this way, and he asked that this be one of the matters that the authorities had to consider in deciding whether to approve an application. He thus sought absolute protection of the right to take (though accepting that it should be limited where necessary to protect stocks): 'Areas in which there are natural stocks of shellfish should be reserved for the public.'<sup>528</sup> At the time Rata was speaking, this was a mainly Maori interest.

The Minister of Marine did not respond to this point, and the Bill was not amended to protect kaimoana beds or the interests of shellfish gatherers.<sup>529</sup> Had the Bill been amended as sought by Rata, then it would have been impossible to set up marine farms in areas of

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525. NZPD, 1964, vol 341, p 3113

526. Rock Oyster Farming Act 1964, s 4

527. Marine Farming Act 1971

528. NZPD, 1971, vol 374, p 2870

529. Ibid, p 2871; Marine Farming Act 1971

significance for customary gathering. This, and the possibility of notifying Maori authorities as people specifically affected, could have gone a long way towards protecting Maori interests in the practice of marine farming. The regime that operated between 1971 and 1991 had no such protections, although we note Mr Sutherland's evidence that efforts were made in that direction from the late 1980s with little success. We do not have comprehensive evidence on marine farming in that period.

In conclusion, we note that the marine farming regime in operation from 1971 did not protect or provide for Maori interests. From the evidence available to us, Maori were not assisted to overcome barriers to their entry to the industry, particularly in terms of investment capital. Such assistance was mooted in Parliament in 1964, the member for Southern Maori noting that Maori in his electorate had 'a certain amount of knowledge yet possibly only a little or no money'.<sup>530</sup> Secondly, the siting of some marine farms before 1992 must have damaged Maori kaimoana beds and customary fishing grounds. The damage may not have been extensive, given the preferred type of bed for these farms, but some clearly occurred, hence the proposed step in 1988 of keeping all farms at least 50 metres offshore. In the absence of further evidence, we are not able to be more specific. We make no comment about marine farming after September 1992. We are not in a position to quantify the extent of marine farming before that date, except to note that aquaculture space in the Tasman district is all covered by the settlement, and just under half of the space in Marlborough (around 1400 hectares) is not. We are not in a position to quantify the prejudice to Maori, except to state that some clearly occurred.

We turn next to the final component of the claimants' customary marine economy – their seabirds.

#### 11.5.5 Islands and seabirds

One of the most powerful grievances of Te Tau Ihu iwi relates to their seabirds, more particularly the titi (shearwater). It is intimately connected to their claims to ownership of, and authority over, the islands off Rangitoto and the Marlborough Sounds. Detailed evidence was presented to the Tribunal about the birding claims of Ngati Koata and Ngati Kuia. We received evidence from many tangata whenua witnesses, as well as historians Anthony Patete, Heather Bassett and Richard Kay, and Cathy Marr.

In his evidence for Ngati Koata, James Elkington explained that muttonbirding was an essential component of the customary economy when he was growing up in the 1940s. It was an important part of feeding the people. Mr Elkington was trained by his father and uncles, and care was taken not to destroy burrows or to deplete the resource.<sup>531</sup> Birding was

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530. NZPD, 1964, vol 341, p 3126

531. J Elkington, brief of evidence for Wai 262, paras 66–73

quite a large-scale community event, and it served a number of purposes in addition to getting food, including the transmission of knowledge and skills and the reinforcement of whanaungatanga. Alfred Elkington described how each family would have one feed of fresh birds and would then preserve the rest, sometimes storing them in their own fat for up to three months: 'All the food we got was for everyone. The communal method of gathering kai was our way of life.'<sup>532</sup>

Tom Wilson explained Ngati Kuia's strict rules for harvesting and described how he was trained by his elders. From the ages of nine to 14, he was a carrier of the birds, and on his fifteenth birthday he was formally designated a catcher, though he was still not allowed to climb up and take birds by himself – he had to go up to the nests with two older men. That was the last time he was able to go muttonbirding, however, as the iwi scaled back their birding for the rest of the decade to help preserve the resource. From 1960, all further access was denied by the Crown. Mr Wilson told us that the Titi Islands were very precious to Ngati Kuia. In his childhood, they were a major source of kai – not just birds but also fish and 'lollies,' 'our nickname for Karaka Berries.'<sup>533</sup>

#### **(1) *The Ngati Kuia claim***

The nineteenth-century history of the offshore islands and the Crown's claim to have purchased most of them during the Waipounamu transaction have been covered in chapter 6. We take up the story in the first decade of the twentieth century, when Ngati Kuia petitioned Parliament for the reservation of the Chetwodes (Nukuwaiata and Te Kakaho) and Titi Islands (Motungarara), which provided them with karaka berries, muttonbirds, and other foods. Instead of granting their petition, the Government reserved the islands in 1901 for the protection of their flora and fauna. Anthony Patete explained that this contradicted an assurance from the Minister of Lands, as the member for Southern Maori, Tame Parata, discovered during questions in Parliament.<sup>534</sup>

When questioning the Minister, Tame Parata revealed that a petition had been sent to Parliament by Ngati Kuia and 'neighbouring tribes' asking for the return of the islands as 'fishing-places and mutton-bird preserves.' In that petition:

it was pointed out that the two small islands referred to had been from time immemorial made use of by these Maoris as fishing-grounds, karaka-grounds, and mutton-bird preserves, and they asked that those islands should be reserved by the Crown for Native purposes.<sup>535</sup>

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532. A Elkington, brief of evidence for Wai 262, p 23

533. T Wilson, brief of evidence, pp 4–5

534. Patete, 'D'Urville Island', pp 227–228

535. NZPD, 1901, vol 119, p 115

The matter went to the Under-Secretary for Crown Lands, who gave a promise that the Government intended to reserve the islands for 'Native purposes'. Asked whether the Government intended to give effect to that promise, the Minister replied that a promise had in fact been given that:

these islands should be retained for the Ngatikuia Tribe. But the other residents in that part of the country wished the islands to be reserved for the preservation of native fauna, and considered they ought to be kept for the preservation of native birds and scenery, and not allowed to go to the aboriginal natives altogether, because in their opinion, the Natives might destroy the scenery of this very beautiful place.<sup>536</sup>

Parata pointed out that 'it was not the desire of the Maoris, in the event of these islands being set apart for their use, to spoil their natural beauties in any way. They only wished the right to use them as fishing-grounds, mutton-bird grounds, and so on.'<sup>537</sup> The Minister replied that the Lands Department feared that Maori might destroy the bush by lighting fires but that the Government did not want to prevent Maori from going there altogether – they would still have 'a perfect right to go there, just as Europeans had'. Parata asked that that right of access be gazetted and the Government agreed.<sup>538</sup>

There, the matter rested until April 1913, when Ngati Kuia again approached the Minister of Lands asking for title to the islands, which supplied their people with karaka, mutton-birds, and 'other maori foods'. They claimed a right stemming from 200 years of use by the tribe. After investigation, the tribe was again refused title in June 1913.<sup>539</sup>

There was, however, provision in the scenery preservation legislation for Maori to take birds (so long as they were not protected) from scenic reserves that had been Maori land before their reservation. This seems to have been stretched to apply to Ngati Kuia when they approached the Crown again in 1918. They sought a 'continuance of privileges and sole rights to take muttonbirds from the Chetwode and Titi Islands, and approval to form a committee of management to ensure that all conditions under the Scenery Preservation Act were complied with.'<sup>540</sup> In September of that year, the Government gave the tribe permission to land on the islands for the purpose of obtaining fish, koura (crayfish), and muttonbirds, on the understanding that they were responsible for upholding the conditions of the scenery preservation laws.<sup>541</sup> An agreement to that effect was signed with Kipa Hemi Whiro

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536. Ibid

537. Ibid

538. Ibid

539. I B Mitchell, chairman, Marlborough Sounds Maritime Park Board, to director, Wildlife Service, 27 February 1981 (Patete, supporting documents, doc GQ), p 1

540. Ibid

541. Ibid

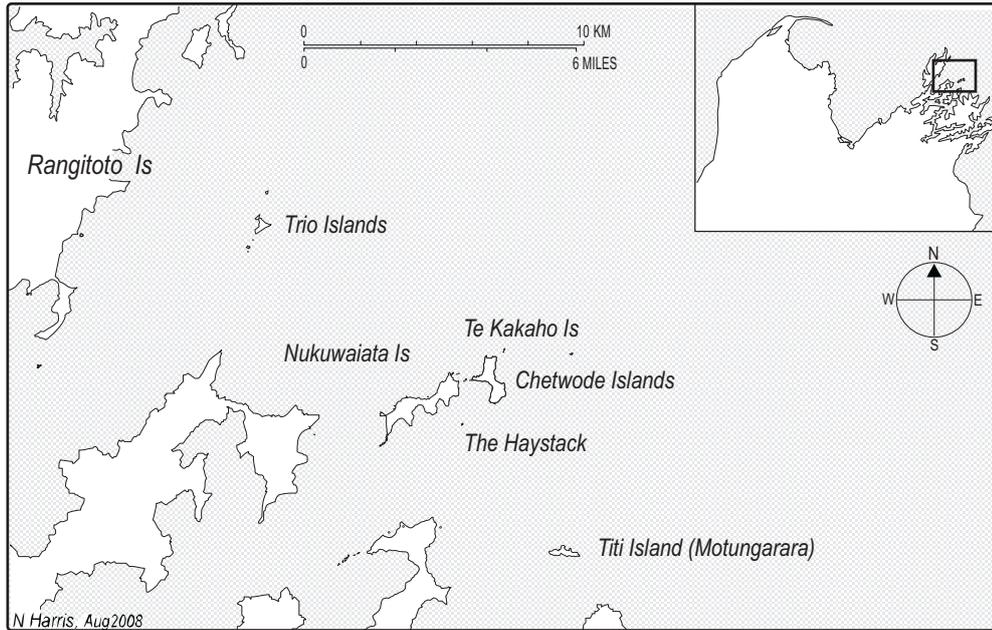


Figure 41: The Titi (Muttonbird) Islands

Source: *Heinemann New Zealand Atlas* (Auckland: Heinemann, 1987), pl 61

and Pou Hemi Whiro, although the claimants were not able to locate a copy of it.<sup>542</sup> Tribal trustees were appointed to ensure that Ngati Kuia abided by the terms of the agreement.<sup>543</sup>

The Marlborough Sounds Park Board noted that ‘From our records this arrangement worked fairly satisfactorily’, although there was ‘poaching’ by other Maori.<sup>544</sup> In the 1930s, the agreement was renegotiated, expanding it to include additional islands, so long as harvesting was restricted to traditional methods (see fig 41). This appears to have happened because of concerns on both sides. The commissioner of Crown lands had become concerned about what he saw as a lack of control by the trustees, in terms of both poaching and the lighting of fires.<sup>545</sup> Ngati Kuia, on the other hand, sought the Government’s agreement to their landing on Nukuwaiata (Inner Chetwode), Te Kakaho (Outer Chetwode), Te Kioere, Motungarara (Titi Island), and the Haystack Islands ‘for the sole purpose of obtaining fish, Koura, Karaka, and Mutton-Birds’. They petitioned the Crown, stating that:

- ▶ They would not light any fires, damage any vegetation, or destroy any native birds or animals other than the specified species ‘on or in the vicinity of the said islands’.

542. Moses, brief of evidence, p 37

543. IB Mitchell, chairman, Marlborough Sounds Maritime Park Board, to director, Wildlife Service, 27 February 1981 (Patete, supporting documents, doc GQ), p 1

544. Ibid, p 2

545. *Draft Titi Island Nature Reserve Management Plan*, January 1982, extract supplied by secretary, Marlborough Sounds Maritime Park Board, to Wildlife Service (Patete, supporting documents, doc GR), p 2

- ▶ They would not ‘damage the trees in any way’ when ‘taking the fruit of the Kāraaka’.
- ▶ They would not take firearms or dogs on to the islands.
- ▶ They would keep an ‘effective supervision on the said islands’ and would report any taking of guano and any act of vandalism or damage to the commissioner of Crown lands. They would also hold themselves ‘individually and collectively responsible’ to see that the conditions were strictly observed and accepted that any violation would result in withdrawal of the Government’s permission.
- ▶ They would take the birds ‘according to the ancient Maori custom.’<sup>546</sup>

The commissioner of Crown lands met with Ngati Kuia at Okoha in September 1933. The result was a new agreement, expanding the arrangement to include not just Inner Chetwode and Titi but also Outer Chetwode, Te Kiore, and the Haystack Islands, with provision to take fish, koura, karaka berries, and muttonbirds by traditional methods. The agreement was signed for the iwi by three trustees, Pou Hemi Whiro, Wiremu Waaka, and Temutini Meihana.<sup>547</sup> Mark Moses told us that the iwi took their role as kaitiaki seriously. In 1935, the trustees declared a closed season, and they also monitored the islands for poaching, set appropriate dates for gathering, and so forth.<sup>548</sup>

From the Government’s perspective, the arrangement involved (it was believed) about 12 families. Each February, a trustee would notify the commissioner of a period suitable for the taking of muttonbirds – usually one or two days in March – and the commissioner would then notify all the families. There were some arguments about who was entitled to go, but the system worked until the mid-1950s. No statistics were kept but it was assumed that 800 to 1000 birds were taken annually until the ‘latter years,’ when comments arose from the iwi that only a smaller number could be taken. The reasons given were the increased number of penguins competing for burrows, an increase in fern cover, predation by Norway rats, and a change in vegetation making it harder for the birds to land and burrow.<sup>549</sup> Traditionally, Maori had dealt with some of these problems by burning off vegetation, but that was no longer permitted.<sup>550</sup>

Tom Wilson explained that the last time he went to the islands for harvesting was in 1953, when the catch was only 500 birds. One of the Ngati Kuia chiefs wanted to place a rahui on the island because of the declining numbers. Although a formal rahui was not imposed, the iwi cut back on their taking of birds for the rest of the 1950s, and Mr Wilson never went back.<sup>551</sup>

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546. G Park, *Effective Exclusion*, pp 473–474

547. *Draft Titi Island Nature Reserve Management Plan*, January 1982, extract supplied by secretary, Marlborough Sounds Maritime Park Board, to Wildlife Service (Patete, supporting documents, doc GR), p 2

548. Moses, brief of evidence, p 37

549. *Draft Titi Island Nature Reserve Management Plan*, January 1982, extract supplied by secretary, Marlborough Sounds Maritime Park Board, to Wildlife Service (Patete, supporting documents, doc GR), p 2

550. Marr, ‘Crown–Maori Relations’, p 165

551. T Wilson, brief of evidence, pp 4–5

In 1953, the Wildlife Act made the titi a protected bird. Permission for harvesting was required from the Minister of Internal Affairs, which continued to be given until the late 1950s, when the Wildlife Service asked for it to be refused. Officials felt that the titi population could not sustain both harvesting and predation by rats and that the absolutely protected flesh-footed shearwater was too hard to distinguish when people were taking sooty shearwaters. Also, somewhat remarkably in light of the history of Ngati Kuia's efforts, there was a 'belief that the interest in taking mutton birds was very small.'<sup>552</sup> One official advised in 1963: 'If we maintain our firm decision of no birding I am sure in a few years interest will have waned completely.'<sup>553</sup>

Accordingly, permission to land was refused in 1960. This was extended for a period of five years, and then in 1964 the Wildlife Division indicated that it was not now 'intended to extend mutton birding away from the major concentrations around Stewart Island' and that no further permission would be granted.<sup>554</sup> Mr Moses pointed out that there was no consultation or negotiation with Ngati Kuia; the 1933 agreement was simply set aside.<sup>555</sup> The park board reported that Maori expressed strong opposition to this decision and continued to make unsuccessful requests for permission to harvest titi, while intermittent 'poaching' also continued after 1961. The board noted in 1982 that the only act of management since the early 1950s had been to lay poison for rat control – this was done for a couple of years 'but never seriously followed up.'<sup>556</sup>

In 1981, Maori approached the park board and suggested that, if they were allowed to take some birds annually and the take was properly distributed according to custom, problems with poaching would largely disappear. The Wildlife Service opposed this proposal, maintaining that allowing a take would increase interest and therefore increase poaching. Officials argued, much as they had 20 years earlier: 'We have found that it is better just to let the tradition die and accept a minimum amount of poaching in the meantime. Anyone caught or involved in such operations should of course be prosecuted.'<sup>557</sup>

The Government's attitude, therefore, was that it was better for Maori to break the law for a time, and for that to be accepted in practice, in the hope that their traditions would eventually die in this hostile climate. There was no intention of ever permitting a sustainable harvest if and when the bird population could support it. We heard evidence from Ngati Kuia and Ngati Koata, however, that the titi remains a highly prized customary food and

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552. *Draft Titi Island Nature Reserve Management Plan*, January 1982, extract supplied by secretary, Marlborough Sounds Maritime Park Board, to Wildlife Service (Patete, supporting documents, doc GR), p 2

553. Wildlife supervisor to commissioner of Crown lands (Marr, 'Crown-Maori Relations', p 164)

554. *Draft Titi Island Nature Reserve Management Plan*, January 1982, extract supplied by secretary, Marlborough Sounds Maritime Park Board, to Wildlife Service (Patete, supporting documents, doc GR), p 3

555. Moses, brief of evidence, p 37

556. *Draft Titi Island Nature Reserve Management Plan*, January 1982, extract supplied by secretary, Marlborough Sounds Maritime Park Board, to Wildlife Service (Patete, supporting documents, doc GR), p 3

557. Director, Wildlife Service, to Marlborough Sounds Maritime Park Board, 27 March 1981 (Marr, 'Crown-Maori Relations', p 165)

that the traditional practice of taking it is still very important to the tribes. Large community expeditions, the training of the coming generations, the art of taking the birds without disturbing their burrows, the competitive exercise of skills and knowledge, and – of course – the preparation, preserving, and eating of customary foods are all still highly prized. The tradition has not died since the hope was first expressed that it would do so back in 1963, but it is certainly imperilled by the lack of opportunity to carry it out. Almost 50 years have passed since the first refusal of permission in 1960, and the number of iwi members who could still train people in the safe and sustainable harvesting of titi is fast declining.

The islands were taken over by DOC in 1987, and the ban on birding remains in place (at least as at our final hearing in 2004). We received no evidence from the Crown, however, as to whether predators have been eliminated, bird statistics gathered, or sustainability investigated. We have no information on why DOC considers the ban still necessary and what, if any, steps are being taken to assist the recovery of the bird population or to involve Ngati Kuia in decision-making.

The iwi acknowledges that the diminished state of the titi and other resources may mean that harvesting is inappropriate at present, but they want the right to fully exercise their own kaitiakitanga and the mana to make the decision.<sup>558</sup>

## **(2) The Ngati Koata claim**

The Ngati Koata claim is different from that of Ngati Kuia because the individual members of the iwi are still the legal owners of the main islands at issue (Kurupongi or the Trios). Crown efforts to acquire the islands began in 1913, but the iwi have clung tenaciously to their ownership.<sup>559</sup> The Government wanted Kurupongi for a reserve to protect tuatara and King Shags, but the Minister of Internal Affairs, Sir Francis Bell, recognised the importance of muttonbirding to the islands' owners and decided that they would need to be paid for the acquisition of that right (as well as for the land). The plan was to pass legislation making the island a reserve and compensating the owners under the Public Works Act. (Ironically, it was seen as too difficult to buy the islands from the multiple owners created by the Crown's title system (see ch 8).) The proposal was shelved, however, because of the First World War.<sup>560</sup>

A clash of Maori–European values over the Trios may have been shown by Maori burning some of the bush in 1918. In that year, the director of the Dominion Museum wanted the Government to renew efforts to acquire the islands. He had heard rumours that the burn-off was done to kill off tuatara, or by one group of Maori to spoil the muttonbirding of another, or by some young, educated Maori wanting to show their contempt for Europeans. Although he did not know which, if any, of these explanations were correct, the director felt

558. Moses, brief of evidence, p 38

559. Bassett and Kay, 'Nga Ture Kaupapa', p 120; Patete, 'D'Urville Island', p 179

560. Patete, 'D'Urville Island', p 179

that Maori were not fit to have charge of the islands, and he requested that the Government take them. In our view, the fire may well have been part of the traditional practice of clearing vegetation to assist the birds to land and burrow. In any case, the Lands Department supported the proposal to take the islands under the Public Works Act, but the Minister of Internal Affairs turned it down.<sup>561</sup>

The battle for the Trios continued in the 1920s. In March 1925, the Internal Affairs Department reopened the matter, again with support from the director of the Dominion Museum. The director believed that it would be necessary to ban Maori from harvesting muttonbirds, as, in his view, there were not enough birds to sustain a harvest. On the other hand, he told the Government that he knew of no Maori actually harvesting the birds. The Marine Department advised that there were a few Maori who did visit the Trios, mainly from Tinui, but thought that they would probably be glad to receive payment for losing their landing and harvesting rights. Even so, the difficulty of obtaining the islands by purchase from multiple owners was again discussed. The Government proposed to use the public works legislation and pay compensation. It was anxious about the possibility of more fires being started by the owners, and in 1927 the idea of moving the tuatara off the islands was considered. One of the owners, Mokau Kawharu, objected to this – he seemed willing to consider selling the island, but also wanted to acquire it as his sole property. In any event, interest lapsed for a second time when the Government decided that it had insufficient funds to appoint a special caretaker and that the proposal was pointless without one.<sup>562</sup>

There was some room for compromise, because, while Ngati Koata wanted to harvest their titi and protect the tuatara, the Government was not primarily interested in the islands for the titi – rather, it too wanted to protect the tuatara, as well as the King Shags. On the other hand, Ngati Koata had had the experience of losing ownership of Takapourewa (Stephens Island) to the Crown and finding themselves banned from taking titi (and other kai) afterwards.<sup>563</sup> The tribe had oral traditions of a promise that they could take muttonbirds after the acquisition of the island. A Wildlife Branch memorandum recorded this in 1951, noting that Turi Elkington ‘also mentioned that when Stephens Island was taken over by the Crown his grandfather had an assurance that he would have the right to take mutton birds thereafter, but later was prevented from landing on the islands to take the birds.’<sup>564</sup> This issue had the potential to disrupt matters when the Crown tried to negotiate similar terms with the iwi in the 1950s.

Interest in acquiring the islands resumed in 1949, and the Crown tried to buy them at a meeting of owners on 20 July 1951. The owners refused to sell, citing a ‘sentimental attachment to a small remnant of the land of their forefathers’ and the ‘lack of any definite

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561. Patete, ‘D’Urville Island’, pp 179–180

562. Ibid, p 180

563. B Hippolite, brief of evidence on behalf of Ngati Koata, p 6

564. Memorandum for controller, Wildlife Branch, 31 July 1951 (Patete, supporting documents, doc HJ), p 1

assurance as regards rights to take mutton birds.<sup>565</sup> At the meeting, the Internal Affairs representative told the owners that a new Wildlife Act was envisaged, 'and that under this he hoped it would be possible to work out an agreement satisfactory to all concerned'. The islands could be declared a wildlife sanctuary with 'appropriate restrictions to ensure the preservation of their fauna and flora while the Maori owners retained ownership. *If they insisted* provision could also be made for the taking of sooty-shearwater (mutton birds).' (Emphasis added.)<sup>566</sup>

The Wildlife Act came into force in 1954, and in 1957 the Government tried again to get control of the islands, this time agreeing to leave them in the ownership of Ngati Koata (individuals). At the assembled meeting, the owners again refused to sell their islands but agreed with the Government that the Trios should become a sanctuary for the preservation of species prized by both the owners and the nation. The right to land on the islands in March and April to take muttonbirds, however, was expressly reserved.<sup>567</sup> In 1965, the islands were gazetted as a wildlife sanctuary. The owners' right to land on the islands was preserved, as was the right to take muttonbirds in April and May, subject to conditions imposed by the Minister of Internal Affairs under section 6 of the Wildlife Act.<sup>568</sup> That section allowed the Minister to set various limits, including the number of birds taken.<sup>569</sup>

Thus, the ownership of the islands enabled Ngati Koata to insist on a continued right of harvest, something which Ngati Kuia had not been able to do. This was because the Crown did not insist on taking the islands under the Public Works Act, as was mooted from time to time (even in 1950). Nonetheless, a marked decline in the seabird population soon rendered the customary right problematic. In the first half of the century, Ngati Koata were taking about 200 birds a year, but by 1951 this number had dropped to 50.<sup>570</sup> Even with rahui to control the seasons and strict self-regulation on the numbers to be taken, the titi population declined to the point where Ngati Koata imposed a total ban at the end of the 1970s. Benjamin Hippolite told us:

We have authority to gather titi, but have not for 20 years because of their decline. The reasons for that are pollution, and no surface fish. This is one example of our preservation systems in place, and we want to be able to exercise them. We never wanted to give away our tino rangatiratanga. There is a place for Pakeha in our world – standing side by side, doing the same mahi as us, but not, however, usurping our authority.<sup>571</sup>

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565. 'Trios Islands – Proposed Formation as a Wildlife Sanctuary', 25 September 1956 (Patete, supporting documents, doc HM)

566. A G Harper, Secretary of Internal Affairs, to the Secretary of Maori Affairs, 26 September 1956 (Patete, supporting documents, doc GK), p 1

567. Patete, 'D'Urville Island', p 182

568. The Wildlife Sanctuary (Trio Islands) Order 1965 (Patete, supporting documents, doc OH)

569. Wildlife Act 1953, s 6

570. 'Trios – Resource Information', 17 February 1988 (Patete, supporting documents, doc OK), p 1

571. B brief of evidence on behalf of Ngati Koata, p 6

Ngati Koata's claim is not, therefore, that the Crown has prevented their taking the birds but rather that it has failed to manage resources in such a way that a sustainable taking is even possible.<sup>572</sup> James Elkington explained:

Mutton birds have now largely disappeared from our islands. This is the cause of great sadness among us. It is attributable I am convinced, largely to the lack of smaller fish upon which the Titi fed, in turn the result of the pollution of their food supply, and the general degradation of the fishery and the environment.<sup>573</sup>

We heard evidence on this point from several Ngati Koata witnesses.<sup>574</sup> Puhanga Tupaea gave this graphic account of the change that has taken place:

We used to trawl for kahawai, we would have to trawl through so many birds it was as though there were paddocks of birds. Sometimes there were so many birds, the noise would be too much to bear. But you don't see that any more. Last time I was down there, I mentioned it to my nephew Carl. After a while he pointed out about half a dozen birds, and said 'there you are, Aunt.' I was so sad to see the changes, to see what lack of proper conservation has done to our resources.<sup>575</sup>

Thus, Ngati Koata blame the Government's management of the marine environment in general, and of fisheries in particular, for the huge decline of their seabirds.

We have no technical evidence about the state of the titi population or the causes of its decline. Anthony Patete's research suggests that there was little or no scientific monitoring of it before 1990. In 1988, the owners inquired about 'parameters for sustained muttonbird yields.'<sup>576</sup> The conservator could not find any relevant material about it and doubted that there was any. The islands had been a wildlife sanctuary for 31 years by that point. The conservator, RK Johnson, argued that a study 'similar to that being conducted on Titi Island would be necessary to gauge whether harvesting would be possible'. He doubted, however, that harvesting on such a small island would ever be permissible, because it was so hard to avoid damaging burrows. Any kind of study would need to be a long-term one, because the titi lays one egg per year and does not return to breed until at least five years old.<sup>577</sup> We have no information on whether the sustainability of harvesting has in fact been investigated for this or for other islands. Ngati Koata's own view is that harvesting is not possible at present.

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572. Counsel for Ngati Koata, closing submissions, 9 February 2004 (doc T7), p 127

573. J Elkington, brief of evidence for Wai 262, para 74

574. See, for example, A Elkington, brief of evidence for Wai 262, p 24

575. Tupaea, brief of evidence on behalf of Ngati Koata, para 64

576. RK Johnson, district conservator, to D Bell, Department of Conservation, 13 January 1988 (Patete, supporting documents, doc 01)

577. Ibid

It was a source of pride to the claimants in our inquiry that they were able to send titi to the Maori soldiers in two world wars.<sup>578</sup> The Mitchells, however, noted that Te Tau Ihu iwi now have to seek titi from outside their region, through customary exchanges with other iwi. Muttonbirds are one of the three most valued resources to obtain from other tribes (the other two being totara and pounamu).<sup>579</sup> In our view, this reinforces the gravity of the loss that has occurred.

### (3) *Other claims*

Dr and Mrs Mitchell reported that ‘representatives of several iwi strongly voiced grievances about their loss of titi harvest rights and/or access to titi harvest areas.’<sup>580</sup> We received detailed evidence, however, only on the Ngati Koata and Ngati Kuia claims. Te Atiawa witnesses also raised muttonbirding as an issue. Witnesses for other iwi referred to it in passing or not at all.

Mostly, the taking of titi became confined to offshore islands. Te Atiawa witnesses referred to muttonbirding on the coasts of the mainland. Judith Billens grew up in Golden Bay in the 1930s and 1940s. She recalled that the Te Atiawa men would go muttonbirding on ‘the West Coast at West Haven and through to Takaka’ but that the birds have since disappeared.<sup>581</sup>

On the other side of Te Tau Ihu, John Bunt described muttonbirding in the Sounds, taking the titi:

from the Tory Channel or just out in the entrance near Cabbage Island, or in Island Bay, or on Love’s Island from over Anatholia. We’d go for a day’s outing in March, get enough for everyone, then come back. There was no sense in flogging it and taking too much, because then the numbers would be fewer next time.<sup>582</sup>

The practice has long since stopped, however, which he attributed to two things: the ownership of islands by the Crown and, more particularly, DOC and the collapse of the food chain in the Sounds, with seabirds increasingly unable to find food.<sup>583</sup>

We do not have detailed evidence on Te Atiawa’s muttonbirding or on the Crown’s control of birding on these particular islands, so we can do no more than note the issue. We expect that the Crown, in its negotiations with iwi, will consider all the muttonbirding claims and the bird populations’ management and sustainability on all the islands at issue.

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578. Fransen, brief of evidence, p 10; Waaka, brief of evidence, p 6

579. Mitchell and Mitchell, ‘Customary Fishing’, p 95

580. *Ibid*, p 104

581. Billens, brief of evidence, p 8

582. J Bunt, brief of evidence, p 16

583. *Ibid*

**11.6 THE MODERN RESOURCE MANAGEMENT REGIME**

The Resource Management Act 1991 was a landmark in environmental legislation and is still the core statute for environmental law in New Zealand. With its overall purpose being ‘to promote the sustainable management of natural and physical resources’, it was built on the assumption that natural and physical resources may be developed in the interests of the community, so long as future generations and ecosystems are taken into account and adverse effects are dealt with or avoided.<sup>584</sup> Apart from its overarching purpose of ‘sustainable management’, the Act required those exercising its functions and powers to ‘recognise and provide for’ a number of matters of national importance, including ‘the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.’<sup>585</sup> It required all persons exercising functions and powers under it to ‘have particular regard to kaitiakitanga’, which was defined as ‘the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.’<sup>586</sup> There was also a requirement to ‘take into account the principles of the Treaty of Waitangi.’<sup>587</sup>

We note, too, that section 6 was amended in 2003 to include the protection of ‘historic heritage’ as a matter of national importance.<sup>588</sup> The definition of ‘historic heritage’ includes ‘sites of significance to Maori, including wahi tapu.’<sup>589</sup> In this chapter, however, we concentrate on issues regarding natural resources. Wahi tapu, such as urupa, that have been affected by environmental modification are covered in chapter 12.

In preparing regional plans, regional councils must consider ‘any significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources.’<sup>590</sup> All planning documents must be prepared or altered by local authorities in consultation with local iwi.<sup>591</sup> In 2003, the Act was amended to provide that regional and district councils must also ‘take into account’ iwi management plans when preparing their planning documents.<sup>592</sup> Another recent (2005) amendment to the Act makes it clear, however, that there is no duty to consult Maori communities about particular resource consents that might affect them.<sup>593</sup> Section 35A, introduced in 2005, provides that local authorities must keep and maintain a record of the contact details of each iwi authority in its district or region and any iwi planning documents that have been lodged with the local authority. The Crown is required in turn to provide information to the local authority on ‘the iwi authorities within

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584. Resource Management Act 1991, s 5

585. *Ibid*, s 6(e)

586. *Ibid*, ss 2, 7(a)

587. *Ibid*, s 8

588. *Ibid*, s 6(f)

589. *Ibid*, s 2

590. *Ibid*, s 65(3)(e)

591. *Ibid*, sch 1, s 3(1)(d)

592. *Ibid*, ss 66(2A)(a), 74(2A)(a)

593. *Ibid*, s 36A

the region or district of that local authority and the areas over which 1 or more iwi exercise kaitiakitanga within that region or district.<sup>594</sup> This is particularly pertinent to the status of Kurahaupo iwi in the region.

Section 33 of the Act authorises any local authority to transfer ‘one or more of its functions, powers, or duties under this Act’ to another public authority, including an iwi authority. This can take place in circumstances where the iwi authority (or another body) represents the ‘appropriate community of interest’ relating to that function and has special capability or expertise, and where it would be ‘efficient’. Before a transfer can take place, the Minister must be notified and there has to be a full round of public consultation. The local authority may revoke the transfer at any time.<sup>595</sup>

Finally, we note that the Minister may issue a national policy statement, which all regional and district planning documents must give effect to, on a wide range of matters including ‘anything which is significant in terms of section 8 (Treaty of Waitangi).’<sup>596</sup> In addition, a New Zealand coastal policy statement must be issued, which may include policies for ‘the protection of the characteristics of the coastal environment of special value to tangata whenua including waahi tapu, tauranga waka, mahinga maataitai, and taonga raranga.’<sup>597</sup>

Further steps towards effective consultation were taken with the passage of the Local Government Act 2002, one of the aims of which is ‘to recognise and respect the Crown’s responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Maori to contribute to local government decision-making processes.’<sup>598</sup> Among the principles and requirements for local authorities intended to facilitate such participation were stipulations that a local authority should ‘provide opportunities for Maori to contribute to its decision-making processes’, ‘consider ways in which it may foster the development of Maori capacity to contribute to the decision-making processes’, and ‘ensure that it has in place processes for consulting with Maori.’<sup>599</sup> These requirements appear to go further than what is stated in the Resource Management Act 1991. What we were told by many claimants, however, was that, despite all the requirements of these statutes, effective iwi participation in resource management was still a struggle.

Where land is vested in the Crown and subject to the Reserves Act 1977, the National Parks Act 1980, or the Conservation Act 1987, there has been a parallel acknowledgement of the relationship between the tangata whenua and the Crown in the management of protected areas. However, section 4 of the Conservation Act provides statutory recognition of the principles of the Treaty in conservation management. Specifically, it requires the Minister of Conservation to interpret and administer the Conservation Act (and all Acts

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594. Ibid, s 35A(2)(a)(i)

595. Ibid, s 33

596. Ibid, s 45(2)(h)

597. Ibid, s 58(b)

598. Local Government Act 2002, s 4

599. Ibid, ss 14(1)(d), 81(1)(b), 82(2)

specified in the first schedule, which included the Reserves Act 1977 and the National Parks Act 1980), so as to give effect to the principles of the Treaty of Waitangi.

Much depends, of course, on interpretation. The department's draft management plan for the Abel Tasman National Park states:

Under section 4 of the Conservation Act 1987, the Department is required to interpret and administer the National Parks Act 1980 to give effect to the principles of the Treaty of Waitangi. However, where there is clearly an inconsistency between the provisions of the National Parks Act 1980 and the principles of the Treaty, the provisions of the National Parks Act will prevail. This is reflected in the Primary Objectives for the park.<sup>600</sup>

This statement is supported by the Court of Appeal's decision in *Ngai Tahu Maori Trust Board v Director-General of Conservation* (the *Whale Watching* case). In that judgment, the court confirmed that section 4 applies to the other Acts listed in the first schedule but that the particular statutes may prevail where there is inconsistency between them and the requirements of section 4.<sup>601</sup>

Nevertheless, all of the major environmental statutes require consideration of the Treaty and Maori values. The nuances of language are important. For example, there is a difference between requiring authorities to 'take account of' or 'have regard to' and requiring them to 'give effect to' the principles of the Treaty. The interpretation of these phrases by local authorities and other agencies can play a significant part in the way in which Maori concerns are approached, and the degree and manner of consultation can vary considerably. In our inquiry, the claimants' witnesses paid little attention to the exact legal meaning of the different statutes. They focused on whether the legislation is working on the ground. For them, the acid test was their ability to exercise their tino rangatiratanga and kaitiakitanga in partnership with the Crown or its delegates, and their ability to exercise their customary rights and meet their cultural obligations of whanaungatanga and manaakitanga. In particular, they were concerned with whether current policy and legislation helps or hinders their efforts to restore a tribal base. As might be expected, however, the lawyers were also interested in the exact wording of various statutes, as that provided legal protection for the claimants and guaranteed (or not) the enforcement of their rights in the courts. We have had regard to both matters.

The claimants in our inquiry had a lot of sympathy with the primary objectives of the Resource Management Act 1991. Russell Thomas, the chairman of the Ngati Rarua iwi trust, told us: 'Our vision is to see sustainable management of all of our natural resources and nga taonga tuku iho.'<sup>602</sup> Sustainable use of natural resources has been part of Maori ethics

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600. *Abel Tasman National Park Draft Management Plan*, 2006, p 45

601. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA)

602. Russell Thomas, brief of evidence on behalf of Ngati Rarua, February 2001 (doc B27), p 9

for centuries. Although there is a tendency among some New Zealanders to see this as a new development, we have already noted that W H Skinner reported its long history among Rangitane back in 1912.<sup>603</sup>

Also, there is general support for another core concept of the Act; namely, that local communities should make their own decisions about resource management. As Arohanui Fransen put it: 'I have always believed that communities know what is best for the people in their areas.'<sup>604</sup> This view fits well with the autonomy of Te Tau Ihu iwi under the Treaty. At the same time, the iwi do not want to be perceived as spoilers or constant objectors.<sup>605</sup> Jeffrey Hynes reminded us that 'Rangitane supports carefully planned well thought out economic development.'<sup>606</sup> Kahurangi Hippolite made the same point for Ngati Kuia: 'We have been cooperative with much development and acknowledge the importance of economic activity in our area, but also want to both protect our environment and to be a significant part of its commercial development.'<sup>607</sup>

These aspirations fit well with the philosophy underlying the Resource Management Act. There are, however, tensions and dissonances. Although iwi believe strongly in their own autonomy and that of local communities, they believe equally that their Treaty partnership is with the Crown. There is a view that the Crown is attempting to shirk its responsibilities by leaving too much to local government and that the Treaty partnership needs to be maintained at the central government level. Also, there are said to be some basic power inequalities between local government and iwi, with local councils often the parties most interested in seeing the kind of development to which iwi object.

Fundamentally, however, most of the claimants believed that the new regime provides for their interests and Treaty rights, at least potentially and on paper. The thrust of their evidence was to show that that is not actually happening on the ground, to their significant prejudice. In large part, they saw the problem in straightforward terms: the local councils are not doing what they are supposed to do (or are not doing it properly). The Government is not monitoring the councils' performance and is doing nothing to ensure that local government complies with the letter or the spirit of the Act. Another cardinal point was that it is extraordinarily difficult for the claimants' over-stretched iwi organisations to participate in the many processes required of them, which are complex and time consuming and often require special expertise, making them expensive. The intentions of the Act, in their view, are being defeated by the fact that they lack the resources to participate properly and effectively. Finally, they believe that the solution is for the Government to restore the Treaty partnership and to ensure local government compliance with the Act, and for iwi to be

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603. Skinner, 'Ancient Maori Canals' (Mitchell and Mitchell, 'Customary Fishing', p 16)

604. Fransen, brief of evidence, p 16

605. C Elkington, brief of evidence, para 57

606. Hynes, brief of evidence, p 8

607. Kahurangi Hippolite, brief of evidence on behalf of Ngati Kuia, 21 March 2003 (doc L17), p 9

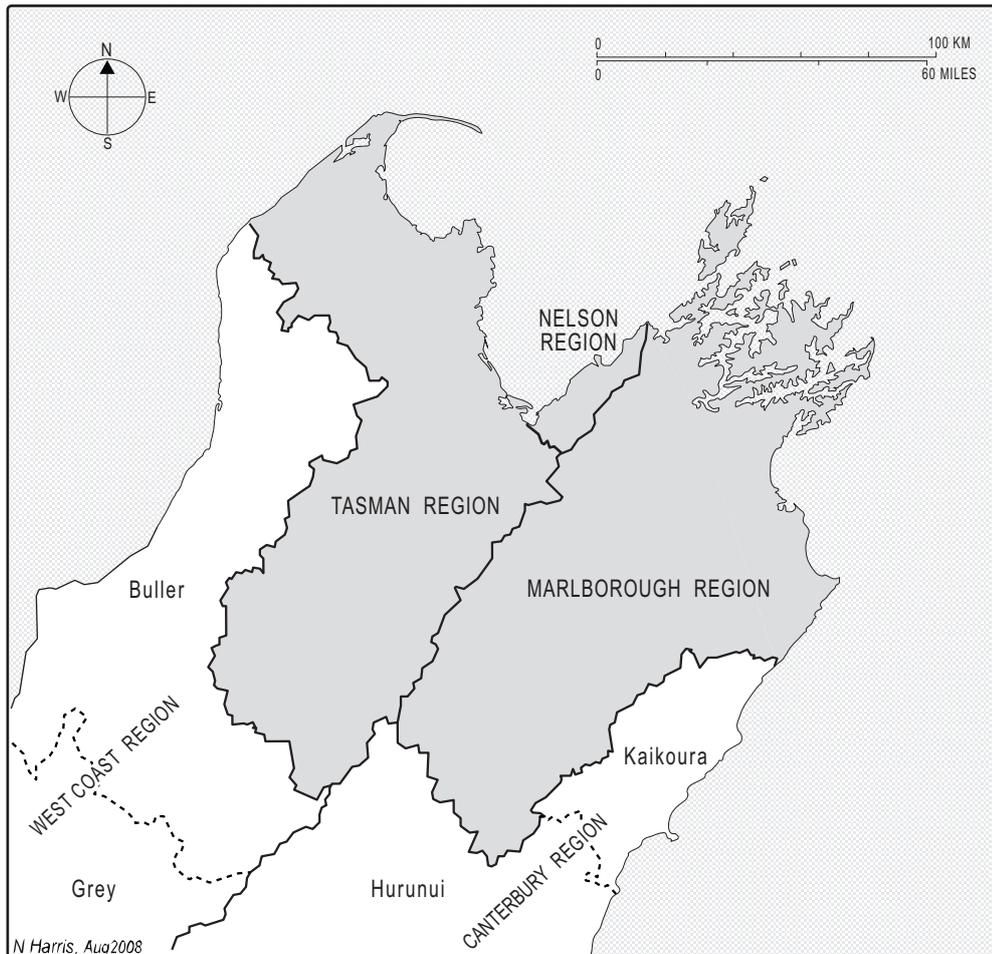


Figure 42: Regional boundaries of the three unitary authorities

Source: Local Government New Zealand

properly resourced and to sit among the decision-makers, rather than being confined to the position of submitters and objectors.

We heard a wealth of evidence on these points, both from tangata whenua witnesses and from the staff that they have employed for some of the professional work required by Resource Management Act processes. We do not need to recite this evidence in detail, however, as the Crown made significant concessions on some issues. In effect, the Crown accepted the claimants' evidence that the Act is not being implemented properly and that decision-makers are failing in their requirements to consult, to take account of Treaty principles, and to provide for kaitiakitanga. It also accepted the claimants' evidence that under-resourcing is preventing their effective participation in Resource Management Act processes. We will explain this further when we discuss the parties' legal submissions and make our findings.

We heard detailed evidence about the implementation of the Act from the claimants' perspective. Ursula Passl, Trina Mitchell, and Dean Walker, all of whom were employed by Te Tau Ihu iwi to assist them in resource management processes, provided an account of their experiences. We also heard evidence from Rita Powick, Judith Macdonald, Lewis Wilson, Kahurangi Hippolite, Antoni Bunt, Carl Elkington, Russell Thomas, and others, who have been involved in representing their iwi in these processes. There were several reports that provided analysis and case studies, including those by Ms Clark, Dr Morrow and Ms Hewitt, and Ms Marr. We did not, however, receive evidence or submissions from the three unitary authorities concerned, the Tasman District Council, the Marlborough District Council, and the Nelson City Council.<sup>608</sup> Although sometimes present as third-party observers, the councils chose not to give evidence or make legal submissions (see fig 42). Also, the Crown provided no evidence on the activities of the Ministry for the Environment, despite arguing that the Ministry is endeavouring to correct the implementation and resourcing problems that it admits exist.

In one sense, therefore, our evidence is somewhat one-sided. We stress, however, that both the Crown and the unitary authorities had every opportunity to engage but chose not to do so. Our evidence is also somewhat behind the times, as things have moved on since our final hearings in 2004. We note that professionals such as Ursula Passl and Dean Walker have significant experience in this area and have worked for a range of organisations. Ms Passl, for example, had worked for territorial authorities (including the Nelson City Council and the Tasman District Council), DOC, and the Parliamentary Commissioner for the Environment, as well as for iwi. Also, the Crown accepted much of the evidence and admitted the significant problems that were raised by iwi.

In her evidence for Te Atiawa, Ms Passl explained that she worked as a resource management officer for Te Atiawa Manawhenua ki te Tau Ihu Trust in 2000 and 2001. In her view, exactly how the principles of the Treaty are 'taken into account' by territorial authorities remains open to interpretation. So, too, does the degree to which the Act provides a framework for a real partnership between Maori and territorial authorities. The legislation neither delineates partnership provisions nor provides an operational definition for them. The protection for Maori interests guaranteed under the Act is largely dependent, therefore, on the 'quality and degree of consultation undertaken, and on the extent to which territorial authorities consider Maori contributions, concepts and values.'<sup>609</sup>

In Ms Passl's experience, the Resource Management Act obliges a territorial authority to have a sound understanding of the iwi's relationship with the natural environment and with its tikanga. How does it gain this? By investigating the nature of the iwi's interests,

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608. Unitary authorities combine the functions of regional and district councils. All the councils in Te Tau Ihu (Tasman District Council, Marlborough District Council, and Nelson City Council) are unitary authorities. Their boundaries are illustrated in figure 42.

609. Passl, brief of evidence, p 4

concerns, and relationships when required to do so by planning processes or resource consents. During her time working for the trust, however, she found that the Tasman District Council did not always consult or inquire, with the result that natural resources and habitats for which Te Atiawa felt responsible as kaitiaki were sometimes managed in a way that was unacceptable and offensive to them. One main cause, in her view, was the lack of regular contact between the council and local iwi, 10 years after the passage of the principal Act. As at 2001, she found it still common for the council to make decisions about natural resources, wahi tapu, and taonga without referring to local iwi.<sup>610</sup>

In addition, the whole resource management system depends on planning documents providing a framework to protect iwi interests. Unless those interests get properly into the plans, there is nothing to make the councils have regard to them. In her experience, the system had fallen down in that respect. As at 2001, she felt that there were either inadequate or no iwi provisions in key policy and planning documents. As a result of this gap, requirements to consult iwi did not arise in the processes governed by the plans. The outcome was continuing damage to or destruction of wahi tapu and taonga. Also, the plans provided for various permitted activities, yet because iwi had not been involved in developing the plans or had not always understood the practical effects of plan provisions, those permitted activities were resulting in harm to taonga.<sup>611</sup> We note that, since receipt of this evidence, public plans have been notified which include iwi provisions.<sup>612</sup> We also note that some groups developed iwi management plans in 2002, although we did not hear evidence on their contents or the degree of their effectiveness.

Ms Passl also argued that councils sometimes failed to collect enough information to make decisions that were properly informed by Maori issues and concerns. In her experience, the Tasman District Council did not investigate whether an applicant had consulted Te Atiawa or whether the consultation was adequate. A system had developed whereby the council emailed a list of all the notifiable consent applications to the iwi resource management officer each week for their informal consideration and comments back to the council. While that was a good start, the nature and extent of the proposed activities was not always clear, entailing time-consuming and expensive research for the iwi and its one part-time resource management officer. Also, Ms Passl felt that too much power was concentrated in the council, which got to decide whether the environmental effects of a proposed consent were 'minor', in which case the iwi did not need to be formally notified, thus removing its opportunity to lodge formal submissions and (if necessary) exercise rights of appeal. Ultimately, in her view, iwi were often not consulted until late in the process (or sometimes

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610. Passl, brief of evidence, p 5

611. Ibid, pp 6–9

612. See, for example, *Tasman Resource Management Plan*, [http://www.tasman.govt.nz/index.php?TasmanResourceManagementPlan\(TRMP\)](http://www.tasman.govt.nz/index.php?TasmanResourceManagementPlan(TRMP)); *Tasman Regional Policy Statement*, <http://www.tasman.govt.nz/index.php?TasmanRegionalPolicyState>

not at all). But there had been some improvements over time. Both the council and applicants were starting to agree, for example, to a condition that an iwi monitor be present whenever earthworks were to be undertaken.<sup>613</sup>

From her work with Te Atiawa, Ms Passl gave examples of two consent processes in 2000 and 2001 – one for river management, the other for replacing a sewer pipeline at Tapu Bay (see fig 44). In both cases, she considered that the Tasman District Council did not notify iwi, identify their issues, or take proper account of their views when the iwi found out about these consents and got involved. There was, she told us, an ongoing and systemic failure of the council to maintain a proper relationship with iwi, involving full and meaningful consultation and consideration of their views and interests.<sup>614</sup> Ms Passl concluded that consultation was too often ‘reactive rather than proactive, more of a token gesture than the means of taking full account of iwi in the decision making process.’<sup>615</sup>

We also heard evidence from Ropata Taylor about the Tapu Bay sewer pipe. Tapu Bay is named for his great-great grandfather, Tamati Parana, a tohunga who lived and conducted rituals in the bay, close to the Riwaka River. In Maori tradition, the mouth of the river is also the point where Hui Te Rangiora, the first person to discover Antarctica, stopped to repair his waka on his return and to heal himself with the tapu waters.<sup>616</sup>

The original sewage pipe across the tidal flats of Tapu Bay was installed before the enactment of the Resource Management Act 1991. Te Atiawa objected both to the desecration of a tapu place and to the pollution of kaimoana. For them, it was like having ‘a toilet in your pantry.’<sup>617</sup> Mr Taylor pointed out: ‘Iwi have brooded about this situation in silence for over a decade, since there was little, if any, recourse to influence or change the location of the pipe.’<sup>618</sup> The Resource Management Act provided new opportunities, however, and the iwi objected when the council planned to upgrade the system by placing an additional pipe beside the old one. Mr Taylor described the long processes that followed, eventually leading to the Environment Court. The council’s decision had hinged on an important technical point – there was nothing ‘new’ about the proposed activity and so it could not be said to compromise any values that were not already compromised.<sup>619</sup> Ultimately, the Environment Court granted only a temporary consent and ordered an iwi–council taskforce set up to resolve wastewater issues. The taskforce has since come up with a plan to build a new land-based pipeline that will circumvent Tapu Bay – a compromise on both sides.<sup>620</sup>

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613. Passl, brief of evidence, pp 7–9

614. Ibid, pp 37–45

615. Ibid, p 46

616. Ropata Wilson Tamu Taylor, brief of evidence on behalf of Te Atiawa, 2002 (doc G18), pp 3–4

617. Ibid, p 9

618. Ibid, p 5

619. Taylor, brief of evidence, pp 7–11

620. ‘Sewage Land Pipe Pleases Iwi’, *The Nelson Mail*, 25 July 2008

The negotiated solution that followed is similar to what the tribes had been asking for all along, but opportunities to have regard to consultation, and then to resolve the matter by pre-hearing mediation, were, in Mr Taylor's evidence, rejected.<sup>621</sup> As a result of this experience, he agreed with Ms Passl's conclusions about consultation:

I think, ultimately what's the purpose of the Resource Management Act if consultation ends up being meaningless and my definition of consultation is meaningful engagement, not just listening to our issues and then ignoring what our principles and values might be. I believe that the Act exists so that situations like this don't arise. Otherwise, we might as well scrap the legislation and why bother consulting iwi at all on issues of this nature?<sup>622</sup>

The evidence of other resource management officers working for iwi, including Trina Mitchell, also agrees with Ms Passl's conclusions. Mrs Powick gave evidence about the operation of the resource management regime in Marlborough. In her experience, there had in fact been an increasing number of examples of good consultation, but Te Atiawa still had concerns. Rather than leading to a deepening relationship, consultation seemed too ad hoc and confined to specific matters. Too often, consultation was considered the same as notification, without providing enough information for those consulted to then make informed comments. Then, the council did not always show that it had listened and taken their responses into account in its decisions. For example, sending draft consent applications to the iwi for comment is not in fact enough to be called consultation. Consultation, in her view, should be more proactive, and iwi should have a direct role in the decision-making.<sup>623</sup>

'This is not to undervalue', she told us, 'the Council's considerable attempts to provide suitable forums to enable consultation.'<sup>624</sup> There were iwi representatives on three Marlborough District Council standing committees. In addition, a Maori advisory komiti was established under a memorandum of understanding between the council and iwi in 1997. The komiti's role was to inform the council of obligations under the Treaty, to encourage awareness within the council of the Treaty and tikanga, and to advise the council as to which iwi needed to be consulted. The advisory komiti was a positive step and helped to raise awareness within the council, but it was not, in Mrs Powick's view, a substitute for regular direct dialogue with iwi.<sup>625</sup>

From Mrs Powick's point of view, the key issue was that Te Atiawa have not been able to participate at a governance level of council business. The iwi would like direct representation on the council and programmes to educate and raise awareness of councillors

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621. Taylor, brief of evidence, pp 10–11

622. Ropata Taylor, oral evidence, sixth hearing, 9–13 December 2002 (transcript 4.6, pp 336–337)

623. Powick, brief of evidence on behalf of Waikawa Resource Management, pp 9–11

624. Ibid, p 11

625. Ibid

and staff. It would also like council hearings to have Maori commissioners, to ensure that expertise on tikanga and values is included. It is insufficient to make submissions to the council if it does not have the expertise in its hearing committees to take full account of those submissions.<sup>626</sup>

Many others agreed with this point. To give one example: Carl Elkington, in his evidence for Ngati Koata, argued that the local councils do not allow adequate representation for iwi or involvement in decision-making. If iwi object to a resource consent application, then they are considered to have a conflict of interest with the applicant and so cannot be a part of the decision-making. Yet, their exclusion means that decisions are made by those who do not know or understand their tikanga. At the same time, Mr Elkington suggested that it is precisely because iwi are vitally interested in the outcome that they should exercise rangatiratanga by being part of the decision-making. They would not, of course, be the sole deciders. Their views would be balanced by others, and recourse would always remain in the form of appeals to the Environment Court.<sup>627</sup>

In support of his arguments, Mr Elkington referred to his own experience in 1999, when Richmond Horticultural Products applied to reclaim land at the Waimea Inlet, an area traditionally used by Ngati Koata for growing and gathering flax and for eeling. Ngati Koata opposed the application:

During evidence, the independent commissioner appointed by the Council asked me how he, as a white middle-class New Zealander, could best determine the tikanga values related to the application, because he had no idea. When I answered 'have us at the decision making table with you', he laughed . . . Having shared decision making status and allowing iwi to provide advice related to tikanga and tino rangatiratanga to enable a well considered decision would be a true recognition of the Treaty of Waitangi.<sup>628</sup>

Sometimes, however, the system works. In an Environment Court mediation over a Waterfall Bay application in the Pelorus Sounds, the applicant, DOC, and Ngati Koata were able to agree on conditions for a resource consent. Mr Elkington suggested:

The Waterfall Bay example shows that Ngati Koata will be reasonable, that we are quite happy to provide and agree to solutions that suit everyone, not just ourselves. We don't want to be labelled objectors, but we have to be continually looking over our shoulders for the next attempt to avoid our proper involvement applicants and local councils use to get past us. We shouldn't be spending our time doing that – we should be spending our time talking with the local councils and working towards solutions. If we had adequate iwi representation on

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626. Ibid, p 12

627. C Elkington, brief of evidence, paras 36–44

628. Ibid, paras 47–48

those Boards and in the final decision, our rangatiratanga and kaitiakitanga over our rohe as recognised by the Treaty of Waitangi would be acknowledged.<sup>629</sup>

In his evidence for Te Atiawa, Dean Walker provided us with an additional perspective. He was less concerned with systems and processes, although acknowledging some of the flaws in them. In his view, the iwi have a fairly good relationship with the Nelson City Council and the other unitary authorities. The problem is not so much with the relationships. It is mainly one of values. He gave sewerage scheme applications as an example. Environmental impact assessments are prepared conscientiously in terms of effects on the ecology and the natural environment and on the technical and engineering aspects of the proposals. There have also been improvements in the treatment of sewage before its discharge, and the tendency now is to relocate discharges out at sea rather than directly to the estuarine environments so valued by Maori for their kaimoana. In his experience, Te Atiawa acknowledge these improvements. It is also the case that, if Te Atiawa opposes consent applications like these, then they can get some of their concerns listened to and at least partially resolved in the various forums and hui that take place.<sup>630</sup>

But there are, in Mr Walker's view, some fundamental problems under the surface. Resource Management Act decisions are all about 'effects', but the system does not cope well with effects that are cultural in nature. Current forms of consultation do not seem to suffice for the real communication of Maori concepts and values to those doing the consulting. This is reflected in the content of decisions and planning documents, which still fail to engage with Maori beyond the surface (if at all). It is also reflected in problems with cultural impact assessments – these are very important but it has sometimes proven difficult to get them carried out or taken seriously.<sup>631</sup>

Mr Walker does not believe that there is any malice or bad faith on the part of applicants or regional authorities. Rather, there are different worldviews. Council engineers tend to see waste disposal as a technical or engineering problem, requiring technical or engineering solutions. Te Atiawa, in contrast, see waste disposal as essentially a cultural problem. Thus, it is often the case that applicants and decision-makers alike struggle to perceive that there are cultural effects arising from the applications. They generally consider such effects minor, when they are identified, and outside of what are usually thought to be 'environmental effects'. In Mr Walker's view, they are too accustomed to separating people and their values from 'the environment'. While both points of view have benefits to offer to resource management, it is still the case that applicants and decision-makers struggle to see the validity, relevance, or usefulness of kaitiakitanga and the 'iwi perspective' and the information that

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629. C Elkington, brief of evidence, para 57

630. Walker, brief of evidence, pp 11–15

631. Ibid, pp 12–15

they receive from tangata whenua. Iwi, on the other hand, accept that there are definite benefits to the insights and information of engineers and Western science.<sup>632</sup>

In part, the problem is one of organisational culture. Cultural impact assessments need to feed into processes where they can be truly understood and then given their due weight. Ultimately, consultants often get away with doing the bare minimum or do not understand what they are told, but the consent authority still has to interpret the material and make a decision. In that situation, the 'degree of importance given to things Maori and Maori values is ultimately dependent on the culture of the institution at the time' – in other words, the organisational culture of the decision-making bodies. In Mr Walker's view, the decisions that get made show that this has inherent problems for tangata whenua. While the Resource Management Act supposedly focuses on effects, the cultural effects raised by Maori tend to be misunderstood and even dismissed, and to be evaluated on single applications rather than looking at wider or cumulative effects.<sup>633</sup>

This evidence goes a long way to explaining the experience of Ropata Taylor and others in their opposition to the sewer pipes at Tapu Bay. It also helps to explain Carl Elkington's perception that 'local councils will only decline an application on environmental grounds, they are not interested in our kaitiakitanga arguments.'<sup>634</sup> This view was widely shared among the witnesses who appeared before us. Judith Macdonald believed that the Resource Management Act 1991 has 'the ability to recognize and provide for Rangitane under the Treaty but the administration, implementation, and interpretation of the act by people who do not understand such terms as kaitiakitanga seriously undermines the purpose of the act.'<sup>635</sup> She appeared before a committee, for example, where most members could not even pronounce the word.<sup>636</sup> Her evidence agreed with that of Carl Elkington and many others that part of the solution is for Maori involvement in decision-making.

Decision-makers may be more comfortable with the values surrounding burial grounds and current food-gathering sites, both of which translate better for Pakeha. In 1993, Te Atiawa and other groups successfully prevented the granting of resource consents to build a resort on a wahi tapu at Pariwhakaoho. Trina Mitchell explained that the Tasman District Council received submissions from Te Runanganui o te Tau Ihu o te Waka a Maui, the Ward-Holmes whanau, Onetahua Kokiri Marae, the Te Waikoropupu Maori Committee, and the Ngati Tama ki te Tau Ihu Trust, as well as from many individuals. John Mitchell, Janice Manson, and other whanau members presented evidence at the hearing. The objections from Maori were ultimately decisive in preventing the approval of the consents, which were

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632. Ibid, p 15

633. Ibid, pp 16–18

634. C Elkington, brief of evidence, para 60

635. J Macdonald, brief of evidence, p 21

636. Ibid, p 22

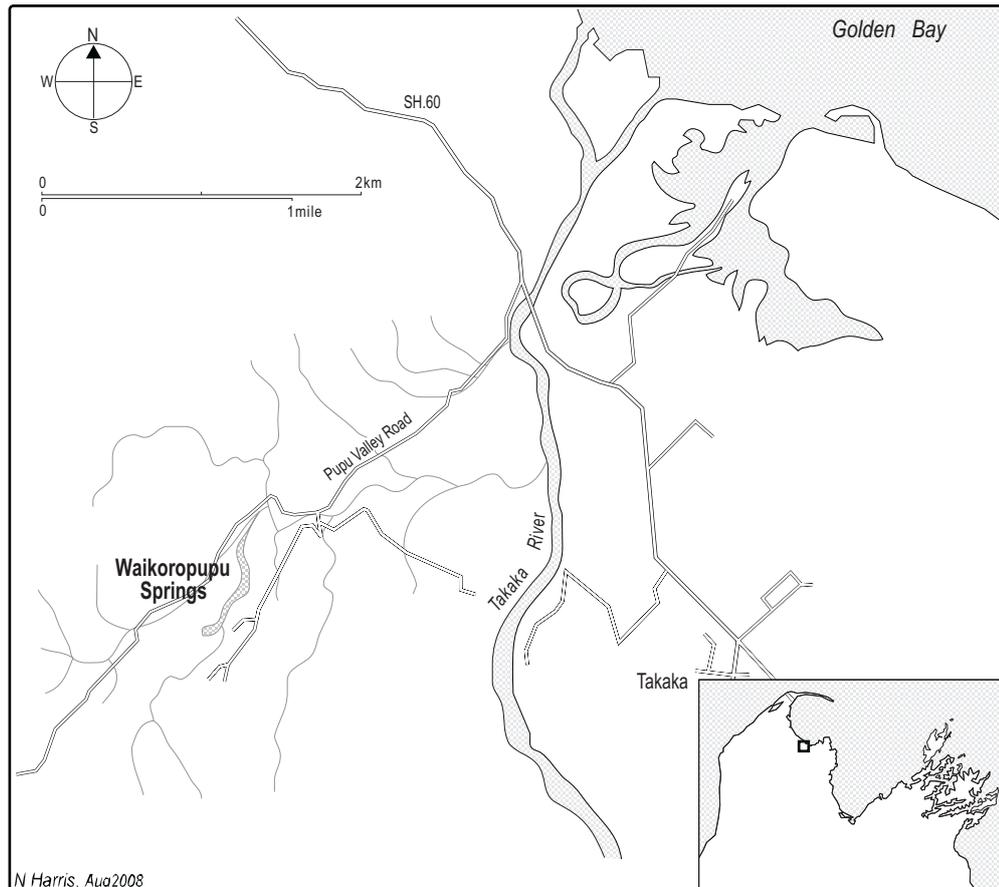


Figure 43: Waikoropupu Springs

Source: NZTopoOnline

turned down because of their effects on nearby mahinga kai and because of the desecration of wahi tapu and urupa (burial grounds) in the immediate area. The applicants withdrew their appeal when they realised that the iwi were resolved to stay the distance. This success was important but expensive – Maori had to meet all the costs of their involvement in the process.<sup>637</sup>

As part of their evidence about the resource management regime, the claimants shared concerns with us about some of their most sacred sites. Foremost among these were Waikoropupu Springs in Golden Bay and the Wairau River and lagoons in Marlborough (see figs 38, 43, 44). In the case of the springs, iwi have to interact with both DOC, which owns and administers the site, and the unitary authority, which administers resource consents. The Waikoropupu site contains New Zealand's largest and clearest freshwater springs, which are described by DOC as having national and international significance as a place of natural, cultural, historic, and scenic value. Situated on land alienated during the nineteenth-century

637. Trina Mitchell, brief of evidence on behalf of Te Atiawa, 2002 (doc G24), pp 15–18

purchases, the springs and the surrounding bush had long been in private non-Maori ownership. During that time, as Judith Billens explained, local iwi continued to use the springs for healing, for fishing, and for gathering watercress.<sup>638</sup>

The area was purchased by the Crown in 1979 as a scenic reserve and is now administered by DOC. The site is a wahi tapu for Te Tau Ihu Maori, who believe that the mauri of the springs must not be tampered with. Several witnesses, including Margaret Little, Anne Chapman, and Judith Billens, explained the significance of the springs as a place where the waters were used for healing and other rites and where the taniwha Huriawa has her abode.<sup>639</sup>

In their role as kaitiaki, the iwi of the area have experienced difficulty in protecting the spiritual and physical integrity of the springs from recreational and commercial divers and other tourists. The iwi have been asking for recognition of their kaitiaki role, and inclusion in the management of the site, since 1984. In 1990, Janice Manson of Ngati Tama, who was also a member of the Nelson–Marlborough Conservation Board, lodged objections to two applications for commercial ventures in gold-panning and diving. Te Runanganui also opposed attempts at commercialisation. Guidelines for commercial use within the springs reserve were then developed. In the mid-1990s, a proposal for producing bottled water from the springs was opposed. Although a consent was granted by the Tasman District Council, the project did not proceed. In 1997, a voluntary code of conduct was agreed to between iwi and DOC, but the iwi withdrew from it in 1998 because swimmers and divers did not respect it.<sup>640</sup> Eventually, a working party, which included iwi, was set up in 2002 to develop a management plan that would incorporate kaitiakitanga. Although the Tasman District Council withdrew from the process, a draft management plan was finally released in 2008.<sup>641</sup>

Mostly, then, this is a success story – the resource management regime provided iwi with a means to oppose and prevent a series of resource consent proposals for commercialisation, despite their exclusion from a role in managing the springs. It has been a process of constant battles. Margaret Little told us that, even as she was giving evidence in 2002, an application to build a café 200 metres from the springs was under consideration by the council, despite iwi opposition.<sup>642</sup> Thus, although they had succeeded so far in preventing what they saw as inappropriate development, the iwi wanted to make sure by securing the return of the springs to their ownership and control. Mrs Little told us: ‘It is paramount

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638. Billens, brief of evidence, pp 8–9

639. John Tahana Ward-Holmes and Margaret Louise Ward-Holmes Little, brief of evidence on behalf of Te Atiawa, 2002 (doc G8), pp 19–22; Billens, brief of evidence, pp 8–9; Anne Chapman, brief of evidence on behalf of Ngati Tama, 12 February 2003 (doc K11), pp 11–12

640. Clark, ‘Kaitiakitanga’, pp 41–45; Passl, brief of evidence, pp 33–37; Ward-Holmes and Little, brief of evidence on behalf of Te Atiawa, pp 19–22

641. Department of Conservation, *Te Waikoropupu Springs Draft Management Plan: Mahere Tukutahi o Te Waikoropupu*, July 2008

642. Ward-Holmes and Little, brief of evidence on behalf of Te Atiawa, p 21

for future generations that we as kaitiaki continue to preserve this taonga in its pristine uniqueness.<sup>643</sup>

Another case study shows the inadequacy of consultation procedures in the early years of the operation of the Resource Management Act 1991. From the late 1940s until the early 1990s, the local authority had operated the Rototai dump-site two miles out of Takaka. As we noted in section 11.5.3, the dump had enabled pollutants to leach into the adjoining Motupipi Estuary. In 1992, the Tasman District Council sought resource consents to operate a refuse transfer station at the site of the former Rototai rubbish tip. The operations were to include the discharge of both contaminated wash onto the foreshore and sewage into the ground along the foreshore. The council asserted that there would be no adverse environmental effects. Despite there being objections from Maori, the resource consent was granted.

Maori and DOC then appealed to the Planning Tribunal. DOC based its arguments on ecological grounds while the Maori appellants argued on several grounds: that the site had formerly been a valuable mahinga kai; that adjacent beaches had potential for commercial shellfish harvesting; that the Tasman District Council had not consulted with tangata whenua; and that the transfer station would have a negative environmental effect. The appellants won the case in 1993. Judge Treadwell of the Planning Tribunal was critical of the way in which the Tasman District Council had decided on the environmental consequences. Its actions were seen as being in contravention of the Resource Management Act and the council's own district plan.<sup>644</sup>

Ms Passl highlighted this as an example of the gap she saw between legislative protection and operational procedure:

The fact that the Council could, as late as 1992, seek consent to erect a transfer station on the site in question and do so without any consultation with local Maori, highlights the gap between advances in legislative protection and theoretical adherence to the principles of bi-cultural resource management, and the reality of the resource management process in contemporary New Zealand.<sup>645</sup>

In a further case, Te Atiawa were very dissatisfied with the planning process used for the operation of fast ferries in the Sounds in the summer of 1994–95. Prior to the ferries' introduction, the Marlborough District Council did not consult with the iwi. Instead, it was left to iwi to respond to reports in the media of the intended introduction.<sup>646</sup> As it turned out, this was perfectly legal. Te Atiawa sought the imposition of speed restrictions, warning about negative impacts if the service went ahead. The council responded that no resource consent

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643. Ward-Holmes and Little, brief of evidence on behalf of Te Atiawa, p 22

644. Hewitt and Morrow, 'Te Atiawa', pp 148–153

645. Passl, brief of evidence, p 32

646. Hewitt and Morrow, 'Te Atiawa', p 116

was deemed necessary. Te Atiawa asked the council to intervene when damage was apparent to the foreshore and their wahi tapu. In tandem with an interest group, Te Atiawa also sought to have an order imposed to stop the service while the council sought clarification of jurisdictional issues. The application was not granted. Indeed, Judge Treadwell upheld the council's decision that no consultation with tangata whenua was legally required.<sup>647</sup>

In 1997, Te Atiawa made submissions on the proposed Marlborough Sounds resource management plan, drawing attention to the need for greater protection of the resources in the channel, which were being damaged by ferry wash. No speed limits were imposed as a result of this planning exercise.<sup>648</sup> However, with further evidence of damage occurring, the council began to respond. In 2000, a district council bylaw restricted the speed of vessels over 500 tonnes in the Sounds. We note that there was further litigation and contest after the close of our hearings, but the fast ferries have now been withdrawn because of the speed restrictions.<sup>649</sup>

Thus, the various witnesses in our inquiry identified core problems in terms of decision-making and the values on which decisions currently tend to be made.

We need to consider a further point, on which all witnesses agreed. Kahurangi Hippolite, in her evidence for Ngati Kuia, explained that the iwi had to respond continually to resource applications and to make submissions about them, although they were not experts, nor (at the time of hearing) were they funded. From 1999 to 2001, for example, Ngati Kuia made 349 submissions on coastal consents alone. The vigilance required of them, given their lack of funding and resources, was a heavy burden for the kaitiaki.<sup>650</sup>

Lewis Wilson described his efforts on behalf of Ngati Kuia:

The current process we use to determine whether we object or support any applications is by the use of maps, written and oral sources of what has been identified as areas of significance to Ngati Kuia. We have processed a huge number of applications. Most of the objections we have lodged with the Council have been based on the grounds of there being significant sites, waahi tapu, pa site, urupa, etc on or around the area being applied for. Due to the lack of funds and resources we were unable to attend the majority of the hearings for the applications that we objected to, but we still hope the Council would take our submissions into consideration when deciding these consents. Really, we operate on a shoe string budget, we do not have any resources to dedicate to this work. We have few people who can give their time to do this work.<sup>651</sup>

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647. Ibid, pp 120–124

648. Ibid, p 128

649. *Fast Ferries on Cook Strait*, <http://www.nzhistory.net.nz>; Corydon Consultants Ltd, *Social and Environmental Impact Assessment*, <http://www.corydon.co.nz>

650. Kahurangi Hippolite, brief of evidence, p 10

651. L Wilson, brief of evidence, p 5

He concluded: 'I'm finding it increasingly harder to maintain iwi input into Ngati Kuaia's affairs. I know we have to keep the fire burning, but it shouldn't be so hard.'<sup>652</sup>

Judith Macdonald gave similar evidence. She told the Tribunal that the most serious difficulty for Rangitane in trying to carry out their role as kaitiaki was their lack of resources to participate effectively in Resource Management Act processes. Yet, that was their only avenue for trying to ensure that development occurred without destroying mahinga kai and wahi tapu. Some Crown agencies funded planning and training hui, but the Marlborough District Council did not.<sup>653</sup> Without that kind of assistance, Rangitane 'has had to abdicate much of their responsibilities to protect places special to them.'<sup>654</sup> In her view, there was money for aquaculture, horticulture, viticulture, and 'any other culture except Maori culture.'<sup>655</sup> Richard Bradley agreed, explaining that Rangitane simply lacked the resources to appeal decisions to the Environment Court, forcing them to give up on 'a number of encroachments on their mahinga kai and waahi tapu.'<sup>656</sup>

At the time of our hearings, Trina Mitchell was employed part-time by Manawhenua ki Mohua, an organisation that represented the interests of Te Atiawa, Ngati Tama, and Ngati Rarua in the area administered by the Tasman District Council. She too told us that lack of resources was a key constraint on the ability of iwi to participate effectively in resource management. Her part-time position was not adequate for the workload associated with the many resource consent applications and policy and planning processes. She explained that applications for resource consent had to be processed, and then some applications required research, site visits, the preparation of reports and evidence, and attendance at hearings. In one case, for example, the iwi had to contract an archaeologist to examine the site of a proposed road realignment and provide technical evidence for them.<sup>657</sup>

In order for their evidence to be taken seriously, they felt that they had to employ costly professionals. There was some support for this view in the case studies of Dr Morrow and Ms Hewitt.<sup>658</sup> Courts necessarily require a high standard of proof. We have identified problems in our own inquiry where a lack of technical evidence has affected our ability to reach conclusions. Nonetheless, involvement in legal processes, sometimes involving the payment of professional witnesses, has to be funded somehow. Trina Mitchell told us that neither the Tasman District Council nor the applicants for consents had helped meet iwi costs. Nor had the Crown. Yet, the chance of iwi success in the resource management process depended at least in part on a great deal of professional work from their organisations.<sup>659</sup> Mrs Powick

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652. L Wilson, brief of evidence, p 7

653. J Macdonald, brief of evidence, p 22

654. Ibid, p 23

655. Ibid, pp 24–25

656. Bradley, brief of evidence, p 44

657. T Mitchell, brief of evidence, pp 7–8, 11

658. Hewitt and Morrow, 'Te Atiawa', pp 120–123, 149–151

659. T Mitchell, brief of evidence, pp 7–8

put to us that either Te Atiawa cannot participate or they must bear a huge financial burden. That cannot have been the Crown's intention when enacting the Resource Management Act 1991.<sup>660</sup> We agree.

Finally, the claimants reminded us of the responsibilities of the Crown in all of this. Many agreed with Rita Powick, who told us of their concern at having to deal with local councils at one remove from their Treaty relationship with the Crown.<sup>661</sup> Also, concern was expressed that the Government has passed legislation that seems to provide for iwi needs in theory but that it is not actively ensuring compliance. Antoni Bunt told us that the Crown seems to have no monitoring or auditing process, leaving the implementation of policy under the Resource Management Act to councils or other agencies. He proposed that the Government must monitor whether or not local authorities are properly carrying out its policies and, if necessary, take steps to ensure their compliance.<sup>662</sup> An integral part of the solution, in Mr Bunt's view, is to accept the Treaty partnership and involve Te Atiawa in the process at a decision-making level: 'Te Atiawa must be at the decision-making table.'<sup>663</sup>

As we have already noted, we received no evidence from the Crown on these points, so we have no information as to what monitoring is carried out by the Ministry for the Environment. One thing, however, is certain. In response to questions from the Tribunal, Ms Passl confirmed that the Crown never checked with Te Atiawa during her time working for the trust in 2000 and 2001. It carried out no audits or monitoring with Te Atiawa to find out how often the iwi were objecting to applications, how their objections were dealt with, how often they succeeded or failed, and whether the process was working from their perspective.<sup>664</sup> Whatever monitoring was being done, it was not at the iwi and hapu level – that is, with the Crown's Treaty partner.

In sum, the following issues emerge from the claimants' evidence. The Resource Management Act 1991 is a very significant advance on the previous situation. It provides a framework for Treaty rights and the claimants' interests to be taken more seriously than before, and for them to have real influence on resource management decisions. Many of the benefits, however, are more theoretical than real, because of the way the Act is being implemented. The resource management regime does not provide fully in practice for consultation, nor does it secure an appropriate involvement for iwi in governance and decision-making. Their values are little understood and sometimes little regarded. Their ability to participate effectively – even at the level allowed them – is seriously compromised by a lack of resources. This situation continues because the Crown has done little or nothing to carry

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660. Powick, brief of evidence on behalf of Waikawa Resource Management, pp 33–34

661. *Ibid*, p 8

662. A Bunt, brief of evidence on behalf of Te Atiawa, pp 20–21; A Bunt, brief of evidence on behalf of Totaranui Ltd, p 6

663. A Bunt, brief of evidence on behalf of Te Atiawa, p 21

664. Ursula Passl, in response to Tribunal questions, sixth hearing, 9–13 December 2002 (transcript 4.6, pp 210–211)

out its responsibilities to its Treaty partner, either by monitoring matters with them or by requiring its delegates to carry out functions in a manner consistent with the Act and the Treaty. The question of whether the Act itself is at fault was dealt with in legal submissions, which we will address below. Neither the claimants nor the Crown suggested that the Local Government Act 2002 had improved the situation.

Finally, we note an issue raised by the Kurahaupo claimants. Kahurangi Hippolite told us that, as at 2003, the Tasman District Council was refusing to acknowledge Ngati Kuia as tangata whenua or to consult with them. The council was consulting with Manawhenua ki Mohua alone.<sup>665</sup> Other Kurahaupo witnesses expressed similar concerns about territorial authorities and DOC. This is a difficult and sensitive area for all concerned, including the iwi, the Government, and the local authorities. We expect the Crown to bring our findings in chapters 2 and 3 to the attention of the relevant agencies and actively to protect the interests of the Kurahaupo peoples.

#### 11.7 RESTORATION OF A TRIBAL BASE

Many witnesses addressed the need to restore a tribal base for the iwi of Te Tau Ihu. In part, they hoped that this will come about through Treaty settlements and the restoration of an economic base of land and resources. A cultural base is equally important. An integral part of restoration concerns the recovery of valued sites and species so that the taonga themselves survive and can then be available for customary use. The ability to exercise customary rights of access, use, and management (kaitiakitanga) is vital to the survival of the tribes. Knowledge, skills, practices, and values have to be transmitted to future generations so that Te Tau Ihu Maori not only survive but flourish as tribal peoples.

In the first instance, there needs to be a home base for people to return to. Alfred Elkington explained that Rangitoto is ‘home’, no matter where he lives: ‘I feel we can all go home there any time. I still feel a responsibility towards it very strongly – not just to D’Urville Island but the whole of our rohe.’<sup>666</sup>

Vern Stafford and other Ngati Rarua witnesses spoke of their desire to see Wairau Pa restored as a viable economic concern that can host whanaunga who wish to return to live or to reconnect with their whenua.<sup>667</sup> Priscilla Paul, in her evidence for Ngati Koata, explained that she had to leave Rangitoto when she was 14 but returns regularly to reunite with land and people. The ‘importance of whanau and whanaungatanga continues today . . . we need it, we thrive on it, it’s part of our mauri, our very being . . . we can’t exist without it.’<sup>668</sup> Moetu

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665. Kahurangi Hippolite, brief of evidence, pp 6–7

666. A Elkington, brief of evidence for Wai 262, p 8

667. V Stafford, brief of evidence on behalf of Ngati Rarua, p 19

668. Paul, brief of evidence for Wai 262, p 16

Stephens described how Keri Stephens began the work of re-establishing a Ngati Tama base at Wakapuaka, keeping the land ‘warm and ready for future generations.’ Whanaunga have been attracted back to meet their relations, connect with the whenua, and visit urupa and wahi tapu.<sup>669</sup>

As part of such initiatives, the iwi trusts of Nelson joined forces in the early 1990s to make submissions on the district schemes of the Nelson City Council and Tasman District Council. They sought special zoning for papakainga housing on suitable Maori land. The iwi wanted to be able to build marae complexes with whanau accommodation, which needed more intensive coverage per site than was normally allowed for urban or rural residential housing. Their arguments were accepted and both district schemes now provide for zoning for papakainga housing – all they need now is the land.<sup>670</sup>

Tangata whenua witnesses stressed the importance of there being a strong home base for people to return to and learn about or experience their heritage in a way that strengthens and nurtures their identity and wellbeing as members of the tribe. Catherine Love, in her evidence for Te Atiawa, told us that the majority of her generation need to reconnect with ‘whanau, hapu and iwitanga’ by participating in hui, going to marae, and learning from the old people. Dr Love now returns ‘regularly to turangawaewae in Taranaki, Wellington and Arapaoa and to whanau and whenua to recharge my wairua.’<sup>671</sup>

An integral part of this process is the role of customary rights and resources. Waihaere Mason told us that he hoped a ‘resurgence in customary practice’ is part of what will enable Ngati Kuia to survive as a cultural entity in the future.<sup>672</sup> But, for such a resurgence to take place, there needs to be sufficient resources (such as customary fisheries) and adequate access to their use and care.<sup>673</sup> Kath Hemi described this in detail for the resources that are fundamental to the survival of Ngati Apa as weavers.<sup>674</sup> Many other witnesses agreed that they must exercise their customary rights of access and use if they are to preserve tribal knowledge and identity for coming generations.<sup>675</sup>

Priscilla Paul gave a detailed example of this at work on Rangitoto in the 1980s:

In the late 1980’s, Uncle Son [Turi Elkington] decided that some of Ngati Koata needed to learn to transplant our kaimoana, as we were losing the art, so we went to D’Urville Island. As it was so important, he invited people from Ngati Kuia to learn as well. Paua had shrunk in quantity. We couldn’t get paua because of the permit and quota systems, when it became saleable, so our uncles said go and learn to transplant kai. They walked through the water

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669. M Stephens, brief of evidence, pp 4–5

670. Ibid, pp 6–7

671. Catherine Maarie Amohia Love, brief of evidence on behalf of Te Atiawa, 2003 (doc 16), pp 10–12, 20

672. W Mason, brief of evidence, p 19

673. R Smith, brief of evidence, pp 6–10

674. Hemi, brief of evidence for Wai 262

675. See, for example, Christopher Love, brief of evidence, pp 3–5

with us and told us to look for a certain type of kelp, and that was where we put the paua (paua is a kelp eater – it hangs around the kelp and feeds off kelp). So he showed us exactly where to put them and then he had a karakia, and we all walked away from the bed. I think we transplanted about 150 paua that day. He said ‘just leave them alone – don’t worry about them now – they’re no longer ours to worry about’. He told us that this was done a lot in the old days – only if they wanted it to grow in certain spots, because there was no need for them to look for it in the old days, as it was plentiful. But they would do it if they wanted to try and grow them in other areas – then they would try to transplant. Now we have learned the old tradition of transplanting, and talk about it whenever we are on D’Urville Island to keep the knowledge alive, and keep our young people aware of our preservation techniques.<sup>676</sup>

Other witnesses described similar work of restoration being attempted across Te Tau Ihu. Margaret Bond explained the Crown-assisted work that is being done at Omaka Marae to cultivate harakeke for weaving.<sup>677</sup> Keri Stephens mentioned his efforts to transplant and enhance kaimoana at Wakapuaka, as well as to cultivate and restore raupo and watercress.<sup>678</sup> Jeffrey Hynes referred to Rangitane’s role in a joint project to restore Grovetown Lagoon and the iwi’s aspirations to acquire wetland at Ruataniwha as ‘an incubator for the breeding of eel juveniles and whitebait to replenish exhausted stocks in local waterways for customary purposes.’<sup>679</sup> John Bunt described Te Atiawa’s intention to use mataitai to help replenish fish stocks in Tory Channel.<sup>680</sup> Resources and Crown assistance are required.

Marine farming can play an important role in restoring kaimoana and the ability of iwi to sustain their culture. Antoni Bunt explained that Te Atiawa’s fishing business, Totaranui Limited, is not simply a commercial operation; it has to meet obligations to the community and fulfil kaitiakitanga responsibilities. Thus, it is an integral part of any planned marine farming that it be used to complement efforts to restore and enhance customary fisheries. One endangered species in particular that Te Atiawa want to use marine farming to preserve and enhance is the kopa kopa, one of 28 mussel species, which is an important delicacy to the iwi. Stock rebuilding through aquaculture could also be extended to land-based programmes, such as protecting the giant land snail. These would complement mataitai proposals designed to facilitate stock rebuilding programmes. The work of restoration is already underway, but it requires a major boost in terms of capacity and resources.<sup>681</sup> Other

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676. Paul, brief of evidence for Wai 262, pp 26–27

677. Bond, brief of evidence, pp 9–10

678. Keri Stephens, oral history interviews, 4 August, 7 September 1999 (A Stephens, brief of evidence, pp 4–6)

679. Hynes, brief of evidence, pp 9, 16

680. J Bunt, brief of evidence, pp 18–21

681. A Bunt, brief of evidence on behalf of Totaranui Ltd, pp 5–6; A Bunt, brief of evidence on behalf of Te Atiawa, p 13

witnesses affirmed that they expect marine farms to help substitute for lost mahinga kai, supplying kaimoana for tangi, hui, and other important events.<sup>682</sup>

We also received an eloquent appeal from Alfred Elkington, whose evidence summarises how the exercise of customary rights (and not just customary resources themselves) is vital to restoring a tribal base. After describing how he learnt to gather different plants in the bush for different purposes, and how they were prepared for eating or other uses, Mr Elkington commented:

It would be extremely sad if our knowledge about taonga was lost. In order to find their grass roots, young people need to learn about who they are. When you reach a certain age, you have to stand up and be accountable, know what your taonga are, and always have access to that knowledge. In order to teach younger people the traditional knowledge, the elders need free access to the taonga. You cannot buy the things you need to teach young people with from a shop. For the mana to come from what you want to teach, it has to come from the natural environment – from when you find it, through to the completion – in order to show the young people.<sup>683</sup>

Mr Elkington expanded on this point in his evidence about rongoa. He described how the kaumatua and kuia selected those whom they felt were right to pass their knowledge to. He also explained the tikanga for gathering the plants, including karakia and the need to thank and seek the guidance of Tane Mahuta: ‘I was taught that the rongoa would not work if we didn’t have the karakia first.’ He then described the various remedies and how they were prepared and taken. This was all part of an integrated system in which the generations changed but the knowledge remained specific to a place and a community. It was a continuous process, from the ritual gathering of certain plants in certain places, the ritual preparation of remedies after the gathering, and then the ritual administration of the healing (rongoa) – all of it being learnt by the chosen recipients at those times and places.<sup>684</sup> Rongoa was never just about plants:

It is also extremely important for the well-being of the patient that an expert in the knowledge gives them the rongoa. Rongoa is not just the plant itself – there is a whole process behind it – a holistic process of which the actual plant is just a part. To a scientist, it is the plant itself which is the medicine, however that is a completely different approach to ours. The scientific approach separates the plant from its environment and the whole knowledge base behind it.<sup>685</sup>

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682. Bradley, brief of evidence, p 44

683. A Elkington, brief of evidence for Wai 262, p 13

684. Ibid, pp 14–17

685. Ibid, p 17

He made the point that tribal rongoa needs to be preserved, but as part of a knowledge system and in the environment in which the plants actually grow and the people actually live. This is why he felt so strongly about accessing the same plants and sites that have always been used, even though they are now located on conservation land. For him, the rongoa is specific to those plants and places.<sup>686</sup> This is all part of what is necessary in restoring a tribal base for the iwi of Te Tau Ihu.

The claimants expect the Crown to play an important role in the work of restoration. Not only is access to resources in the conservation estate a vital component, but the Crown's assistance is also needed to help restore polluted sites and depleted resources. During the second Te Atiawa hearing, counsel for Ngati Koata asked John Bunt what kind of compensation would be suitable for the damage done by the fast ferries. Mr Bunt replied that the Crown should help restore or enhance paua stocks in certain sites to replace what has been lost. Monetary compensation was beside the point, whereas restoration or enhancement was possible and would be best. He also thought that it would be 'a better compensation if the Crown would get behind Te Atiawa and all the Te Tau Ihu iwi when [they] go for a mataitai'.<sup>687</sup>

Counsel for Te Atiawa submitted that the Crown has a Treaty duty to restore polluted or damaged sites. We will address that point in the next section. Here, we note that the ability to exercise customary rights is a key aspect of what the claimants need to restore their tribal life and identity in Te Tau Ihu. It is also critical for the preservation and transmission of tribal knowledge and identity to coming generations. The future of the tribes is at stake.

## 11.8 LEGAL SUBMISSIONS AND FINDINGS

In this section, we explore the legal submissions of the claimants and the Crown on the matters at issue in this chapter and make our findings as to whether the Treaty has been breached, and – if it has been – whether prejudice has occurred.

### 11.8.1 Loss of access and control

In essence, many of the claims were about loss of access to the natural resources of Te Tau Ihu as a result of, in the first instance, the alienation of land and, in the second, the imposition of British property laws. Under those laws, the ownership of taonga such as non-navigable waterways, fisheries, and cultivated plants (as with harakeke) passed to the holders of Crown grants. The iwi of Te Tau Ihu disputed that those property rights were greater than,

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686. A Elkington, brief of evidence for Wai 262, pp 14–16

687. John Bunt, under cross-examination, seventh hearing, 27–31 January 2003 (transcript 4.7, p71)

or can be held to have superseded, their own customary rights to access, use, and manage their taonga. Those customary rights, the claimants told us, have never been willingly or knowingly relinquished.

Secondly, the claims were about the loss of control of natural resources and of the management of the environment that sustains and nurtures those resources. The loss of control came in part through the loss of land ownership but also through the policies and statutes that have vested control of the resources – over and above land ownership – in a series of central and local agencies. As a result, power was vested mainly in settler ratepayers, who made development decisions without protecting Maori interests. One consequence was a massive modification of the environment to further the ends of settlement and economic development. The claimants argue that, by this means, the Crown permitted, facilitated, legislated for, and sometimes funded the damage or destruction of sites or resources of great value to them (see secs 11.4, 11.5).

#### **(1) Claimant submissions**

As noted in section 11.1, not all counsel made detailed submissions on these issues. In our view, the submissions of counsel for Ngati Tama may be taken as fairly representing the evidence and propositions that were received from claimant witnesses of all iwi, as well as being typical of the submissions from those counsel who did address these points.

Broadly speaking, Ngati Tama summarised their grievances as ‘the loss of ownership, access and control of mahinga kai, forests, waterways, customary fisheries and other natural resources.’<sup>688</sup> In his closing submission, counsel argued that the Tribunal has previously found taonga (guaranteed protection in article 2 of the Treaty) to include ‘all valued resources including fishing grounds, harbours and foreshores, forests, together with the use and enjoyment of the flora and fauna within them, as well as intangible values such as the Maori language and mauri.’<sup>689</sup> He also noted the findings of the *Report on the Manukau Claim* that ‘the omission to provide that protection (to Maori interests) is as much a breach of the Treaty as a positive act that removes those rights.’<sup>690</sup> He further cited the *Report on the Muriwhenua Fishing Claim*:

The essential point was that the Treaty both assured Maori survival and envisaged their advance, but to achieve that in Treaty terms, the Crown had not merely to protect those natural resources Maori might wish to retain, but to assure the retention of a sufficient share from which they could survive and profit, and the facility to fully exploit them.<sup>691</sup>

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688. Counsel for Ngati Tama, closing submissions, [2004] (doc T11), p 25

689. Ibid, p 32

690. Ibid, p 33

691. Ibid

For the detail of the Crown's failure in this respect, counsel for Ngati Tama concentrated on the original purchases and reserve-making, as all iwi did. Drawing on the *Ngai Tahu Report 1991*, he argued that the Crown was obliged to provide sufficient reserves for present and future needs and that such needs clearly included that 'generous provision of land and guaranteed possession of eel-weirs and other sources of mahinga kai would be needed'.<sup>692</sup> Crown officials were fully aware of the scattered nature of settlement and resource-use, the need to shift cultivations, and the dependence on seasonal foraging and hunting, with movement into the interior for brief periods of occupation:

It was incumbent on Crown officials . . . to ascertain the nature, location and extent of hapu hunting and food gathering rights over the tribal territory, as well as the more permanent kainga. This would ensure, after consultation with their representatives, that appropriate provision was made for their present and likely future needs, including the various forms of farming.<sup>693</sup>

Ngati Tama submitted that the Crown's reserve-making had turned very restrictive by the time of the Waipounamu purchase (1853–56), with the result that they (and all other Te Tau Ihu iwi) were not permitted to keep enough land for either the traditional or the new Western economy. The economic and natural resource base left to Ngati Tama after 1856 was 'extremely limited'. The Crown never investigated matters to ascertain the quantity of land and other resources that were reasonably necessary for Ngati Tama to progress as a tribe. As early as the 1860s and 1870s, both James and Alexander Mackay recognised that Te Tau Ihu iwi had been left with too little land and natural resources for their needs.<sup>694</sup>

As well as losing access by these means, iwi lost control. They were denied their rangatiratanga over the foreshore, seabed, harbours, and fisheries. They have also been harmed by significant environmental changes to their ancestral landscape that have been 'promoted and/or permitted by the Crown'. The awa, moana, and whenua have been damaged, which has eroded the kaitiaki function of the tribe, as well as its ability to provide for its economic and cultural needs.<sup>695</sup>

Specifically, Ngati Tama claimed that the Crown has, with minimal (if any) consultation, implemented various regulatory and legislative regimes, which have:

- ▶ adversely affected the environment, thus restricting, limiting, and denying Ngati Tama access to their traditional food resources;
- ▶ adversely affected the relationship of Ngati Tama with their significant sites;
- ▶ permitted the pollution of water bodies, land, foreshores, sea, and air through the discharge of effluent and waste; and

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692. Counsel for Ngati Tama, closing submissions, p 61

693. Ibid

694. Ibid, pp 62–64

695. Ibid, p 110

- ▶ depleted resources by land drainage, water extraction, river and stream diversion, reclamation, and other changes to the environment.<sup>696</sup>

The Crown's responsibility, it was argued, lies in its failure or refusal to prevent the various schemes or works that have thus damaged resources. In particular, the Crown has permitted reclamations and has claimed the ownership of harbours, foreshores, seabed, and rivers. It has failed to protect the environment and *iwi kaitiakitanga* over the environment. It has failed to ensure that central or local authorities have had sufficient (or any) regard to Maori interests or values. All this was in alleged breach of the Treaty principles of consultation, negotiation in good faith, and active protection. With the exception of recent customary fishing regimes, Ngati Tama argued that the Crown has failed or refused to protect the exercise of their customary uses and practices in respect of land, estates, forests, fisheries, rivers, minerals, seabed, foreshore, and harbours.<sup>697</sup>

In Ngati Tama's submission, prejudice includes the continuing pollution of their domain, contributing to the fact that the *iwi* have been left with a severely depleted natural resource base for their present and future needs. Also, the ability of Ngati Tama to fulfil their cultural and social obligations has been almost completely removed.<sup>698</sup>

As part of their cultural redress, Ngati Tama seek guaranteed access to, and protection of, sites for cultural purposes, including health and medicinal resources, and for the exercise of the 'customary gathering and access rights that have endured since time immemorial'. This would include the provision of areas of Crown land for 'appropriate non-commercial fishing and gathering of natural resources'. The claimants also want 'proper and reasonable access' to 'cultural resource sites' throughout Te Tau Ihu, and the appropriate recognition of their rights ('shared in some cases') to all the natural resources in their *rohe*.<sup>699</sup>

The submissions of other claimant counsel made the same points. In addition, Ngati Kuia emphasised the spiritual and cultural dimensions of the prejudice that they have suffered. Counsel argued that the *iwi* has lost spiritual and cultural, as well as economic, sustenance from the loss of the ability to access and use their valued natural resources. They have lost the ability to express their cultural values in practice. Particularly important in this respect is the reduced means of practising *rongoa*. Further, the ability to continue some ancient customs, such as muttonbirding on the Titi Islands, has been forcibly removed. Loss of this cultural food has caused prejudice, but so too has the loss of the ability to land on the islands and pass on vital knowledge and skills to coming generations.<sup>700</sup> 'Part of the prejudice suffered,' submitted counsel, 'is the loss of the spirit and values of *whanau* and *hapu*, so vital to

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696. Ibid; Janice Manson and others, amendment to claim Wai 723, 13 March 2003 (claim 1.16(a)), pp 33–34

697. Manson, amendment to claim Wai 723, pp 33–34

698. Counsel for Ngati Tama, closing submissions, p 115

699. Ibid, pp 121–122

700. Counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), pp 69–70

## 11.8.1(1)

the wellbeing of “Ngati Kuitanga.”<sup>701</sup> With all of this, the loss of kaitiakitanga and the loss of valued bird and plant species cause further cultural harm and a loss of mana and identity.<sup>702</sup>

Ngati Kuia’s counsel also stressed that these claims were particularly serious for them because of the circumstances in which they found themselves in the twentieth century. On the one hand, they had lost so much land that they lost access to most mahinga kai, and with it they gradually lost the knowledge associated with the practice of their customary rights. Nor could they afford boats to facilitate access where they no longer owned land. On the other hand, the evidence shows that the only way Ngati Kuia survived well into the twentieth century was by continued reliance on the mahinga kai that were left to them. This was not only because their grossly inadequate lands left them entirely dependent on traditional foods and customary gathering, but also because the location of their new landless natives reserves had at least some benefit in that respect. Thus, although Ngati Kuia were restricted in their ability to exercise their rights, those rights were the only thing standing between them and starvation well into the twentieth century. Hence, the importance of these issues to the tribe today.<sup>703</sup>

Counsel for Ngati Koata stressed that there was an inter-tribal dimension to the loss of access to customary resources. Te Tau Ihu iwi were accustomed to range widely for gathering and to exchange resources with each other in a complex web of relationships underpinned by whakapapa and whanaungatanga. As a result, they were interdependent. The loss of land, resources, or a particular site might affect many more than just the immediate inhabitants. This customary economy, counsel argued, was guaranteed respect and protection by the Treaty. The Crown’s failure to inquire properly into customary rights before the purchases – which it admitted – prevented it from becoming aware of and protecting these arrangements. Also, the massive land and resource loss that followed not only damaged this part of the customary economy but also soured relationships between many of the iwi concerned, to their lasting prejudice.<sup>704</sup>

Counsel for Ngati Toa agreed, stressing the importance of both the relationship with Ngati Koata and the customary society and economy described in operation by Ariana Rene (see sec 11.5.2), which still operates (albeit in truncated form) today. The Crown, by depriving Ngati Toa of land and resources and by engaging in management practices that have depleted or destroyed mahinga kai and resources, has destabilised ‘the traditional patterns of resource use, economic structures and society of Ngati Toa.’<sup>705</sup> It has also prevented the tribe’s development of those resources.

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701. Counsel for Ngati Kuia, closing submissions, p 70

702. Ibid, pp 76–78

703. Counsel for Ngati Kuia, closing submissions, p 68

704. Counsel for Ngati Koata, closing submissions, pp 20–21

705. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), pp 51–55, 120–122

Further, Ngati Koata raised the issue of clashing beliefs about ‘ownership’ of resources. They noted how they had continued to fish the waters of Moawhitu, despite the loss of land ownership, because they still had, in their view, the right to do so. It was not sufficient for the Crown to rely on the forbearance of the landowner, as it seemed to do – rather, its duty was to ensure that legal access was retained.<sup>706</sup> Counsel argued that the Crown and claimants now have to find a way to reconcile tino rangatiratanga with the ‘perception’ that resources are in the private ownership of others. Counsel submitted that there must be a full and effective recognition of rangatiratanga in accordance with Ngati Koata’s laws and customary rights to waters, fisheries, and other resources, whether or not ‘such taonga are perceived now as being in their ownership or possession.’<sup>707</sup>

In addition to these general arguments, some counsel specified loss of access through the damage or destruction of particular valued resources or sites. Ngati Koata and Ngati Kuia, for example, both detailed their loss in terms of muttonbirds, with Ngati Kuia also emphasising how they had lost access to the islands and their other resources as well. Ngati Kuia also stressed the loss of various birds and plants, including kereru.<sup>708</sup> Ngati Koata referred to the reclamation of Moawhitu Lagoon and its impact on their ability to access their eel fishery.<sup>709</sup> Ngati Tama and Ngati Rarua provided a list of sites without detailed arguments, noting that the Crown had not challenged their evidence.<sup>710</sup>

Counsel for Te Atiawa provided detailed submissions about the damage or destruction of resources and sites. Included in these were allegations about the Rototai dump, the Takaka River and Cobb Dam, Waikawa Marina, Shakespeare Bay, the reclamation of Nelson Airport, and the effects of the fast ferries in Tory Channel and the Sounds.<sup>711</sup>

## **(2) Crown submissions**

As noted in chapter 6, the Crown made significant concessions about this aspect of the claims. First, the Crown conceded that its purchase and reserve policies in the 1840s and 1850s had deprived Te Tau Ihu iwi of the ownership of, and access to, sufficient land and resources. It also conceded that the subsequent purchase of reserves meant that ‘over time many Maori in Te Tau Ihu were not left with sufficient land, or access to land to maintain their traditional economy.’<sup>712</sup> As a result, the Treaty principle of options was breached. Maori had too little land to develop in the Western economy or to continue to maintain

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706. Counsel for Ngati Koata, closing submissions, pp 89–90

707. *Ibid*, p 136

708. Counsel for Ngati Kuia, closing submissions, pp 69–70

709. Counsel for Ngati Koata, closing submissions, pp 89–90

710. Counsel for Ngati Tama, closing submissions, pp 111–113; counsel for Ngati Rarua, closing submissions, p 16

711. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 227–233, 240–249

712. Crown counsel, closing submissions, p 116

their traditional economy (or, if they so chose, to do both). Te Tau Ihu Maori suffered prejudice as a result.<sup>713</sup> In particular, the Crown accepted Dr Ballara's criticism, quoting an 1874 report by Alexander Mackay, that Maori were left with insufficient land and were 'cut off from their other traditional sources of supply by close settlement around them', and that both outcomes had been avoidable.<sup>714</sup>

In terms of social organisation and culture, the Crown conceded that the Treaty promises included the 'preservation of tribalism' and the option to 'develop along customary lines and from a traditional tribal base', or to 'walk in two worlds'. The Crown conceded that its purchase of almost the entirety of Te Tau Ihu had had the prejudicial effect of limiting the ability of Maori to 'maintain a tribal or collective way of life on tribal lands'.<sup>715</sup> Counsel also noted that due regard must be had to general social and economic trends, not all of which were controllable by the Crown, and to the wishes and choices of Te Tau Ihu Maori.<sup>716</sup>

The Crown, it seems, had no problem in accepting claims based on the loss of access to customary resources and on the harm that resulted to traditional society and the customary economy when that access was curtailed. It also accepted the fact that access to customary resources was prevented by the spread of settlement once the land had been alienated. Counsel also accepted Alexander Mackay's judgement that the Crown could easily have taken the precaution to 'set apart land to provide for the wants of the Natives, in anticipation of [this] probable effect of colonization on their former habits'.<sup>717</sup> In other words, the Crown accepted that it was obvious to the Government that settlement was going to effect the ability of the tribes to use their customary resources, and enough land could have been reserved to protect their access to those resources.

The Crown did not, however, accept the claimants' arguments about the loss of control of resources and the environmental modification that followed the transfer of control to settlers. In counsel's view, this amounted to a claim that the Crown has 'failed to maintain and restore the environment adequately'.<sup>718</sup> This included allegations that the Crown had failed to protect estuaries from pollution, had failed to prevent reclamations from changing waterways, and had allowed the destruction of customary fishing grounds and so forth. According to counsel:

What in effect is asserted is that the Crown has breached Treaty principles by failing to maintain a pollution-free environment. With respect, that places a responsibility on the Crown that it could never reasonably be expected to meet. Examples cited by Te Atiawa, include dams, marinas and reclamations. Such development necessarily has a destructive

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713. Crown counsel, closing submissions, p 116

714. *Ibid*, p 4

715. *Ibid*, p 116

716. *Ibid*, pp 116–119

717. *Ibid*, p 4

718. *Ibid*, p 157

effect on the environment. But that does not mean that the Crown is *ipso facto* in breach of Treaty principles because the environment has been altered.<sup>719</sup>

The Crown did not address Cathy Marr's evidence or the claimants' submissions about its delegation of authority to local bodies, which it had failed to require to protect Maori interests. This, the claimants argued, was the primary cause of the environmental modifications that have destroyed or depleted their customary resources. The Crown did, however, argue that:

It is reasonable to expect that the government will put in place mechanisms to ensure that environmental, cultural, and other demands are managed and appropriately balanced. The Crown says that it has put in place such mechanisms by enacting legislation such as the Resource Management Act 1991.<sup>720</sup>

Further, the Crown's submissions about the Resource Management Act stated that one of its three most important features was 'recognising and providing for the rights of Maori in relation to natural and physical resources.' Counsel added: 'a major difference from the pre-1991 regime is that much greater statutory rights are afforded to Maori in relation to resource management decision-making.'<sup>721</sup> That in itself was an oblique comment on the pre-1991 regime.

In respect of the specific sites detailed by Te Atiawa, the Crown argued that there were no Treaty breaches involved in respect of any of them. It took this position on the basis that no specific Crown responsibility or action could be established or that there was insufficient evidence for the Tribunal to reach a decision.<sup>722</sup>

### (3) *The Tribunal's findings*

In sections 11.4 and 11.5, we explored the various means by which the iwi of Te Tau Ihu lost the access, use, and control of customary resources. The historical evidence is in clear support of the concessions made by the Crown. The reports of Alexander Mackay, as outlined in section 11.4, proved that the Crown had insisted on reserves that were too small to permit sufficient access to resources. This could have easily been avoided. Further, the loss of land continued throughout the nineteenth and twentieth centuries. We noted the loss of the remaining 'large' blocks, Taitapu and Wakapuaka, in the 1880s, and the effect of this on the ability of the claimants to access customary resources. Although the Crown did not purchase these blocks, it played a significant role in their loss to iwi (see ch 8). We also explored how Maori clung to small surviving interests in the twentieth century as a means

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719. Ibid, p 158

720. Ibid

721. Ibid, pp 155–156

722. Ibid, pp 158–163

of preserving access and how the ongoing attrition of reserves had serious consequences in this respect. In particular, we considered the example of Ngaruru and the way in which it highlighted these issues for the Government.

Also, we noted Mackay's evidence that, while officials did nothing to stop Maori access to Crown land for the use of resources in the interim, they opposed any suggestion that Maori accessed those resources as of right. We also explained Ms Marr's evidence that this access was gradually cut off by pastoral leases, then from the 1920s by the Forest Service (and later the Wildlife Service). As tangata whenua witnesses explained, they continued to access customary resources on Crown lands as much as they could.

In practical terms, the Government had an opportunity to redress its Treaty breaches through the landless natives reserves. Restoring a sufficient land and resource base was still possible in the late nineteenth century and was advocated by Mackay in various commissions of inquiry. As will be recalled from chapter 7, the Government refused to do as much for Maori as it did for settlers. The 'great estates' were repurchased by the Crown and made available to settlers. Maori, however, got small, isolated, unfarmable reserves (when they actually got possession of anything). We noted that, if their owners could get to them, these reserves did provide additional access to mahinga kai precisely because of their location. For that reason, owners have clung to them in the twentieth century. We also discussed the significance of this in terms of individualised title. Counsel for Ngati Tama pointed out that whanau land can still, in some cases, be used for wider iwi benefits.<sup>723</sup> For some, Maori land has served as a base for whanau and group access to resources despite its individual ownership, as we saw at West Whanganui Inlet, Wakapuaka, and Port Gore. For others, individual ownership has resulted in the exclusion of groups from their former whenua and resources. That is clearly a prejudicial effect of the nineteenth-century title system, which we discussed in chapter 8.

From our review of the evidence, we agree with both the claimants and the Crown that its actions were in breach of the Treaty. It purchased too much land and insisted on reserving too little, so that Maori lost legal access to the great bulk of their customary resources. It compounded this action by continuing to purchase surviving reserves during the nineteenth and twentieth centuries, further reducing Maori access to resources. However, until that land was granted to settlers, leased to pastoralists, or turned into State forests, the Crown did not actively stop Maori from accessing the land for the use and management of their resources.

We find the Crown in breach of the Treaty principles of reciprocity, active protection, and redress. The principle of reciprocity concerned the exchange between the Crown and Maori in the signing of the Treaty. The Crown was obliged to exercise its power of pre-emption in a manner that was scrupulously fair and protective of Maori (who had entrusted it with that

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723. Counsel for Ngati Tama, closing submissions, p 101

power). Pre-emption was also to be exercised in accordance with Lord Normanby's instructions (see sec 11.4, chs 5, 6). The Crown failed to purchase land from Te Tau Ihu Maori in accordance with this principle. The iwi were left with too little land for access to their customary resources. The ongoing purchasing of reserves, despite the clear knowledge of that fact, was in breach of the principle of active protection.

Also, the Crown had anticipated that settlement would cut Maori off from continued access to the use and management of their resources, but it did nothing to prevent this. That failure was in breach of the principles of partnership and active protection. The failure to redress these Treaty breaches at the end of the nineteenth century, despite a clear opportunity to do so, was in breach of the principle of redress. The continued attrition of reserves in the twentieth century compounded these Treaty breaches. Preventing Maori from exercising their customary rights on Crown land, once it was leased to pastoralists or reserved as State forests, was in breach of the principle of active protection.

The Crown did not concede that Maori retained rights in their customary resources after land alienation and Crown grants to settlers. Nor did the Crown concede that the massive modification of the environment that followed settlement was its responsibility. It did not accept that the Treaty has been breached because mahinga kai have been polluted or developed.

In other inquiries, the Waitangi Tribunal has taken two broad approaches to the question of Crown responsibility for reclamations, pollution, and other modifications of the environment. In its report *Te Whanganui a Tara me ona Takiwa*, the Tribunal found that the Crown was responsible for reclamations of foreshore in Wellington Harbour, because many such reclamations were carried out by the Crown and all were authorised by legislation or Order in Council. The resultant destruction of foreshore and fisheries was clearly the responsibility of the Crown.<sup>724</sup> With regard to the pollution of the harbour by sewage and industrial waste, the Tribunal lacked evidence of certain Crown responsibility and also of 'what action the Crown could realistically have taken to prevent or to reduce the pollution.'<sup>725</sup> The primary point, however, was the exclusion of Maori from any role in decision-making about the harbour, thus preventing them from having a say in such matters. The Tribunal found the Crown in breach of the Treaty for not providing for a Maori share in the management of their harbour. Serious pollution was one of the resultant prejudicial effects (rather than an action of the Crown in breach of the Treaty per se).<sup>726</sup>

This approach was in broad agreement with that of the Ngai Tahu Tribunal, which found that a Treaty breach required a direct correlation between a specific action or inaction of the Crown and any particular environmental modification. The Tribunal noted that many

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724. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp 473–475

725. *Ibid*, p 476

726. *Ibid*, pp 475–478

people and forces were involved in changing New Zealand's environment and reiterated its main point that the principal breach in terms of mahinga kai was the Crown's original failure to reserve a sufficiency of land and resources.<sup>727</sup> In its later report on specific ancillary claims, the Tribunal stated:

In 1991 the Tribunal felt unable to uphold the general grievance relating to the loss of the tribe's mahinga kai through the impact of settlement. We stated that the loss was the result of activities from the whole spectrum of society and could not be attributed solely to the Crown as a breach of its duty to protect under the Treaty.<sup>728</sup>

In assessing claims about specific mahinga kai, however, the Tribunal felt that 'a distinction exists between the general impact of settlement on the countryside as a whole' and specific cases of failure to protect individual fisheries. At issue was both the loss of fisheries and conservation restrictions on the exercising of customary rights, in each of which the Crown had failed to ensure the tribe's management, use, and enjoyment of particular valued fisheries.<sup>729</sup> The question of whether Maori would have had the power to protect those resources from river works or agricultural runoff if sufficient had been reserved, was not addressed. Faced with a similarly specific instance, the Ika Whenua rivers Tribunal found the Crown in breach of the Treaty for failing to protect river fisheries, and for actively damaging them, and it recommended restorative action to remedy the grievance.<sup>730</sup>

The Tribunal appointed to hear the Hauraki district claims, on the basis of the evidence available to it, considered a different question. It concluded that the Crown had failed to act on repeated representations informing it of Maori interests in natural resources and customary food supplies and seeking its protection of those interests from harm. Maori concerns:

expressed consistently in petitions and at parliamentary inquiries over the many instances of damage to their lands and resources . . . were almost always the Crown's last priority. The evidence has shown an official attitude of neglect towards Maori . . . The Crown's duty of active protection towards Maori was often not honoured in Hauraki.<sup>731</sup>

The Tribunal found: 'In failing to protect the land, forests and waterways on which Hauraki Maori relied, the Crown was in breach of the Treaty.'<sup>732</sup>

The Mohaka ki Ahuriri Tribunal took a similar approach. It pointed out, first, that it 'would be wrong to judge Crown actions or omissions by the standards expected in

727. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, pp 906–911

728. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995* (Wellington: Brooker's Ltd, 1995), p 362

729. Ibid

730. Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wellington: Legislation Direct, 1998), pp 137, 142–145

731. Waitangi Tribunal, *Hauraki Report*, vol 3, p 1160

732. Ibid

environmental management in the twenty-first century.<sup>733</sup> The question for the Tribunal, therefore, was ‘when the Crown should have both recognised the deleterious effects of the absence of controls in land management and taken action to ameliorate the situation.’<sup>734</sup> The Tribunal found that the Crown was aware of environmental problems and damage much earlier than it acted on them, and that its failure to protect Maori interests was in breach of the Treaty. The Government, for example, expected Maori to live off the land (and even paid less unemployment assistance as a result), while at the same time doing nothing to protect their mahinga kai either from alienation or from environmental harm, despite its knowledge about both points. The Tribunal concluded:

We find that the Crown, in its failure adequately to protect the Mohaka ki Ahuriri environment and the traditional Maori use thereof, breached the principles of the Treaty of Waitangi. We find that the Maori people of Mohaka ki Ahuriri were prejudiced thereby . . . The Crown has a duty under article 2 to actively protect forests, fisheries, and other taonga. We consider that, at Lake Tutira, at the polluted coastal reefs at Tangoio, and at other places, the Crown has failed in this duty.<sup>735</sup>

Of these two approaches, the evidence available in our inquiry persuades us to take the broader view. We agree with the Crown’s submission that environmental modification for economic development is not a breach of the Treaty per se. Reclamations, for example, may be of benefit to Maori and the community, and there may be sound reasons for Maori to agree to them. Dr and Mrs Mitchell, for example, told us that the claimants had no problem with river works that protected their land (as well as others’) from flooding.

We also agree that it was not a Treaty duty for the Crown to maintain a pollution-free environment, which was clearly neither possible nor contemplated in the circumstances of early development in New Zealand. We cannot, however, accept the Crown’s submission on that point without qualification. Pollution was a public health issue in nineteenth-century New Zealand, and steps were taken (for example) to monitor and ensure clean supplies of drinking water.<sup>736</sup> It remained a public health issue throughout the twentieth century, with the Crown’s role broadening in line with growing concerns to prevent harmful effects to the environment. A range of legislation from the 1960s onwards has vested a high responsibility in the Crown. From the Water and Soil Conservation Act 1967, the Clean Air Act 1972, the Marine Pollution Act 1974, and the Town and Country Planning Act 1977 through to the Environment Act 1986, the Conservation Act 1987, and the Resource Management Act 1991,

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733. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 2, p 636

734. Ibid

735. Ibid, pp 637–638

736. Marr, ‘Crown–Maori Relations’, pp 91–93; Bassett and Kay, ‘Nga Ture Kaupapa’, pp 203–204; Young, ‘Maori Society’, pp 62–63, 111–112, 116, 123–126

## 11.8.1(3)

there has been a statutory framework of central and local government responsibility for the minimising or prevention of pollution.

The Crown cannot be blamed for the entirety of the wholesale environmental changes that have taken place over the past 168 years. What was required, however, was for it to have protected a sufficient land and resource base in Maori ownership and control to enable the Maori people of Te Tau Ihu to develop and prosper while maintaining as much of their customary economy and lifestyle as they chose to do. This is the Treaty principle of options, which was accepted by the Crown in this inquiry. The Crown conceded that it had failed to ensure that Te Tau Ihu Maori retained sufficient resources for them to continue their customary economy and way of life unimpaired or to develop in the Western economy (or, more importantly, to do both).

Having agreed on that point, the Crown and claimants did not, however, agree the sequel. The claimants argued that they had never willingly relinquished their rights to particular waterways, resources, and mahinga kai or their right to travel where they chose in Te Tau Ihu to use and enjoy those resources. They also argued that loss of access, as well as damage and harm to those resources, curtailed or even precluded their tikanga and almost their very existence as a tribal people. This, they maintained, was in breach of the Treaty, to their great prejudice.

The Crown, on the other hand, argued that it was ‘reasonable to expect that the government will put in place mechanisms to ensure that environmental, cultural, and other demands are managed and appropriately balanced’.<sup>737</sup>

If we are to follow the approach of the Tribunal in its Hauraki and Mohaka ki Ahuriri inquiries, and to take account of the Crown’s submission, we must consider the following questions, which we posed in section 11.5:

- ▶ Was the Crown aware of a Maori interest in the natural resources of Te Tau Ihu requiring its active protection?
- ▶ If the Crown was aware of such an interest, did it balance matters fairly so as to protect the Maori interest?

In section 11.4, we examined the issue of environmental modification in the nineteenth century. We noted repeated reports to the Government from officials and commissions of inquiry. As we discussed in chapters 9 and 10, there was also a flow of information from officials about the dependence of Te Tau Ihu Maori on their surviving customary food supplies. They were vulnerable to any unexpected disaster, especially crop failures, and the Public Trust had to give frequent assistance. There was a state, Commissioner Mackay reported, of semi-starvation. He also reported frequently on how Maori food supplies – especially freshwater fisheries and native birds – were being decimated by environmental modifications. Those modifications were being carried out by a plethora of local boards

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737. Crown counsel, closing submissions, p158

and by the acclimatisation societies. The Crown did not act on these many reports. It did nothing to protect the Maori interest in Te Tau Ihu. Rather, it continued to adopt policies and to enact legislation that authorised, facilitated, or funded the modifications reported by Mackay.

We examined this issue for the twentieth century in section 11.5. There, we noted that the Crown did not challenge Ms Marr's evidence in cross-examination or by submissions. We described how officials reported the dependence of Te Tau Ihu Maori on their customary resources in the first half of the twentieth century. We also outlined several key Maori petitions and communications to the Government, all of them complaining of interference with what they considered their rights to access, use, and control customary resources in the rivers, forests, and seas of the colony. We noted, too, that this information was received in a context of similar reports and representations from all around the country. From all this information, the Crown could not have been unaware of the vital importance of customary food supplies to Te Tau Ihu Maori or that such supplies were being interfered with or were under threat.

How seriously should the Crown have taken this issue? In section 11.5, we referred to the 1935 decision of Judge Acheson on one particular food-gathering place. In that instance, his view was that the Crown should go to 'extreme trouble' to protect Maori customary food supplies. He considered the Crown in breach of Treaty promises if it did not do so. He also argued that no one-off monetary payment could ever compensate for what was being lost. We think that Acheson's decision indicates how the protection of food-gathering sites could and should have been seen by decision-makers of the time.

Ms Marr's report shows that New Zealand governments provided the legislative and policy frameworks to carry out land clearance, swamp drainage, reclamation and public works, and the conversion of forest land for pastoral farming. This included the passage of enabling legislation, the provision of public works schemes, financial assistance, and sometimes centralised government action, direction, or coordination. It was a grand enterprise, a vision of economic development that was in part shared by the Maori people of Te Tau Ihu. They, too, wanted social and economic development, but they did not share aspects of the vision. They had their own, sometimes conflicting, rights and interests, which the Treaty had promised to protect. The Government, therefore, had to decide which interests would prevail and what protection – if any – would be given to the Maori interest.

The Ngai Tahu Tribunal pointed out that, in setting policy, the Government did not act in ignorance of the Maori interest. In 1912, the Minister of Internal Affairs addressed the Legislative Council on the Ellesmere Lands Drainage Amendment Bill, stating:

the Maori, like the European, must submit, for the public good, to accept full monetary compensation for rights which barred a public work . . . It was impossible to permit a Maori to hold up the whole drainage of a plain, to prevent the straightening up of a river, to

## 11.8.1(3)

prevent the reclaiming of swamp land and turning it into productive land . . . In regard to this lagoon, it might or might not, for all he knew, be a valuable fishing right to the Natives . . . He assumed it was an ancient fishery, and he assumed the fish were there now, and he assumed that the drainage operations would interfere with the fish and the quantity of food which the Natives could obtain there . . . The answer was that notwithstanding that the country should be drained.<sup>738</sup>

In that instance, Ngai Tahu at least received compensation because the lagoon was on Maori reserved land. For the many fisheries degraded or destroyed in Te Tau Ihu, however, few were in a position to attract that kind of compensation.

The claimants put to us that a key consideration was the power to make such decisions. That power, in their submission, had been entrusted to settler-dominated bodies that were not required to take account of Maori interests and did not do so. We agree with this submission. This was clearly inconsistent with the Treaty. The claimants also argued that the result of their exclusion was serious environmental damage and harm to their valued resources and to particular valued sites. Again, we accept this submission. While the claimants may well have been willing to sacrifice certain sites or customary practices in return for a full and meaningful share in development – as anticipated by the Treaty – they received no such share, and had no involvement in the decision-making. Ms Marr noted that the Government usually relied on the Native Department to ameliorate the harshness of local bodies' treatment of Maori interests, but the department had almost no presence or interest in Te Tau Ihu. This was very evident from the historical material submitted to us.

We find that the Government was almost entirely neglectful of Maori interests in their customary resources, although those interests were known to it. We further find that the Government set in place a framework for decision-making without providing for a Maori share in the decisions or requiring local decision-makers to take account of Maori interests. Again, those interests were known to the Government. The result was environmental modification in a manner that gave no protection to Maori interests in their customary resources. Such an outcome was not consistent with the Treaty.

It was not the Crown's task to prevent environmental harm or modification per se. We accept that some degree of modification and damage was inevitable for economic development. We also accept that Maori – if given the choice – may well have agreed to development that benefited them as well as the settler community. But these points do not mitigate the Crown's actions or its failure to protect Maori interests in a fair and just manner. We find the Crown in breach of the Treaty principles of partnership and active protection.

We also need to consider the question raised with us as to ongoing Maori rights of customary resource-use and management. In the claimants' view, those rights have continued

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738. Waitangi Tribunal, *Ngai Tahu Ancillary Claims*, p 48

from 1840 to the present day, albeit interrupted or prevented in certain cases. In section 11.4, we described how officials did not prevent Maori use or management of resources on Crown land until it was needed for settlement. We also explained that any claim that Maori were using those resources as of right was firmly resisted. In section 11.5, we outlined how Te Tau Ihu Maori continued to claim rights of access, use, and management (kaitiakitanga) on private and Crown land in the twentieth century. Ngati Koata, for example, described their long claim to fishing rights in inland waterways, regardless of whether rivers or lagoons had ended up in private land. Iwi claimed the right to fish, hunt, and gather resources as they had always done, regardless of a variety of laws that purported to restrict their ability to do so. As we discussed in section 11.5, the Crown's typical response to Maori's assertion of such rights was not to provide statutory protection or legal instruments such as easements to protect those rights. Rather, it relied on cases like *Waipapakura v Hempton* to defeat them. The Muriwhenua fishing Tribunal found this to have been in breach of the Treaty.<sup>739</sup> We agree.

Ngati Koata and others also put to us the question of how customary rights should be acknowledged and protected today. In particular, they were concerned about their ability to access, use, and care for plants and other valued resources on conservation land, as well as on private land. They put to us that their survival as tribes is partly dependent on their ability to exercise their customary rights and, in doing so, to transmit cultural knowledge and values to future generations.

In section 11.5, we found that the Crown was fully aware of Maori claims about their customary rights in the twentieth century. Petitions, communications from Te Tau Ihu Maori, and reports from officials all documented these claims. As we noted in that section, the Crown could have provided legal protection by statute, by negotiating or purchasing access strips from landowners, by providing easements, or by other options available to it. The Crown's failure to do any of these things, insisting that Maori rights did not exist at law, was in breach of the Treaty principles of partnership and active protection. Further, we accept the claimants' argument that they have never knowingly or willingly alienated their customary rights of fishing, resource-gathering, and authority to manage (kaitiakitanga) those resources. As we found in chapters 5 and 6, neither the deeds nor the transactions themselves stand up to scrutiny. While the Crown's title to lakes, rivers, and resources may rely on the New Zealand Company, Wairau, and Waipounamu purchases, that outcome in itself is a breach of the Treaty.

From the 1970s, the Crown began to enact legislation requiring the consideration of Maori interests and values in environmental decision-making. There are many possibilities today for recognising the customary rights that are protected and guaranteed by the Treaty and that Te Tau Ihu iwi have never formally agreed to alienate. One is the 'legal

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739. Waitangi Tribunal, *Muriwhenua Fishing*, p 226

rights approach', in which those rights are confirmed as legally enforceable. The Ngai Tahu Tribunal, for example, suggested that the Crown could register 'certain defined mahinga kai rights against Crown or state-owned enterprise land'.<sup>740</sup> The Foreshore and Seabed Act 2004 provides for territorial customary rights orders and customary rights orders. (We make no comment on these in comparison to what was legally available before the Act.) The Ngai Tahu Tribunal, echoing the legal opinions of Dr Paul McHugh, also mooted the possibility of Parliament providing for the registration of mahinga kai rights against private, as well as Crown, land. It seemed unlikely to the Tribunal in 1991 that Parliament would go so far.<sup>741</sup>

Another possibility is the 'relationship approach', based on the partnership created by the Treaty. Under that model, the Crown and Maori would decide and revise regularly what rights should be exercised and in what parts of the conservation estate, ensuring that all interests are respected and provided for. This approach requires a generous spirit on the part of the Crown and a commitment to partnership on both sides. We note that, in 1989, James Elkington tried to get an esplanade status revoked at Cathedral Bay because it cut off his whanau's land from their 'kaimoana gardens' in the sea.<sup>742</sup> DOC sought advice from its lawyers and was told in 1990 that it had to carry out the Treaty only when it was acting under the Conservation Act 1987, not when it was administering the Reserves Act 1977. This was because it had to have regard to the Treaty only if it was mentioned in the relevant statute.<sup>743</sup>

When this kind of thinking prevails in government, then the 'legally enforceable rights' approach seems the only safe one for Maori. The 'relationship approach', on the other hand, requires a genuine partnership. Not having heard from DOC in our inquiry, it is impossible for us to gauge how far attitudes might have shifted since 1990. Also, we accept that there are some profound differences to overcome. We have already cited Michael Park, who, in his evidence for Te Atiawa, told us of a fundamental clash of ethics, where DOC embodies a Western preservationist ethic and iwi see conservation in a context of human use.<sup>744</sup>

Both the 'legal rights' and 'relationship' approaches can be consistent with the Treaty. In our view, though, the 'legal rights approach' may be too narrow and prescriptive to protect the full range of customary rights and authority of Te Tau Ihu Maori. These need to include, at a minimum, the ability to take plants for rongoa and weaving, where that is sustainable, and to pass customary knowledge to other members of the tribe in situ (see sec

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740. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, p 918

741. *Ibid*, p 917

742. J Elkington to D Oliver, Marlborough County Council, 31 July 1989 (James Elkington, comp, appendices to brief of evidence on behalf of Ngati Koata, various dates (doc B34(a)), doc 6)

743. Patete, 'D'Urville Island', p 215; protection manager to regional conservator, 18 October 1990 (Patete, supporting documents, doc 0C); protection manager to regional conservator, 24 October 1990 (J Elkington, appendices to brief of evidence, doc 8). We note that this is contrary to the law as found in the *Whale Watching* case cited above, which was not decided until 1995.

744. M Park, brief of evidence, pp 15–16

11.7). The taking of plants and animal materials for food, and the transmission of customary knowledge on these matters, is also important. Regular access for monitoring and for maintaining relationships and links is a prerequisite. Overall, the tribe needs to be a full and equal partner in the decision-making, not merely about the actual sites and extent of customary takes but for maintaining and protecting the health and mauri of lands and waters in the conservation estate. They should be among the decision-makers, as Kath Hemi put it, and not merely submitters.<sup>745</sup>

We preface our comments with the proviso that we have no knowledge of any developments between DOC and iwi since 2004. With that said, we think it would be best for the Crown and claimants to negotiate arrangements for the exercise of customary rights in the conservation estate and other Crown lands. The goal of such negotiations would be a true partnership between the kawanatanga authority of the Crown and the tino rangatiratanga of the Te Tau Ihu tribes. Compromise would be necessary on both sides. DOC is already willing to accept some sustainable use of plant and animal resources on Crown land, as we noted in section 11.5. What it must also do is share decision-making about it. Iwi, on the other hand, have to accept – as the Rekohu Tribunal found – that the conservation of species for the future has priority over customary takes.<sup>746</sup> Given the many tangata whenua witnesses who stressed their support for the conservation of resources for future generations and the need for customary use to be truly sustainable, we think that there is enough common ground to make joint decision-making work. But we make no recommendations on this matter, leaving that to the Wai 262 Tribunal.

Finally, we address the question of the prejudicial effects of the Treaty breaches described above. In sections 11.3, 11.5.1, and 11.5.2, we explored the nature of customary rights and the customary economy, and the values and society that underpinned them. We found that the ability of Maori to sustain themselves from their forest and inland resources, in economic and cultural terms, had been significantly affected by the early twentieth century. Various species either had been eliminated or were gone for all practical purposes, such as the upokororo and the kereru. Maori had insufficient access to the bush for regular reliance on forest products for food, rongoa, or raw materials. In some places, such as Rangitoto, enough indigenous forest was still accessible to highlight what had been lost. We discussed the cultural effects of these losses. They included the loss of some tikanga and knowledge, the loss of culturally significant foods, the loss of means to transmit knowledge and skills to future generations, the loss of mana, and harm to tribal cohesion and identity.

The customary economy and society were truncated by these losses but they were still operating. The Maori people of Te Tau Ihu continued to sustain themselves primarily by customary means until the 1960s: fishing and gathering kaimoana, hunting (by then

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745. Hemi, brief of evidence for Wai 262, p10

746. Waitangi Tribunal, *Rekohu*, pp 270–273

mainly pigs, deer, and seabirds), and gathering remaining wild plants such as watercress and harakeke. Vegetable gardens and cropping substituted in part for what had been lost. So, too, did the keeping of domesticated animals. Seasonal work provided some money for necessities that now had to be bought and for the rates that had to be paid. Witnesses in our inquiry, growing up in the 1930s to 1950s, do not recall the extreme privations of their nineteenth- and early twentieth-century forbears. Poverty was endemic, but there was usually enough to eat. This was in part because coastal food sources were still able to supply a key part of the diet. Improvements in technology (especially motorboats) had made those resources more accessible to some.

From the evidence of tangata whenua, we determined that, although some tikanga and knowledge had been lost, or was being lost along with te reo, their society continued to be underpinned by whanaungatanga, manaakitanga, and kaitiakitanga. The skills and knowledge of customary gathering proved resilient because they were vital to physical survival. Along with new substitutions like poultry, customary foods continued to play an important part in exchanges and manaakitanga. 'Barter' in the form of reciprocal gifts between Maori communities continued, as did barter with Europeans. There were enough raw materials for weaving to substitute for the purchase of clothing and other items where necessary. Rongoa was still practised but not so much in the old way – forest products were not immediately available to most, so it became, to some extent, the preserve of home-grown plants. Some taonga, such as kereru and other forest birds, had been lost, but the customary economy survived in truncated form. It is important to note that the resources sustained tribal culture only for a minority. The majority had to leave their ancestral land.

In sections 11.5.3 to 11.5.5, we described how further inroads were made into this society and economy, and into the values and resources that sustained it, in the second half of the twentieth century. In particular, the massive depletion of fisheries (which we consider in more detail below) has had a profound effect. Also, there has been a decline in the plants that were still accessible back in the first half of the century. Watercress, harakeke, pingao, and many other species are now rare and are often found in an uncontaminated state only on conservation land. Also, as resources became depleted and harder to access, damage to, or the destruction of, key sites began to have pronounced effects. We noted evidence, for example, of its contribution to the 'push' of Te Atiawa whanau out of the Sounds in the 1960s and 1970s. The loss of an important kaimoana site, such as Waikawa Bay, could have significant consequences in general, over and above the personal loss of mana and culture for those with a close relationship to that place.

The claimants accept that some social change would have happened anyway. They described the process of assimilation and acculturation that took place in Te Tau Ihu. Most witnesses, agreed, however, that the home whanau are still exercising their customary rights to the fullest extent possible. They have not, Jeffrey Hynes told us, stopped getting customary

resources by choice.<sup>747</sup> It is their role to maintain a tribal base for the whanaunga who wish to come home or to reconnect (however often). They blame their inability to maintain their whanaungatanga and manaakitanga on the depletion of resources and the cumulative loss of access. They would still be maintaining a tribal base and transmitting core values, knowledge, and skills to coming generations if they could. But there has to be a turangawaewae for people to return to, there have to be customary resources to sustain whanaunga and to manaaki guests, and there has to be capacity to pass these taonga to mokopuna. All these things have been undermined and are still at risk.

The Maori people of Te Tau Ihu have lost identity and mana. They have also experienced cultural harm. As Michael Park put it: ‘We, as a people in tune with the cycles and the mauri, were forced to watch whole species forced into extinction and habitats succumb to serious decline.’<sup>748</sup> This has caused significant hurt to the kaitiaki of those places.

We find that the claimants have experienced economic, social, and cultural prejudice as a result of Treaty breaches.

### **11.8.2 Customary fisheries and marine resources**

In section 11.5, we provided a detailed analysis of core claimant grievances – the serious depletion of their customary fisheries, and their loss of (and loss of access to) seabirds and islands integral to their culture and customary economy. We also discussed the current provisions that the Crown has put in place to protect their Treaty fishing rights, including the South Island customary fishing regulations, the option of establishing taiapure and mataitai, and the ministerial power of closing fishing grounds at Maori request. Historical claims about marine farming were also considered.

#### **(1) Claimant submissions**

Counsel for Te Atiawa cited the evidence of Christopher Love in respect of the critical importance of customary practices and knowledge of gathering and preparing kaimoana, passed from generation to generation, for the cultural survival of Te Atiawa. The pollution and degradation of its kaimoana gathering places, therefore, has affected the iwi economically and culturally.<sup>749</sup> Counsel for Ngati Koata maintain that the Crown is to blame for the massive depletion of customary fisheries that has occurred, because it is the Government’s management of fisheries and marine environments that has allowed commercial fishing and the establishment of marine farms to harm customary fisheries. The Crown, it was

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747. Hynes, brief of evidence, pp 4–5

748. M Park, brief of evidence, p 4

749. Counsel for Te Atiawa, closing submissions, p 246; counsel for Te Atiawa, supplementary closing submissions, 18 February 2004 (doc T10(a)), p 19

## 11.8.2(1)

argued, still has an obligation today to include iwi in the management of fisheries, to ensure that fisheries are managed sustainably, and to actively rebuild the resource where its actions have damaged it in breach of the Treaty.<sup>750</sup>

Counsel for Ngati Kuia referred to evidence showing that there has been a gradual and, in some cases, complete loss of Ngati Kuia's ability to exercise their customary fishing practices. All witnesses spoke of the depletion of fish stocks and the adverse effect of marine farming on their ability to catch sufficient numbers or to access traditional grounds. Customary fishing is being pushed aside by the rapid growth of both marine farming and commercial and recreational fishing. The Crown has breached the Treaty, she argued, by not working with Ngati Kuia to ensure that they could enjoy their customary fishing rights, and it has failed to share the management of customary fisheries with the iwi. Counsel also referred to the gradual loss of knowledge associated with these practices (because the practices could no longer be carried out) and the cultural and economic prejudice to Ngati Kuia that resulted.<sup>751</sup>

Counsel for Ngati Toa emphasised that there is a unique aspect to that iwi's claim – their exercise of rangatiratanga on both sides of Cook Strait and over all the sea in between. Ngati Toa claim a special relationship with the sea and its fisheries, and they argued that fishing was one of the primary ways in which they continued to exercise their rights and maintain their presence in Te Tau Ihu and its waters. Loss of fisheries, therefore, has hit Ngati Toa particularly hard.<sup>752</sup>

Other iwi did not make submissions about the depletion of freshwater and coastal fisheries, but we consider that the submissions of counsel above raise issues that are representative of Te Tau Ihu iwi as a whole. Similarly, we received very few submissions about the modern customary fishing regime. Ngati Tama and Te Atiawa made submissions about the South Island (Customary Fisheries) Regulations 1999. No counsel made submissions about the provisions for taiapure and mataitai. We find this difficult to account for, given the prominence that those issues had in some of the evidence that we heard.

Counsel for Te Atiawa submitted that the Fisheries (South Island Customary Fishing) Regulations do not comply with the Treaty because:

- ▶ They fail to empower Te Atiawa to manage their non-commercial fishing rights. An example is that tangata whenua are unable to place rahui over the whole or a part of their fisheries.
- ▶ They are too limited to ensure that the full range of customary fishing rights can be exercised without undue restriction. An example is that kaimoana is not allowed to be gathered in advance and stored frozen.

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750. Counsel for Ngati Koata, closing submissions, pp 129, 131–132

751. Counsel for Ngati Kuia, closing submissions, pp 69, 73

752. Counsel for Ngati Toa Rangatira, closing submissions, pp 7–8, 53–55, 114–115

- ▶ They have not given management powers to iwi – the management of fisheries is still effectively with the Ministry of Fisheries, DOC, and the unitary authorities.
- ▶ They have not provided for the effective restoration of depleted customary fisheries. The ongoing pollution of kaimoana needs to be stopped and polluted sites restored.<sup>753</sup>

Counsel for Ngati Tama, on the other hand, referred in closings to their amended statement of claim, in which the iwi accepts that ‘recent customary fishing regimes’ do protect Ngati Tama’s customary uses and practices. This, we presume, includes taiapure and mataitai, as well as the fishing regulations.<sup>754</sup>

In terms of marine farming, we faced an unexpected problem with our closing submissions. Counsel, of course, could not have known that the Crown would later remove our jurisdiction to consider commercial aquaculture post-September 1992. As a result, their submissions do not easily allow us to distinguish between pre- and post-1992 issues (if, indeed, they are different).

With that in mind, counsel for Ngati Kuaia’s submissions were largely representative. She reminded us that the Marlborough Sounds foreshore is 15 per cent of New Zealand’s coastline and has between 60 and 74 per cent of the country’s aquaculture. Ngati Kuaia’s claim is that Te Hoiere is their ‘heartland’ and marine farming is part of their bundle of customary rights in the coastal marine area. Their customary practices included techniques for restoring and transplanting depleted kaimoana. These customary practices, the ownership of the foreshore and seabed, and the iwi’s authority (tino rangatiratanga) over the coastal space were guaranteed by the Treaty. They also have a Treaty right of development. The Crown, however, has breached the Treaty because it has failed to allocate them waterspace in their rohe and has failed to provide financial assistance for them to participate in marine farming. They are too poor to purchase space. Relevant legislation (including the Marine Farming Act 1971) does not give the Marlborough District Council the authority or need to provide for Ngati Kuaia’s Treaty rights. As a result of these two things, they have been shut out. In remedy of these and other breaches, waterspace (or the ability to buy it) should be provided for Ngati Kuaia in their ‘heartland’.<sup>755</sup>

Counsel for Ngati Kuaia and Te Atiawa both argued that marine farming has also damaged customary fishing and contributed to the overall depletion of kaimoana and customary fishing grounds that is of such concern to all iwi today. Conversely, Te Atiawa emphasised the role that marine farming can play in remedying this problem. Counsel argued that the establishment of marine farms by the claimants can help to restore depleted kaimoana stocks, and thus assist iwi to meet their customary resource needs and cultural obligations.<sup>756</sup>

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753. Counsel for Te Atiawa, supplementary closing submissions, pp 22–24

754. Counsel for Ngati Tama, closing submissions, pp 110–111; Manson, amendment to claim Wai 723, pp 33–34. (Counsel’s only reference to the taiapure was to say that it had been established without objection from Ngati Koata: counsel for Ngati Tama, closing submissions, p 100.)

755. Counsel for Ngati Kuaia, closing submissions, pp 71–73

756. Counsel for Te Atiawa, supplementary closing submissions, pp 25, 40

## 11.8.2(2)

Ngati Kuia and Ngati Koata both made closing submissions in relation to titi and the island sanctuaries. Ngati Kuia acknowledged that the Crown had provided for their access to the Titi Islands since 1918 but that this had unceremoniously ended in 1960. Since then, the Crown has failed to work with iwi to ensure the restoration of the birds and of harvesting rights. Ngati Kuia have therefore lost this cultural food source, and the knowledge of Titi Island practices has been greatly diminished. This kind of loss is a loss to the spirit and values of the hapu, which are so vital to their wellbeing. Counsel also argued that this was emblematic of how the Crown has failed to provide for the shared management of natural resources. Ngati Kuia maintained that they have lost material, cultural, and spiritual sustenance and practices with the lost access to, and control of, their valued natural resources and habitats.<sup>757</sup> Counsel for Ngati Koata acknowledged that that iwi retained access at first through the ownership of islands, but she blamed the Crown for a failure to ‘protect and ensure sustainable numbers of mutton birds as a traditional food resource for Ngati Koata.’<sup>758</sup>

**(2) Crown submissions**

The Crown confined its submissions on these issues to the Fisheries (South Island Customary Fishing) Regulations 1999. It did not respond to the allegations about the depletion of customary fisheries or the harm that this is doing to Te Tau Ihu iwi. Claimant submissions about the degradation of rivers and freshwater fisheries were brief and general, and the Crown did not respond to them. Nor did it respond to submissions about the depletion of coastal kaimoana and kai ika. Te Atiawa made detailed submissions about particular sites (as we discussed above). In response to those allegations, the Crown denied that it was responsible for any particular harm to the kaimoana beds specified. It also argued that it was not responsible for pollution and does not have a responsibility to restore the environment. It made no submissions, however, about the sustainable management of fisheries via quota or the extent to which the Ministry of Fisheries is meeting its Treaty obligations to Te Tau Ihu Maori. It did not address how total allowable catches are set, or whether the customary fisheries of Te Tau Ihu iwi are indeed in serious decline. It did not deny (or accept) allegations that its management of fisheries is responsible for a depletion of customary fisheries.

In respect of the current management regime, the Crown argued that it is meeting its Treaty responsibilities through the Resource Management Act and the Fisheries (South Island Customary Fishing) Regulations. On the latter, it submitted that section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 required the Minister of Fisheries to consult with tangata whenua, to develop policies and programmes for their use and management practices, and to provide for their non-commercial fishing interests. This

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757. Counsel for Ngati Kuia, closing submissions, pp 69–70

758. Counsel for Ngati Koata, closing submissions, p 127

consultation was carried out with Ngai Tahu and Te Tau Ihu iwi and resulted in the present regulations, which allow the tangata whenua to manage customary food gathering within their rohe, subject to the principles of sustainability as provided for in the Fisheries Act. The Minister appoints a tangata tiaki upon the nomination of the tangata whenua, who is then responsible for authorising customary food gathering. The tangata tiaki has discretion to decide whether any particular purpose for taking is customary: 'if taking and storing fish for future use (as appears to be sought by Te Atiawa) is customary it is permissible. The Kaitiaki would also need to specify how fish would be distributed from storage, and this is also within their discretion.'<sup>759</sup>

If there are objections to the nominations, the regulations provide for dispute resolution, which was (at the time of submissions) in progress in Te Tau Ihu. In the meantime, regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986 still governs customary food gathering in Te Tau Ihu. It allows tangata whenua to take fish for hui and tangi, under permits issued by approved kaumatua.<sup>760</sup>

The Crown argued that the Ministry of Fisheries can still respond to any specific concerns from iwi. Section 186B of the Fisheries Act 1996, for example, provides for the Minister to temporarily close, or restrict the use of, any fisheries waters in the South Island. Maori can ask for this if they wish to impose a rahui for replenishment or some other customary purpose. Also, the provisions for mataitai and taiapure provide legal management instruments for iwi to use in particular fishing grounds.<sup>761</sup>

In the Crown's view, therefore, it has consulted Te Tau Ihu Maori and provided a framework of regulations that recognise and provide for customary fishing rights.<sup>762</sup>

Finally, the Crown did not make any submission about seabirds, muttonbirding, or the denial of access to island sanctuaries. In terms of the aquaculture claims, counsel simply informed the Tribunal that the Government had embarked on a process of reforming aquaculture law and planning, that there was a moratorium for new permits in place, and that 'aquaculture Treaty issues remain under consideration by the Crown.'<sup>763</sup>

### (3) Findings

In section 11.5, we explored a wealth of evidence about the depletion of customary fisheries. This ranged from Rangitane's information about the Wairau River and lagoons to Ngati Koata's information about Rangitoto and French Pass to Te Atiawa's and Ngati Kua's information about the Marlborough Sounds. We received evidence from claimants who have been fishing and gathering kaimoana all their lives, some of whom are professional fishers.

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759. Crown counsel, further closing submissions, p 3

760. Ibid

761. Ibid, p 4

762. Ibid, pp 2-4

763. Ibid, pp 4-5

## 11.8.2(3)

This evidence agreed with other information that the deregulation of commercial fishing from 1963 to 1983, in conjunction with the continuing pollution, draining, and degradation of inland waterways, has seen a serious decline of freshwater and marine stocks since the 1960s. From the mid-1980s, the Crown created a system of fisheries management to reverse this decline and ensure sustainable fishing. In the meantime, waters have continued to be polluted – inland waters like the Wairau River in particular. The claimants told us that the new management regime has had some successes. Crayfish have recovered in the Sounds; some kaimoana stocks are recovering in Golden Bay. Overall, the claimants believe that their fisheries remain seriously depleted. In section 11.5.4, we concluded that the claimants' evidence must be accepted and that there is serious cause for alarm.

In terms of inland waterways, we note the series of petitions and communications from Te Tau Ihu Maori in the first half of the century. Had the Crown granted their petitions and given adequate legal protection to their fishing rights, the iwi would have had a basis for enforcing their rights and, perhaps, preventing their destruction by the draining and modification of waterways. They might also have been in a stronger position to have had their wishes respected in the second half of the century, when uses of the river were decided by local authorities. But the Crown gave their rights no protection, and their inland fisheries have been seriously degraded and depleted. The Crown argued that it has a duty to 'put in place mechanisms to ensure that environmental, cultural, and other demands are managed and appropriately balanced.'<sup>764</sup> It did not do so for the freshwater fisheries of Te Tau Ihu. The evidence is that these fisheries have not recovered since the creation of the modern management regime in 1991. We find the Crown in breach of the Treaty for its failure to protect freshwater customary fishing rights and fisheries.

In terms of prejudice, the effects of this Treaty breach are part of the overall prejudice that we identified in section 11.8.1. The essence is captured in the evidence of Graeme Norton for Rangitane:

When my sons were old enough to travel I was keen to take them around the mahinga and show them the sites that were shown to me by my father. I discovered that it was nearly impossible to take them to all of the sites as the rivers and wetlands had become polluted or dried out as a result of the intensive horticultural and urban development. While the trout were protected and thriving our eels had been fished out by commercial operators and their habitat changed. The same had happened to all our fresh water kai such as whitebait.<sup>765</sup>

The result for the tangata whenua of Te Tau Ihu was economic, social, and cultural prejudice, which has undermined their tribal base and put its future recovery in jeopardy.

In terms of coastal fisheries and kaimoana, the evidence is again clear that these are

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<sup>764</sup>. Crown counsel, closing submissions, p 158

<sup>765</sup>. Norton, brief of evidence, p 29

either seriously depleted or at risk of becoming so. Dr and Mrs Mitchell established that, by dint of concentrating on certain species and sites and not others, the people can still obtain enough to maintain their whanaungatanga and manaakitanga. But, the witnesses in our inquiry agreed, they are at risk. (Some iwi, such as Ngati Kuia, argued that they had all but lost access, regardless of the state of the fishery, but that is a separate issue and has been dealt with in section 11.8.1.)

As noted, we received no evidence or submissions from the Crown. We have no information on what steps the Ministry of Fisheries has taken to assess the health and sustainability of the fisheries concerned or what action, if any, it has taken to consult with tangata whenua about it. We find that the Crown is not yet in breach of the Treaty but may soon be. If the decline is not arrested and serious steps taken to restore the fisheries, then the Crown will become in breach of its Treaty obligations to Te Tau Ihu Maori. We urge the Crown to consult urgently with the iwi, to carry out a joint assessment of the fisheries with them, and to agree in partnership any necessary steps to redress this problem. As we have made no finding of Treaty breach, we do not explore the question of prejudice, except to note from our discussions in sections 11.3, 11.5.2, and 11.5.4 that this situation is contributing to the general prejudice described in section 11.8.1.

In terms of the South Island customary fishing regulations, we note that Ngati Tama supported them and Te Atiawa complained about aspects of them. We discussed the relevant evidence and issues in section 11.5.4. Most claimant witnesses supported the regulations as an appropriate way for them to manage customary fishing themselves. Also, there was general support for taiapure and mataitai as mechanisms for setting aside particular fishing areas for the management of all users by iwi. There was a difference of view as to which was preferable but a universal concern at the difficulty and length of time required to actually get them established. That concern must have grown in the years since our final hearing, given that the situation has not changed – only one taiapure and no mataitai have been established. We agree with the view of some witnesses that taiapure and mataitai meet the Crown's Treaty obligations in theory but that they appear to be prohibitively hard to establish. We do not find the Crown in breach of the Treaty, as taiapure and mataitai are accepted by the claimants as an appropriate way of giving effect to their Treaty rights. We do, however, warn the Crown that it may soon be in breach of the Treaty if the mechanisms are not made more obtainable. We urge the Crown to consult with Te Tau Ihu iwi for a way to overcome the current difficulties.

In terms of the regulations, we accept the Crown's submission that there are mechanisms to meet the specific issues identified by Te Atiawa. As we noted in section 11.5.4, the evidence is conclusive that Te Tau Ihu iwi stored kai in a variety of ways, in anticipation of future needs or to send to whanaunga or for exchange with other iwi. If tangata tiaki are able to authorise the storage of kai, and feel that that is appropriate, then we would endorse that decision. Similarly, there is power under the Fisheries Act for the Minister to close

## 11.8.2(3)

certain fishing grounds or places at the request of iwi. The relevant section is 186A, as section 186B only applies to that part of the South Island waters included in the Ngai Tahu statutory takiwa. The Minister, however, must consult with all users before agreeing to a rahui.<sup>766</sup> We have no evidence that the utility of this provision has been tested or that it will be any easier in practice than it is to establish taiapure or mataitai. We therefore make no findings on it.

Finally, we note an issue raised in evidence but not in submissions. We noted in section 11.5.4 that iwi will be breaking the law if they exchange fish or kaimoana obtained under customary permits for the valued resources of other iwi. We think that this must have been an oversight in the Crown's provision for customary rights. As we discussed in sections 11.3 and 11.5.2, this was an integral part of the customary economy and society. We do not find the Crown in breach of the Treaty, but we urge that this oversight be corrected.

Overall, we find that the Crown has acted consistently with the Treaty in its modern provision for Maori to manage their customary fisheries. There may be one exception. Counsel for Te Atiawa suggested that iwi have too little say in the wider management of fisheries by the Ministry, DOC, and the unitary authorities. Customary fisheries cannot be managed in a vacuum from the management of commercial and recreational fishers and the marine environment. We lack comprehensive evidence on this point so we make no findings, but we note it for discussion between the parties in their negotiations. The Treaty cannot be kept if iwi do not have an effective voice in the overall management of fisheries.

We discussed historical (pre-1992) marine farming issues in section 11.5.4. We found that the active assistance of Maori to enter aquaculture had been mooted in the 1960s but was not given effect. The Government of the day argued that Maori had an equal chance of participating with other citizens. We received claimant evidence that this was not so and that Maori faced barriers to participation from past Treaty breaches, especially a lack of capital. They did not obtain a fair share of water space and a fair stake in the marine farming industry before 1992. We make no comment on the question of ownership of the foreshore and seabed, which Ngati Kuia and others raised in respect of their entitlement to aquaculture space. That question was resolved by the Foreshore and Seabed Act 2004, which was passed after the close of our hearings. In the absence of submissions from parties, we make no comment on that Act.

Matiu Rata asked for all natural kaimoana beds (and access to them) to be protected in the Marine Farming Act 1971, but the Government chose not to provide this protection. We accepted claimant evidence that the siting of marine farms had damaged customary fishing grounds. We were not given specific examples and are not able to quantify or gauge the extent of the loss. The evidence of Ronald Sutherland, a resource management professional, was that the relevant authorities accepted that damage had occurred. In 1988, the

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766. Fisheries Act 1996, ss 186A–186B

Marlborough Harbour Board tried to require that all farms from then on be sited at least 50 metres offshore to preserve kaimoana beds. The requirement was not, in his evidence, enforced before 1992.

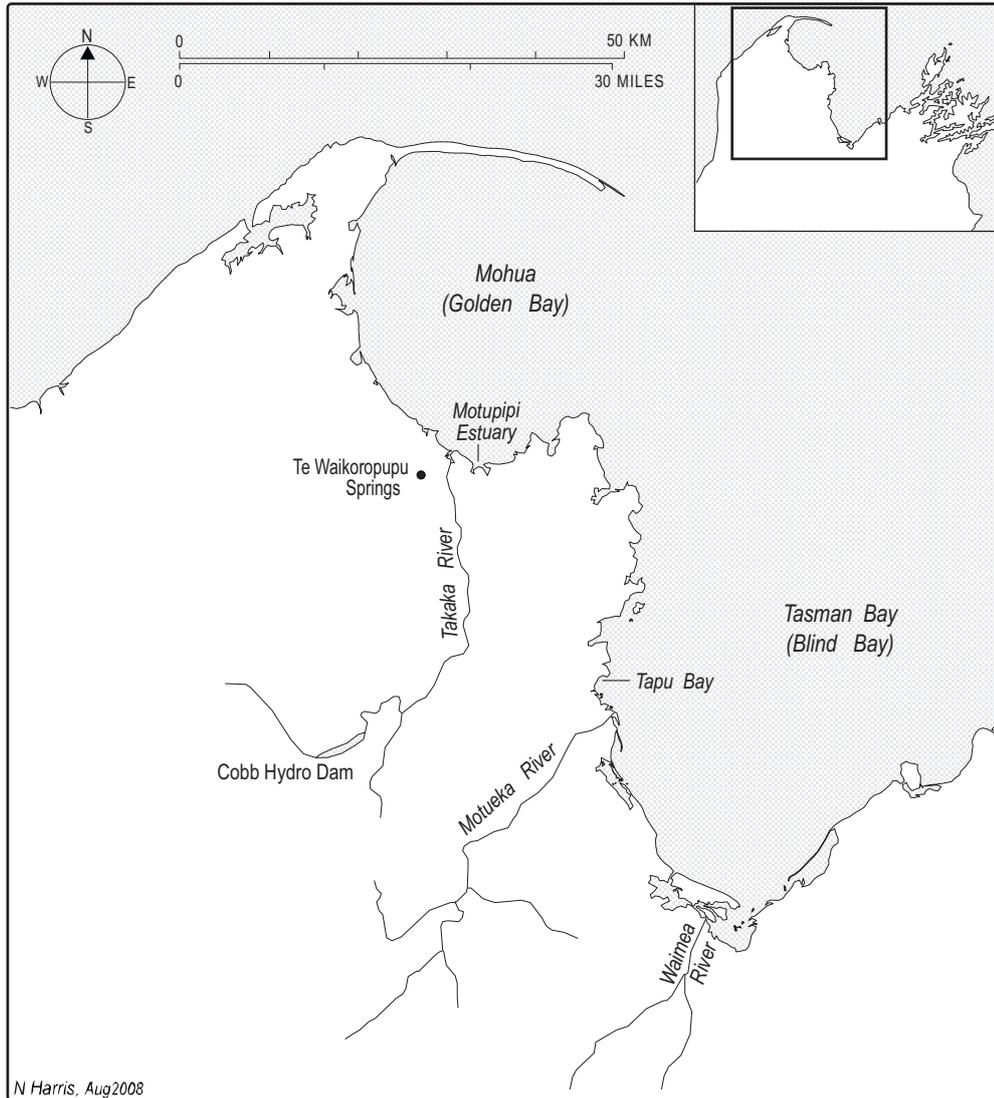
We find the Crown in breach of the Treaty for not assisting Maori to obtain a fair stake in the marine farming industry and for not managing the industry in such a way that it did not damage or further deplete their customary fisheries. Both were proposed and could have been accommodated in the regime established in 1971.

The Crown accepted the validity of the claimants' arguments with regard to commercial aquaculture when it enacted the Maori Commercial Aquaculture Settlement Act 2004. We see no reason why the pre-1992 claims should not also be settled in a fair and equitable manner. We note, too, the submissions of Te Atiawa and others that they want to use marine farming to help rebuild a tribal base. This is not limited merely to commercial profit. As we discussed in section 11.7, they also want to use marine farming to help stocks recover, and to provide kai for their people and for manaakitanga obligations. We note that we still have jurisdiction to comment on non-commercial aquaculture issues. We urge the Crown to ensure that, in carrying out the 2004 settlement, it also provides for these non-commercial interests. We also recommend that the Crown settle the pre-1992 aquaculture claims in a manner that provides for both commercial and non-commercial marine farming.

Finally, we address the claims about titi and the exercise of customary rights in island sanctuaries. The Crown did not respond to these issues but, after hearing the evidence of Ngati Kuia and Ngati Koata in particular, we think that they are important. In section 11.5.5, we discussed the relevant evidence and issues. The customary right to take titi and other species from the islands was highly valued by the iwi and played an important part in their customary economy and society. There were frequent negotiations, petitions, and meetings about this issue in the first half of the century. Indeed, it was one of the principal ways in which Te Tau Ihu Maori kept the importance of their customary resources and rights in front of the Crown. As we found in section 11.5.5, the Crown largely provided for the exercise of these rights until the passage of the Wildlife Act in 1953, which coincided with the beginning of a substantial decline in the bird populations. Before the establishment of DOC, however, our evidence is that the Government did not keep records, monitor populations, or investigate sustainability in any concerted way. We heard no evidence or submissions from the Crown on the current situation.

Ngati Koata argued that the Crown's management of fisheries, and of the marine environment in general, is responsible for the decline of the titi to the point where it cannot be sustainably harvested. We have no technical evidence on this matter, but we note that titi numbers were declining from the early 1950s, before the generally agreed impact of commercial fishing after 1963. In any case, we agree with the Rekohu Tribunal that the Crown's kawanatanga responsibility is to conserve the resource. Sustainable use must truly be sustainable. We do not find that a Treaty breach has taken place in respect of protecting the titi.

11.8.2(3)



**Figure 44: Sites of significance for resource management claims**

Source: Moira Jackson and Associates Ltd, 'Te Atiawa: Western Te Tau Ihu Map Book', map book commissioned by the Crown Forestry Rental Trust, 2002 (doc G23)

We do, however, find that the Crown failed to act consistently with its Treaty obligations when it banned Ngati Kuia from landing on the islands covered by the 1933 agreement. It thus deprived Ngati Kuia of the ability to take karaka berries, to fish, and to take koura when its goal was to protect the titi. Taking this step without consultation, simply setting aside the agreement without negotiation or consent, was inconsistent with the Treaty principles of partnership and active protection.

We recommend that the Crown consult with tangata whenua and establish a process for monitoring titi populations and agreeing levels of sustainability. We note the great

importance of this resource in cultural terms. If tangata whenua are not fully involved in its management soon, then the skills and knowledge for safe harvesting (including how to check burrows without causing damage) will be lost. That will be of significant prejudice to the iwi concerned. We recommend also that the Crown consider our findings in chapter 2, so as to consult with all appropriate iwi in respect of the islands that it now owns. We also recommend that the Crown arrange the joint management of island sanctuaries with iwi. We will return to that point in chapter 12, where we consider claims about Takapourewa.

### 11.8.3 The modern resource management regime

The modern resource management regime was the subject of much evidence in our inquiry. We outlined that evidence, and the issues that arise from it, in section 11.6. We received submissions from several claimant counsel. The Crown, as we noted in section 11.1, made important concessions. Some matters remained in contention. Everyone agreed that the Resource Management Act 1991 is an improvement on the pre-1991 regime.

#### (1) *Claimant submissions*

The most detailed submissions were made by counsel for Te Atiawa. Those submissions captured and expanded on the points made by others, though the examples cited were, of course, specific to Te Atiawa and their whanaunga. We therefore rely on the Te Atiawa submission to summarise the claimants' arguments. Counsel made separate submissions about the western and eastern parts of Te Atiawa's rohe, although the differences were ones of emphasis rather than substance. For the western rohe, counsel relied on the evidence of Ursula Passl and Trina Mitchell to demonstrate that local authorities have not protected a range of resources and sites of significance to iwi (see fig 44). Important wetlands have been drained, mahinga kai destroyed, significant sites polluted, and water bodies contaminated.<sup>767</sup>

The Resource Management Act, in Te Atiawa's submission, has not fixed the problems between iwi and decision-makers. It obliges territorial authorities to get an understanding of iwi relationships with the environment and resources, but the current authority (the Tasman District Council) does not always investigate this, nor find out whether iwi have interests or concerns. As a result, resources and sites continue to be managed in a way that is often unacceptable to Te Atiawa. There is a lack of investigation, a lack of regular contact, and a resultant low level of knowledge and awareness. Decisions are still made without reference to iwi, and culturally significant taonga continue to be desecrated or destroyed.<sup>768</sup>

These problems are not limited to the western side of Te Tau Ihu. For their eastern rohe, Te Atiawa relied on the evidence of Rita Powick. Counsel submitted that the Act's protection of Maori interests is:

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767. Counsel for Te Atiawa, closing submissions, p 216

768. *Ibid*, pp 216–217

largely dependent on the quality and degree of consultation undertaken, and on the extent to which territorial authorities consider Maori contributions, concepts and values. Te Ati Awa's experiences in the rohe illustrate the gap between current legislative and policy formulations advocating partnership, and their practical implementation.<sup>769</sup>

The solution, argued counsel, is for iwi to have more input into decision-making. While accepting Mrs Powick's evidence that there are an 'increasing number of good examples of consultation' by the Marlborough District Council, the claimants maintained that it is still too ad hoc, with insufficient relationship-building, and too reactive instead of proactive. There needs to be more focus on the longer term development of 'ways to work together, including Te Ati Awa participation at the governance level of Council business'.<sup>770</sup> Consultation requires that sufficient information be provided for informed responses, and the council has to actually listen to those responses before making a decision. Improvement is needed for more effective input to decision-making. Fundamentally, iwi need to be represented among the decision-makers.<sup>771</sup>

Te Atiawa presented a number of case studies, including the Rototai dump resource consent, the fast ferries issue, Waikoropupu Springs, and the Waikawa Marina and Shakespeare Bay developments. They argued that their 'catalogue of experiences' shows that the delegation of Treaty obligations and resource management duties to local government has been unsuccessful in Treaty terms.<sup>772</sup> They sought findings that it was a breach of the Treaty for the Crown to place authority and management over resources in the hands of bodies 'incapable or unwilling to give effect to the principles of the Treaty'.<sup>773</sup>

The other principal issue raised by Te Atiawa was the degree of resourcing for iwi to participate effectively in resource management processes. Relying on the evidence of their professional witnesses, they argued that iwi are under-resourced and struggle to meet their responsibilities, which need to be met in an informed way, to ensure that decisions are made on full information. That is both expensive and time-consuming. Simply, iwi are unable to participate as effectively as they need to because the Crown (and councils) do not assist them. Te Atiawa sought findings that the Crown is in breach of the Treaty for failing to resource iwi participation.<sup>774</sup>

Counsel for Ngati Koata made the additional point that the Crown is not monitoring the situation with iwi. She submitted, 'what is really required is that the Crown should play a role in terms of monitoring and assisting local authorities that have delegated authority from the Crown, to fulfil the legislation that they operate under and enforce'.<sup>775</sup>

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769. Counsel for Te Atiawa, closing submissions, p 237

770. Ibid, p 238

771. Ibid, pp 237–238

772. Ibid, p 255

773. Ibid, pp 239–240

774. Ibid, pp 235–236

775. Counsel for Ngati Koata, closing submissions, p 129

**(2) Crown submissions**

In the Crown's view, the problems described in the claimants' evidence are matters of implementation. Counsel summarised them as follows:

- ▶ The ability of iwi to participate in processes due to resource constraints, in terms of both available expertise and funding.
- ▶ The number of central and local authorities that iwi have to work with, and the failure of those authorities to work in an integrated way.
- ▶ The attitude of local authorities:
  - Te Tau Ihu iwi are consulted but their views are mostly disregarded.
  - They are treated as just another interest group and their views are never given priority.
  - Scientific and economic viewpoints are prioritised over those of Maori.
  - Local authorities rely too much on prior consultation by applicants and neglect their own statutory obligations.
  - Different local bodies deal with things differently, which makes it harder to participate.
- ▶ The Crown has given local government the main role in managing the environment, to the exclusion of Maori.
- ▶ There are failures of process, especially in consultation.
- ▶ The Crown does not provide enough guidance to local authorities on how they should fulfil their Treaty obligations under the Resource Management Act 1991.
- ▶ There are problems with the actual implementation of regional plans.<sup>776</sup>

The Crown also noted two problems (as alleged by the claimants) with the Act itself: it does not address the ownership of resources, enabling local authorities, as managers of resources, to dodge the issue and it does not go far enough to protect or provide for *kaitiakitanga* or the ability of Te Tau Ihu Maori to preserve their *rangatiratanga*.<sup>777</sup>

In response, the Crown argued that the Resource Management Act 1991 was the result of a major reform of the previous regime. Its core principles are that:

- ▶ Natural and physical resources should be sustainably managed.
- ▶ Local communities should control their local environments in two ways – local bodies should make the decisions, and the local public should participate in that decision-making.
- ▶ Maori rights in relation to natural and physical resources must be recognised and provided for. A major difference from the previous regime is that 'much greater statutory rights are afforded to Maori' in decision-making. Most importantly, those exercising functions or powers under the Act have to take into account the principles of the Treaty (s8), recognise and provide for the relationship of Maori with their ancestral

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<sup>776</sup>. Crown counsel, closing submissions, pp 154–155

<sup>777</sup>. *Ibid*, p 155

## 11.8.3(2)

lands, waters, wahi tapu, and other taonga as a matter of national importance (s 6(e)), and have particular regard to kaitiakitanga (s 7(a)). Numerous other sections recognise and provide for 'Maori interests in the management of natural resources'.<sup>778</sup> In combination, these provisions:

can be seen as a partial statutory incorporation of Maori customary law into resource management decision-making. They also reflect the importance that central Government has put upon effective participation by Maori in resource management decision-making.<sup>779</sup>

The Crown submitted that it has developed a statutory framework for resource management but that it is up to district and regional councils to give effect to it. The responsible agency is the Ministry for the Environment. The Ministry's view is that the Act 'generally provides for a regime that *can* meet the aspirations of Maori' (emphasis added). Since 1991, the Act has been amended several times to 'better recognise and provide for Maori rights and aspirations'.<sup>780</sup>

The Crown then made the following concession and arguments:

It is submitted that most of the problems identified by the Te Tau Ihu claimants stem not from the Act itself, but from the way in which it is implemented. Another problem identified by the Te Tau Ihu claimants relates to the capacity of iwi and hapu to participate in resource management processes in their area. In recognition of these problems the Ministry, since the inception of the Act, has devoted significant resources to improving the practice of local authorities, and increasing the capacity of iwi and hapu to participate in processes under the Act.<sup>781</sup>

We were given no evidence or examples of the Ministry of Environment having devoted 'significant resources' to the rectification of these problems.

Later in its submission, the Crown addressed the specific arguments of Te Atiawa. The Crown summarised these as follows:

- ▶ that notwithstanding its Treaty reference, the Resource Management Act 1991 has not improved the poor relationship between decision-makers and Te Atiawa;
- ▶ that local authorities are not giving proper effect to their responsibilities under the Act, such as their duty of consultation; and
- ▶ that Maori are inadequately funded to participate in resource management processes in a 'well-resourced and informed way'.<sup>782</sup>

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778. Crown counsel, closing submissions, pp 155–156

779. Ibid, p 156

780. Ibid

781. Ibid, p 157

782. Ibid, pp 158–159

Again, the Crown conceded these points (though with slightly different wording). Counsel submitted:

In recognition of issues such as this the Ministry for the Environment, since the inception of the Act, has devoted significant resources to improving the practice of local authorities, and increasing the capacity of iwi and hapu to participate in processes under the Act.<sup>783</sup>

Again, the Crown gave no specifics or examples of how the Ministry for the Environment has improved the practice of local authorities in Te Tau Ihu or how it has increased the capacity of iwi and hapu to participate. Counsel did refer to the environmental legal assistance fund, by which the Ministry assists community and environmental groups to participate in resource management cases in the Environment or High Court. He did not, however, give us an example of assistance provided specifically to Te Tau Ihu iwi.<sup>784</sup>

In her submissions in reply, counsel for Te Atiawa argued that the claim is not only about implementation and resourcing; there is a fundamental problem with the Act itself. The Treaty clauses do not require decision-makers to give effect to the principles of the Treaty. Until those clauses are amended, any regime operated under the Act will not be required to act consistently with the Treaty.<sup>785</sup> In addition, counsel for Ngati Koata argued that the Crown's admission of problems at the local government level does not allow it to avoid responsibility. The Crown has to 'ensure that the principles of the Treaty are being upheld at all levels of government'. This includes an obligation to ensure that local bodies are aware of their Treaty duties and are carrying out their statutory functions in accordance with those duties. The Crown, having admitted the problems, must step in and remedy them.<sup>786</sup>

### (3) Findings

We discussed evidence and issues with regard to the Resource Management Act 1991 in section 11.6. We did not hear evidence or submissions from the unitary authorities. Nor did the Crown present evidence from the Ministry for the Environment, although it maintained in its closing submissions that the Ministry's (unspecified) actions were fixing the admitted problems. In our view, the Crown's statement that the intention of the Act was to serve as 'a partial statutory incorporation of Maori customary law into resource management decision-making' is most significant. To take such an important step requires appropriate resourcing and processes to ensure that that customary law is properly considered and dealt with. Otherwise, a serious risk exists that the law will be diminished, through poor Maori participation and uninformed decision-making. Having introduced the customary law, there is a grave responsibility to ensure that it is preserved and strengthened in the process.

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783. Ibid, p159

784. Ibid

785. Counsel for Te Atiawa, submissions in response, 28 April 2004 (doc U17), pp 21–22

786. Counsel for Ngati Koata, submissions in response, 30 April 2004 (doc U18), p 8

## 11.8.3(3)

Seen in that light, the evidence of Ursula Passl, Trina Mitchell, Rita Powick, and Dean Walker, all of whom worked for iwi, demonstrated some fundamental problems in the Crown's approach:

- ▶ The implementation of the Act by the unitary authorities (and relevant central government agencies) is not meeting its objectives. Proper or sufficient regard is not being paid to the principles of the Treaty, kaitiakitanga, and the relationship of the Maori people of Te Tau Ihu with their ancestral lands, waters, and resources. Consultation is not always carried out sufficiently or to a high enough standard. The values of Te Tau Ihu Maori are not being properly or fully regarded in decision-making. The intention that the Act should serve as 'a partial statutory incorporation of Maori customary law into resource management decision-making,' providing for 'effective participation by Maori in resource management decision-making,'<sup>787</sup> is not being met.
- ▶ Iwi do not have the resources to participate effectively in resource management processes, even to the extent allowed them under the Act. At the time of our closing hearings, Te Tau Ihu iwi had not been able to obtain such resources from the councils (to any significant extent), from applicants, or from the Crown. This was having a serious effect on their ability either to participate at all on matters of importance to them or to have appropriate influence on the outcome when they did participate.

If the Crown chooses to delegate its powers, it must do so in terms that ensure that its Treaty duties are fulfilled.<sup>788</sup> Its stated intention that Maori customary law should be part of resource management decisions and that Maori should participate effectively in the making of those decisions is consistent with the Treaty and must be given effect. Although we did not hear from the unitary authorities, we consider that the Crown has accepted that its intentions are not being carried out.

The Crown's argument was that the Ministry for the Environment is aware of these problems and has 'devoted significant resources to improving the practice of local authorities, and increasing the capacity of iwi and hapu to participate in processes under the Act.'<sup>789</sup> As we noted above, the Crown did not specify any policies or actions of the Ministry in that respect, other than to mention the existence of its environmental legal assistance fund. The Ministry uses that fund to assist community and environmental groups to participate in resource management cases in the Environment or High Court. We understand that this is a general fund available across the whole country to which anyone can apply. The Crown did not provide any examples of the fund being used to assist Te Tau Ihu iwi or any information on the criteria for assistance.

Of the many witnesses who gave evidence to us, none mentioned any initiatives or actions of the Ministry in Te Tau Ihu. Richard Bradley, as we discussed in section 11.6, specifically

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787. Crown counsel, closing submissions, p 156

788. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 332

789. Crown counsel, closing submissions, pp 157, 159

advised that Rangitane had to let many decisions go without litigation because the iwi could not afford to take appeals to the Environment Court. Lewis Wilson told us that Ngati Kuia could not often afford to appear at consent hearings but that they 'hope the Council would take our submissions into consideration when deciding these consents'.<sup>790</sup> In other instances, iwi told us that they piggybacked on others' professional evidence in court cases. Further, Ursula Passl and other witnesses specified that, as at the time of giving evidence (2002–03), iwi had received no assistance from the Crown to participate in resource management processes. We have no information on whether they have received assistance since then. It is clear that, if the Ministry was providing significant resources to improve matters in Te Tau Ihu, there had been no apparent effect from that by 2004.

The claimants' evidence was not entirely negative. Witnesses pointed to good examples of consultation, to successes in defeating some resource consent applications, and to improvements in relationships with councils. On the whole, however, the sum of their experiences supports the points accepted by the Crown about resourcing and failures in implementing the Act.

We find the Crown in breach of the Treaty principles of partnership and active protection. It has failed to ensure that the Resource Management Act 1991 is implemented in accordance with its stated intention to protect Maori interests and to provide for their values, custom law, and authority in resource management decisions. It has failed to ensure that Te Tau Ihu iwi have adequate capacity to participate in a fair and effective manner. These are significant breaches. As a result, iwi are faced with insufficient regard to, or even understanding of, their values and interests, and an inability to participate on a level playing field with consent applicants and authorities. Although the Crown says that it has devoted 'significant resources' to improving this situation, we were provided with almost no evidence of it, despite the importance of this legislation and the compelling claimant evidence about the problems with it. Clearly, the claimants have been prejudiced by these breaches of Treaty principle.

It is a difficult matter to determine exactly how and in what manner claimants should be resourced to participate, but we accept the Crown's acknowledgement that it should devote significant resources to that end. In the absence of submissions on the point, we make no recommendations. From the evidence available to us, it appears that each iwi organisation needs a fulltime resource management professional with access to legal and other expertise as necessary. A distinct central government fund may well be appropriate to assist with that need. We recognise that this is a wider matter than can be arranged in negotiations between Te Tau Ihu iwi and the Crown, but it is clear that action must be taken if prejudice is to be avoided for Te Tau Ihu iwi in the future.

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790. L Wilson, brief of evidence, p 5

## 11.8.3(3)

The claimants made further points in evidence and submissions. These included their concern that their Treaty relationship is with the Crown, which has delegated responsibilities to local bodies without adequately monitoring the outcome. In their view, the Crown needs to monitor the situation with its Treaty partners, Te Tau Ihu iwi, to ensure that their needs and interests are being met in a fair and Treaty-consistent manner. In section 11.6, we found that the Crown does not monitor with iwi the effectiveness of their participation in the resource management regime. The Crown did not provide any evidence of, or submissions on, its monitoring of local authorities, other than to say that the Ministry of the Environment is aware of the problems raised by the claimants. We hesitate to recommend further bureaucratic processes that require iwi participation. On the other hand, we agree with the claimants that the Crown should be monitoring the situation directly with its Treaty partners.

The Crown argued that it is attempting to improve the practice of local authorities and that it has amended the legislation to 'better recognise and provide for Maori rights and aspirations'.<sup>791</sup> Counsel did not comment directly, however, on the issue of Maori participation as decision-makers. He argued that a fundamental goal of the Resource Management Act was to incorporate Maori customary law into resource management decision-making and to ensure effective participation by Maori in that decision-making. As we saw, this goal has not been met in Te Tau Ihu. Maori are confined to being submitters rather than decision-makers, and, as a result, their core values are not well understood by those who are making the decisions. We heard ample evidence of that. There is capacity to appoint Maori commissioners for consent hearings, but in the evidence of the claimants, this capacity has not been used. Neither the claimants nor the Crown mentioned whether the Local Government Act 2002 had improved the situation. We note that the provision for Maori wards is unlikely to be taken up in Te Tau Ihu.<sup>792</sup> This is not to say that there is no representation of iwi at all – there are Maori advisory komiti and iwi representation on, for example, Marlborough District Council standing committees. But, from the evidence available to us, this has not provided for Maori partnership in decision-making on natural resources of value to them.

This situation is all the more astonishing given that it is well known that, in 2002, the Privy Council commented on just this problem in a case concerning a proposed designation for a roadway through Maori freehold land:

Counsel for the appellants made the point that at present there are no Maori Land Court Judges on the Environment Court and only one Maori Commissioner out of five. In a case such as the present that disadvantage may be capable of remedy by the appointment of a

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791. Crown counsel, closing submissions, p 156

792. Representation Review Subcommittee, Tasman District Council, minutes, 16 August 2005, <http://www.tasman.govt.nz>

qualified Maori as an alternate Environment Judge or a Deputy Environment Commissioner. Indeed more than one such appointment could be made. Alternate Environment Judges hold office as long as they are District Court or Maori Land Court Judges; Deputy Environment Commissioners may be appointed for any period not exceeding five years. It might be useful to have available for cases raising Maori issues a reserve pool of alternate Judges and Deputy Commissioners. At all events their Lordships express the hope that a substantial Maori membership will prove practicable if the case does reach the Environment Court.<sup>793</sup>

As far as we are aware, the Crown has taken no steps to progress this matter, which may assist in improving decision-making in cases involving Maori issues. We recommend that it do so.

We also note that the Crown made no mention of whether a national policy statement on Treaty issues has been considered or whether transfers of powers under section 33 had ever been considered or had occurred in this region.

For failing to provide fair and effective means for Maori decision-making in resource management, we find the Crown in breach of the Treaty principles of partnership and autonomy. If it has not already acted to remedy that matter, we recommend that it take immediate steps to do so.

Finally, we address the question raised by counsel for Te Atiawa; namely, that the Resource Management Act 1991 itself is the problem because it does not require decision-makers to give effect to the principles of the Treaty. In that respect, we note that the Waitangi Tribunal has said in many reports that the Act is inconsistent with the Treaty for that reason. In our view, because of the problems admitted by the Crown, the Act has not had a fair test in Te Tau Ihu. Even so, it seems that the Crown could require better performance from decision-makers if the latter were legally obliged to give effect to the Treaty, rather than – as at present – balancing Treaty principles and kaitiakitanga against the considerations that they do have to give effect to. Counsel made no detailed arguments about the Act itself in any of their submissions, so we simply note that we see no reason to depart from that position, adopted most recently by the Tribunal in its report on central North Island claims.<sup>794</sup>

#### 11.8.4 The duty of restoration

Counsel for Te Atiawa put to us that the Crown has a duty to restore damaged or polluted sites of great value to the tangata whenua. She submitted that the Crown is in breach of the Treaty if it fails to restore polluted sites such as the Motupipi Estuary and fails to provide a remedy for the destruction of fishing grounds by development (such as in the case of

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793. *McGuire v Hastings District Council* [2002] 2 NZLR 577

794. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1406–1411, 1456–1458

Waikawa Marina).<sup>795</sup> Te Atiawa further sought a recommendation that the Crown take ‘such steps as are necessary and appropriate to remove (and maintain the removal of) pollution from the air and waters of Te Atiawa.’<sup>796</sup> The Crown denied that it is required to maintain a pollution-free environment, which it claimed is neither reasonable nor possible. Nor did Crown counsel accept that there are proven Treaty breaches for any of the sites specified by Te Atiawa. He did not respond to the suggestion that a Treaty breach arises if the Crown fails to restore those sites.<sup>797</sup>

In section 11.7, we noted that customary resources, the exercise of customary rights, and the exercise of those rights in particular places are all important to restoring a tribal base. In section 11.8.1, we described the Crown’s acknowledgement that it should have ensured the retention by Maori of sufficient land and resources for their customary economy and tribal way of life. Its failure to do so was in breach of the Treaty. Its subsequent purchase of reserves and its failure to provide appropriate redress at the end of the nineteenth century were also in breach of the Treaty. Its failure to fulfil the Treaty principle of options, in which Maori should relinquish their customary resources and way of life only by their own free and unconstrained choice, was admitted by the Crown. Also in that section, we found that the Crown’s Treaty responsibility to protect the interests of Maori in their customary resources, and to ensure a sufficiency of those resources for their economic, social, and cultural needs, continued in the twentieth century. We explained that governments were aware of Te Tau Ihu Maori needs in this respect but neglected to take any action to protect their interests. These considerations are all relevant to the question of whether a Crown duty of restoration now applies.

We accept the Crown’s submission that it is neither reasonable nor possible to expect it to maintain an entirely pollution-free environment. Nonetheless, the Crown has vested a high degree of responsibility in both central and local government for minimising or preventing harmful effects to the environment, including those of pollution. We do not accept Te Atiawa’s general contention that the Crown must ‘remove (and maintain the removal of) pollution from the air and waters of Te Atiawa.’<sup>798</sup> What is more at issue today is the question of whether the restoration of damaged or polluted sites is possible and, if it is, who should pay for it.

In our view, two Treaty principles apply. First, the Crown is required to give active protection to taonga. This has long been established by the Tribunal and the courts. The Privy Council stated in the Maori language case:

It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in

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795. Counsel for Te Atiawa, closing submissions, pp 231–232, 243, 245, 249–250

796. *Ibid*, p 262

797. Crown counsel, closing submissions, pp 157–163

798. Counsel for Te Atiawa, closing submissions, p 262

the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection.<sup>799</sup>

The second relevant principle is that of redress. The Crown is required to redress past Treaty breaches. In its *Report on the Crown's Foreshore and Seabed Policy*, the Tribunal found:

Where the Crown has acted in breach of the principles of the Treaty, and Maori have suffered prejudice as a result, we consider that the Crown has a clear duty to set matters right. This is the principle of redress, where the Crown is required to act so as to 'restore the honour and integrity of the Crown and the mana and status of Maori'. Generally, the principle of redress has been considered in connection with historical claims. It is not an 'eye for an eye' approach, but one in which the Crown needs to restore a tribal base and tribal mana, and provide sufficient remedy to resolve the grievance. It will involve compromise on both sides, and, as the Tarawera Forest Tribunal noted, it should not create fresh injustices for others.<sup>800</sup>

The central North Island Tribunal considered the application of this principle to situations of environmental degradation:

Sometimes there will be a need for a programme of restoration work. This may require the joint efforts of a number of agencies working with Maori if that is what the parties agree to. If that is an option, new regimes may need to be developed for the joint management of significant tribal or hapu taonga. There are a number of different ways the Crown and Maori could address restoration of taonga where the evidence warrants a joint approach. But that will depend on the facts of each case and is a matter best left for negotiation.<sup>801</sup>

In section 11.8.1, we concluded that the Crown was in breach of the Treaty for failing to protect the interests of Te Tau Ihu iwi in their customary resources. We also found that the Crown was not required to protect every single site from development or damage. The Treaty envisaged that New Zealand would be shared by two peoples and that both would

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799. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) (Waitangi Tribunal, *Ika Whenua Rivers Report*, p 119)

800. Waitangi Tribunal, *Foreshore and Seabed*, pp 134–135

801. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1248

prosper. Some alienation of natural resources was expected – and, as we explained in section 11.4, Te Tau Ihu iwi were willing to share land and resources with settlers for mutual benefit. The Crown, however, failed to ensure that Maori retained sufficient resources for their tribal economy and society. Nor did Te Tau Ihu Maori willingly and knowingly consent to the alienation of all natural resources. They have never alienated their customary rights of fishing, hunting, gathering, and caring for resources (*kaitiakitanga*), and they continue to exercise these rights to the fullest extent possible in the present circumstances. We note, as other Tribunals have done, that *kaitiakitanga* is a responsibility that never ends, no matter who has legal ownership or control of a resource.

Although we have not made site-specific findings of Treaty breach, it is clear that the Crown has breached the Treaty in respect of the customary resources of Te Tau Ihu iwi, and it is now required to redress those breaches. It is also, as stated above, required actively to protect *taonga*. There can be no doubt that many *taonga* in Te Tau Ihu are in a degraded or polluted state. In 1991, the Ngai Tahu Tribunal commented in respect of pollution: ‘There should be little need for this Tribunal to awaken any New Zealand conscience on this issue.’<sup>802</sup> Seventeen years on, that comment seems premature.

In our view, the Crown and claimants must negotiate for the restoration of a tribal base. Such negotiations must provide for iwi to exercise their rights of *kaitiakitanga*, access, and use of customary resources. Without the active protection of those rights, the tribes cannot recover and transmit their core knowledge and values to succeeding generations. We agree with the Rekohu Tribunal that such use must be truly sustainable and not endanger the viable conservation of species.<sup>803</sup> But we noted the adaptability of Te Tau Ihu Maori in section 11.5.1. Landing on the island sanctuaries, for example, and demonstrating how to navigate the burrows (without causing damage) and how to check for chicks should enable the transmission of knowledge and experience without actually harvesting. Creative ways need to be found for the survival and transmission of culture so as to restore a healthy, long-term tribal base.

Negotiations must also provide for the restoration of *taonga*. Although we cannot be prescriptive on that matter, we note, for example, the many Rangitane witnesses who described their great distress and anger over the state of the Wairau River and lagoons. These *taonga* have been degraded, their fisheries depleted, their *mauri* damaged, and their role in tribal identity compromised. The restoration of such *taonga* ought, in our view, to have a high priority in negotiations. While the Crown cannot restore every site, it must be possible for the parties to negotiate the restoration of the most highly valued sites. To be blunt, the Crown’s Treaty duty to reserve sufficient customary resources for Te Tau Ihu iwi has not and will never change, though the circumstances may alter in which it can be given effect. It remains to be fulfilled.

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802. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, p 897

803. Waitangi Tribunal, *Rekohu*, pp 270–273

## CHAPTER 12

### WHANAU AND SPECIFIC CLAIMS

#### 12.1 INTRODUCTION

This chapter examines the whanau and specific claims that have not been addressed in earlier chapters. The issues covered are wide ranging but for the most part concern events after the period of very heavy land loss in the 1850s. Many of the claims concern the ownership and administration of lands, while others might be seen as raising issues of cultural marginalisation. As we have seen in previous chapters, such issues were thrown into sharp relief as Te Tau Ihu Maori soon became a small minority of the total population of Nelson and Marlborough and increasingly became confined to their reserves. Many of the grievances raised in this chapter can therefore be viewed as further symptoms of the processes outlined in earlier chapters. Our focus here is, however, on claims not previously addressed, some of which also raise unique issues.

The first claim we deal with concerns the land interests acquired by Joseph Toms, a whaler who arrived in Te Tau Ihu around 1829–30. These interests were the subject of an old land claim involving land around Totaranui (Queen Charlotte Sound) and Titahi Bay. Subsequent issues spanning several decades around succession to this land, and the status of customary Maori marriages, are the subject of the Te Kotua whanau (Ngati Toa) claim.<sup>1</sup>

In chapter 9, we discussed the issues surrounding the 1853 Crown grant of lands at Whakarewa to the Anglican bishop of New Zealand for the purpose of an industrial school. The return of these Whakarewa lands to the Ngati Rarua Atiawa Iwi Trust (NRAIT) in 1993 was the subject of further submissions by Te Atiawa and Ngati Rarua and is also part of the claim by the Georgeson whanau (Te Atiawa).<sup>2</sup> This is the second set of claims we deal with in this chapter.

The third set of claims concern Te Atiawa grievances relating to the Crown's compulsory acquisition of land for public works in Waikawa, northeast of Waitohi (Picton). These claims raise issues with respect to the taking of the land and the Crown processes available

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1. Grace Saxton, amendment to claim Wai 648, 23 July 2002 (claim 1.15(a))

2. Reverend Harvey Ruru, claim Wai 104 concerning Whakarewa School, 2 August 1988 (claim 1.4); Patrick David Takarangi Park, claim Wai 923 concerning Motueka reserves, 29 September 1999 (claim 1.24); Gloria Georgeson, amendment to claim Wai 1002, 7 January 2003 (claim 1.31(a)); see also Jane Du Feu and others, second amendment to claim Wai 607, 8 November 2001 (claim 1.14(b)), pp 26–28; Barry Mason and others, first amendment to claim Wai 594, 14 July 2000 (claim 1.13(a)), pp 19–20

for the land's return.<sup>3</sup> We have used the following examples as case studies: the rifle range lands (Waikawa West A and Waikawa West D1–D5), the waterworks land (Waikawa 2C2) and the Port Underwood Road (Waikawa 1).

Both the 1957 taking of Waikawa 2C2 for waterworks and the late nineteenth-century taking of land for the Port Underwood Road also raise issues in relation to the Crown's vesting of land acquired under the public works legislation in local bodies with no enforceable Treaty obligations. Issues surrounding the Crown's 1912 taking of the rifle range land include subsequent uses of the land. Part of Waikawa 2C2 was vested in Rangitane of Whites Bay; another part of that land was used as an education reserve and a further part was returned to the Waikawa Marae Trustees for a marae and community centre. While the vesting of the Waikawa Marae land in the Waikawa Marae Trustees is the primary focus in the claims made regarding this public works taking, other matters of concern relating to the marae formation are included in this section.<sup>4</sup>

The fourth claim addressed in this chapter concerns the claims made by the Stafford whanau (Ngati Rarua). Their claim relates to the effects of Crown administration in the twentieth century in matters of succession, specifically with respect to sections at Wainui Bay.<sup>5</sup>

Another side of the Stafford whanau, making a specific claim under the Ngati Tama iwi umbrella, questions the actions of the local body in realigning a road through a part of section 14 that had been set aside as an urupa.<sup>6</sup> This is the fifth claim addressed in this chapter.

We next address issues concerning the management of Takapourewa (or Stephens Island). These claims were made by Ngati Koata and Ngati Kuia in respect of contemporary issues. Our discussion of the Ngati Koata claim focuses on a 1994 deed of settlement between the Crown and the iwi. The claim from Ngati Kuia involves their exclusion from the deed and from the management of the island.<sup>7</sup>

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3. Matthew Love and others, amendment to claim Wai 851, 14 February 2003 (claim 1.20(a)); Rita Powick, claim Wai 920 concerning Waikawa block, [2000] (claim 1.21); Ngaire Noble, claim Wai 921 concerning Waikawa 1 block, [2000] (claim 1.22); Victor Keenan, claim Wai 924 concerning Kinana Waikawa Village, [2000] (claim 1.25); Mary Barcello, claim Wai 925 concerning Anatohia Bay, [2000] (claim 1.26); Laura Bowdler, claim Wai 927 concerning Waikawa Village block, [2000] (claim 1.28)

4. See Jane Du Feu and others, claim Wai 607 concerning alienation of Te Atiawa lands and resources, not dated (claim 1.14); counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 251–255; George Matene, brief of evidence on behalf of Te Atiawa, January 2003 (doc 15)

5. Wiremu Tapata Stafford, claim Wai 1043 concerning loss of ancestral land, 12 February 2003 (claim 1.32)

6. See Janice Manson and others, amendment to claim Wai 723, 13 March 2003 (claim 1.16(a)); counsel for Ngati Tama, closing submissions, [2004] (doc T11); Vern Stafford, brief of evidence on behalf of Ngati Tama, 12 February 2003 (doc K21); Russell Thomas, brief of evidence on behalf of Ngati Koata, not dated (doc K22)

7. See counsel for Ngati Koata, closing submissions, 9 February 2004 (doc T7); James Elkington, brief of evidence on behalf of Ngati Koata, not dated (doc B34); Benjamin Turi Hippolite, brief of evidence on behalf of Ngati Koata, 1 February 2001 (doc B36); Heather Bassett and Richard Kay, 'Nga Ture Kaupapa o Ngati Koata ki te Tonga, c1820–1950', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A76); Crown counsel, memorandum concerning Ngati Koata's amended statement of claim, 22 December 2000 (paper 2.189), p 12; *Deed between Her Majesty the Queen and Ngati Koata no Rangitoto ki te Tonga Trust and James Hemi Elkington*, 29 November 1994 (doc B34(B)(21)), p 6

In the final section of this chapter, we examine several remaining claims. These include: a claim submitted by the Tahuaroa whanau seeking the return of land surrounding their family urupa; a claim made by Sharon Gemmell relating to the process for protecting sites of historic and cultural significance and in particular the Ngawhatu Hospital in Nelson; a claim by Ropata Taylor in respect of the vesting of lands in the Wakatu Incorporation; a claim by Mabel Grennell concerning the sale of land by the Maori Trustee and adoption policy and practice; a claim by the Kinana hapu concerning the return of land taken under public works legislation; a further claim by Sharon Gemmell concerning an action of the Maori Land Court; and a claim by Miriana Ikin on behalf of the descendants of the Warren Pahia and Joyce Te Tio Stephens Whanau Trust concerning the return of shares in the Wakatu Incorporation and Parininihi ki Waitotara and legislation allowing Pakeha to succeed to the interests of their spouses in Maori lands. In some cases insufficient evidence has not allowed us to make firm findings on the merits of particular claims. We also note several instances in which aspects of claims have been considered in previous chapters and are therefore not further examined here. The chapter concludes with a summary and conclusion.

## **12.2 THE TE KOTUA WHANAU CLAIM RELATING TO JOSEPH TOMS' OLD LAND CLAIMS**

### **12.2.1 The claimants and the claim**

Grace Saxton brought this claim (Wai 648) on behalf of the Te Kotua Whanau Trust, which represents the descendants of George Hori Toms, the oldest son of Joseph Toms. It was also the trust's stated intent to represent the interests of the descendants of George's younger brother, Thomas Toms.<sup>8</sup> Mrs Saxton informed us that the descendants of Thomas had become involved in the claim since it was first filed on behalf of the descendants of George Toms.<sup>9</sup> The claim questions the validity of Commissioner Spain's determinations in respect to Joseph Toms' old land claims, the Crown's administration of Joseph Toms' estate, delays in issuing a Crown grant at Titahi Bay and the Crown response to petitions from George Toms and his daughter Sarah Toms. A further issue raised in the Te Kotua whanau claim is the effect of the Marriage Ordinance 1847 and the Marriage Act 1854 on the eligibility of children of Maori customary marriages to succeed to lands originating from their Maori relatives.<sup>10</sup>

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8. Saxton, amendment to claim Wai 648, p 3; Alan Ward, 'A Report on the Historical Evidence: The Ngai Tahu' report commissioned by the Waitangi Tribunal, 1988 (Wai 27 ROI, doc T1), pp 2-3; Grace Saxton, under cross-examination, eighth hearing, 17-19 February 2003 (transcript 4.8, pp 160, 172-174)

9. Grace Saxton, under cross-examination, eighth hearing, 17-19 February 2003 (transcript 4.8, pp 172-173)

10. Saxton, amendment to claim Wai 648

**12.2.2 Joseph Toms' old land claim**

Soon after arriving in Te Tau Ihu in 1829–30, the whaler Joseph Toms married (by Maori custom) Te Ua Torikiriki, daughter of the Ngati Toa chief, Nohorua. The couple lived together until Te Ua died around 1837–38 and they had two children: George Toms, born in April 1833, and Thomas Toms, born in April 1835.<sup>11</sup>

It appears that some time after Joseph's marriage to Te Ua, either before or at the time of George's birth, Nohorua made a promise of land to Joseph. Customary marriage, according to a 2001 study by the Law Commission:

did not necessarily carry with it any rights against property owned by the other spouse, but where a husband went to live with his wife's tribe some property arrangements were often made by the wife's family. As regards children, the existence or otherwise of any particular form of union did not generally appear determinative of their rights, at least in general.<sup>12</sup>

Nohorua's allocation of land was formalised with two documents: one dated 20 September 1838 and the other 14 October 1839.<sup>13</sup> Both documents were written solely in English and had been read over and interpreted to Nohorua, on the first occasion by a man named Bosworth, and on the second by Richard 'Dicky' Barrett, whose ineptness as a translator we discussed in chapter 4, along with Joseph Davis.<sup>14</sup> The 1839 document was also witnessed by Nohorua's Ngati Rahiri brother in law, which Dr Bryan Gilling, who presented historical evidence for the Te Kotua whanau claimants, has suggested can be taken to indicate the involvement and approval of the Te Atiawa hapu for the arrangements entered into.<sup>15</sup> We consider this aspect of the arrangements further below.

In the 1838 document, Nohorua gave and made over to Joseph Toms 'all the Land & Bays belonging to him in Queen Charlotte Sound for his [Toms'] Good & the Good of his Children they being the said Nohorua's grandchildren'. The 1839 document explained and confirmed this, and was clearly linked to a letter Joseph wrote to Colonel Wakefield to ensure that the New Zealand Company was aware of Nohorua's rights to land in Totaranui, Kapiti, and Titahi Bay. The 1839 document cautioned all persons 'not to trespass on any part

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11. Bryan Gilling, 'For His Good and the Good of His Children: The Toms and Colonial Law Affecting Succession', report commissioned by the Te Kotua Whanau Trust, 2002 (doc G1), pp 10–14, 20. Thomas alternatively is recorded as having been born in November 1837.

12. Law Commission, *Maori Custom and Values in New Zealand Law* (Wellington: Law Commission, 2001), p124

13. Gilling, 'For His Good', pp 35–45

14. Joy Hippolite, "And His Children . . . Will Become the Proprietors": The George Hori Thoms and Colonial Laws of Succession Claim', report commissioned by the Waitangi Tribunal, 1999 (doc A42), p 4. This may have been the same Bosworth who was a member of the crew on Barrett's first trading expedition to New Zealand in 1828: see Angela Caughey, *The Interpreter: The Biography of Richard 'Dicky' Barrett* (Auckland: David Bateman, 1998), pp 22, 66, 182, 198.

15. Gilling, 'For His Good', p 35

or parts' of the land without permission from Toms, as Nohorua had received from Toms 'an equivalent' in 'various Articles of Merchandise'.<sup>16</sup>

As noted in chapter 5, when Nohorua signed the Treaty he insisted that Joseph act as a witness so that 'If his grandchildren should lose their land . . . their father would share the blame'. Clearly, Nohorua believed that Joseph Toms would bear ultimate responsibility if the land was lost.<sup>17</sup>

The 1838 and 1839 documents formed the basis of Toms' claim to the Land Claims Commission, which he lodged on 27 November 1840. Toms made a personal claim to land 'in Cloudy Bay Ka Ka Pa Bay' and 'at the entrance of Porrie Rua' by purchase, and a claim 'in right of myself and children all the Lands & Bays which belonged to Noroa commonly called Thos [Thomas] Street, a Native Chief my Father in Law in virtue of a transference dated 20th Sept 1838' and 'more particularly described in another Deed executed by the said Noroa in my favor bearing date 14th October 1839'. This included land at Wariki on Kapiti (500 acres), Titahi Bay (40 acres) and Anakiwa (400 acres), Opuia (20 acres) and Te Awaiti (300 acres), all in Tootaranui.<sup>18</sup>

On 25 November 1840, immediately before lodging his claim with Spain, Joseph Toms made a will leaving most of his land to his second (Pakeha) wife, Maria Boulton and all his children 'now born or hereafter to be born' equally.<sup>19</sup> Maria and Joseph's son, Joseph junior, was born in March 1842.<sup>20</sup>

Toms presented his claim to the Spain commission in May 1843. He explained that he had asked Nohorua for some land and Nohorua had replied that he would give Toms and the children all the places that belonged to him. Joseph Toms' view was that Nohorua had given up all claim to the lands, and that Toms had the right to sell any portion of the lands during Nohorua's lifetime, except for Titahi 'which they told me to reserve for my Children'.<sup>21</sup>

In his evidence to Spain, Nohorua stated that he had 'given' the whole of his land at 'all those places' to Joseph Toms, with the consent of Te Rangihaeata and Te Rauparaha, to whom the land also belonged. He stated that 'They all consented for their Grandchildren'

16. Saxton, amendment to claim Wai 648, pp 3-4; Gilling, 'For His Good', pp 35-36, 46-47. The 1839 deed may have been prompted by speculation of imminent annexation and the setting up of a commission, to be appointed by the Governor of New South Wales, which was to determine whether existing purchases were 'lawfully acquired, and ought to be respected, and what may have been the price or other valuable considerations given for them': Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87. Hence, perhaps, the importance of emphasising the payment made to Nohorua.

17. Gilling, 'For His Good', pp 18-19

18. Ibid, pp 33-35. Note that these are different acreages from those that appear to have been claimed when Toms appeared before the commissioner in 1843: p 40.

19. The other beneficiary of the will was his brother in law, Thomas Boulton, to whom he left his interests in 'Sawyer's Bay', Tootaranui: Saxton, amendment to claim Wai 648, pp 6-7; Gilling, 'For His Good', pp 19-20, 29-31.

20. Saxton, amendment to claim Wai 648, pp 6-7; Gilling, 'For His Good', pp 19-20, 29-31. Maria Boulton claimed their marriage occurred in February 1838.

21. Gilling, 'For His Good', pp 35-40

and that he had parted with his land because Toms ‘was a relation of ours, and [on] account of our Grandchildren.’ Nohorua also referred to a promise made to Toms when the children were born and said that Toms had promised at the time of the transaction to settle the land at Titahi on the grandchildren solely.<sup>22</sup>

Te Rangihaeata informed Spain that ‘We gave Titahi to him for our grandchildren,’ adding ‘because he was our son-in-law we gave him all those places.’ Dr Gilling suggests this might have been interpreted to mean that ‘Titahi had been given for the grandchildren, but all the other places were for Toms.’ Claimant counsel notes that the statement that Titahi was given for the grandchildren may have led Spain to conclude that only Titahi Bay was to be held in trust for the Toms brothers.<sup>23</sup> Te Rauparaha’s evidence confirmed that Nohorua was entitled to the land and ‘the whole of us consented to give it him and our Grandchildren.’<sup>24</sup> As claimant counsel remarked, it was unclear from this evidence precisely what lands the ‘it’ referred to, and whether this was intended to encompass all the lands claimed by Joseph Toms. It was submitted to us that it was reasonable to surmise that this was intended as a reference to all of the lands, or at least the Queen Charlotte Sounds lands, given the context.<sup>25</sup>

However, as Dr Gilling notes, Nohorua married a Ngati Rahiri (Te Atiawa) woman, and may have gained some further rights through this association, alongside his rights from his Ngati Toa side. Muriwhenua, of Ngati Rahiri, received some of the payment mentioned in the 1839 deed. Later, in the mid-1850s, Te Atiawa challenged Toms’ claim. It was the only old land claim to which Te Atiawa did object. Ngati Rahiri, who were said at the time to have ‘not a great deal of land’ claimed that it was only the timber and not the land that was sold to Toms. Dr Gilling suggests, given the timing of the objection, that they may have been objecting to the alienation of lands (the sale of 1100 acres at Okiwa to pay Toms’ debts following his death, discussed below) that they thought should have remained in the hands of their relations George and Thomas Toms, not a Pakeha woman and boy.<sup>26</sup>

There were a further set of issues raised by how Maori understood the arrangements entered into with Toms and Commissioner Spain’s treatment of this question. As far as can be discerned from the minutes of the inquiry, which, as Dr Gilling points out, are an abridged English translation of proceedings, witnesses appear to have spoken in terms of both ‘gifts’ and ‘payment’. While Nohorua referred to giving the land to Toms, he also stated that they had received ‘a great deal of property’ from him for the land. Te Rauparaha mentioned

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22. Bryan Gilling notes that the highlighting of Titahi alone conflicts with previous statements: Gilling, ‘For His Good’, pp 42–45.

23. Ibid, pp 41–42; Ward, ‘The Ngai Tahu’, p 9

24. Gilling, ‘For His Good’, p 41

25. Ward, ‘The Ngai Tahu’, p 9

26. Gilling, ‘For His Good’, pp 16, 21–23, 37–38, 51–52, 57; Dr Donald Loveridge, “‘Let the White Men Come Here’: The Alienation of Ngati Awa/Te Atiawa Lands in Queen Charlotte Sound, 1839–1856”, report commissioned by the Crown Forestry Rental Trust, 1999 (doc A53), pp 32–34

payment but, like Nohorua, also apparently spoke of giving the land. Te Rangihaeata said that Ngati Toa generally were satisfied with the payment, but he knew nothing about the payment himself. Joseph Toms claimed that he had paid for the land, and Spain asked him to distinguish between goods given in payment for the land and goods constituting presents to Nohorua as his father in law, which he did.<sup>27</sup> However, Nohorua and other recipients of any goods received may not have so readily discerned the difference, since it was customarily expected that any 'gift' – almost certainly a translation for 'tuku' – would be reciprocated by equal or greater presents in return.

Spain's award of March 1845 nevertheless upheld Toms' claim. Toms was awarded absolute rights to the Totaranui blocks of Okiwa (Anakiwa, 1100 acres), Opuia (55 acres), Te Awaiti (111 acres), and Ko Anaru (91 acres). 'Titai' (Titahi, 247 acres) was to be held in trust by Joseph 'during the term of his natural life' for his sons, George and Thomas. Spain noted that Nohorua had 'given and made over' to Toms all his Queen Charlotte Sound land 'for his good and the good of his Children, they being his Grandchildren'. Although Spain acknowledged that this was the basis on which Nohorua had entered the transaction, he concluded that all but the land at 'Titai' had been sold absolutely, a conclusion that Dr Gilling contends is 'hard to reconcile with his [Spain's] acceptance of the pre-1840 documents as having conveyed the various lands for the benefit of the boys'.<sup>28</sup>

Dr Gilling suggests that Spain's conclusion was 'arguable on the evidence before him'.<sup>29</sup> He also notes that the delay between hearing and award meant that Spain would have based his decision on 'ambiguous written minutes', though it is worth remembering that the delay was just two years and presumably Spain had some memory of the testimony he had heard.<sup>30</sup> Dr Gilling concludes that questions arise with respect to the area involved in the transaction and the nature of the transaction in general.<sup>31</sup>

Tribunal-commissioned researcher Joy Hippolite shared Dr Gilling's doubts about the transaction being viewed as an absolute sale over all but Nohorua's interests at Titahi. Ms Hippolite discussed the way in which Maori may have understood the transaction, with gifts implying mutual obligations and an ongoing relationship between the parties to the deal. She argued that Nohorua had entered a relationship with Joseph Toms through the gift of his daughter, but asks to what extent he was also seeking an ongoing relationship with the 'sale' of these various blocks of land. In her view, the question is whether Nohorua and the other Ngati Toa chiefs envisaged the Toms' lands passing out of Ngati Toa ownership at

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27. Gilling, 'For His Good', pp 37–38, 41–42

28. Saxton, amendment to claim Wai 648, pp 4–6

29. Gilling, 'For His Good', p 44

30. Ibid, pp 44–45

31. Ibid, pp 16, 44–49; Dr Bryan Gilling, under cross-examination, eighth hearing, 17–19 February 2003 (transcript 4.8, pp 151–152, 155–156)

all. Put differently, did they think that all of the lands, and not just Titahi Bay, would remain in tribal hands through being passed only to George and Thomas?<sup>32</sup>

There was a seven-year delay before the Governor approved Spain's award and then it was not fully implemented. For example, the grant at Titahi Bay was for 160 acres and not 247 acres.<sup>33</sup> Crown researcher, Brent Parker explained that the Titahi Bay grant was encroached upon by a grant of 87 acres to the bishop of New Zealand for a school. Ngati Toa appear to have agreed to the school grant in August 1848 and the grant to Toms was reduced on the instructions of the Secretary for Crown Lands so that the school grant should not be impinged upon.<sup>34</sup>

### 12.2.3 Joseph Toms' will and his older sons' attempts to inherit

As noted above, Toms' will of November 1840 stipulated that all his children would share equally in the bulk of his estate, along with his second wife. Thus, George and Thomas were entitled to inherit. However, this did not eventuate following Toms' death in August 1852.

The will's existence was either unknown or concealed when the Supreme Court considered a debt affecting Toms' estate in October 1854. Robert Strang, master and registrar of the Supreme Court, sought a court order to be served on Maria Toms and Joseph junior to sell land at Anakiwa to extinguish a debt. Strang was also the administrator of both Joseph's estate and the estate of Alexander Perry, to whom Joseph owed money.

The court stated that Toms had died intestate and that Joseph junior was his only heir. No inquiry appears to have been made as to the veracity of those facts, but that would not normally have been the court's role. As her son was considered an 'infant' in law, Maria consented to the sale, which occurred in June 1855, and none of the proceeds went to George and Thomas Toms, Joseph's older two sons by Te Ua.

Claimant counsel questioned whether Strang's responsibilities to both Perry's and Toms' estates gave rise to a conflict of interest and argued that, as administrator of Toms' estate, Strang had an investigative function. Dr Gilling also commented on Strang's position. He observed that even a cursory questioning by Strang would probably have unearthed the information that Joseph had two other sons and that the land in question had some connection with his first wife.<sup>35</sup>

Maria and her brother Edward Boulton subsequently filed an affidavit, in August 1856, declaring that Joseph had died intestate and had only one child – Joseph junior. Strang

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32. Gilling, 'For His Good', pp 38–40, 44; J Hippolite, 'And His Children', pp 10–11; Dr Bryan Gilling, under cross-examination, eighth hearing, 17–19 February 2003 (transcript 4.8, pp 151–154, 159)

33. Gilling, 'For His Good', p 50

34. Brent Barker, brief of evidence on behalf of the Crown, 19 September 2003 (doc s6), pp 2–3; Crown counsel, closing submissions, 19 February 2004 (doc T16), pp 144–145; Gilling, 'For His Good', pp 22, 26

35. Gilling, 'For His Good', pp 54–56; Ward, 'The Ngai Tahu', pp 17–18, 34–35; Crown counsel, closing submissions, p 143

acted as a witness to the affidavit. It is not known whether Maria or her brother knew about the will but we can only agree with Dr Gilling that the statement that Joseph junior was Toms' only child was a deliberate misrepresentation of the truth. Indeed, as Dr Gilling noted, when the artist George Angas visited the Toms' family residence in 1844, 'George and Thomas were part of the family, being mothered by Maria, who would later swear that they did not exist'.<sup>36</sup>

If the affidavit had recorded that Joseph junior was Toms' only 'legitimate' son, then it would have been correct. The Marriage Ordinance 1847, and its successor the Marriage Act 1854 did not recognise Maori customary marriages, such as that of Joseph Toms and Te Ua, rendering George and Thomas illegitimate in the eyes of the law, and thereby ineligible to succeed to Joseph's estate on his supposed intestacy. The court's finding would have been in accordance with the legislation at the time in instances where the deceased had died intestate.<sup>37</sup> Dr Gilling argues otherwise, suggesting that by 1856 'the law had been changed and Thomas at least could claim to be an heir at law, a senior brother to Joseph junior, and thus entitled to at least half and possibly more of the estate'.<sup>38</sup> That would only have been the case had Toms' marriage to Te Ua been conducted by an authorised clergyman. But although there was a later attempt to depict such a marriage as having taken place, which we discuss further below, Joseph Toms himself testified before Spain that, soon after his first encounter with Nohorua many years earlier:

I asked him & his wife if they would let me have their daughter as a partner to which they consented immediately, and delivered her to me, being his only daughter and I lived with her for 8 years until her Death & had 2 children (male) by her. During the whole of this time I lived with her alone. The delivering up of the daughter to me I considered a marriage according to the custom of the Natives and so did the Father and Mother Consider. At that time and up to the period of her Death there were no missionaries living in the part of the Island where I resided, so that I never had the opportunity of being married according to the Religious Forms of the Church of England of which I am a member, and no missionary arrived in those parts until 2 years after her Death.<sup>39</sup>

There was thus no legally recognised marriage, and no legal right of inheritance for either George or Thomas, notwithstanding Maori custom in such matters.

In April 1866, Joseph junior tried to obtain grants for Opuā and Ko Anaru. Under the Deeds Registration Amendment Act 1865, every deed of grant was to be registered in the province in which the land was situated prior to delivery, so the grants were returned to Alfred Domett, Secretary for Crown Lands, for transmission to the commissioner of Crown

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36. Gilling, 'For His Good', p 28

37. Ibid, pp 27–28, 31, 54–56, 73–74; Ward, 'The Ngai Tahu', p 19

38. Gilling, 'For His Good', p 56

39. LS-N45/1a, ArchivesNZ (Gilling, 'For His Good', p 10)

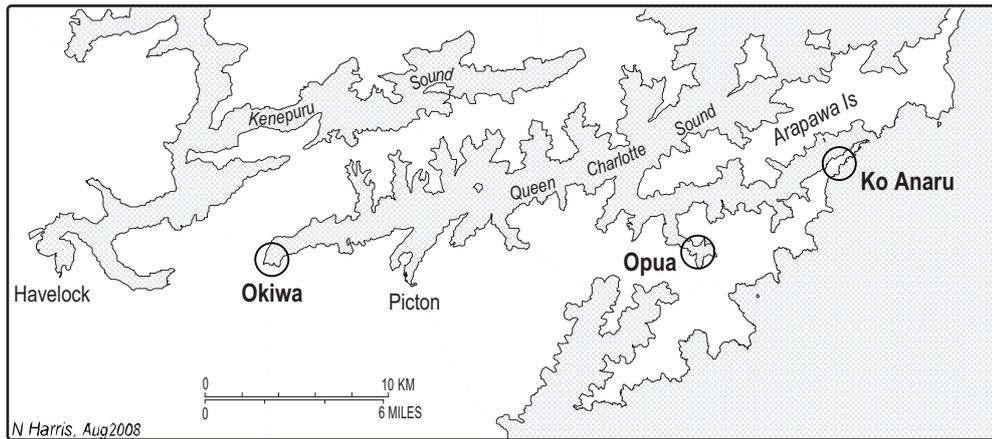


Figure 45: Toms' Crown grants

Source: *Heinemann New Zealand Atlas* (Auckland: Heinemann, 1987), pl 61

lands in Marlborough province. In August 1867, George Toms wrote to Domett seeking to prevent Joseph junior from being given those Crown grants and Domett agreed to detain the grants until some arrangement was made 'in accordance with the natural equity of the case'.

Domett, who was highly sympathetic to George's case, then appears to have been instrumental in securing the enactment of section 39 of the Native Lands Act 1867, which would have enabled George to make an application to the Native Land Court. Section 39 authorised the division and settlement of land upon children of grantees arising out of land dealings with Maori whose land had been acquired through having had children with a Maori woman and then married, had more children, and died without making provision for the first children. Following Domett's recommendation, the Native Department advised George to apply to the land court under this provision, sending him a draft letter to sign and date and send to the chief judge. It is not clear whether or not George sent the application, but no such case was considered by the Native Land Court.

Instead, on the advice of his lawyer, Travers, George took a case to the Supreme Court in 1870. The case sought recognition of a fabricated story that Joseph and Te Ua had legally married in European style in May 1840 and that Thomas was born after their marriage and was a legitimate heir. The idea appears to have been that, if Thomas could legally inherit Joseph's estate as a legitimate heir, displacing Joseph junior, he could then pass the lands on to George. The court accepted the story.<sup>40</sup> In January 1871, Travers forwarded the Supreme Court's decision to Domett, so that Crown grants could be delivered to Thomas for Anakiwa, Ko Anaru, and Opua (see fig 45). Around February 1871 the Crown grants for the latter two areas were sent to Travers, who acknowledged their receipt.<sup>41</sup> However, George Toms (who

40. Gilling, 'For His Good', pp 67–72; see also Ward, 'The Ngai Tahu', p 20

41. Saxton, amendment to claim Wai 648, pp 7–9; Gilling, 'For His Good', pp 72–75

had received a legal conveyance of the interests of Thomas in these lands in 1870) never received these grants. Dr Gilling assumed that at some point the grants must have been recalled.<sup>42</sup> The available documentary evidence becomes especially patchy from about this point onwards.

In 1883, George applied to the Native Land Court to succeed to Te Ua's lands at 'Onihiwa Anapua' (Okiwa or Anakiwa<sup>43</sup>) and Joseph's lands at Ko Anaru and Opuā. The Native Land Court found that the land had been Crown granted to George and was therefore outside its jurisdiction. George petitioned Parliament about the land in 1887. The petition was not dealt with until the following year, at which point it was forwarded around various politicians and officials. Official discussion focused on the Paremata land, which had been bought by Joseph Toms senior from the chief 'A Ki' and conveyed to one Newton Lewyn. Officials recorded that Travers (George's lawyer) was satisfied with this explanation that the land had been purchased by Joseph Toms and this is where the matter appears to have remained. George Toms died in August 1890.<sup>44</sup>

In 1893, Joseph junior successfully applied for grants for Opuā and Ko Anaru under the Land Transfer Act 1885. His application stated that he was the 'eldest son and only surviving child of the late Joseph Toms and Maria his wife'. Joseph sold Opuā immediately on receiving the grant and Ko Anaru was transferred to Charles James Radcliffe on Joseph junior's death in 1909. Te Awaiti, or a nine acre two rood portion of it, also appears to have been granted to Joseph junior.<sup>45</sup>

Around 1896, Sarah Toms (Hera Te Ua Te Kotua), George's daughter, petitioned Parliament for the restitution of lands set apart by Ngati Toa for Te Ua (Joseph Toms' first wife) and her descendants and wrongfully passed into possession of Joseph Toms (presumably the junior) by his second wife. The Native Affairs Committee recommended that the petition be referred to the Government in order that the South Island Landless Natives Commission could deal with it. The commission did not consider the case until 1914, at which point Sarah appears to have spoken only of wanting assistance to exchange or lease 189 acres in the Waiau. Nothing was said about the Toms lands. When the commission duly made its report, there was no mention of the Toms lands.<sup>46</sup>

Today, George Toms' descendants continue to seek redress in respect of their inheritance of Nohorua's lands. Grace Saxton spoke of the 'despair of George, Thomas, Granny Kotua and all our ancestors as they tried and tried to regain what should rightfully belong to our whanau'. Through the loss of the land 'we lost our mana and our heritage'. Deemed illegitimate, or not to have even existed, 'we lost our respect and our sense of being'. Lydia

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42. Dr Bryan Gilling, under cross-examination, eighth hearing, 17–19 February 2003 (transcript 4.8, pp 157–158)

43. Joy Hippolite refers to Onihiwa Anapua and Gilling to Onihiwa (Okiwa) and Anapua: J Hippolite, 'And His Children', p 17; Gilling, 'For His Good', p 76; Native Land Court, Nelson, minute book 1, 21 November 1883, fol 33

44. Gilling, 'For His Good', pp 75–79, 81; Ward, 'The Ngai Tahu', p 23

45. Saxton, amendment to claim Wai 648, p 12; Gilling, 'For His Good', pp 80–81, 85

46. Saxton, amendment to claim Wai 648, pp 10–12; Gilling, 'For His Good', pp 81–82

Chester felt a lack of belonging and a sense that something was missing in her family's past, also attributing this to the whanau's loss of mana and heritage through losing the land. Joan Carew put it simply. The Crown 'deemed our tupuna illegitimate and so left the mokopuna landless. The loss of Mana was inevitable'. Roy Te Kotua saw illegitimacy as a sign that they were 'not worthy of inheriting their grandfather's land' and linked this to all their mana and lands being taken away. Josephine Faragher saw a direct correlation between dispossession of land and whanau identity and standing within the Maori community and noted its impact on the whanau's spiritual and physical health. Mrs Saxton's ancestors, she stated, 'carried the sadness and the pain all through their lives'. Josephine Faragher wants to put 'an end to a grief that has burdened our whanau for far too long' and to 'regain respect for our ancestors'.<sup>47</sup>

#### 12.2.4 Commissioner Spain's determinations: counsel submissions and Tribunal findings

Claimant counsel viewed Spain's determinations as the crux of the problem. Counsel argued that this Tribunal should adopt the *Muriwhenua Land Report* finding that pre-Treaty transactions between Maori and Pakeha could not be considered binding sales if the parties were not of sufficiently common mind for valid contracts to have been formed. Counsel pointed to the evidence regarding the intentions and expectations of Nohorua and his relatives that land had been 'given' to Joseph Toms for the benefit of him and his children. Spain's determinations triggered a series of events that led to the disinheritance of George and Thomas Toms and their descendants.<sup>48</sup>

Crown counsel pointed to the ambiguity in the material available to Spain and argued that it is not possible to know the precise intentions of the grant or gifting of land by Nohorua to Toms. Spain heard evidence that indicated that the grant was to be for the benefit of the children. He also heard evidence suggesting that only the Titahi Bay lands were granted on trust for the children. The Crown viewed Spain's findings as reasonable in the circumstances and considered these could arguably be a legitimate reflection of the chief's intention. The effect of Spain's decision did not preclude George and Thomas from ultimately inheriting all of the lands, through their father.<sup>49</sup>

We find that the parties were not of sufficiently common mind for valid contracts to have been formed. The statements made to Spain were ambiguous and this ambiguity was no

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47. Grace Saxton, brief of evidence on behalf of the Te Kotua whanau, 1 February 2003 (doc 16), pp 4, 6–8; Lydia Chester, brief of evidence on behalf of the Te Kotua whanau, 1 February 2003 (doc 17), p 2; Roy Te Kotua, brief of evidence on behalf of the Te Kotua whanau, 1 February 2003 (doc 18), p 2; Josephine Faragher, brief of evidence on behalf of the Te Kotua whanau, 1 February 2003 (doc 19), p 3; Joan Carew, brief of evidence on behalf of the Te Kotua whanau, 1 February 2003 (doc 110), p 3

48. Ward, 'The Ngai Tahu', pp 5–12, 32–33; Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), pp 393–394

49. Crown counsel, closing submissions, pp 140–142

doubt compounded by the lack of precision inevitably arising with translation, comprehension, and interpretation. We find that the evidence overall suggests that Nohorua, Te Rauparaha, and Te Rangihaeata did not knowingly and willingly wish to alienate the lands from their grandchildren (and thus from Ngati Toa).

We do not assume, however, that the interests of the whanau and those of the wider Ngati Toa grouping were necessarily one and the same. Indeed, if the gift of land was consistent with customary practices as outlined in the *Muriwhenua Land Report*, as claimant counsel urged us to accept, then we must also accept that there was no absolute alienation of the land, and that all of those with customary interests in the lands and who had consented to the gift retained an interest in these. Nohorua informed Spain that there were other customary rightholders besides himself, including Te Rauparaha and Te Rangihaeata, both of whose consent had also been required. As we saw, there is also evidence that the Ngati Rahiri hapu of Te Atiawa, were also involved in the 1839 deal and continued to assert their rights over at least some of the lands in question. George and Thomas Toms could legitimately claim customary rights based on the interests of Nohorua, as well as through their Ngati Rahiri grandmother. But if they were to be awarded outright and exclusive title then that necessarily required the consent of all others with customary interests in the lands. In the event, Spain concluded that there had been an absolute alienation to Joseph Toms of all but Titahi Bay. The commissioner's wrongful assumption of an outright alienation meant that the sorts of broader customary equations discussed here did not even enter the picture.

While the effect of Spain's decision did not preclude George and Thomas Toms from ultimately inheriting all of the lands through their father, it did not ensure that Nohorua's intentions and expectations were followed. Nohorua evidently believed that Joseph would pass on the land to his grandchildren and thus remain in Ngati Toa ownership. Spain's determinations allowed the possibility that the lands awarded to Joseph Toms might be lost to Te Kotua whanau and to Ngati Toa.

#### **12.2.5 The delay in issuing the Titahi Bay grant: counsel submissions and Tribunal findings**

Claimant counsel argued that the delay in issuing the Titahi Bay grant resulted in its reduction in size. The school grant took precedence over the grant to George and Thomas, although the gift to the bishop was made after Spain's award. Counsel submitted that the delay of eight years in the issue of the Titahi Bay grant and the resulting reduction in the land available to George and Thomas was inconsistent with the Treaty.<sup>50</sup>

Crown counsel argued that Spain's award of 247 acres to George and Thomas was subject to the award remaining available and 'unobjectionable'. Counsel also pointed out that none

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50. Ward, 'The Ngai Tahu', pp12-15, 33-34

**12.2.6**

of Toms' grants were approved before July 1852, which implies that the delay with the Titahi Bay grant was not intentional.<sup>51</sup>

While we consider that the Crown's delay in issuing a grant to George and Thomas at Titahi Bay was not necessarily intentional, it resulted in a reduction in the size of the area left for the Te Kotua whanau and Ngati Toa once the land had been granted to the bishop. From the evidence before us we are unable to confirm that Crown officials ever assessed whether any awards had been recommended in the area before the issuing of the grant to the bishop.

**12.2.6 The administration of Joseph Toms' estate and the loss of Anakiwa: counsel submissions and Tribunal findings**

Claimant counsel argued that Strang had a responsibility to investigate Joseph's alleged intestacy and the legitimacy of Joseph junior as sole heir and she questioned his failure to do so.<sup>52</sup> Crown counsel suggested that counsel for the Te Kotua whanau had taken the coincidence of Strang's roles to be evidence of some form of conspiracy designed to prevent George and Thomas from receiving what was rightfully theirs. Crown counsel added that to ascribe some intentional malevolence on the part of Strang towards the claims of George and Thomas is conjecture.<sup>53</sup>

We are not convinced that Strang acted with intentional malevolence towards George and Thomas. There is insufficient evidence to make a finding on whether he acted carelessly in his role as administrator of Joseph's estate. Strang's witnessing of Maria's sworn affidavit does not make him responsible for its veracity, although its timing is unusual. We are also not convinced that Strang's actions can be cast as an omission or action of the Crown per se. However, irrespective of Strang's role and performance, the legislation existing at the time would have been a substantial barrier to the older two sons inheriting their father's land.

**12.2.7 The Marriage Ordinance 1847 and the Marriage Act 1854: counsel submissions and Tribunal findings**

Claimant counsel argued that the above two pieces of legislation did not recognise the customary marriage of Joseph Toms and Te Ua, rendering George and Thomas illegitimate in the eyes of the law and thereby ineligible to succeed to Joseph's estate on his supposed intestacy. It was for this reason that they engaged in litigation in 1870, intended to establish that

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51. Crown counsel, closing submissions, pp 144–145

52. Ward, 'The Ngai Tahu', pp 15–18, 34–35

53. Crown counsel, closing submissions, p 143

the union was a European-style marriage between Te Ua and Joseph before Thomas was born, despite this almost certainly having no basis in fact.

Claimant counsel submitted that legislation that rendered Maori ineligible to succeed to lands originating from their Maori relatives was discriminatory, inconsistent with the Treaty, and prejudicial to the interests of George and Thomas Toms and their descendants. The legislation's requirement that marriages be celebrated in a prescribed way took no account of marriages recognised by Maori under their custom.<sup>54</sup>

Crown counsel stated that there was provision for George and Thomas Toms to contest the estate under section 39 of the Native Lands Act 1867, which recognised customary marriages and enabled children in George and Thomas' circumstances to inherit land by applying to the Native Land Court for relief. Crown counsel considered that the brothers' failure to do so suggested that they had been ill advised by their lawyer.<sup>55</sup>

While the 1847 ordinance and the 1854 Act were not specific to Maori, they required that marriages be celebrated by a clergyman, minister, or other person, in a church or other building or place. This meant that children of parents who were married under Maori custom were illegitimate in the eyes of the law and ineligible to succeed to their parent's estate if the parent had died intestate. We agree with claimant counsel that legislation that rendered Maori ineligible to succeed to lands originating from their Maori relatives was inconsistent with the Treaty.

However, while this may have resulted in George and Thomas being disinherited up until 1867, section 39 of the Native Land Court Act 1867 appears to have responded to the brothers' exact situation and in fact may have been drafted with their situation in mind. It recognised customary marriages and theoretically enabled George and Thomas Toms to contest the estate and to inherit land despite any perceived illegitimacy.

George Toms was sent a draft letter to sign and date and send to the Native Land Court for a testamentary order under section 39. Yet, he appears not to have applied to the court to test this option for redress. We agree with Crown counsel that the Toms brothers appear to have been ill advised by their lawyer in taking the case to the Supreme Court instead.

We consider that, while George and Thomas Toms were affected by discriminatory legislation up until 1867, from that date on there was theoretically a remedy at their disposal. We say theoretically because it was not put to the test and it is possible that the land court might not have been able to implement the provision in this case. With this proviso in mind, we conclude that any prejudice created by the 1847 ordinance and 1854 Act was probably removed in 1867. Nevertheless, we note that George and Thomas were deprived of the lands,

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54. Ward, 'The Ngai Tahu', pp 18-19, 35-36

55. Crown counsel, closing submissions, pp 143-144

**12.2.8**

and had incurred legal costs. We would also note, however, that the remedy offered after 1867 took no account of the wider iwi and hapu interests discussed previously.

**12.2.8 The issue of certificates of title to Joseph jnr: counsel submissions and Tribunal findings**

Claimant counsel argued that the Crown's failure to issue the grants to Thomas Toms in 1871 enabled the grants in respect of Ko Anaru, Opuia, and Te Awaiti to eventually be issued to Joseph junior.<sup>56</sup> The Crown does not provide any submissions on this matter.

We find that Crown grants for Opuia and Ko Anaru, issued in Thomas' favour, were sent to Travers in February 1871, following the successful Supreme Court case, but somehow were not received by the Toms brothers. In December 1893 and January 1894, grants for these lands went to Joseph junior instead. Te Awaiti, or at least part of it, went to Joseph junior as well. The evidence relating to the Crown's action in issuing grants to these lands to Joseph junior, following the Supreme Court decision, is inadequately explained, but was prejudicial to the Te Kotua whanau and thus to Ngati Toa.

**12.2.9 Subsequent petitions: counsel submissions and Tribunal findings**

Claimant counsel argued that the Crown's response to George's 1887 petition was superficial and ineffectual and that the Crown thereby failed to comply with their Treaty obligations of protection, fair dealing, and acting in utmost good faith. Similarly, claimant counsel noted the 18-year delay before the Crown considered Sarah's petition through a hearing at the South Island Landless Natives Commission. The commission did not actually address the petition in its hearing or recommendations.<sup>57</sup> Crown counsel does not provide any submissions on this matter.

We find that the Crown's apparent inaction in dealing with the substance of George's 1887 petition, and its extremely lengthy delay in dealing with Sarah Toms' 1896 petition, was a breach of good faith. While Sarah's apparent failure to raise the issues again in the South Island Landless Natives Commission 18 years later is curious, the Crown's actions in not responding to her petition in a timely manner, and then not responding to it at all when Sarah failed to raise it again, is an inadequate recognition of her right to fair process and redress. We cannot assume what the outcome of George Toms' petition would have been, but the fact that the Crown failed to deal with it in a proper manner similarly suggests a lack of fair process and redress. Clearly, both instances represent prejudice to the Te Kotua whanau and Ngati Toa.

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56. Saxton, amendment to claim Wai 648, pp13-14

57. Ward, 'The Ngai Tahu', p 36

**12.2.10 Tribunal findings of Treaty breach**

We find that the Crown acted in breach of Treaty principles in that it failed to actively protect Te Kotua whanau and Ngati Toa interests in the land at Queen Charlotte Sound and Titahi Bay when it:

- ▶ recognised the Queen Charlotte Sounds transactions between Nohorua and Joseph Toms as valid ‘sales’;
- ▶ delayed the issuing of the Titahi Bay grant to George and Thomas Toms;
- ▶ passed the 1847 ordinance and the 1854 Act thereby rendering some Maori ineligible to succeed to lands originating from their Maori relatives, at least up until the passing of the Native Land Court Act 1867;
- ▶ granted the land at Anakiwa to Joseph Toms junior, in accordance with the 1847 ordinance and the 1854 Act; and
- ▶ responded with inaction and delays in dealing with George and Sarah Toms’ petitions.

As a consequence, Ngati Toa and Te Kotua whanau were prejudicially affected

We further find that the Crown acted in breach of Treaty principles in that it failed to act reasonably and with the utmost good faith to protect and ensure fair process and redress in relation to Te Kotua whanau and Ngati Toa interests in the land at Queen Charlotte Sound and Titahi Bay when it:

- ▶ failed to ensure that no earlier awards had been made in relation to the Titahi Bay land intended to be granted to the bishop for education purposes; and
- ▶ responded with inaction and delays in dealing with George and Sarah Toms’ petitions.

As a consequence, Ngati Toa and Te Kotua whanau were prejudicially affected. As we noted above there were wider interests in the lands than merely those of George and Thomas. Those broader interests survived the conditional gifting for the benefit of George and Thomas, but could not survive Spain’s finding of an outright sale of all but Titahi to Joseph, or later circumstances which conspired to ensure the lands were lost to Maori ownership altogether. In this respect, we also note the customary interests of the Ngati Rahiri hapu to at least part of the lands and conclude that they too were prejudicially affected by the loss of such interests.

**12.3 THE RETURN OF WHAKAREWA SCHOOL LANDS****12.3.1 The claimants and the claims**

Gloria Georgeson’s claim (Wai 1002) is made on behalf of the descendants of Hohaia Rangiauru of Te Atiawa. The claim concerns the 1853 Crown grant at Whakarewa to the Anglican bishop of New Zealand, for the formation of an industrial school. This is discussed in chapter 9 as part of the broader Te Atiawa, Ngati Rarua, and Ngati Tama iwi claims.

Also in that chapter, in section 9.7.3, we consider the impact of perpetual leasing on the ex-Whakarewa land.

The focus here is on calls from Motueka Maori for the return of the land after the school closed in 1881, and the claims by the Georgeson whanau and other Te Atiawa claimants with respect to the trust in which the lands were vested when they were finally returned in 1993 – NRAIT.<sup>58</sup> These claims include Wai 923, filed by Patrick David Takarangi Park on behalf of the descendants of Merenako, who is one of the 15 Te Atiawa tupuna named in the NRAIT Empowering Act. This whanau disputes the 80:20 division of proceeds between Ngati Rarua and Te Atiawa, arguing that it was based on an incorrect decision of the Native Land Court.<sup>59</sup> There is also Wai 104, lodged by the Reverend Harvey Whakaruru, who withdrew his statement of claim in favour of the relevant sections of the Te Atiawa iwi claim.<sup>60</sup> The Wai 830 claim, filed by Ropata Taylor and amended by Ngawaina Shorrocks, originally sought the addition of Parana whanau tupuna to the NRAIT list, but this part of their claim was withdrawn in 2002.<sup>61</sup>

### 12.3.2 Motueka Maori protests about the Whakarewa grant

Maori protests about the Crown grant to the Anglican Church led to official inquiries in 1869 and 1879, which examined whether Whakarewa (and other schools set up on a similar basis) were operating within the terms of the trusts under which they were established.

In the 1880s, Motueka Maori took the matter to Parliament. Opposition to the grant was sometimes expressed by means of the removal of children from the school, which was closed for lengthy periods twice between 1857 and 1868. Following the final school closure in 1881, Ngati Rarua petitioned Parliament, arguing that the land they had given for a school and for the children to cultivate should be returned to them. Such petitions became a near annual occurrence in the late nineteenth century.<sup>62</sup> The historian for Ngati Rarua, Tony Walzl, has traced these petitions and the Crown's lack of responsiveness to them, characterising it as 'a

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58. See Georgeson, amendment to claim Wai 1002; Ruru, claim Wai 104; Patrick Park, claim Wai 923; Du Feu and others, second amendment to claim Wai 607, pp 26–28; counsel for Te Atiawa, closing submissions, pp 149–157; counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 176–177; Harvey Whakaruru, brief of evidence on behalf of Te Atiawa, not dated (doc G11(b)), p 9; see also counsel for Ngati Tama, closing submissions, pp 24, 70

59. Patrick Park, claim Wai 923

60. Whakaruru, brief of evidence, p 9

61. Ropata Taylor, claim Wai 830 concerning transfer of lands to the Wakatu Incorporation, 17 November 1999 (claim 1.19); Ngawaina Shorrocks, amendment to claim Wai 830, 8 October 2002 (claim 1.19(a)); counsel for Te Atiawa, opening submissions, 12 December 2002 (paper 2.402), p 3

62. Tony Walzl, *Ngati Rarua Land and Socio-Economic Issues, 1860–1960* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(2)), p 113; Mary Gillingham, 'Ngatiawa/Te Atiawa Lands in the West of Te Tau Ihu: Alienation and Reserves Issues, 1839–1901', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A74), pp 153–154, 157

most extraordinary example of Crown reluctance to act on a matter which its own officers consistently reported represented a clear case of injustice.<sup>63</sup>

In 1884, Alexander Mackay, whose 20-year tenure as administrator of the tenths estate had recently ended, described the Whakarewa grant as 'both illegal and inequitable'. Following his advice, the Native Affairs Committee recommended returning the land to the tenths estate under the management of the Public Trustee. Steps were taken to enable this to take place but stalled following the objections of the bishop of Nelson. On Mackay's suggestion, the Crown then considered legal action to test the legality of the grant but this also fell through.<sup>64</sup> Instead, an orphanage was established on the site in 1888. In the face of Government inaction, the line of protest of Ngati Rarua and their parliamentary representative had dropped away by mid-1892 and the matter lapsed again until 1897.

In response to a further petition from Ngati Rarua in 1897, the Native Affairs Committee recommended legislation to restore the land to Maori. The Native Minister instead agreed to consider establishing an inquiry into Whakarewa.<sup>65</sup> Alexander Mackay entered the debate once more, describing the case as 'one of the most glaring cases of injustice on record in connection with setting apart of lands for school endowments for the Natives'.<sup>66</sup> Another petition was submitted in 1899.<sup>67</sup> Finally, in 1905, an inquiry was established to inquire into whether there had been compliance with the conditions of the reserves regarding educational endowments.

The 1905 commission of inquiry was the final recorded Government consideration of the issue. The commission heard from a number of Motueka Maori, including Te Atiawa's Hohaia Rangiauru. The terms of the inquiry centred on the proper administration of the trusts, both in administering leases and the application of the funds. It also considered what modifications should be made in order to give effect to the original intention of the trust. While Motueka Maori repeatedly called for the return of the land, this was outside the scope of the inquiry. The commissioners recommended that the orphanage should take into account the special claims of Maori in its provision of services. Critical of the trust's management of the lands, it proposed that the Synod should appoint more trustees and that there be a Maori representative amongst them and 'a strong lay element in the trust'. This fell well short of what Maori wanted.<sup>68</sup>

As counsel for Ngati Rarua commented, efforts to have the school trust disestablished and the land returned were not advanced. It would take another 90 odd years for Ngati Rarua to achieve the return of this land, 'something they were required to do without any

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63. Walzl, *Land and Socio-Economic Issues*, pp 143–144, 150, 183, 197

64. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 156–158; Walzl, *Land and Socio-Economic Issues*, pp 115–116, 144–146, 182–183, 197

65. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 161

66. *Ibid*, pp 159–161

67. Walzl, *Land and Socio-Economic Issues*, pp 186–187, 197

68. *Ibid*, pp 220–228

Government assistance.<sup>69</sup> And yet, as was stated in Parliament in 1993, Te Tau Ihu Maori efforts to seek the return of the land continued in the mid to late twentieth century, and were known to the governments of the day.<sup>70</sup>

### 12.3.3 NRAIT Empowering Act 1993

#### (1) *Late-twentieth-century administration and the return of Whakarewa*

From 1888, the Anglican Church used the school site as a church home for orphans and disadvantaged children and it was then leased to the Nelson Hospital Board for the care of handicapped children. Sales and public works takings during the first half of the twentieth century reduced the size of the estate and some sections were leased during the 1950s and again in the 1970s. There were further sales in the early 1980s, although in the mid-1980s the church took steps to reacquire land at Whakarewa.<sup>71</sup>

The return of Whakarewa lands to Motueka Ngati Rarua and Te Atiawa followed renewed Maori agitation over the ownership of the lands in the 1970s and 1980s and the new awareness in the Anglican Church about Treaty of Waitangi issues. The Reverend Harvey Whakaruru clearly identifies the impetus for the return of the land as coming from the Anglican Church.<sup>72</sup> Ngati Rarua counsel also pointed to the efforts of Ngati Rarua's Barry Mason to secure the transfer, noting the lack of Crown involvement in this initiative prior to legislation in 1993.<sup>73</sup>

The NRAIT Empowering Act 1993 gave legislative effect to an arrangement made on the ground between the Anglican Church and local iwi. In 1993, the Nelson Diocesan of the Anglican Church resolved to vest the assets of the Whakarewa School Trust Board in the newly created NRAIT for the descendants of the original owners of those assets, on an 80 per cent Ngati Rarua, 20 per cent Te Atiawa basis. A trust deed was negotiated between the church and representatives of Ngati Rarua and Te Atiawa. According to the evidence of Dr John Mitchell, Patrick Park, and other witnesses involved in these negotiations, the proposal for the 80:20 split was based on the 1892 decision of Judge Mackay about respective iwi interests at Motueka in which these were respectively allocated on a 49:12 ratio (see ch 9). The ownership lists endorsed by the court in 1893 contained 94 Ngati Rarua names and 15 Te Atiawa names. These named tupuna were made the foundation of the trust; descendants (by either blood or adoption) of these individuals are the beneficiaries of the trust, even though it is called an iwi trust. The proposal to use this method of identifying beneficiaries came from the iwi themselves and was agreed before the trust deed was taken to the Government

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69. Counsel for Ngati Rarua, closing submissions, pp 176–177

70. NZPD, 1993, vol 537, pp 17,428–17,430

71. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 161–164

72. Whakaruru, brief of evidence, p 11

73. Counsel for Ngati Rarua, oral submissions, sixth hearing, 9–13 December 2002 (transcript 4.6, pp 274–275)

to be given effect in legislation.<sup>74</sup> As we detail further below, according to evidence from Patrick Park, Te Atiawa agreed to this arrangement ‘under duress’ but in the belief that it could be changed later.<sup>75</sup>

The 1993 Act enabled the transfer of the remaining land and assets from the school trust to NRAIT. Management of the lands remained in the hands of West Yates and Partners of Nelson, to whom the church had devolved management in 1989. The returned estate was 417 hectares (approximately 1032 acres), which was less than the area endowed upon the Church of England in 1853, but larger than the 918 acres granted out of the tenths estate.<sup>76</sup>

## **(2) The legislative process**

The NRAIT Empowering Act was a private member’s Bill, sponsored through Parliament by the Minister of Maori Affairs, the Honourable Doug Kidd. Reference to Parliament was necessary because the church could not divest itself of the trust without legislative intervention. The Crown had had no role in the negotiations leading up to the signing of the trust deed. Nonetheless, both the Government and the Opposition were familiar with the history of the land and earlier attempts to secure its return. The Bill went through the normal parliamentary process, with an inquiry by the Maori Affairs Committee and an opportunity for public submissions. There were 15 submissions, of which three sought a public hearing. The Maori Affairs Committee held a two-hour hearing in Wellington, attended by around 40 Motueka Maori in support of the Bill. Opposition from two submissions (including one from Ngati Toa) led to the inclusion of a new section in the Act, permitting the addition of further beneficiaries to the trust, which we discuss below.<sup>77</sup>

The 1993 Act sets out the deed of trust establishing the NRAIT board, which received the land returned by the church. The beneficiaries of the trust are ‘those Maori people comprising members of the Ngati Rarua and Te Atiawa manawhenua ki Motueka tribes who can establish a direct lineal descent (by birth or adoption)’ from the original owners. The Act defines the original owners as those whose land was taken by the 1853 Crown grant, ‘such owners being listed in 1845 by Land Commissioner Spain and found in judgments of the Maori Land Court delivered in 1892.’

The trust deed defines the trust’s role as the promotion of:

74. See, for example, Patrick David Takarangi Park, under cross-examination, sixth hearing, 9–13 December 2002 (transcript 4.6, pp 244, 247–249)

75. Patrick David Takarangi Park, brief of evidence on behalf of Te Atiawa, not dated (doc G26), p 15

76. The 1853 grant of 1078 acres included 160 acres of Crown land: counsel for Ngati Rarua, submissions in response to closing submissions of counsel for the Crown and Ngai Tahu, 12 August 2004 (paper 2.796), p 10; counsel for Ngati Rarua, closing submissions, p 177; Crown counsel, closing submissions, p 78; Gillingham, ‘Ngatiawa/Te Atiawa Lands’, pp 161–164; Jane Du Feu and others, second amendment to claim Wai 607, p 27; NRAIT Empowering Act 1993, sch 1

77. NZPD, 1993, vols 537–538, pp 17,428–17,430, 18,351–18,353

## 12.3.3(2)

education, vocational training, economic development, health, religious and spiritual welfare (including the promotion of Maoritanga), social services, hospital and residential care of beneficiaries and the relief of poverty and provision of social support and care for indigent or impoverished beneficiaries.

Membership of the board is set out at clause 10. The trust board has a maximum of 10 members: four are appointed by and to represent Ngati Rarua; one by and to represent Te Atiawa; three are voted upon at a hui of the entitled beneficiaries of both iwi; and the board has the power to appoint two additional members (who do not have to be affiliated to either iwi).

The 80:20 split is imposed by clause 15 of the trust deed, which requires that any distribution of funds shall be made on this basis. As noted, the division derives from the Native Land Court's 1892–93 decision on beneficial ownership of the tenths estate. The Native Land Court's apportionment at Motueka of 49:12 between Ngati Rarua and Te Atiawa is the basis for the 80:20 split of benefits in the NRAIT Act.<sup>78</sup>

In response to submissions on the Bill made to the Maori Affairs Select Committee, the 1993 Act provided for changes in both the iwi and hapu membership of the trust and their relative interests. Section 9(1) states that:

Notwithstanding anything contained in the trust deed, if . . . any other hapu or iwi obtains a decision from the Waitangi Tribunal, the Maori Appellate Court, the High Court of New Zealand, or any other Court of competent jurisdiction declaring that persons who were members of such hapu or iwi were original owners of the land the subject of the Crown grants, the provisions of the trust deed shall apply *mutatis mutandis* to any person who is able to illustrate a direct line of descent by Whakapapa from the persons named or identified in any such decision.

Section 9(2) provides for the adjustment of 'percentages of entitlements' in the event of any such court or Tribunal decision.

Evidence from Te Atiawa witnesses suggests that such an adjustment would be welcomed by that iwi. The Reverend Harvey Whakaruru maintained that the proportions should not have been based on the flawed Native Land Court determination of interests. Whakaruru favoured looking at Motueka population figures at the time and pointed to a census taken by John Tinline in 1847, on which basis the relative proportions would be 51 per cent Ngati Rarua, 41 per cent Te Atiawa, and 8 per cent Ngati Tama. Whakaruru noted that Ngati Tama had been left out under the 1892 judgment and therefore was also left out of NRAIT. Yet, in his view, it was through Ngati Tama that Ngati Rarua and Te Atiawa resided at Motueka and that a number of places within Motueka were named, including 'Whakarewa' itself.<sup>79</sup>

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78. Counsel for Te Atiawa, closing submissions, pp 154–155

79. Whakaruru, brief of evidence, pp 11–15

Whakaruru said that there had been a 'distinct lack of consultation with the people affected by this grievance' during the process.<sup>80</sup> He stated that:

The Crown failed to consult appropriately with iwi when putting together the NRAIT Empowering Act. I cannot recall any public meetings being called to discuss the issue . . . I knew nothing about the shape or form of the Act prior to its passing.

The legislation of Parliament that split the entitlement of the NRAIT assets in a manner disproportionate to iwi entitlements, tikanga and inconsistently with our customary use of the Whakarewa lands is a sore point for our iwi. Te Atiawa believe that the entitlements as listed in the NRAIT Empowering Act 1993 schedule of names have not been properly investigated and researched and that the lands have been returned in an unjust fashion.<sup>81</sup>

The Crown's actions, he claimed, contributed to the greater loss of Te Atiawa control of their Whakarewa lands.<sup>82</sup>

Patrick Park, a trustee of Te Atiawa Manawhenua ki Te Tau Ihu Trust and trustee and director for NRAIT, stated that he had always believed that the 80:20 split 'was wrong and that it was only agreed to on the basis that it would be reviewed in the future'. Mr Park described Te Atiawa's acceptance of a 20 per cent share as a decision made 'under duress' in order to attain the quick and expeditious return of the lands. He noted that Te Atiawa were careful to reserve the right to revisit that agreement, stating that this was why only five of the 10 seats on the board had been allocated on an 80:20 basis.<sup>83</sup>

Whilst the Reverend Harvey Whakaruru is correct that there were no public meetings later about the NRAIT Bill, Mr Park explained that there were hui before the original agreement. Under cross-examination by Crown counsel, who asked how Te Atiawa reserved a right to adjust the 80:20 percentages later, he stated:

At the time of the, or just prior to the signing of that agreement, my father, Robbie, was a Trustee on the Whakarewa School Trust Board before it was passed across to NRAIT. He called a meeting of the whanau of the area, Te Atiawa, that he could contact and it was discussed and that was the position that we had asked him to put forward. And he informed us that that was the position that he had put to the Board when the vote was taken . . .<sup>84</sup>

In Mr Park's view, Te Atiawa were concerned to ensure that the land was secured as quickly as possible, in the belief that whakapapa would serve as the basis for inclusion in the trust and that control (of the board) was fairly apportioned. Dividing the money was secondary: 'It wasn't the driving principle to get an agreement signed.'<sup>85</sup>

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80. Ibid, p 11

81. Ibid, pp 16-17

82. Ibid, p 17

83. Patrick Park, brief of evidence, p 15

84. Patrick Park, under cross-examination, sixth hearing, 9-13 December 2002 (transcript 4.6, p 244)

85. Ibid (p 247)

Matters have also been complicated by the Native Land Court decision of 1901. As discussed in chapter 9, the 1853 Whakarewa grant included pieces of various occupation reserves. The commissioners of native reserves recorded the distribution of whanau in those reserves in 1858–62, and the Native Land Court awarded title to them in 1901. Hohaia Rangiauru became a legal owner of those pieces of sections 160, 161, and 164 that had been left out of the Whakarewa grant.<sup>86</sup> In Mrs Georgeson's evidence, the whanau homestead was right next door to the Whakarewa lands on section 182, where the pito of the whanau have been buried.<sup>87</sup> As a result of this individualisation of title in 1901, the Georgeson whanau have come to believe that their tupuna similarly 'owned' the parts of the sections granted to the church in 1853. They seek the return of this land.

In terms of events in 1993, the Georgeson whanau say that the Whakarewa lands were transferred to NRAIT without their full and proper consent, and without consulting with them, as descendants of one of the named original owners, Hohaia Rangiauru. Kuini Katene remembered attending a meeting in 1993 without knowing what it was about and complained that no one came to talk with her about transferring her grandfather Hohaia's lands to NRAIT. Similarly, Norma Ordish stated that she recalled attending meetings but did not know what they were about. She stated that she did not understand how the family changed from being owners of the land to beneficiaries in the land. She understood that Ngati Rarua had decided to amalgamate the whanau shares held in lands around Motueka and vest them into the NRAIT structure, but did not recall being asked, as a descendant of Hohaia Rangiauru and of Te Atiawa, to discuss whether shares in lands that her grandfather owned should be transferred to NRAIT or not. Lynne Katene also had no recollection of being part of any consultation process to transfer her great grandfather's lands to NRAIT.<sup>88</sup>

#### 12.3.4 Claimant and Crown submissions

##### (1) *The delay in returning the land*

Claimant counsel submitted that the Crown had an obligation to return the land in 1881 once the Whakarewa School closed. The Georgeson whanau allege that the Crown failed in its duty to actively protect their full and undisturbed possession of the land at Whakarewa by not returning it to the original owners at this point.<sup>89</sup> Counsel for Te Atiawa submitted

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86. Georgeson, amendment to claim Wai 1002

87. Gloria Georgeson, brief of evidence on behalf of the Rangiauru whanau, not dated (doc R1), p 3

88. Counsel for Georgeson whanau, closing submissions, 5 February 2004 (doc T5), pp 9–10; Georgeson, brief of evidence, pp 2, 8; Kuini Katene, brief of evidence on behalf of the Georgeson whanau, 8 August 2003 (doc R2), pp 4–5; Norma Ordish, brief of evidence on behalf of the Georgeson whanau, 8 August 2003 (doc R3), pp 3–4; Lynne Katene, brief of evidence on behalf of the Georgeson whanau, 8 August 2003 (doc R4), p 5

89. Counsel for Georgeson whanau, closing submissions, pp 13–15

that the land was taken before beneficial ownership of the land in question had been defined and that these original owners had not been compensated for the taking.<sup>90</sup>

The Crown conceded that the land should have been returned to Motueka Maori after it was no longer being used for 'Native purposes', though counsel submitted that it should not have been returned until 1888, when the orphanage opened. Crown counsel noted that there were repeated assertions by Motueka Maori that those who agreed to grant the land only did so on the understanding that the land would return when it was no longer required for the purposes of a school. Crown counsel viewed this as a 'reasonable construction of the agreement' and thought it 'reasonable to suggest that if land were granted to allow for a school then that land should be returned once it is no longer required for that purpose'. In the Crown's view, the 'crucial issue' with respect to the Whakarewa grant was at what point the land was no longer used for Maori purposes and therefore should have been returned.

Counsel noted that the orphanage that opened on the site in 1888 was open to Maori children but, as with all others, their families were required to make a contribution to their upkeep if the family was in a position to do so. Crown counsel concludes: 'From 1888 onwards, it seems that the land was no longer employed for native purposes.'<sup>91</sup>

## (2) *NRAIT*

The Georgeson whanau seeks the return of Whakarewa lands to all descendants of the original owners of those lands. The whanau believes that this is unlikely to occur because the land has been transferred to *NRAIT* under proportional divisions which they see as effectively a transfer to Ngati Rarua. They also say that the Whakarewa lands were transferred to *NRAIT* without the full and proper consent of or consultation with the descendants of Hohaia Rangiauru and that they were prevented from having any say as to what should have happened to the land.<sup>92</sup>

Te Atiawa also submitted that the 80:20 split is incorrect and that Ngati Tama were wrongly excluded from participation in the trust. Counsel criticised the process used by the Native Land Court in 1892–93 to determine ownership of the land, noting that it was not clear how Mackay reached his decision on relativities. It was also not clear that the 94 Ngati Rarua and 15 Te Atiawa individuals named in the *NRAIT* Empowering Act represented those people affected by the gift to the church. It was, however, clear from population figures that there were many more Te Atiawa with rights in Motueka than the 15 individuals named in 1893 (now the basis for membership of the trust).

In Te Atiawa's view, in the case of the occupation reserves at least, population figures at the time the land was transferred would be a better guide for deciding on the trust's

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90. Counsel for Te Atiawa, closing submissions, pp 149–150

91. Crown counsel, closing submissions, pp 76–78

92. Counsel for Georgeson whanau, closing submissions, pp 7–8; Georgeson, brief of evidence, pp 3–4, 8

## 12.3.4(2)

constitution. On this basis, the proportions would be 51 per cent Ngati Rarua, 41 per cent Te Atiawa and 8 per cent Ngati Tama. Te Atiawa claimants do not seek to have NRAIT assets redistributed, or the Ngati Rarua share diluted, but want to have additional assets provided to the trust and the trust deed adjusted to accommodate a split based on population and the inclusion of Ngati Tama.<sup>93</sup>

Counsel for Ngati Tama did not challenge the composition of NRAIT or make any submission about it.<sup>94</sup> Witnesses for Ngati Tama did not do so either, although Dr Mitchell described his involvement in helping to negotiate the 1993 arrangements.<sup>95</sup> According to the Ngati Tama statement of claim, they seek separate compensation for the Crown's Treaty breaches with regard to Whakarewa.<sup>96</sup>

Crown counsel commented on the Georgeson whanau view that the re-vesting of the land in Ngati Rarua and Te Atiawa through NRAIT is a grievance in itself. The Crown viewed the NRAIT Act and the terms of the trust as 'not inconsistent with the concerns identified by the claimant'. Crown counsel pointed out that the Act and the terms of the trust allow the direct descendants of Hohaia Rangiauru to be beneficiaries of the trust. This entitled them to privileges and ensured that they would be informed of any special general meetings. The Crown also noted the Georgeson whanau's acknowledgement that the land should be returned to all descendants of the original owners. It was Crown counsel's view that 'the various competing interests of Ngati Rarua and Te Atiawa can be managed effectively through the transfer to a Trust that represents all descendants' (ie, NRAIT).

Crown counsel suggested that Norma Ordish's evidence reflected the claimant's real difficulty: the inability to have the land or at least a definite portion of it returned in a tangible manner. Crown counsel acknowledged that the claimant does not appear to have been kept informed and included by Te Atiawa and that the representative for Te Atiawa on the NRAIT board was without mandate from the Georgeson whanau. Counsel added, however, that it was difficult to ascertain the level of attempted consultation with the Georgeson whanau. Regardless, counsel stated, the failure of the whanau to engage in the process cannot be attributed to the Crown. In the Crown's view, 'a return of a portion of the land itself is impractical' and given the claimant's acknowledgement that all descendants of the original owners ought to benefit, the trust is the best means to achieve that end. The trust reflects the communal nature of landholding, the range of intersecting interests in land and responds to the problem of conflicting inter-iwi interests.<sup>97</sup>

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93. Counsel for Te Atiawa, closing submissions, pp 152, 154–155

94. Counsel for Ngati Tama, closing submissions

95. See the transcript of the ninth hearing, 16–21 March 2003 (transcript 4.9). For Dr Mitchell's involvement in the NRAIT process, see Dr John Mitchell, under cross-examination, sixth hearing, 9–13 December 2002 (transcript 4.6, pp 160–161).

96. Manson, amendment to claim Wai 723, pp 38–39

97. Crown counsel, closing submissions, pp 78–80

The Crown does not accept, as suggested by the Georgeson whanau, that in revesting the land in NRAIT it has permitted the land to be transferred to Ngati Rarua. Rather, it says, 'the trust allows for involvement of the descendants of both Te Atiawa and Ngati Rarua original owners of the land, providing the type of redress sought by the claimant in the most appropriate manner practicable, taking into account the wide range of interests in the land'. Crown counsel noted that it was not clear whether Ngati Tama or Ngati Rarua agree with the 51:41:8 proportion proposed by Te Atiawa. The NRAIT Act does contemplate, and allow for, shifts in the proportionate interests of the iwi, as well as the addition of further iwi. If the Tribunal or a court issues a decision that other hapu or iwi were 'original owners' of Whakarewa lands, Crown counsel added, then the provisions of the deed will apply to those persons and the relative interest shall adjust accordingly. Thus, if the Tribunal concludes that further owners should be included, this would alter the relative shares of iwi in the trust.<sup>98</sup>

### **(3) NRAIT: submissions in reply to the Crown**

Further submissions were made, following the Crown's closings, by the Georgeson whanau and Ngati Rarua.

Counsel for the Georgeson whanau argued that the Crown's statement that the NRAIT Act and the terms of the trust are 'not inconsistent' with their concerns disregards their evidence of loss of land from the original owners. Summarising these losses as they impacted on the whanau, counsel reiterated that the transfer of lands to NRAIT frustrates any return to the claimants.<sup>99</sup>

The Crown's view that 'the various competing interests can be managed effectively through the transfer to a Trust that represents all descendants' was criticised by the counsel for the Georgeson whanau. Counsel stated that the claimants cannot utilise or occupy their land within the trust, or effectively or practically manage the lands, and that their interests were subsumed in the trust for the benefit of Ngati Rarua and Te Atiawa as a whole. Ngati Rarua counsel also objected to this particular part of the Crown's submission, interpreting it as a suggestion by the Crown that the assets of NRAIT should be re-vested in a separate Trust.<sup>100</sup>

As to the Crown's view that the 'return of a portion of the land itself is impractical', counsel for Georgeson whanau stated that this is of the Crown's own making. Counsel contended that the land might have been returned to the four original owners or their descendants when the school closed in 1881 or in 1993 when the church agreed to relinquish the lands. The Crown's policy of dealing with 'large natural groupings' of claimants, should not, in their

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98. Ibid, pp 80–81

99. Counsel for Wai 1002, submissions in response to Crown closing submissions, 15 April 2004 (paper 2.793), pp 2–4; Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 117–120, 148

100. Counsel for Wai 1002, submissions in response, p 5; counsel for Ngati Rarua, submissions in response, p 9

view, preclude the possibility of the claimants having their own separate settlement. Ngati Rarua counsel, on the other hand, insisted that the Georgeson claim must not be accepted as a whanau claim against the Crown in a manner which can defeat the legitimate claims of Ngati Rarua. They suggest that instead it may be considered as part of the Te Atiawa claim. They note that Hohaia Rangiauru expressed his belief before the Native Land Court in 1892 that Motueka (including Whakarewa) was a Ngati Rarua community.<sup>101</sup>

Ngati Rarua objected to any suggestion that its proportionate interest in NRAIT be diluted. Rather, they say, it should only be enhanced. They claim to have held Motueka and Whakarewa under their mana as a Ngati Rarua community. Te Atiawa whanau with connections to Ngati Rarua lived at Whakarewa under Ngati Rarua's mana. Counsel for Ngati Rarua submitted that the Tribunal cannot, on the evidence before it, recommend additional 'original owners' in the manner sought by the claimants.<sup>102</sup>

### 12.3.5 Tribunal discussion

#### (1) *The timing of the return*

Parties agreed that the land should have been returned to Motueka Maori once it was no longer being used for 'native purposes', although there is debate over what date this was. The Crown conceded that it should have secured the return of the land, albeit only from 1888 onwards. We consider, however, that the Crown was in breach of its Treaty obligations in not returning the land when the school closed in 1881. It was obliged, on the basis of recommendations from its own officials and the Native Affairs Committee, to either challenge the church's title in court or recover the land for Maori by some other means, whether by legislation, purchase, or some other arrangement. We also find that the Crown failed to assist in the return of the Whakarewa lands up until the passing of the NRAIT Act 1993. This ongoing failure for over a century was in breach of the Treaty principle of redress, to the prejudice of all iwi with an interest in the Whakarewa lands. This Treaty breach (and prejudice) included the Georgeson whanau, among many others.

#### (2) *NRAIT*

Under the Treaty of Waitangi Act 1975, the Tribunal is empowered to hear claims that actions or inaction of the Crown have breached Treaty principles. This means that any claim with regard to the return of Whakarewa lands in 1993 and the present constitution of NRAIT must focus on the enactment of the NRAIT Empowering Act and the Treaty consistency of its provisions. This is complicated by the fact that the settlement was not negotiated by the Crown, nor did the Act reflect a Government policy or policies. Rather, it was a private

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101. Counsel for Wai 1002, submissions in response, pp 5–6; counsel for Ngati Rarua, submissions in response, pp 10–11

102. Counsel for Ngati Rarua, submissions in response, p 11

member's Bill introduced in order to give legal effect to an arrangement agreed between private parties. That the private member concerned was the Minister of Maori Affairs does not alter this situation.

One question before the Tribunal is: what were the Crown's Treaty responsibilities in respect of this private member's Bill? First, we note from the parliamentary debate that the Government and Opposition were aware of the long history of Maori grievance about this land.<sup>103</sup> As we saw in the preceding section, Crown actions had created the original grievance, and then compounded it by the repeated failure to remedy it when opportunities had arisen to do so. Thus, the Crown ought to have been aware that it had a particular responsibility to the iwi concerned in 1993. Second, the Crown's obligation actively to protect the interests and the tino rangatiratanga of iwi and hapu remains constant, whether it be in respect of a public or a private Act of Parliament. Regardless of whether the Government's intention is to give effect to private arrangements, the parliamentary process employs the legislative power of the State in doing so, and the Crown cannot act without regard to its Treaty obligations in thus wielding the legislative power of the State. Hence, private Bills are referred to select committees, the public has an opportunity to comment, and the Crown must vet the legislation and satisfy itself as to (among other things) its consistency with the Treaty.

Here, we are hampered by a lack of evidence. Neither the claimants nor the Crown provided us with detailed evidence about the interactions between the Government and the proponents of the NRAIT Bill. We have no information on what steps the Government took to satisfy itself that the arrangements were fair, duly authorised by the iwi concerned, and consistent with the Treaty. In the absence of evidence on this issue, we are not in a position to evaluate the Crown's actions in accepting the NRAIT proposal and introducing legislation to give it effect.

This leaves us with the provisions of the NRAIT Bill itself, and its passage through Parliament. The Bill was referred to the Maori Affairs Committee, which called for submissions by advertising in newspapers and 'writing directly to persons considered to have a special interest in the Bill.'<sup>104</sup> The committee hearing was attended by 40 members of the iwi concerned, and three submissions were heard (out of 15). The Tribunal has not been given copies of the submissions. According to the report back in Parliament, there were two objections to the Bill. One was from an 'individual' who argued that the Crown (not the church) should provide the remedy for the grievance, that the Waitangi Tribunal should advise on the proper tribal share of assets, and complained at the absence of any provision for other hapu or iwi who might have a valid interest in the land. This objection was discussed with representatives of NRAIT, after which a new clause was introduced to the Bill to

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103. Doug Kidd and Koro Wetere, 12 August 1993, NZPD, vol 537, pp 17,428–17,430

104. Joy McLauchlan, 23 September 1993, NZPD, vol 538, p 18,351

provide a means for other interested parties ‘who believe that they have a legitimate claim on the land, to take action as they deem appropriate.’<sup>105</sup>

The second objection was from Ngati Toa. Their runanga supported the objective of the Bill but argued that all possible claims and rights must be provided for. In particular, Ngati Toa challenged the reliance on Native Land Court decisions and lists of owners as a legitimate means for identifying the original owners and their descendants. They too asked for the matter to be considered by the Waitangi Tribunal.<sup>106</sup>

The Maori Affairs Committee responded to these objections by (as noted) inserting a new section into the Act. This satisfied both the Government and the Opposition. Koro Weterere (for Labour) stated:

I guess that the issue is that, as the member for Western Hutt raised when reporting back the Bill, there could well be, and in some respects is, opposition to the Bill. Although the Bill as written is supported by the Ngati Toa people, there are provisions within the Bill that allow them to put a case to the Waitangi Tribunal.<sup>107</sup>

The Government and the Opposition both supported this private member’s Bill in the belief that they had now provided an appropriate remedy for anyone who felt unfairly excluded from the trust. There was no suggestion, either in Parliament or in the objections as reported, that an iwi trust was an unsuitable vehicle for the return of these lands.

The next question for the Tribunal is: Was section 9 an adequate remedy for the objections received to the Bill, did it meet the Crown’s obligation actively to protect the interests of Te Tau Ihu Maori, and does it provide a remedy for the claimants today? As noted above, section 9 provided that, if any hapu or iwi obtained a ‘decision’ from the Waitangi Tribunal, the Maori Appellate Court, the High Court, or any other court ‘of competent jurisdiction’ declaring that ‘persons who were members of such hapu or iwi were original owners of the land’, then any person who could show a whakapapa connection to such ‘original owners’ would become a beneficiary of the trust. Following that, the percentage of entitlement as between iwi ‘shall be adjusted according to any such decision’ of the Tribunal or a competent court. Any hapu or iwi added to the trust would have the power to appoint a board member. Further, the Act was not to prevent anyone from bringing a claim to entitlement to the Tribunal or any court, nor was it to be considered a settlement of Ngati Rarua and Te Atiawa’s Treaty claims against the Crown.<sup>108</sup>

The claims of Te Atiawa and the Georgeson whanau turn in part on the interpretation of this section of the Act. On the face of it, section 9 does not provide a remedy for either of them. Crown counsel, in his cross-examination of the Reverend Harvey Whakaruru,

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105. Joy McLauchlan, 23 September 1993, NZPD, vol538, p18,352

106. Ibid

107. Ibid, p18,353

108. NRAIT Empowering Act 1993, s9(1)–(5)

suggested that it does allow for an adjustment of the 80:20 percentages to take place, leading the reverend to express a hope that that would follow from our inquiry.<sup>109</sup> As we read it, however, section 9 only provides for an adjustment of the percentages following the addition of a new hapu or iwi to the trust. That is, it does not envisage an adjustment to the 80:20 split between the current iwi beneficiaries. A new hapu or iwi would have to be added first. While adding a new group would require a change to the overall distribution of proceeds, there is no reason to expect that it would require a change to the proportions of Ngati Rarua in relation to Te Atiawa. Secondly, as the Crown points out, the descendants of Hohaia Rangiauru are already entitled to be beneficiaries of the trust. Thirdly, Te Atiawa's concern that the 1893 list did not include their full population cannot be addressed under section 9. There is no power to add more Te Atiawa people to the trust.

It may be, therefore, that the only group who could benefit from section 9 is Ngati Tama (although this does not preclude any other iwi from attempting to utilise section 9). As noted, Ngati Tama did not seek to disturb the *NRAIT* arrangements in our proceedings. Rather, they sought separate redress from the Crown for its granting of Whakarewa land to the church.

In any case, we do not consider that section 9 provides a justiciable remedy through the Tribunal process. The Tribunal's jurisdiction is confined to making findings and recommendations in relation to claims by Maori against the Crown. It does not have the jurisdiction to make or in fact amend orders as to ownership which is envisaged by section 9. That being the case, we are left with the question of whether the Crown discharged its Treaty obligations satisfactorily in 1993.

The process of consultation carried out by the representatives of Ngati Rarua and Te Atiawa with their constituents (including the Georgeson whanau) has not been made the subject of detailed evidence. We are aware from some witnesses (such as Mr Park) of conscientious attempts to consult with members of the iwi concerned. We are also aware from the evidence of the Georgeson whanau that they felt either left out or unable to ascertain what was really going on. But we lack sufficient information to determine whether there were significant or systemic flaws in the process followed by the iwi and the church. It seems unlikely, from the evidence available to us. Ngati Rarua witnesses were satisfied with the consultation. Te Atiawa witnesses complained of haste and duress, but appear to have been widely consulted. Some of the witnesses for the Georgeson whanau claimed to have been left out altogether, but others disagreed with the process or did not understand what their participation in the meetings was leading to.

Most importantly, we have no information at all on what steps (if any) the Government undertook to satisfy itself that there had been adequate consultation and consent. The only

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109. Reverend Harvey Whakaruru, under cross-examination, sixth hearing, 9–13 December 2002 (transcript 4.6, pp 262–263)

process on which we have partial information is the select committee's hearing on the Bill. From what we know of it, no objections were received from Te Atiawa about the 80:20 split. This may have been because (as they told us) Te Atiawa believed that there was power to revise the proportions later. No such power was explicitly provided for in the Act, although clause 18 of the trust deed allows the beneficiaries (not the iwi) to change the rules by a three-quarter majority at a special general meeting.<sup>110</sup>

Given the belief of the Te Atiawa witnesses, it is difficult to account for their failure to either ensure the inclusion of such a provision in the Act, or to object to its absence. We accept Mr Park's evidence that their concern had led to the unusual composition of the board: four members to be elected by Ngati Rarua, one member by Te Atiawa (representing the 80:20 split); plus three members to be elected jointly by Ngati Rarua and Te Atiawa, with provision for the board itself to appoint an additional two members (not necessarily of either tribe). This still did not, however, allow for the revision of proportionate benefit from the trust itself, which became the fundamental concern. Mr Park argued that Te Atiawa agreed to the 80:20 split under duress. If his view of matters is correct, then that ought to have been within the power of the Government to ascertain in 1993 before it passed the Act. But, in the absence of evidence about the Crown's actions in 1993, we are unable to make a finding on this matter.

Given the great wealth of evidence presented to us by the claimants, the Crown, and their historians, we are, however, in a rather unique position to comment on the 'original owners' referred to in the NRAIT Empowering Act. As we see it, this question does not have to be complicated by Native Land Court decisions. In other words, that court never created any legal entitlements to the Whakarewa lands, although an attempt has been made to read its 1892–3 decision backwards to determine 'ownership' as at 1853.

It is clear from the evidence in our inquiry that there were three categories of land in the grant to the church. First, the Crown was the owner of one piece. In our view, the serious and sustained Treaty breaches associated with Whakarewa prevent the Crown from, in all fairness, asserting a claim today. Secondly, 429 acres of the Whakarewa grant was taken from the tenths estate. As the Crown has conceded, it breached the Treaty when it failed to ascertain ownership of that estate in 1844. From our findings in chapter 9, it will be clear that we think the leading share of the tenths estate was correctly established in 1892, as belonging to Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata. We also found, however, that Ngati Toa and the Kurahaupo iwi ought to have been included as well. In all fairness, since the narrower definition of ownership was not made until 1892, then all eight iwi of Te Tau Ihu ought to have been beneficiaries of the trust at the time that Whakarewa was granted, without their consent or the payment of compensation, to the church.

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110. Deed of trust, NRAIT Empowering Act 1993, sch 3, s18

Thirdly, as we found in chapter 2, Ngati Rarua were the predominant iwi at Motueka at that time. Te Atiawa also had customary interests. As we discussed above, Ngati Tama were actually resident on the Whakarewa lands. According to James Mackay in 1862, they were there through their connection to Ngapiko, a Ngati Rarua rangatira.<sup>111</sup> Be that as it may, there is no suggestion that they were squatting there without rights. The occupation reserve component of the grant – 489 acres – was therefore taken from Ngati Rarua, Te Atiawa, and Ngati Tama. They were the ‘original owners’ of the occupation reserves as at 1853. Although technically within the tenths trust, the evidence recited in chapter 9 makes it clear that the occupation reserves were always considered to have had a different and more particular ownership.

That ownership as at 1853 was a customary one, based on the authority of rangatira and their hapu communities. Individuals and their whanau had rights to use particular lands and resources but those rights were governed by the community. Only the community, through its traditional leaders and customary institutions, had the power to alienate or otherwise dispose of the land. Hohaia Rangiuru was an undoubted rangatira of Te Atiawa. But, as an individual, he did not ‘own’ the land in the sense meant today by the Georgeson whanau. His individual rights were subsumed within those of the hapu and its leadership. This question is not complicated by any intervening Native Land Court decision, legally vesting this particular land in individuals. We do not accept, therefore, that the Georgeson whanau (or any other whanau) has a customary basis for claiming that the land should now be returned to them. They are entitled – as with other Motueka whanau – to be beneficiaries of the iwi trust. We are satisfied that this was the correct mode of returning land to the ‘original owners’ of the occupation reserves as at 1853. That being said, there may still be ways for the iwi trust to provide for the relationship of whanau with particular places or sites. The nature of the leases may limit options in this respect. The trust can also accommodate special interests through two seats on the board. After hearing the Georgeson whanau claim, we urge this matter on the consideration of the trust.

It follows, therefore, that the ‘original owners’ in 1853 were of two classes:

- ▶ the tenths endowment sections belonged to the many iwi who were (or ought to have been) beneficial owners of the tenths estate; and
- ▶ the occupation sections belonged to the resident hapu communities of Ngati Rarua, Te Atiawa, and Ngati Tama, with the predominant interest belonging to Ngati Rarua.

As noted above, we are not sure what the legal effect is (or could be) of such a ‘declaration’. Ngati Tama did not seek to challenge the NRAIT arrangements, nor did they seek inclusion in the trust. The argument for their inclusion came from Te Atiawa, and was not endorsed or adopted by Ngati Tama. We note Ngati Tama’s position and make no further comment on whether or not they ought, in Treaty terms, to have been included.

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111. James Mackay, memorandum, 17 December 1862 (Hilary Mitchell and Maui John Mitchell, comps, supporting documents to ‘Motueka Occupation Reserves’, various dates (doc A38(a)), p 79)

The NRAIT Empowering Act is quite clear that the return of Whakarewa land by the church is not to be considered a settlement of Treaty claims. We endorse this approach. In our view, the Crown should compensate all iwi entitled to have benefited from the tenths endowment sections as at 1853. Such compensation ought not to disturb the NRAIT arrangements. We agree with the approach of returning the Whakarewa lands not to the beneficiaries of the tenths but to those iwi more connected to the particular lands (the resident iwi of Motueka). Nonetheless, the fact that this land has finally been returned does not settle their Treaty claims either. We recommend that the Crown negotiate with the resident iwi to compensate them for its repeated failure to return this land, and the long-term prejudice suffered by them as a result. Those negotiations should be with the iwi (including Ngati Tama), not with NRAIT. As noted in chapter 9, we are particularly concerned that the NRAIT lands were distinguished from other perpetually leased lands in 1997 and have not been put on a proper footing. We think this is unfair to the iwi concerned, given the long history of Treaty breaches associated with Whakarewa. Resolution of that matter would appropriately be negotiated with NRAIT.

That leaves us with two final issues: the 80:20 split and the limiting of the ‘iwi’ trust to descendants of individuals named on the 1893 list. On the first issue, we have noted that the NRAIT Empowering Act did not provide for a revision of the 80:20 split, unless new hapu or iwi were added to the trust. Given Te Atiawa’s claim in our proceedings, would it now be appropriate for the Crown to reinvestigate this aspect of the 1993 Act? In our view, the matter hinges on the degree to which the Government had already investigated it (and discharged its Treaty duties) in 1993, when the proponents of NRAIT sought enabling legislation. As discussed above, we simply do not know the answer to that question.

The historical evidence does not enable us to reach a decided view on whether there should have been such a precise apportionment, or whether it is a fair approximation of customary rights in the occupation reserves. As we found in chapter 9, there is no compelling evidence that Judge Mackay got the proportions significantly wrong in 1892 (which led to the 80:20 proportion for Motueka), except, as we noted, he wrongly missed Ngati Tama’s rights in that district. Reliance on Native Land Court determinations is not safe, however, and we note that the 1901 decision for surviving Motueka occupation reserves was very different (in proportional terms) from that of 1892 for the tenths. The 1901 case was based in part on adjustments made after the 1853 grant – in 1858 and 1862 by the native reserves commissioners – and on the situation prevailing between the 1860s and 1901 (see ch 9). It was based, in other words, on proven whanau occupation of these reserves, not on the customary rights and authority of hapu communities in the Motueka district. Given the parameters under which this decision was made, we think it provides little if any real guidance.

We do not, however, see a basis for revisiting the Ngati Rarua–Te Atiawa proportional split according to population figures, as suggested by Te Atiawa. With respect, customary

rights in Motueka did not depend on the numerical size of the respective hapu communities. So long as the intent remains to determine the 'original owners' as at 1853, population size is not a relevant factor. The mechanism relied on by the trust instead is the 1893 list of owners, which was adopted by the iwi concerned in 1993. This decision was not imposed upon them by the Crown. Clearly, from the 1901 lists and other evidence, the 15 Te Atiawa names did not include all the Te Atiawa people with rights in Motueka. On the other hand, we do not know what compromises and arrangements were made between hapu and whanau when the 1893 list was compiled. Ropata Taylor conceded, for example, in cross-examination by Mr Castle, that he is included in NRAIT through his Ngati Rarua connections. Many such pragmatic inclusions at the time may hide behind the 1893 list and the exclusion of certain individuals.<sup>112</sup>

There are hints that the iwi sought to moderate the effects of using the 1893 list. First, it is not the beneficiaries who elect the board but the iwi of Ngati Rarua and Te Atiawa at hui.<sup>113</sup> Secondly, this board has the power to assist with the establishment, maintenance, and development of marae, as well as to assist iwi with their claims; neither of these powers is restricted to the narrower category of beneficiaries, although they are included as part of the iwi concerned.<sup>114</sup>

In our view, the 1893 list is a dubious basis for defining the members of the Motueka hapu with customary rights in 1853. But this was the mechanism chosen by the iwi themselves. As we found above, we have insufficient evidence to determine whether the Crown satisfied itself of their full and meaningful consent to these arrangements in 1993. In the absence of such evidence, we are unable to determine whether a Treaty breach has taken place. We note, however, the concerns expressed by various members of Te Atiawa in our inquiry. It may be that many Te Atiawa whanau have been improperly excluded by reliance on the 1893 list. None of those concerns were, as far as we can tell, expressed to the Select Committee in 1993.

Ultimately, we cannot do other than note our view that the predominant interest in Motueka was with Ngati Rarua, and that Te Atiawa and Ngati Tama also had customary interests. Whether the 80:20 split should be revisited is a matter for Te Atiawa, Ngati Rarua, NRAIT, and the Crown. In terms of remedies, Te Atiawa is not seeking a dilution of the present Ngati Rarua interest. They are happy for the 80:20 split to remain for the current assets, so long as additional assets are provided to the trust which bring the overall proportions to what they see as a fairer result. Such a change to the basis of the trust would require the agreement of Ngati Rarua and legislative amendment. It is a matter that could be considered as part of Treaty settlement negotiations.

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112. Ropata Taylor, under cross-examination, sixth hearing, 9–13 December 2002 (transcript 4.6, p 291)

113. Deed of trust, 7 May 1993, s10 (NRAIT Empowering Act 1993, sch 3)

114. Deed of trust, 7 May 1993, s 4 (NRAIT Empowering Act 1993, sch 3)

**12.3.6 Tribunal findings**

In chapter 9, we found that the endowment sections at Whakarewa were virtually confiscated by the Crown, when it granted them to the church without paying the owners or obtaining their consent. We also found that the occupation reserves were transferred with only partial consent, and again without payment. The extinguishment of the ownership rights of Te Tau Ihu iwi in this manner was in serious breach of the Treaty of Waitangi. The loss of what the Crown's historian, Dr Ashley Gould, referred to as quality lands, was of lasting prejudice to the Motueka hapu and the beneficiaries of the tenths trust.

Here, we find that the Crown had opportunities to return this land from at least the 1880s. Despite acknowledging the validity of the grievance, successive governments failed to provide redress through the options available to them. They did not challenge the validity of the grant in the courts, when the land was no longer being used for the purposes specified in the grant. Nor did they negotiate with the church to purchase or otherwise reacquire the land. They failed to act on recommendations from officials and the Native Affairs Committee. The Crown conceded in our inquiry that the land ought to have been returned to Maori from the point at which it was no longer being used for 'native purposes'. We agree, and find that failure to do so compounded the earlier Treaty breach in making the grant in the first place. The Crown's admitted failure was in breach of the Treaty principle of redress. The iwi concerned, and the Georgeson whanau, were prejudiced by this Treaty breach.

We do not, however, have sufficient evidence to determine whether the Crown fulfilled its Treaty obligations to the affected iwi in 1993, in respect of its enactment of the NRAIT Empowering Act. Section 9 of that Act, supposedly providing a remedy for anyone found to have been wrongfully excluded, appears to us to be of questionable utility and effect. It has not yet been tested. It does not appear to provide for the proportionate share of Ngati Rarua and Te Atiawa to be revised, unless an additional group is added to the trust.

In our view, the 'original owners' of the land (as referred to in section 9) were in two categories:

- ▶ the endowment sections belonged to the beneficial owners of the tenths, which ought to have included Ngati Rarua, Te Atiawa, Ngati Tama, Ngati Koata, Ngati Toa, and the Kurahaupo iwi; and
- ▶ the occupation sections belonged to the hapu communities resident in Motueka, including Ngati Rarua (predominantly) and also Te Atiawa and Ngati Tama.

We are not sure what, if any, status this 'declaration' has in terms of section 9 of the Empowering Act. We do not wish to be understood as recommending the addition of Ngati Tama to the trust. They did not seek such inclusion themselves in our inquiry, but rather sought compensation from the Crown for the Whakarewa Treaty breaches. That is a matter for negotiation. Nor do we wish to recommend the inclusion of the beneficial owners of

the tenths estate. Their claims should be compensated outside of the NRAIT arrangements, which, in our view, were appropriately concluded with resident iwi.

In terms of the specific claims made to us, we have too little evidence to determine whether the Crown carried out its Treaty obligation to ensure the proper consultation and consent of the iwi affected to the terms of the NRAIT trust deed and Bill. We are not in a position to make a finding on whether the consultation was fair in Treaty terms. As a result, we cannot determine whether or not a Treaty breach has occurred in respect of Te Atiawa, who claim to have accepted the 80:20 split under duress, and in the belief that it could be revised later.

In our view, however, the return of this land to the resident iwi of Motueka was an appropriate outcome of the parties' intention to return it to the 'original owners' as at 1853. Customary rights at that time were vested in the iwi communities and their rangatira. We do not accept the Georgeson whanau claim that their tupuna, Hohaia Rangiauru, had an individual right that required the separate return of land to his descendants. We note, however, that the trust ought to provide for the relationships of whanau with their ancestral land, insofar as it is able to do so. Leases may well limit what is possible in that respect.

We endorse the approach taken in the Empowering Act that it does not settle Treaty claims. We recommend that the Crown negotiate with all the iwi of Te Tau Ihu in terms of compensating Treaty breaches associated with the endowment sections, and that it negotiate with Ngati Rarua, Te Atiawa, and Ngati Tama to compensate breaches associated with the occupation sections.

There is no power to revise the composition of the trust under the present legislation, except under the circumstances detailed in section 9. As we have found, none of the claims in our inquiry meet the criteria in that section. Ngati Rarua made it clear that they do not want the 80:20 split to be revised. Te Atiawa believe that, given the composition of the board (which is not 80:20), both groups could now be accommodated by the addition of new assets to the trust, distributed under a different formula. That solution could be provided for in settlement negotiations if all parties agree. Also, the relationship of the Georgeson whanau to particular pieces of land (and whanau in like position) could be accommodated within the trust, leases permitting. That is a matter for discussion between the NRAIT board and the Georgeson whanau. We do not, however, see a solution for the problem raised by Te Atiawa with regard to the limits of the 1893 list, without there being a fundamental change to the very nature of the trust. We leave that issue for the further consideration of parties.

**12.4 TE ATIAWA CLAIMS TO WAIKAWA LANDS TAKEN FOR PUBLIC WORKS****12.4.1 The claims and case studies**

Six Te Atiawa whanau and specific claimant groups raised issues relating to the Crown's taking of land for public works at Waikawa.<sup>115</sup> Matthew Love's claim (Wai 851) was brought on behalf of the descendants of the original owners of Waitohi, a smaller group than the confederation of hapu represented by Te Atiawa iwi. The claim related to public works takings for a rifle range, and the claimants were represented by separate counsel from the other Te Atiawa public works claims.<sup>116</sup>

Te Atiawa counsel represented the other five Te Atiawa claims, which related to a number of takings in and beyond Waikawa, including the rifle range land. The most detailed evidence in these claims was provided by Rita Powick in relation to land taken for waterworks and Ngaire Noble regarding land taken for the Port Underwood Road. Claims made by the Kinana hapu, Mary Barcello, and Laura Bowdler include further examples of Crown takings in and around Waikawa.<sup>117</sup>

We do not intend to produce a comprehensive response on every public works taking in the Waikawa area, but have chosen to look at the lands taken for the rifle range, waterworks, and the Port Underwood Road as case studies on the basis that they all deal with similar issues. We also provide some comment on two further issues identified by counsel for Te Atiawa iwi which deal with public works and we note arguments relevant to the general topic of public works takings within counsel for Te Atiawa iwi's closing submissions.

As noted, the case studies all raise similar issues with respect to Crown acts and omissions. These include:

- ▶ the taking of land over which restrictions on alienation applied;
- ▶ the compulsory acquisition of land which might instead have been purchased from willing sellers or leased;
- ▶ the extent of the areas taken and particularly in relation to the small amount of lands remaining in local Maori ownership;
- ▶ the source of the funds for the acquisition of the lands taken;
- ▶ the difficulties the claimants have experienced wherever the Crown has vested land in local bodies;
- ▶ the difficulties the claimants have encountered in seeking the return of the lands either not used or no longer required for public purposes;
- ▶ the inadequacies of the provisions within the Public Works Act 1981 regarding the

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115. Love and others, amendment to claim Wai 851; Powick, claim Wai 920; Noble, claim Wai 921; Keenan, claim Wai 924; Barcello, claim Wai 925; Bowdler, claim Wai 927

116. Mathew Love, brief of evidence on behalf of Ngati Awa, 1 August 2003 (doc Q13), p 3

117. Powick, claim Wai 920; Noble, claim Wai 921; Keenan, claim Wai 924; counsel for Wai 920, closing submissions, 12 February 2004 (doc T12), p 12; counsel for Wai 921, closing submissions, 18 February 2004 (doc T15), p 4; counsel for Wai 927 and Wai 925, opening submissions, 8 August 2003 (paper 2.666), p 2

price to be paid by the original owners for the return of land formerly taken and the timeliness of any land returns; and

- ▶ the problems arising from the Crown's return of land to groups other than the original owners.

#### 12.4.2 Waikawa reserve

Chapter 7 discussed the creation of the reserve through the Crown purchase of Waitohi in 1856. It will be recalled that Grey viewed the reserve as compensation for the Waitohi residents required to relocate their residences and cultivations and it was intended to incorporate 'sufficient room for the future operations of the Natives.'<sup>118</sup> In chapter 7, we discussed the alienation of much of the land in the reserve during the late nineteenth and early twentieth centuries after the Native Land Court investigated title in 1889. David Alexander calculated that 84.3 per cent of the 3050-acre Waikawa reserve had been permanently alienated by 1999, leaving only 467 acres in Maori ownership. A similar, but less dramatic, trend emerged with the Waikawa village sections. While the vast majority of transactions were small private sales, public works takings in Waikawa totalled over 440 acres between 1856 and 1999.<sup>119</sup>

#### 12.4.3 The 1912 taking of land for a rifle range

In July 1912, 133 acres was taken for a rifle range from the land that became Waikawa West A and Waikawa West D1–D5 blocks under the Public Works Act 1908 and the Defence Act 1909.<sup>120</sup> The land purchase officer inspecting the area initially estimated it at 90 to 100 acres. He acknowledged that this area 'may be considered somewhat excessive', but advised purchase of the full extent because he thought it could be acquired cheaply, at around £350 to £400. In the event, the land was compulsorily acquired, apparently with little or no consultation with the owners. At least some of the owners were recorded in Native Land Court minutes to have claimed that they had 'suffered a severe loss' through the transaction, owing to depreciation in the value of the residue of the land. The court's September 1912 award of £723 10s in compensation took this into account.<sup>121</sup>

118. Dr Diana Morrow, 'A Legacy of Loss: Ngati Awa/Te Atiawa Reserves in Queen Charlotte Sound, 1856–c1970', report commissioned by the Crown Forestry Rental Trust, 2000 (doc D6), p 89

119. Morrow, 'Legacy of Loss', pp 89–91; David Alexander, 'Reserves of Te Tau Ihu (Northern South Island)', 2 vols, report commissioned by the Crown Forestry Rental Trust, 1999 (doc A60), vol 1, p 5; Rita Powick, brief of evidence on behalf of Te Atiawa, 10 January 2003 (doc 130), pp 4–5; see Dion Tuuta, 'Waikawa Rifle Range and Education Reserve, 1911–1992', report commissioned by the Waitangi Tribunal, 1998 (doc A33), pp 3–11. The fact that the total is only 440 acres suggests that it takes returns by 1999 into account.

120. As with all other blocks adjudicated on by the Native Land Court under section 8 of the Native Equitable Owners Act 1886, the Waikawa West reserves were restricted from sale, mortgage, or leases of over 21 years.

121. Morrow, 'Legacy of Loss', p 92; Tuuta, 'Waikawa Rifle Range', pp 11, 17–18, 52; M Love, brief of evidence, p 15

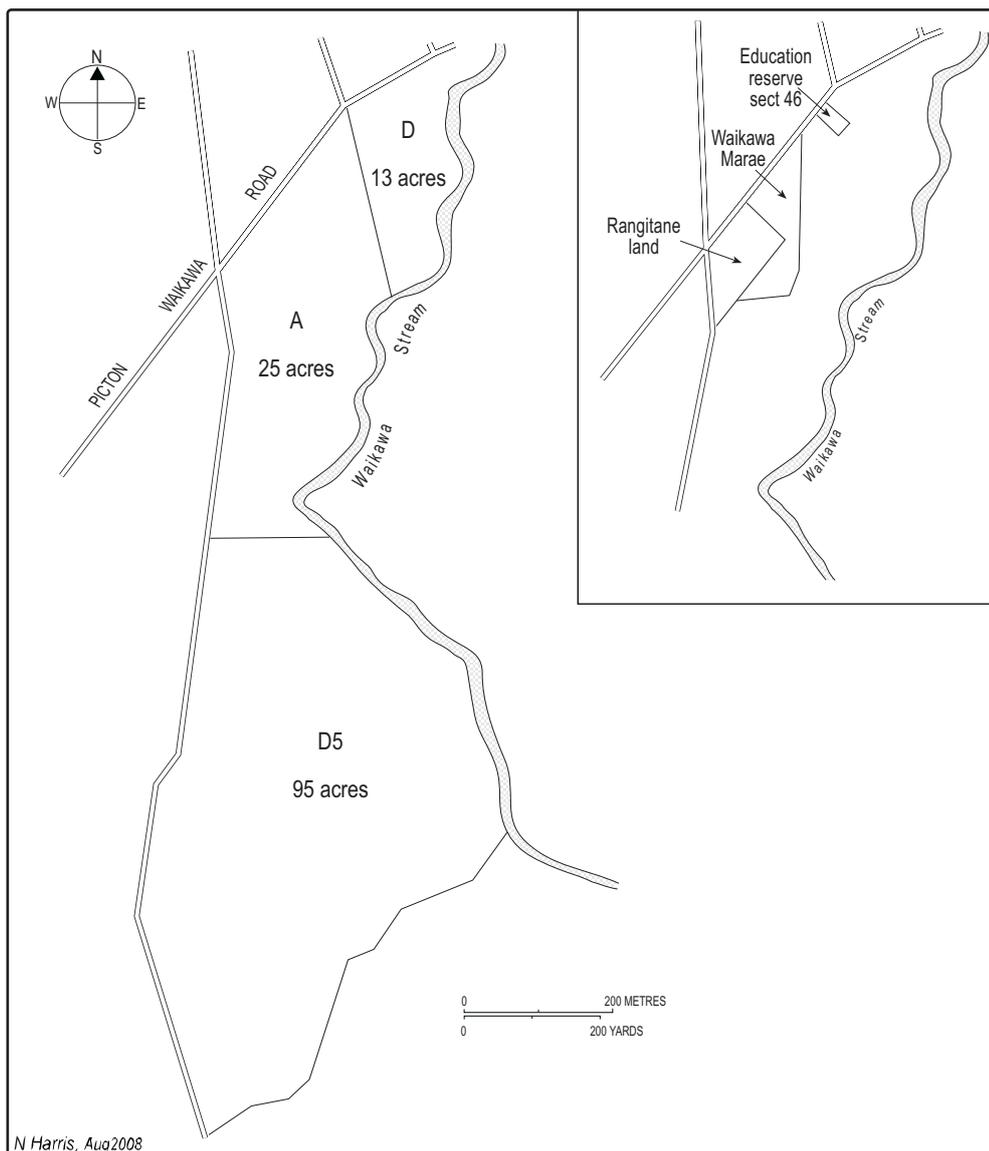


Figure 46: Waikawa rifle-range and marae

Source: Dion Tuuta, 'Waikawa Rifle Range and Education Reserve, 1911–1992', report commissioned by the Waitangi Tribunal, 1998 (doc A33), map 4

Prior to 1912 the land had been used to graze sheep by at least one of the owners and a European lessee. The Department of Defence had also leased an unspecified area from the owners to use as a rifle range. Tribunal-commissioned historian Dion Tuuta and Dr Diana Morrow for the claimants both questioned why a long-term lease could not have satisfied the department's needs, while at the same time supplying an ongoing source of income to the owners. It appears that the department thought it necessary to acquire the title to the land because it wished to prevent the site being cut up for building purposes, although that

also could have been achieved through a lease arrangement. The department considered the area to be the only available range site in the locality.<sup>122</sup>

After acquiring title in 1912, the department then leased the land out to J M Todd for grazing purposes while maintaining it as a rifle range. Todd, the first of a number of lessees, was required to erect a barbed-wire fence around the target trench and move stock when the army needed the area for shooting practice. In 1916, the army thought that the rifle range required reconstruction, at an estimated cost of £280, but before this could be undertaken it believed it to be 'desirable' to either acquire or obtain shooting rights over an additional piece of land, owned by Todd. When Mr Todd persistently refused to part with this land, no action was taken to compulsorily acquire it under the Public Works Act. Some 30 years later, in 1949, the army revealed that it was 'not possible to construct a rifle range' on the site and that it had no other uses for the land. Matthew Love considers that the land was never in fact used as a proper rifle range at all.<sup>123</sup>

#### **12.4.4 Alienation of the former rifle range land: the education reserve, the Rangitane swap, and the Waikawa Marae**

Parts of the rifle range land have since been alienated, in Mr Love's view, without any consultation with the descendants of the original owners of the land. In 1951, the rifle range land was transferred from the Defence Department to the Lands Department under the Public Works Act 1928 and declared Crown land. A quarter-acre section of the former rifle range land taken out of Waikawa West D4, originally owned by John Heberley, was reserved for education purposes in 1953 and is the site for the teacher's residence at Waikawa Pa School, which Dr Morrow recorded as being 'still in use today'.<sup>124</sup> According to Mr Love, however, this residence was not properly used and is no longer occupied.<sup>125</sup> In 1995, the Heberley whanau approached the Department of Education to inquire about the possible return of the reserve. They were unsuccessful and a claim was lodged with the Tribunal.<sup>126</sup>

The Public Works Act 1928 in fact provided that where land had been taken and later found to be surplus it was to be offered back to the original owners at a price to be determined by valuation. But the effect of this provision was weakened by exemptions allowing for surplus lands to be sold to education boards without going through this procedure, and more generally by permitting such lands to be declared Crown land subject to disposal by

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122. Morrow, 'Legacy of Loss', pp 92–93; Tuuta, 'Waikawa Rifle Range', pp 11, 15, 18, 52

123. Morrow, 'Legacy of Loss', pp 92–93; Tuuta, 'Waikawa Rifle Range', pp 11, 13–15, 18, 21–23; M Love, brief of evidence, p 15. The additional land considered desirable was an area between the stream and the road, part Waikawa 2A.

124. Morrow, 'Legacy of Loss', p 93

125. M Love, brief of evidence, pp 16–20; Tuuta, 'Waikawa Rifle Range', pp 26–27

126. The claim was added to Wai 469, the Ngati Awa claim: Tuuta, 'Waikawa Rifle Range', pp 1–2, 24. With the removal of Wai 469 from our inquiry (see sec 1.4.3), this claim became part of the Te Atiawa iwi claim (Wai 607).

sale through the Lands Department, again without any first right of purchase being recognised. Later provisions after 1948 also weakened the earlier ‘ancient principle’ that land taken by compulsion should be used for the purpose for which it was originally taken. It was not until the Public Works Act 1981 that the ‘offer back’ provision was significantly strengthened.<sup>127</sup>

In legal terms, the Crown thus had a great deal of discretion in disposing of lands originally taken for public works purposes. At Waikawa, other alienations included the 1955 Crown transfer of three acres 35 perches to Rangitane, as part of a swap in return for Rangitane land interests in White’s Bay. In 1956, section 45 of the former rifle range land, comprising almost 79 acres, was gazetted as a scenic reserve under section 167 of the Land Act 1948 (see fig 46). In 1976, 1.72 hectares of land was vested in the Waikawa Marae Trustees, a group described as representing the Maori people of Waitohi, for a marae and community centre for the Maori people of Picton, Waikawa, and Blenheim.<sup>128</sup>

#### 12.4.5 Negotiations for the return of the remaining land

In 1986, Mr Love and James Mark became engaged in negotiations with the then Minister of Lands, Peter Tapsell, for the return of all the former rifle range land. In 1987, they lodged a claim (Wai 83) with the Tribunal while continuing negotiations with the Crown. The claim was withdrawn following the success of negotiations. It was agreed that the land was to return to the descendants of the original owners of the land.

From at least 1987, the Crown was aware of the competing claims of the Waikawa Marae Trustees and the descendants of the former owners of the land. The Acting Director-General of Lands was of the opinion that under ‘current policy’ the Crown had an obligation to return the land to the descendants of the former owners, seeing the question of further land for marae projects as a matter to be resolved between the two groups. He also thought that the land should be returned free of cost because the land ‘could have been handed back at a much earlier date’ and the Crown had received an income from land which ‘at least since 1981 (date of offer back policy), should have been returned to Maori ownership.’<sup>129</sup>

127. Cathy Marr, *Public Works Takings of Maori Land, 1840–1981*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), pp 145–146; Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, pp 313–314

128. Morrow, ‘Legacy of Loss’, p 93; M Love, brief of evidence, pp 16–20; Tuuta, ‘Waikawa Rifle Range’, pp 1, 27–28, 30–32, 53. In 1962, a section of the rifle range land (part of which was subsequently vested in the Waikawa Marae Trustees) was leased for 10 years to Sounds Scenic Flights Limited. Ironically, an approach by Sir Eruera Tirikatene to the Minister of Lands in 1964 on behalf of ‘the Maori community at Waikawa Pa, Picton’ seeking to acquire that land was looked upon unfavourably compared to the progress of the airfield, and the would-be purchasers were redirected to ‘the possibilities of the Reserve [the Rangitane land swap] already provided and any other areas including Maori Land which might serve its purpose’.

129. Tuuta, ‘Waikawa Rifle Range’, pp 1, 27, 38–39

From 1990 to 1992, all the land except for the education reserve, the ‘Rangitane’ land and the Waikawa Marae was returned. In 1990, this involved the vesting of three areas of land in family trusts: the Te Pohe Trust (23 acres), the Enoka Trust (three acres), and the Heberley Trust (eight acres). In 1992, the remaining Crown land, constituting the scenic reserve, was vested in the Waikawa West Trustees, a group Mr Love describes as being the descendants of the original owners of the land.<sup>130</sup>

Mr Love informed us that the Waikawa West Trustees received the land but have no financial means to do anything with it. The three land trusts have no income and no capital to begin any initiatives on the land, which is of poor quality and is burdened with rates arrears. Mr Love recalled that, when the lands were handed back, there was gorse everywhere and river damage, and ‘we could not get any money to help our cause’. He believed that they had been ‘shut out’ of any funds received by the broader Te Atiawa iwi and was critical of the Government’s refusal to recognise the descendants of the original owners of Waitohi as ‘the rightful owners of the lands and reserves associated with the original displacement at Waitohi.’<sup>131</sup>

#### 12.4.6 The Waikawa Marae

The 1976 vesting of the Waikawa Marae land (lot 1, DP4289, of 1.72 hectares) in the Waikawa Marae Trustees for a marae and community centre is one of the issues raised by the descendants of the original owners of Waitohi.

Te Atiawa claimant George Matene described how the Waikawa Marae came to be established on its present site.<sup>132</sup> In 1864, about a quarter of an acre of land was reserved in Waitohi (Picton) as ‘a Fish Market for the Aboriginal Natives’, although Mr Matene later referred more specifically to the land as being in ‘Te Atiawa’ ownership.<sup>133</sup> It was the only reserve for Maori ever made in Picton and had formerly been a Crown reserve known as lot 132, containing one rood 32 perches.<sup>134</sup> In the 1880s, a Maori hostel was built on the site. Several decades later, in 1926, the Lands and Survey Department, believing that the reserve was no longer in use, sought its cancellation on the grounds that the eradication of noxious weeds on the reserve was an ongoing expense for the Crown. At a subsequent Native Land Court investigation into this issue ordered by the chief judge, local Maori declared that they:

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130. M Love, brief of evidence, pp 16–20; Tuuta, ‘Waikawa Rifle Range’, pp 1, 27, 38–39. Mr Love also referred to two acres being a shingle block.

131. M Love, brief of evidence, pp 16–20; Tuuta, ‘Waikawa Rifle Range’, p 27

132. Matene, brief of evidence, pp 8–9

133. In legal terms, it was in fact a Crown reserve set aside for the purpose specified: Alexander, ‘Reserves of Te Tau Ihu’, vol 1, pp 414–415.

134. *Ibid*, p 414

strongly oppose any attempts to deprive them of this land, which is of considerable area, and they desire that steps be taken to vest the reserve in Henare Arthur, Pero Ngapaki and Riwai Keenan as Trustees, to hold for the benefit and accommodation of the Ngati Tuahu Hapu and all Natives who may be visiting Picton from other parts. It is the intention of the Natives to take steps to have a new accommodation house erected on this land.<sup>135</sup>

This desire to take charge of the land was not legally possible, and instead an advisory committee was established.

In the 1950s, the Picton Borough Council wanted to reclaim part of the lagoon at Waitohi next to the site and use the area for a war memorial and recreation reserve. The Picton Tribal Committee objected and the council proposed to swap lot 132 with section 1017, which was a public reserve in Picton owned by the council. The committee agreed. A couple of years later the name of section 1017 was changed to section 1184, when part of the land was taken to widen Waikawa road. Up until that time, the Arapawa Rowing Club Hall had been used as a marae. In 1973, local Maori called a hui to form the Picton Marae Building Committee to fundraise for a marae. Reserves around Waitohi and Waikawa were surveyed in the hope that one could be used for a marae. The commissioner of Crown lands, George McMillan, then suggested the idea of purchasing the land where the Waikawa Marae is now situated.<sup>136</sup>

In 1974, local Maori applied to the Maori Land Court to sell section 1184 and use the money raised from the sale to buy the land for Waikawa Marae and build the wharekai building. Having secured the land, fundraising began and the Maori Affairs Department subsidised the building of the marae by providing a dollar for every dollar raised. Further funds came from the sale of five acres of land at Whatamango Bay to Internal Affairs (managed by DOC at the time the evidence was given). By 1975, the gorse- and blackberry-clad rocky land was cleared, a boundary fence repaired, and a hay shed completed. A wharekai was built in 1982, and the Wharenui completed in 1994.<sup>137</sup>

Mr Love claimed that the Waikawa lands should never have been given to a group of 'Maori' unless the Crown was sure they were representative of the original owners of Waitohi. In his view they were not. According to Mr Love, the correct name for the descendants of the former owners of Waitohi, Waikawa, and Totaranui is 'Ngati Awa'. He maintains that Te Atiawa 'is not the same group of people at all'.<sup>138</sup> Through the establishment of the marae on broader Te Atiawa foundations, Mr Love believes, the wider group has been able to 'bulldoze its way over the descendants of the original owners, and rewrite history'. Matthew Love refers to years of trying to work through a maze of legislation and official reasons as to why the rifle range lands could not be returned to the rightful owners. Love suggests

135. Judge Gilfedder to chief judge, [1926], Maori Affairs, head office, file 21/3/268 (Alexander, 'Reserves of Te Tau Ihu', vol 1, p 414)

136. Matene, brief of evidence, pp 7–9; counsel for Te Atiawa, closing submissions, pp 251–252

137. Matene, brief of evidence, pp 9–11; counsel for Te Atiawa, closing submissions, pp 252–254

138. M Love, brief of evidence, p 3

that redress could be achieved through returning the marae land to the descendants of the original owners of Waitohi, who could then immediately re-vest the land with the Waikawa Marae Trustees. Counsel for the descendants of the original owners shared this view.

Mr Love also complained about the payment by the Crown–Congress Joint Working Party of the reserve contribution for the benefit of all Maori of the Picton, Waikawa, and Blenheim areas, and for the purposes of the marae and its improvement, to the Waikawa Marae Trustees. The trustees, in turn, assigned their rights to Te Ati Awa Manawhenua ki Te Tau Ihu Charitable Trust which, while it has agreed to pay Te Runanga o Rangitane, has not agreed to pay the Waikawa West block trustees (who represent the descendants of the original owners at Waitohi).<sup>139</sup>

But the descendants of the original owners of Waitohi are not alone in their dissatisfaction with the vesting. Te Atiawa claimant Mary Barcello also stated that return of (presumably part of) the Waikawa rifle range land to a trust structure, rather than the descendants of the owners, has not enabled her to exercise the full extent of her Treaty rights over that land.<sup>140</sup> And counsel for Te Atiawa iwi complained that the marae is designated as a community marae for all people and that, under the law, Te Atiawa do not have a marae of their own in Totaranui.<sup>141</sup>

#### **12.4.7 Method of acquisition of Waikawa West A and Waikawa West D1–D5 blocks: counsel submissions and Tribunal findings**

Te Atiawa counsel questioned whether it is ‘Treaty compliant’ for the Crown to ever compulsorily acquire land from Maori. If so, she asked, was it justified in doing so in this case? Was the method of acquisition of the land in this case in accordance with the principles of the Treaty?<sup>142</sup> Counsel for the descendants of the original owners focused his submissions on issues arising from the later restoration of some of the lands to Maori ownership, and did not comment on the original taking of the rifle range lands. Crown counsel also did not make submissions on the taking.

In relation to this taking in particular, we consider there to be serious doubt as to the need for compulsory acquisition. A relevant factor, we believe, is that Waikawa was originally set aside as Maori reserved land. The land was subsequently leased by the Department of Defence and could have continued to be leased to provide an ongoing source of income to the owners. We also question the level of consultation with the owners prior to the compulsory acquisition. The land was being used for grazing by at least one owner and another

139. Morrow, ‘Legacy of Loss’, p 93; Tuuta, ‘Waikawa Rifle Range’, p 53; M Love, brief of evidence, pp 15, 17–20; counsel for Wai 851, opening submissions, 8 August 2003 (paper 2.665), p 5

140. Barcello, claim Wai 925, pp 3–4. We note, however, that she is not specific as to which trust structure she refers.

141. Counsel for Te Atiawa, closing submissions, p 254

142. Counsel for Wai 920, closing submissions, p 12

lessee, and some of the owners claimed to have ‘suffered a severe loss’ through the transaction affecting the value of their remaining lands. There is insufficient evidence for us to find whether consultation was adequate or not. We note in this regard that Mr Tuuta, a Tribunal-commissioned witness, found no evidence of consultation other than the fact that the owners were represented at the Native Land Court hearing to determine compensation.<sup>143</sup>

We also consider that the extent of the taking was in excess of what was actually required for a rifle range. Mr Tuuta commented that 133 acres ‘is a very large rifle range.’<sup>144</sup> The truth of that assertion would appear obvious from one official’s instructions at the time the initial lease to Todd was under contemplation that the military needed to inform him ‘what area would be actually required for the rifle range so that the remainder might be leased.’<sup>145</sup> There is some doubt as to whether the land was ever used as a proper rifle range. However, the fact that it was leased for grazing, and the perceived need for reconstruction and extension of the rifle range only four years later, suggest that, at the least, the land was not frequently used as a rifle range and possibly not used much at all following 1916.

Earlier Tribunals have commented on the circumstances under which compulsory acquisition of Māori lands might be justified. They have established that Maori land should have been compulsorily taken only in exceptional circumstances and as a last resort in the national interest. To take land where other alternatives had not been explored and without an assessment of the national interest is to breach the principles of active protection and equity.<sup>146</sup> We concur with this analysis, but would add that in the particular circumstances of Te Tau Ihu, more especially given that some 95 per cent of the land had been lost to Maori before 1865 and that Crown officials regularly reported the inadequacy of existing Maori landholdings thereafter, there was an even greater obligation upon the Crown to think long and hard before committing to the compulsory acquisition of any of what little land remained. We conclude that the taking of lands at Waikawa for a rifle range did not meet this test. Compulsory acquisition in this instance does not appear to have been a last resort in the national interest so much as the only option considered in a situation in which the question of national interest was very much open to question. We conclude that the takings for the Waikawa rifle range were contrary to the Treaty principles of reciprocity, partnership, and active protection.

We find that the Crown had a Treaty obligation to return the land, if not in 1916, when the need for significant reconstruction of the site contingent on acquisition of adjoining European-owned land was first identified, then in 1949, when the army decided that they could not construct a rifle range on the site without the adjacent land and had no other uses

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143. Tuuta, ‘Waikawa Rifle Range’, p 13

144. Ibid, p 13

145. Ibid, p 14

146. Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker’s Ltd, 1995), pp 285–286; Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), pp 121–125

for the land. Although there had been no hesitation in earlier compulsorily acquiring 133 acres from Maori, the Defence Department appeared reluctant to adopt a similar course of action with respect to the eight-acre adjoining block of general land it claimed to need, as a consequence of which the land taken from Maori was handed over to the Public Works Department 'for disposal or other uses, in accordance with Government policy'.<sup>147</sup>

It was over three decades later before most of the land was eventually returned to the descendants of the original owners in the late 1980s and early 1990s under the offer-back provisions of the Public Works Act 1981 and the Reserves Act 1977, with the exception of the education reserve, and the lands exchanged with Rangitane in 1955. We discuss these lands below. Here we note that the lengthy delay in returning the remaining lands to those from whom they were taken can hardly be regarded as consistent with the Treaty and its principles. Nor could there be any justification in Treaty terms for retaining lands no longer required for the purpose for which they had originally been taken. The Public Works Act 1928 in fact provided for such lands to be offered back to the original owners at valuation price, but at the same time allowed the Crown to avoid this if it wished by instead disposing of the lands under other provisions. In the case of Te Tau Ihu, there could be no excuse for failing to offer the lands back to those from whom they had been compulsorily acquired as soon as it became apparent these were no longer required for the purpose for which they had originally been taken.

#### **12.4.8 The alienation of parts of the former rifle range land to groups other than the original owners: counsel submissions and Tribunal findings**

Counsel for the descendants of those awarded title to the Waikawa lands by the Native Land Court in 1889 (Wai 851) was critical of the Crown's decision to gift part of the former rifle range lands to Rangitane in exchange for the taking of Rangitane lands at Whites Bay. Counsel suggested that it indicated that the Crown 'either had no desire to understand the original ownership of those lands, or proceeded on the erroneous belief that Rangitane had some rights to the Waikawa West block'. Counsel noted that this was done despite the Native Land Court having determined that Rangitane had no interest in the Waikawa West block. He recorded that this 'complete disregard' for the rights of the 'original owners', even where the Crown is statutorily required under public works legislation to regard those rights, has created 'an unhealthy and festering breach in those whanaungatanga ties'.<sup>148</sup>

The descendants of those awarded title saw the vesting of land from the rifle range block for a marae in the Waikawa Marae Trustees as a similar instance of the Crown's disregard for the rights of the 'original owners'. Mr Love stated that the Crown did not consult with the descendants of the grantees regarding the Waikawa Marae Trust. Counsel for Wai 851

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147. Tuuta, 'Waikawa Rifle Range', p 22

148. Counsel for Wai 851, opening submissions, pp 4, 7

argued that any accurate recognition of those who have suffered the prejudice or loss was in this case ‘hampered by years of assumptions by various Crown agencies that the Te Ati Awa Trust represent the original owners’. He stated that the allocation of various resources, including the New Zealand Railways Corporation money, has been denied the descendants of those found to be the owners by the Native Land Court, further disadvantaging them. Counsel concluded that ‘the root of the difficulties lie in the failure of the Crown to recognise the original owners of the land, and to deal with them (and no other group) in relation to the remedying of their wrongs’. He also questioned whether the Crown’s 1953 creation of an education reserve was in contravention of public works statutory requirements, but provided no evidence relating to this matter.<sup>149</sup>

Counsel for Te Atiawa also argued that it was ‘inappropriate’ for land at Waikawa to be vested in Rangitane, ‘when the original owners, Te Atiawa have such little land available to them’. Counsel further questioned the designation of the Waikawa Marae as a marae for all people. In her view this denied Te Atiawa their own dedicated marae. Te Atiawa sought findings that Te Atiawa were required to sell their only land in Waitohi (Picton) to purchase land to establish a marae at Waikawa. The claim is dubious in our view, as there does not appear to have been a ‘requirement’ as such. We think the claim to be more related to the failure of the Crown to create Waitohi reserves and its whittling down of reserve lands in the vicinity in general.<sup>150</sup>

The Crown also disputed the suggestion that Te Atiawa had been required to sell land to establish the marae, but otherwise did not respond to this claim except to note its understanding of the distinction between Te Atiawa iwi and the descendants of the original owners of Waitohi. Crown counsel agrees with claimant counsel’s submissions that representational issues relating to this claim need to be addressed and are a matter for the claimants and the Crown to work through. Counsel also notes that potential overlap or duplication with the wider Te Atiawa claims remains an important consideration for the Crown.<sup>151</sup>

We have some difficulty in accepting the assumption of claimant counsel that the ‘original owners’ of Waikawa were necessarily those individuals named on the 1889 award of the Native Land Court. We have seen in earlier chapters that the Native Land Court was far from an ideal arbiter of Maori custom. The fact that Rangitane were not recognised in the 1889 judgment is hardly conclusive evidence of the absence of customary rights, more especially since Judge Mackay ‘worked to a strict formula’ involving little more than checking off names attached to reserves promised by McLean in 1856.<sup>152</sup> This was consistent with the court’s jurisdiction under section 7 of the Native Equitable Owners Act 1886, which

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149. Counsel for Wai 851, opening submissions, pp 4, 6–7

150. Counsel for Te Atiawa, closing submissions, pp 254–255

151. Crown counsel, closing submissions, p 164; Crown counsel, further closing submissions, 14 May 2004 (paper 2.795), pp 5–6; see also counsel for Wai 851, opening submissions, p 3

152. Tuuta, ‘Waikawa Rifle Range’, p 9

stated that ‘the Court, in determining the title or interests to any of such [South Island] reserves, shall give effect to the original intention for which the said lands were respectively set apart’. Waikawa was officially deemed as having been reserved ‘in 1856 for the use and occupation of the Ngatiawa tribe resident in Queen Charlotte Sound’.<sup>153</sup> Any determination of title based on this criterion would of necessity have excluded Rangitane. On the other hand, Rangitane’s primary interest at the time of the 1956 exchange was to secure land at Grovetown, with Waikawa suggested by officials only when the necessary extent of land was unable to be found at the former location.<sup>154</sup> There appears to have been no suggestion that it was a site of particular significance to Rangitane, as it undoubtedly was to local Te Atiawa whanau and hapu.

With regard to the vesting of land from the rifle range block in the Waikawa Marae Trustees, we consider there to be insufficient evidence as to the measures the Crown took to determine the full implications of this transfer for local Maori. We would note, however, that the land was not ‘returned’ as such, but followed the sale of section 1184 in order to raise the funds necessary to acquire the land upon which the marae was to be built. There is also insufficient evidence for us to make a determination regarding the allocation of resources, including the actions of the Crown–Congress Joint Working Party. No evidence was given as to the statutory compliance or otherwise of the vesting of part of the land for an education reserve, although it appears to have been used for another public work. However, we noted earlier that there were legislative provisions which allowed lands to be used for purposes other than those for which they had originally been taken, including specific authority for surplus lands to be transferred to education boards. We assume that the vesting of land at Waikawa for education purposes was therefore in compliance with the relevant provisions of the Public Works Act. As we have already suggested, though, that does not mean that such an action was consistent with the Treaty and its principles. In Treaty terms, it was incumbent upon the Crown to return lands compulsorily acquired from Maori as soon as these were no longer required for the purpose for which they had originally been taken. Instead, all too often the first response of Crown officials was to cast around in search of other uses for the land, and if this failed to seek to sell it on the open market. In Te Tau Ihu in particular, a very different approach was required, both to the taking of land and to its return, from that which appears to have been practised before the 1980s.

Finally, we find ourselves disposed to agree with the Crown’s further closing submissions that representational issues relating to this claim need to be addressed and are a matter for the claimants and the Crown to work through. We agree that this is an important consideration for the Crown and one that we recommend it takes active steps to address.

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153. *Compendium*, vol 2, p 338

154. David Armstrong, ‘Rangitane and the Pukatea Reserve’, report commissioned by Rangitane ki Wairau, 2002 (doc D3), pp 20–26

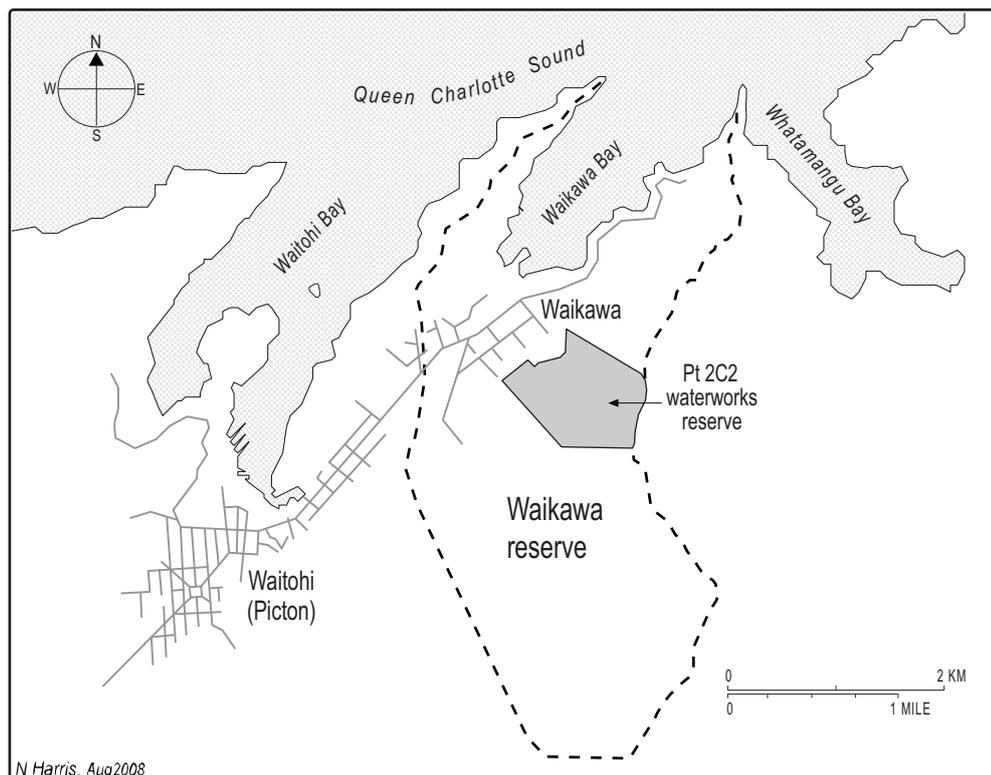


Figure 47: Waikawa waterworks land (2C2)

Source: NZMS260, P27

#### 12.4.9 The 1957 taking of land for waterworks

The largest single taking of land in the Waikawa reserve occurred in the 1950s with the taking of 305 acres 2 roods and 16 perches from the 319 acres and 18 perches of Waikawa 2C2 for waterworks (see fig 47). Waikawa 2C2 had been awarded to seven owners who were all members of Rita Powick's grandfather's family in September 1918.<sup>155</sup>

The original water supply to Waikawa Pa was installed in 1932, with costs being shared by the Maori purposes fund, the South Island tenths, the Civil List, and the Waikawa Maori Committee. Local resident Ivor Te Puni, the chairperson of the Waikawa Village Committee, took care of the dam, the pipeline, connections to new houses, and the collection of dues. By 1948, Mr Te Puni was having difficulty collecting fees and finding it increasingly troublesome to clean out the dam each year owing to scrub fires in the catchment area. With new homes being built in Waikawa, it was an opportune time to reassess the community's needs. He approached Eruera Tirikatene, the member for Southern Maori, requesting assistance to improve the water supplies to Waikawa Pa. Tirikatene initially sought the Minister of

155. Morrow, 'Legacy of Loss', pp 94; Alexander, 'Reserves of Te Tau Ihu', vol 1, p 177; counsel for Wai 920, closing submissions, pp 4-6; Powick, brief of evidence, p 6. Note that a general claim regarding this land is also made by the Kinana hapu in Keenan, claim Wai 924, pp 9-10.

Maori Affairs' support to protect the area by proclamation as a catchment area, proposing administration by a Maori-run catchment board. He then sought to make an immediate proclamation over the whole area for fire prevention purposes, have the property surveyed and valued, and have steps taken to purchase the whole or part of it. A 1949 engineer's report stated that a catchment area of about 150 acres would be necessary.<sup>156</sup>

By 1950, two of the owners (including the shares of two minors under the trusteeship of one of these identified owners) had agreed to sell their interests in the block to the Crown so that it could be used as a catchment area. The Crown then had sufficient interests to acquire 150 acres, but it did not partition the catchment area from the block. Instead, it pursued the purchase of all of Waikawa 2c2. Why the Crown chose to do this, and whether there were impediments to partitioning out the required 150 acres, is not known.<sup>157</sup>

In June 1955, a meeting of the Maori owners (most of whom were said to have resided in Taranaki) was held in Waitohi. The owners decided against a proposal put forward by the Crown that they sell Waikawa 2c2 to the Marlborough County Council for £151. The owners considered the money offered to be inadequate and wanted suitable land for housing be set aside before the lands were partitioned out for the catchment. They envisaged that a meeting would then be called to consider the sale of the catchment area. It was also agreed that Mr Te Puni and James Matangi arrange with the county engineer to prepare a plan of the portion to be retained and that an application for partition be lodged. In her evidence to this Tribunal, Mrs Powick noted that, although the water supply was recognised as an essential service by the families at the pa, reluctance from some owners stemmed from the fact that it would largely benefit non-owners. Only one of the owners would benefit from the water supply.<sup>158</sup>

As no agreement for sale could be reached, the Department of Maori Affairs wrote to Mr Te Puni advising that the matter would be dropped. Mr Te Puni's disappointed reply stated that he had been 'most active in getting the Marlborough County Council interested' in taking over the supply as a county amenity and the county engineer had identified 'about 10 acres' to be excluded for the owners for building purposes. Mr Te Puni's letter prompted a proposition by the department, in November 1955, that 10 acres of Waikawa section 2c2, suitable for housing, should be partitioned off and vested in the Maori Trustee for the benefit of the owners. The remainder of Waikawa 2c2, about 300 acres, could then be 'be sold by leave of the Court to the Marlborough County Council for the purposes of the proposed water supply'. Further correspondence indicated that Mr Te Puni was confident that the council could be persuaded to administer the water supply if the land required for the

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156. Morrow, 'Legacy of Loss', pp 94–95; counsel for Wai 920, closing submissions, p 6; Powick, brief of evidence, pp 7–8

157. Counsel for Wai 920, closing submissions, p 7; Powick, brief of evidence, pp 8–9, attachments G, H

158. Morrow, 'Legacy of Loss', p 95; counsel for Wai 920, closing submissions, pp 4–5, 7–8; Powick, brief of evidence, pp 7, 9–10, attachments C, D, E

watershed was vested in council free of cost under the Public Works Act 1928. He thought that a meeting of assembled owners would agree to the sale.<sup>159</sup> A letter of August 1956, from the Secretary for Maori Affairs to the Commissioner of Works, also referred to 'Maoris in the Pa' having negotiated with the Marlborough County Council for the council to undertake tree planting and other necessary works to safeguard the health of the community. The secretary added that the portion to be taken was 'very steep and broken and valueless for farming and would not be economical to clear and grass'.<sup>160</sup>

Mrs Powick was critical of the decision to vest 10 acres in the Maori Trustee without consulting the owners, arguing that this alienated the owners by placing another level of bureaucracy between them and their land. She was critical also of the tandem advice as to the sale of the remainder of Waikawa 2C2 to the Marlborough County Council, noting the leap in the area under discussion for the water catchment land from 150 acres to over 300 acres.<sup>161</sup>

The Maori Trustee wrote to the Marlborough County Council to seek its agreement to an arrangement whereby the council would take over, maintain, and control the water supply in the area if the land was vested in it under the Public Works Act 1928 'free of cost'. He offered to send the owners a notice of intention to take the land.<sup>162</sup>

Waikawa 2C2 was proclaimed as a public works taking in February 1957. The land that was taken was vested in the 'Chairman, Councillors and Inhabitants of the County of Marlborough'. An area of 13.5 acres was excluded from the taking because it was deemed to be potential housing land. That area, as we have already discussed, was vested in the Maori Trustee. In October 1957, the Maori Land Court assessed compensation at £330, not much more than one pound per acre, but considerably more than the £151 offered in June 1955. The compensation was to be paid to the owners, partly from the South Island tenths benefit fund and partly from the Health Department. Mrs Powick concluded that: 'Paying us for the loss of our land from that fund was wrong – this money was ours in the first place.' Around 1973 the Marlborough County Council stopped using Waikawa 2C2 for waterworks purposes and today it remains unused Marlborough District Council land.<sup>163</sup>

Counsel for the claimants outlined more recent attempts by the claimants to seek the return of the land. Counsel wrote to the Marlborough District Council in November 2000

159. Morrow, 'Legacy of Loss', p 95; counsel for Wai 920, closing submissions, pp 4–5, 7–8; Powick, brief of evidence, attachments E, I, J–M

160. Davidson, Ayson and Melton, 'Report on Stability of House Sites', report commissioned by the Marlborough County Council, 1986 (doc s8)

161. Powick, brief of evidence, pp 9–10

162. Ibid, attachment L

163. Morrow, 'Legacy of Loss', p 95; counsel for Wai 920, closing submissions, pp 4–5, 8; Powick, brief of evidence, p 11, attachments H, K, N. It appears that £65 12s 6d was probably contributed by the Health Department and the rest from the tenths fund. In her written evidence, Mrs Powick claimed that all the compensation came from the South Island tenths benefit fund. She clarified, however, in questioning, that her knowledge of this came from Dr Morrow's work: Rita Powick, under cross-examination, eighth hearing, 17–19 February 2003 (transcript 4.8, pp 142–143).

asking if it still required the land. The council replied that its engineers had been undertaking a water supply study for Picton–Waikawa and that no assessment could be made about the land until the report was available in early 2001. Claimant counsel wrote again in September 2002, this time asking whether or not the council still required all or part of Waikawa 2C2. She received a response from counsel for the Marlborough District Council, informing her that the land was intended as a possible reservoir site for the Waikawa water supply and that hydraulic design work was to be undertaken over the following 12 months. The council would then be able to identify reservoir storage requirements and would be in a better position to identify whether the land was needed for any other public work.

In August 2003, the council extended its view of the potential future uses of the land, suggesting that the land might be used for a reservoir and possibly a treatment plant, requiring access and an area to secure the works. It viewed continued study of further options to be necessary and noted that a detailed analysis of future water sources and then hydraulic and geotechnical analysis of reservoir site options was yet to be undertaken. It concluded that, ‘Even if a reservoir was built in another location, the land in question may still be required for a reservoir in, say, 20 to 60 years’ time depending on development in Waikawa.’ While the council thought that it may be able to allocate resources to define the possible area to be used, it thought it likely to be February 2004 before those studies could be completed to the point where the engineers may be able to be more definitive.

In February 2004, counsel for the claimants wrote again to the council’s solicitors asking whether hydraulic and geotechnical studies had been commissioned or were available. The report had not been completed, however the potential future use of the site for a reservoir or water treatment plant was repeated, as were possible delays in decision-making due to competing council priorities for funds. The council was awaiting advice from its consulting engineers on future water supply options, expected by the end of 2004, before it would be in a position to arrive at a conclusion. Counsel for the Marlborough District Council did note, however, that, if having received advice the council viewed that the land was no longer required, it would use the offer-back provisions of the Public Works Act.<sup>164</sup> We note that in October 2002 the Marlborough District Council sought leave to appear and be heard before us with respect to Waikawa issues.<sup>165</sup> Leave was duly granted that same month in respect of Mrs Powick’s claim (Wai 920) and a further claim (Wai 921) lodged by Ngaire Noble with respect to Waikawa 1 (to be discussed shortly).<sup>166</sup> Counsel for the Marlborough District Council subsequently appeared at some hearings but we received no submissions on behalf of the council.

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164. Counsel for Wai 920, closing submissions, pp 8–10; Powick, brief of evidence, pp 13–14, attachment Q; counsel for Wai 921, additional closing submissions, 27 February 2004 (paper 2.791), attachments A–C

165. Marlborough District Council, application seeking leave to appear and be heard, 11 October 2002 (paper 2.379)

166. Waitangi Tribunal, memorandum granting Marlborough District Council leave to appear as interested party in respect of claims Wai 920 and Wai 921, 24 October 2002 (paper 2.380)

**12.4.10 Method of acquisition of Waikawa 2C2: counsel submissions and Tribunal findings**

The questions posed by counsel for Te Atiawa iwi regarding the method of acquisition of the rifle range lands are repeated in respect to the waterworks land (see sec 12.4.7).<sup>167</sup>

Counsel argued that the taking of Waikawa 2C2 was a striking example of the use of the power to compulsorily acquire land far in excess of that needed and when the amount of land actually required was willingly offered for sale by two owners. In counsel's view, the taking of 305 acres, which exceeded the amount actually required for the work (only 150 acres were required), raised a question about the meaning of 'required', as used in section 11 of the Public Works Act 1928.<sup>168</sup> Both Mrs Powick and claimant counsel argued that the Marlborough District Council could have met its obligation to supply water through an agreement with the owners who had agreed to sell their shares in the land in 1950, leaving the rest of the block in the ownership of the remaining landowners.<sup>169</sup>

Counsel for the claimants recorded that, when the Crown wished to purchase the whole block, a meeting of owners was convened at Waikawa and a decision was made not to accept the proposal, yet the Maori Trustee and the local council proceeded with the taking.<sup>170</sup> Mrs Powick claimed that the Crown's decisions, made with others, about land that belonged to identified owners, caused members of her family undue stress, deep-seated resentment, total loss of belief in the system and the loss of ability to manage their own affairs.<sup>171</sup>

Crown counsel noted that the unexplained change from the requirement of 150 to 300 acres was a major concern raised by Mrs Powick. The Crown stated that there might be issues relating to Waikawa 2C2 that could be addressed in any future settlement negotiations.<sup>172</sup>

We find that, while the provision of waterworks for the Waikawa community was necessary, the compulsory acquisition of 305 acres of land for these purposes under the provisions of the Public Works Act was not. For one thing, the amount of land taken under the Public Works Act was more than double the area clearly understood by the Crown at the time to be immediately required for the work. More fundamentally, however, a range of alternatives to the compulsory taking were available, including leasing the land, purchasing the interests offered for sufficient part of the block needed for catchment purposes, along with Tirikatene's suggestion that a Maori-run catchment board be appointed to protect the community's interest. All of these options could and should have been fully explored before application of the Public Works Act was even contemplated. Instead, the unwillingness of the owners to sell the full block was taken as a signal to later proceed with a compulsory

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167. Counsel for Wai 920, closing submissions, p12

168. Ibid, p13

169. Ibid, pp11–12, 15; Powick, brief of evidence, p15

170. Counsel for Wai 920, closing submissions, pp 13–14

171. Powick, brief of evidence, p14

172. Crown counsel, closing submissions, pp 151–152

taking. While there is some evidence of consultation with at least one member of that community, that was hardly a mandate to proceed with such a drastic step, especially in view of the fact that the earlier meeting of owners had rejected the proposed sale, let alone compulsory taking. We conclude that the taking was both unnecessary and excessive and contrary to the Treaty principles of reciprocity, partnership, and active protection. We further concur with the claimant that vesting the flat area of land in the Maori Trustee without consulting the owners was unacceptable. The result of both the public works taking and the vesting of the remaining area of good land in the Maori Trustee was to see the entire block pass out of Maori ownership, when at most less than half of it needed to, and even that was after options to use part of it for catchment purposes without outright loss of title which ought to have first been considered.

**12.4.11 Payment for the land from the South Island tenths benefit fund: counsel submissions and Tribunal findings**

Counsel for the claimants alleged that the payment for the taking of Waikawa 2C2 being made from the South Island tenths benefit fund was both in breach of the Treaty and unlawful. The tenths fund was not available to assist the Crown to acquire Maori land. She suggested that the prejudice of land loss and payment from a Maori source of compensation is clear.<sup>173</sup> Mrs Powick criticised the dual payment the original owners have made for their water, with the section being taken and by simultaneously being charged water installation and water rates costs to the present day.<sup>174</sup> Crown counsel noted claimant concerns about the payment through the tenths benefit fund, repeating their suggestion that there may be issues relating to Waikawa 2C2 that could be addressed in any future settlement negotiations.<sup>175</sup>

We find that the payment of compensation for the taking of this land from the South Island tenths benefit fund was highly inappropriate. We have commented already on inappropriate use of the tenths benefit fund in chapters 7 and 9 and therefore do not comment further. It is unclear how many beneficiaries of the fund would have benefited from the waterworks. It is also unclear how many of those who received compensation for their interests in Waikawa 2C2 out of the tenths fund were also beneficiaries of the fund. We did not receive detailed evidence or submissions concerning the legality or otherwise of payment from the tenths fund and do not make any findings on the issue here.

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173. Counsel for Wai 920, closing submissions, pp 14–15

174. Powick, brief of evidence, pp 15–16

175. Crown counsel, closing submissions, pp 151–152

**12.4.12 The Public Works Act 1981: counsel submissions and Tribunal findings**

Counsel for the claimants criticised the Crown's vesting of Waikawa 2C2 in a local body with no enforceable Treaty obligations.<sup>176</sup> Counsel noted that the Public Works Act 1981 sets out the procedure for offering back land that is no longer required for public works and suggested that this should be implemented in this case. Counsel accepted that the establishment, maintenance, and operation of a residential water supply is a 'public work' as defined by the Act, but stated that 'it is clear at law' that Waikawa 2C2 is not required for the original public work and is likely not to have been since 1973.<sup>177</sup>

Counsel for the claimants criticised the Crown's failure to require the Marlborough District Council to make a determination pursuant to section 40 of the Public Works Act 1981 whether or not all or part of Waikawa 2C2 is required for any other public work in the future. She questioned whether it is consistent with the principles of the Treaty for the Crown to allow local bodies to hold land that they are clearly not using.<sup>178</sup>

Claimant counsel was critical of the council's delays, noting that the land has been unused for 30 years, yet the council 'cannot or will not put itself in a position to make a decision and in all likelihood return some of the land to those from whom it was taken'. Further, she noted that the council acknowledges that it does not require the full acreage, and that it is 'highly likely' that the lower portion, except to facilitate access, is not going to be required.<sup>179</sup>

Claimant counsel suggested that the Tribunal may wish to comment on the Act's provision, under section 40(2)(d), empowering the council to offer land back at current market value or a lesser price if the local authority considers it reasonable to do so. Counsel reiterated the features of the claim: compulsory acquisition, the extent of the taking, the council's receipt of the land at nil cost and the compensation being paid to the owners from the tenths trust funds. Given these circumstances, counsel argued that very wide discretion should be used here and Waikawa 2C2 offered back to the successors of the owners at nil or nominal value.<sup>180</sup>

Crown counsel noted that the possibility that the land has not been used for the purpose for which it was taken since 1973 was a major concern raised by Mrs Powick. The Crown noted that it has no power to require the Marlborough District Council to return the land to the claimants, but acknowledged that there may be issues relating to Waikawa 2C2 that could be addressed in any future settlement negotiations.<sup>181</sup>

In response to claimant counsel's application to the Tribunal seeking leave to amend the relief sought to recommendations from the Tribunal that the Public Works Act be amended, Crown counsel noted that public works legislation was being reviewed by the Government.

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176. Counsel for Wai 920, closing submissions, pp 18–19

177. *Ibid*, p 16

178. *Ibid*, pp 12, 15, 18–19

179. *Ibid*, pp 10–11

180. *Ibid*, pp 16–17

181. Crown counsel, closing submissions, pp 151–152

and that the review was taking account of existing Tribunal reports on public works issues where the active protection principle has been discussed.<sup>182</sup>

We note that the interdepartmental review had involved the preparation of policy option papers, following the close of the consultation phase. Since October 2003, the options have been under consideration by the appropriate Ministers to 'decide the policy that underpins the draft legislation'.<sup>183</sup> As far as we are aware, although a private member's Bill is currently before Parliament with respect to the offer-back provisions of the Public Works Act, no Government Bill has been introduced yet on the basis of the interdepartmental review.

The Public Works Act 1981 does not specify a timeframe within which a decision should be made on land no longer being used for the purpose for which it was taken. We view this as a serious omission. We find the indefinite length of time the council is taking to come to a decision as to its retention of Waikawa 2C2 to be unacceptable. The notion that the land may be kept indefinitely on the possibility that it may, at some unspecified future date, be of use is similarly unacceptable. We agree with counsel for the claimants that the Crown has a duty to ensure that local bodies do not hold onto land that they are clearly not using. The Crown has a fiduciary duty to ensure that the purpose for which the land was originally taken is actually carried out or the land returned. Where the land is known not to be used for the purpose for which it was taken, and particularly where this situation has been the case for some time, the former Maori owners have a right to have the situation renegotiated. The former owners of Waikawa 2C2 have been prejudiced by the inadequacies of the public works legislation.

We therefore agree with the claimants that the land should have been offered for return when the site ceased to be used by the council for waterworks purposes, around 1973. We do not make any finding as to whether or not the existing legislation would allow for the return, as we are unsure of the current status of the land vested in the Marlborough County Council. If it is found that the original owners do in fact retain a residual property right at law then we reiterate our concern that the existing legislation provides no timeframe in which such a return ought to occur, following the cessation of a particular use, and note further that this has allowed local bodies to exploit the situation through indecision. This is prejudicial to the descendants of the original owners of the land and unacceptable. Irrespective of the requirement at law, we consider that the Crown has a Treaty obligation to ensure that land vested in a local authority is used for the purpose for which it was taken or returned within a reasonable timeframe. Should the area be required again, a new arrangement might then be entered into with the owners.

Further, we consider that local bodies should have less latitude in the conditions of return of the land than that given under section 40(2)(d) of the Public Works Act. We note that

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182. Crown counsel, further closing submissions, p 5

183. Land Information New Zealand, 'Public Works Act Review, Update October 2003', <http://www.linz.govt.nz/publications/pwaupdate/index.html>, accessed 7 March 2008

the provisions of the Te Ture Whenua Maori Act enable a local authority (but not a former owner or former owner's descendant) to apply to have the land returned. We discuss this Act below (sec 12.4.22).

We note the Crown's submission that issues of concern to this Tribunal were raised in the review of the public works legislation.<sup>184</sup> These issues include:

- ▶ the inclusion of a Treaty clause in the legislation
- ▶ timing for triggering the offer-back
- ▶ the circumstances of the original acquisition

At the time of writing this report, there is no certainty that these issues will be addressed in any new legislation. We welcome the Crown's acknowledgement that issues relating to Waikawa 2c2 may need to be addressed in any future settlement negotiations. We would urge all interested parties to consider whether, apart from broader measures involving legislative reform, there are alternative options that could be considered by the Crown, the claimants and the council in this instance. For example, the land might be returned to the descendants of the former owners and an easement or lease entered into with the council if the land was required for a reservoir or water treatment plant at some stage in the future.

#### 12.4.13 The taking of land for the Port Underwood Road

Port Underwood Road runs around the edge of the Waikawa 1 block and is the main road from Waikawa to Karaka Point (see fig 48). The land taken for roading purposes in the late nineteenth century came from Waikawa 1 and extends to the seaward side of the existing road. It included land known by the claimant, Ngaire Noble, as the 'Track', which was originally owned by her tupuna. Title to the Waikawa 1 block was investigated by the Native Land Court in March 1889, at which time an area of 11 acres 2 roods and 13 perches was excluded from the title for roading purposes.<sup>185</sup> Although most public works takings envisaged that compensation would be paid, there had been, from the time of the first Native Lands Act in 1862, a longstanding exception in the case of Maori land taken for roading purposes. The Native Land Court Act 1886 adopted similar provisions to previous Maori land legislation in granting the Governor the right to lay off up to 5 per cent of land granted to Maori for public roads without compensation.<sup>186</sup> Since the total area of the Waikawa 1 block was just over 468 acres before the exclusion for roading, that taking was well within what the Crown was legally able to claim under these provisions. We note that claimant counsel stated in her closing submissions that the land for the road was taken under the Public Works Act, while the evidence of Ngaire Noble cited a 1982 report from the chief draughting officer of

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184. Crown counsel, further closing submissions, p 5

185. Alexander, 'Reserves of Te Tau Ihu', vol 1, p 159

186. David Williams, *'Te Kooti Tango Whenua': The Native Land Court, 1864–1909* (Wellington: Huia Publishers, 1999), pp 319–324

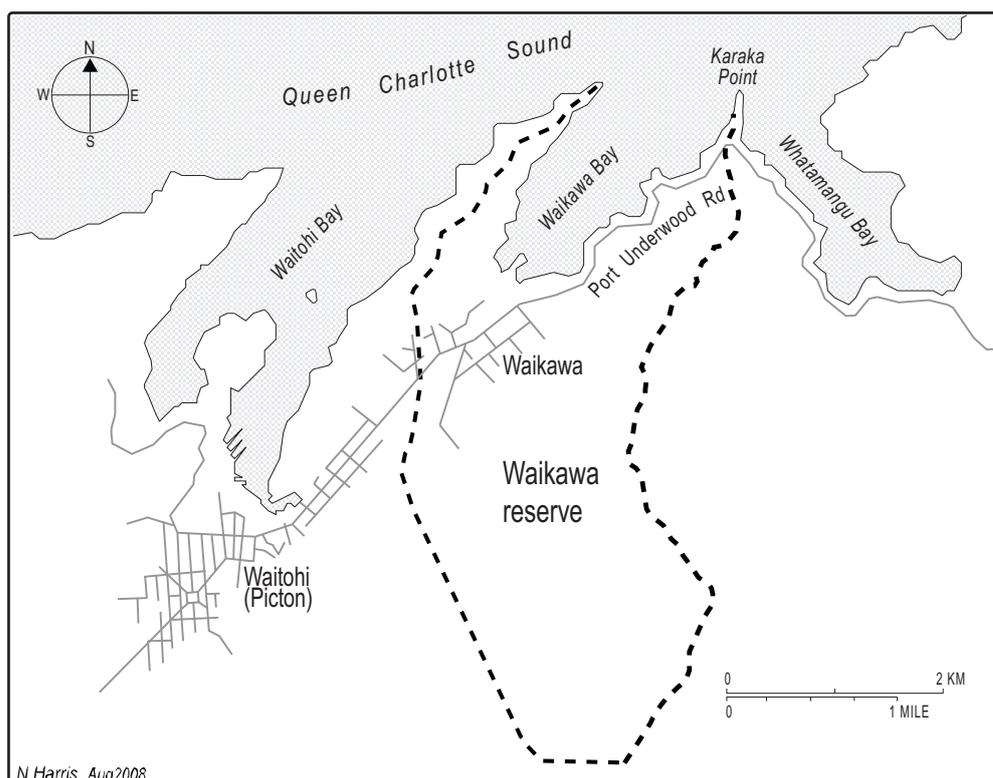


Figure 48: The Port Underwood road

Source: NZMS260, P27

the Department of Lands and Survey, which noted that it was unclear whether the land was taken under the Native Land Court Act or the Public Works Act.<sup>187</sup> We consider it unlikely that the land was taken under the Public Works Act, requiring the Crown to pay compensation, when an alternative legal mechanism existed allowing the land to be taken without cost. However, we cannot entirely dismiss this scenario. It is thus unclear whether or not there was a legal requirement to pay compensation for the Waikawa taking.

From the late 1920s, the Marlborough County Council permitted dwellings to be built on the part of the land it was not using for a road. It then leased the land to the house owners. The current owners are represented by the Waikawa Lessees Association.<sup>188</sup>

The Public Works Department formed a bridle track along part of Waikawa 1 in 1887 and in 1892 representatives of the owners of Waikawa 1 complained to the Department of Lands and Survey that they had not received compensation for this track. From the evidence before us, we have not been able to ascertain the requirement at law to pay compensation, but we note that Native Land Court Judge Alexander Mackay was consulted and

187. Counsel for Wai 921, closing submissions, p 6; Ngaire Noble, brief of evidence on behalf of Wai 921, February 2003 (doc 15), p 5

188. Counsel for Wai 921, closing submissions, pp 3–4; Noble, brief of evidence, pp 2–3

agreed that compensation should be paid. Values were sought, but there is no evidence that compensation was paid for the land taken. Mrs Noble informed us that her great grandparents chopped down trees to stop people using the path, action that Mrs Noble argues her tupuna would not have taken if the land been fairly taken.<sup>189</sup>

In 1896, the chief surveyor ordered the survey of the bridle track, an addition of further land to widen the track into a cart road and a chain reservation. Survey plans of the area were produced and approved by Judge Mackay in early 1900 and the road was vested in the Crown in accordance with the legislation of the time.<sup>190</sup> During the twentieth century, the road was upgraded and moved from the position shown on the plan approved by the court. It is now further away from the sea. At some point in time, the road appears to have been vested in the local authority, currently the Marlborough District Council.<sup>191</sup>

From the late 1920s, but mainly in the early 1950s, the council allowed 15 dwellings to be built on the road reserve land between the road and the sea, and since that time it has leased the land to the owners of the houses. Mrs Noble believes that one of the first homes belonged to a councillor. Claimant counsel refers to the construction of these dwellings as ‘unlawful’. The council did not authorise the building of the houses but accepted that it is ‘not unknown’ in the Sounds for dwellings to be constructed without approval. Claimant counsel noted that this construction prevented any further access by the claimant and her whanau to kaimoana and the beach.<sup>192</sup> Mrs Noble gave evidence that, as children, she and her whanau collected kaimoana from the rocks where the houses now stand. She recalled:

We suffered a great deal of humiliation after the first houses went up because we were denied access to the beach by the property dwellers. My own children and their cousins were asked to leave the beaches as they were told they were trespassing on private beaches. The children also had water thrown over them by people in the houses above the beaches.<sup>193</sup>

In 1984, the council initiated plans to remove the road reserve designation and grant long term leases or sell the land to the dwelling owners. This was put on hold when a report commissioned by the council revealed that the land was unstable, placing four of the dwellings at high risk and the remaining 10 at low to moderate risk. Although the council followed the report’s advice to reduce the risk by constructing additional storm water drains,

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189. Counsel for Wai 921, closing submissions, p 6; Noble, brief of evidence, p 5; Ngaire Noble, under cross-examination, eighth hearing, 17–19 February 2003 (transcript 4.8, pp 136–137)

190. Noble, brief of evidence, p 5, attachment D. Either section 96 of the Native Land Court Act 1886 (re-enacted as section 72 of the Native Land Court Act 1894) or section 95 of the Public Works Act 1894 gave legality to the road. Both these sections state that, whenever a road is surveyed and laid off over Maori lands under the Surveyor-General’s direction, the site shall be deemed to be a road dedicated to the public and shall vest in the Crown. This provision was repealed by the Native Land Act 1909.

191. Counsel for Wai 921, closing submissions, p 6

192. Ibid, p 7

193. Noble, brief of evidence, p 3

one house slipped into the sea around 1999.<sup>194</sup> Concerned about the potential legal liability of stopping the road and granting long-term leases of unstable land, the council abandoned its plans to dispose of the road reserve.<sup>195</sup>

Mrs Noble recalled that her father ‘suffered a great deal of stress and spent a lot of money trying to get the Council to return the land’. In recent years, other whanau members have approached the council. In 1991, Mrs Noble approached the council to see whether the land not being used as a road could be returned or the rentals received credited to the successors of the former landowners. The council responded that it retained the road reserve because of the engineering advice that the land was unstable and if the road was lowered, either through slippage or for widening purposes, the council’s interest would best be served by retaining ownership of that land below the physical road.<sup>196</sup>

Rentals up until the 1970s were around \$50 a year. This rose in the 1970s to around \$500 per home per annum and in the mid-1980s, when the council undertook a lot of engineering work on the homes, rentals increased to \$1000 per home per annum. In her 2004 submissions, claimant counsel noted that the latest leases run for five-year terms and the council charges each one about \$1400 a year. She calculated that, from 14 homes, the council receives \$19,600 per year plus rates. Over the term of the then current leases, 1999 to 2004, the council would have received \$98,000 in rental from the road reserve.<sup>197</sup>

Mrs Noble stated that her whanau feel the loss, having been unable to use this land for their own purposes for the last 80 plus years. She noted the council’s stance that they need the land for future roading purposes, ‘even though there are houses and garages on the land today and they have recently connected these houses to a reticulated sewerage system’. She takes this to mean that the council ‘possibly has long term plans for these housing leases and roading may not be one of them.’<sup>198</sup>

#### 12.4.14 The Local Government Act 1974

In February 2004, the Marlborough District Council forwarded to claimant counsel a copy of a report it had received from Ward Property Services. This May 2002 report stated that that the council could use the provisions of the Local Government Act 1974 to stop the seaward part of the road reserve and dispose of the land without having to invoke the offer-back provisions of the Public Works Act 1981.<sup>199</sup>

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194. Counsel for Wai 921, closing submissions, pp 7–8; Noble, brief of evidence, p 6

195. Counsel for Wai 921, closing submissions, pp 8–9

196. Ibid, p 9; Noble, brief of evidence, p 3, attachment D. The council notes that the lease of the road land for residential purposes appears to have been reliant on section 39 of the Public Works Act 1928.

197. Counsel for Wai 921, closing submissions, pp 9–10. In general, the leases ran from three to five years.

198. Noble, brief of evidence, p 7

199. Chris Ward to Peter Radich, 9 May 2002 (counsel for Wai 921, additional closing submissions)

Section 342 of, and the tenth schedule to, the Local Government Act empower the council to stop roads by lodging a plan of the road to be stopped with the chief surveyor, along with an explanation for its stoppage and the proposed alternative use. A public notification process then follows, with any objections not accepted by the local authority referred to the Environment Court. Public comment cannot extend to the use the council may wish to put the land after the road is stopped. Objections may only be lodged as to whether the road ought to be stopped or not. If the road stopping is allowed, the land ceases to be a road and is vested in the council and the Public Works Act offer-back provisions do not apply.<sup>200</sup>

#### 12.4.15 The method of acquisition of Waikawa 1: counsel submissions and Tribunal findings

The questions posed by counsel for Te Atiawa iwi regarding the method of acquisition of the rifle range lands are repeated in respect to the Port Underwood Road and Waikawa 1 (see sec 12.4.7).<sup>201</sup> Is it 'Treaty compliant' for the Crown to ever compulsorily acquire land from Maori? If so, was it justified in doing so in this case? Was the method of acquisition of the land in this case in accordance with the principles of the Treaty? Is it consistent with the principles of the Treaty for the Crown to allow the local bodies to hold land that they are clearly not using?<sup>202</sup> The Crown made no submissions on this issue.

We have previously noted the findings of earlier Tribunals with respect to the circumstances under which the Crown might be justified in compulsorily acquiring Maori land. Takings can only be justified in exceptional circumstances and as a last resort in the national interest. The taking of part of Waikawa 1 for roading purposes in no way met these criteria. Indeed, section 93 of the Native Land Court Act 1886 enabled the Crown to routinely take up to 5 per cent of any Maori land block without compensation, consultation, or any reflection at all upon the necessity of the taking. The *Ngati Rangiteaore Claim Report 1990* concluded that this provision and its use by the Crown was 'discriminatory and in breach of article 3 of the Treaty which allowed Maori the rights and privileges of British subjects.'<sup>203</sup> We agree and would note that, although there were at different times provisions allowing for the taking of up to 5 per cent of general lands for roading purposes, this usually provided for payment in money or land in recompense for the taking, was subject to strict time limits (the taking normally had to be within five years of the first survey), and was usually confined to rural lands only. As the central North Island Tribunal recently concluded:

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200. Counsel for Wai 921, additional closing submissions, pp 2–4, attachment B. Ertel refers to the Environment Court having recently clarified that the Treaty of Waitangi was not to be taken into account when local authorities take decisions under the Local Government Act 1974.

201. Counsel for Wai 920, closing submissions, p 12

202. Counsel for Wai 921, closing submissions, pp 4–5

203. Waitangi Tribunal, *The Ngati Rangiteaore Claim Report 1990* (Wellington: Brooker and Friend Ltd, 1990), p 48

Discrimination was built into the system by legislation, which treated Maori land unfairly in respect of uncompensated takings for roading. It allowed the Crown a much longer period to take land from Maori titles than from general, it continued the provision for Maori titles after it ended for general ones, and it covered an ever-expanding number of Maori titles and land, while general titles were soon freed of it despite the need for increased roading with closer settlement.<sup>204</sup>

Notwithstanding some uncertainty concerning the legislative basis upon which the land was taken, we noted earlier our view that this was likely to have been pursuant to the Native Land Court Act. If part of Waikawa 1 was required for roading purposes then it should have been taken under the provisions of the Public Works Act and compensation paid provided all other options had first been explored, the owners had been consulted and advised of the necessity for the taking, and provided that this was indeed a matter of national interest. None of these processes were followed. We find the taking contrary to the Treaty principles of partnership, reciprocity, equity, and active protection.

#### **12.4.16 The vesting of the land in a local authority: counsel submissions and Tribunal findings**

Counsel for the claimants criticised the Crown's vesting of the road reserve in a local body with no enforceable Treaty obligations, allowing the council to rent the road reserve to private individuals and letting those people restrict access to the beach. Counsel also pointed to the Crown's failure to ensure that the road reserve land was returned to the owners in 1984 when it was no longer required for the purposes taken.<sup>205</sup> Again, we note that the Crown made no submissions on this issue.

We find that the land not being used for a road should have been offered for return. This possibly dates from the late 1920s and early 1950s, when unauthorised dwellings were built on the road reserve without council intervention, and definitely from 1984, when the council initiated plans to remove the road reserve designation. It is unacceptable that the council should retain the land simply because it may be of future use, and contrary to the Treaty and its principles for the Crown to allow it to do so. We also consider it to be extremely inappropriate that the council should gain revenue from uses of the land other than those for which the land was taken. The council is effectively profiting from what could be viewed as illegal activity at the expense of the descendants of those Maori from whom the land had been compulsorily taken (most likely without compensation or consultation). We consider that the Crown has an obligation to ensure that land vested in a local authority is used for

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204. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, pp 840–841; see also Marr, *Public Works Takings*, pp 64–65

205. Counsel for Wai 921, closing submissions, p 12

the purpose for which it was taken or is instead promptly returned to its original owners. This is especially the case where a taking for the original purpose was not required to be compensated, whereas other kinds of takings did require compensation.

#### **12.4.17 The Public Works Act 1981: counsel submissions and Tribunal findings**

Claimant counsel noted that the Public Works Act 1981 sets out the procedure for offering back land that is no longer required for public works. She stated that it is clear that the road reserve is not required for the original public work and likely has not been since 1984 when the council planned to stop the road and dispose of the land to the bach, or dwelling, owners. The plan did not reach fruition because the council feared it might be liable in future if land stability failed.<sup>206</sup>

Counsel notes the council's view that the obstacle to using the offer-back provision is that it may require the land in future if the road is to be widened. However, counsel argues, the land has never been used for roading and there is no foreseeable plan to widen the road by lowering it. The council uses this land to obtain income that is not associated with roading or any other public work. Counsel is critical of the council's 'liberal view of the timeliness with which a determination should be made as to whether or not the land is required for roading or any other public work.'<sup>207</sup>

Counsel suggests that the Tribunal may wish to comment on the Act's provision, under section 40(2)(d), empowering the council to offer land back at current market value or a lesser price if the local authority considers it reasonable to do so. She notes the circumstances of the Noble claim, including the compulsory acquisition, the council's receipt of the land at nil cost, the lack of evidence of any compensation being paid to the owners and the fact that the council has profited from holding the land not used for roading purposes. In these circumstances, counsel argues that very wide discretion should be used here and the road reserve offered back to the successors of the owners at nil or nominal value.<sup>208</sup>

The Crown does not respond to this claim specifically, although as we noted in section 12.4.13, it has referred to the review of public works legislation in relation to both the Powick and the Noble whanau claims.<sup>209</sup>

We repeat our findings in relation to the public works legislation outlined previously. We consider the legislation's failure to specify an appropriate timeframe in which a return ought to occur following the cessation of the original use, or other public use, to be a serious omission. We find the council's retention of the land because it may be of future use to be unacceptable. We agree that the Crown has a duty to ensure that local bodies do not

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206. Counsel for Wai 921, closing submissions, p 10

207. Ibid, pp 10–11

208. Ibid, p 11

209. See Crown counsel, further closing submissions, p 5

hold onto land that they are clearly not using. Further, we consider that less latitude in the conditions of return of the land should be left to local bodies than that which is currently given under section 40(2)(d) of the Public Works Act. We agree with claimant counsel that in the circumstances of the Noble claim the road reserve should be offered back at nil or nominal value. This is particularly so in light of the improbability that compensation was paid and the fact that the council has gained revenue from inappropriately holding onto the area of land not used for the purposes for which it was taken. We also consider it to be appropriate for compensation for use and income loss to be paid to the claimants. We note that the provisions of the Te Ture Whenua Maori Act enable a local authority to apply to have the land returned. We comment further on this Act in section 12.4.22.

Once again, we wonder whether, apart from broader measures involving legislative reform, there are alternative options that could be considered by the Crown, the claimants and the council in this instance. For example, the portion of the land not used for a road might be returned to the descendants of the original owners and an easement or lease entered into with the council if the land was required for a road at some stage in the future.

#### **12.4.18 The Local Government Act 1974: counsel submissions and Tribunal findings**

Claimant counsel argues that the claimants would be severely prejudiced by the utilisation of section 342 and schedule 10 of the Local Government Act and seeks a recommendation that the Crown remove the statutory ability of the council to use these provisions in the case of the above road reserve. The Crown does not respond to this claim other than to the general claim made about amending the Public Works Act. Crown counsel noted again that the legislation is under review and the review would take account of general concerns already raised about Treaty compliance.<sup>210</sup>

We find that the unjust circumstances of this case are blatantly clear. If the council contemplates taking the action available to it under the Local Government Act 1974 (the relevant section of which remains in force) it will multiply the injustice to the claimants. We find that the Crown has failed to ensure that the Local Government Act road stopping provisions cannot be invoked by local bodies to avoid the Public Works Act offer-back provisions. Section 342 and schedule 10 of the Local Government Act are clearly contrary to the Treaty and its principles and prejudicial to the claimants.

#### **12.4.19 Other Crown takings raised by Te Atiawa claimants**

In this section of the chapter we briefly comment on two extant issues relating to the public works takings at Waikawa: Waikawa Village section 1 and Whakauruhunga (Cooper Point).

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<sup>210</sup>. Counsel for Wai 921, additional closing submissions, pp2–4, attachment B; see Crown counsel, further closing submissions, p5

Claimant Laura Bowdler's evidence is provided for her by her nephew, Anthony Keenan. Mr Keenan stated that, when Waikawa Village 1 was first laid off as a reserve, a portion of land was taken under section 72 of the Native Land Act 1894 for roading purposes, but no road was ever built (see fig 49). In 1982, 0.392 hectares was vested as a local purpose and utility reserve and transferred to Picton Borough Council and the remainder of the land was left as road reserve. No development of the site occurred, and the council leased it for grazing. In 1989, the claimants learned that the council planned to subdivide a section off the reserve and sell it on the open market. While the claimants are aware that they can request that the council apply to the Maori Land Court to have the land returned, they have no faith that the council will do this.<sup>211</sup>

The claim relating to Cooper Point (Whakauruhunga) involves the 1940 gifting by Riwai Keenan of 20 acres of land (section 125, block XIX, Gore survey district) to the Department of Defence as a reserve for a pilot and signal station during the Second World War. Nothing was built on the land. In 1974, the reservation was revoked and in 1985 the land became a scenic reserve, with the Marlborough Sounds Maritime Park Board controlling and managing it. The claimants say that the land should be returned to the descendants of Riwai Keenan.<sup>212</sup>

Anthony Keenan concluded that in the claimants' experience, the Treaty relationship between the tangata whenua and bodies such as the Picton Borough and Marlborough District Councils is 'non-existent'. These bodies, in his view, 'do not have a grasp of basic concepts such as tangata whenua status and kaitiakitanga' and the claimants have no faith that they will do what is right for Maori. In certain circumstances, he argued, the attitude is so negative that it puts tangata whenua off even approaching them. Mr Keenan called for the Crown to urgently address the attitudes and behaviour of the bodies it has created to manage local resources.<sup>213</sup>

#### **12.4.20 Waikawa Village 1 land taken for roading and Whakauruhunga: Tribunal comment**

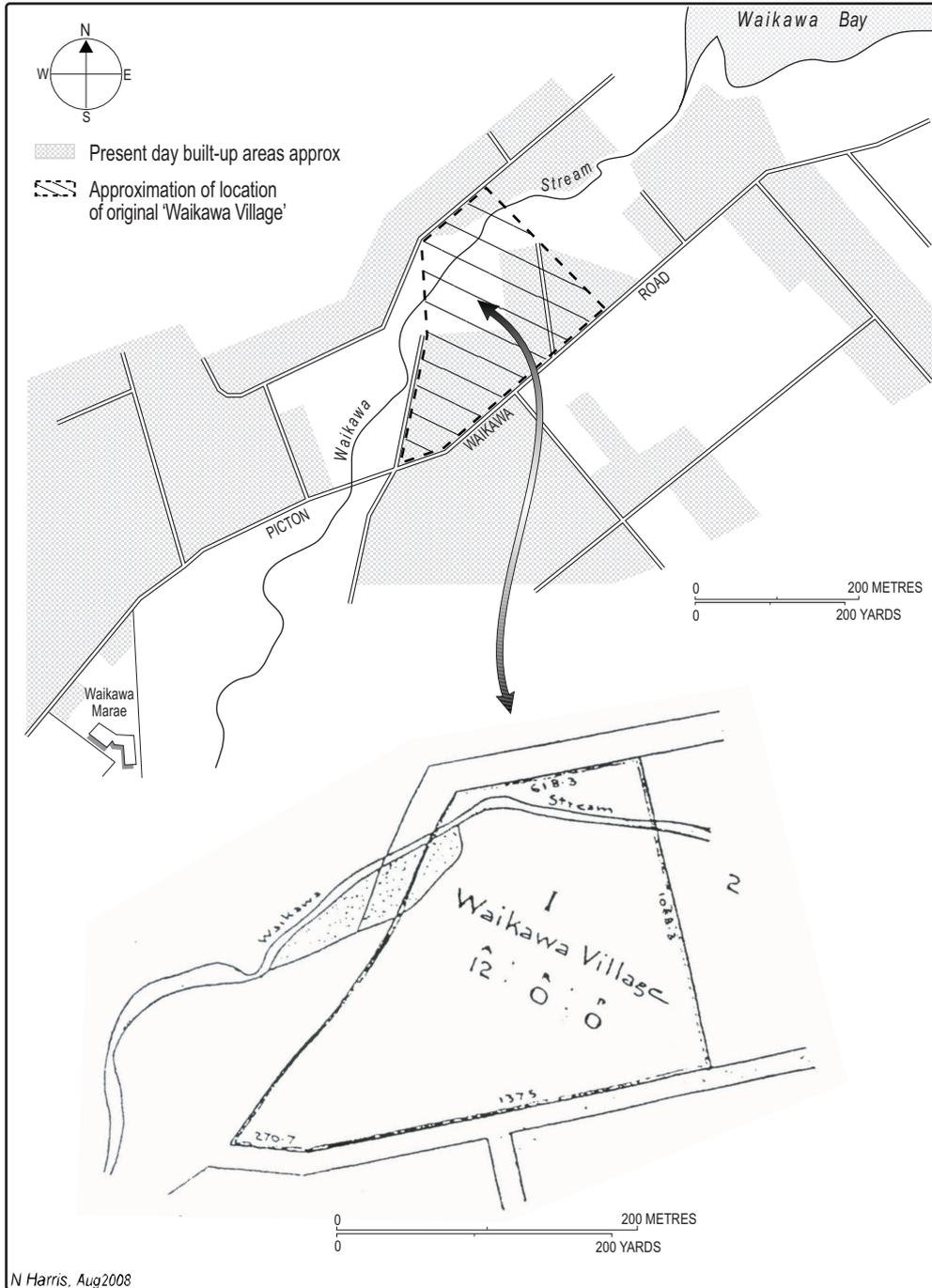
The Waikawa Village 1 scenario has similarities to the history of the Port Underwood road: land was taken for one purpose, and used for another. In neither case would the later use of the land have even remotely justified the original taking. Moreover, although we did not receive detailed evidence on the subject, the land again appears to have been taken with the help of legislative provisions allowing for up to 5 per cent of any Maori land block to be taken by the Crown for roading purposes without compensation or consultation. As we

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211. Anthony Keenan, brief of evidence on behalf of Te Atiawa, 8 August 2003 (doc Q16), pp 2-3

212. Ibid, p 10

213. Ibid, p 11



N Harris. Aug2008

Figure 49: Waikawa Village

Source: Anthony Keenan, brief of evidence, 8 August 2003 (doc Q16), apps 3, 8

noted in relation to the Port Underwood road, those provisions were both discriminatory and contrary to Treaty principles in our view. We repeat the findings concerning the timely return of land not or no longer used for the purpose for which it was taken, and the gaining of revenue from inappropriate uses of the land.

In relation to Whakauruhunga, we are of the opinion that, if the land is owned by the Crown, and not used for the purpose for which it was gifted, it should be returned under section 134 of the Te Ture Whenua Maori Act 1993. We note that current Crown settlement policies acknowledge Maori grievances in respect to lands gifted for one purpose and not returned once the purpose has been fulfilled.<sup>214</sup>

#### **12.4.21 Section 134 of the Te Ture Whenua Maori Act 1993: counsel submissions and Tribunal findings**

Counsel for the claimants states that section 134 of Te Ture Whenua Maori Act 1993 enables the Maori Land Court to vest any land owned by Maori that has been acquired by the Crown for a public purpose and is no longer required for that purpose in those found entitled to receive the land. The catch to section 134, she argues, is that only the Crown can make an application to have the jurisdiction of the court exercised, and further notes that the claimant, Mrs Bowdler, does not feel confident that the Crown would take that action on her behalf.<sup>215</sup> The Crown does not appear to have responded to this claim.

We find that section 134 of the Te Ture Whenua Maori Act 1993 leaves claimants such as the Bowdlers at the mercy of local bodies and the Crown to act honourably, reasonably, and with utmost good faith. As the experience of those interested in the Waikawa Village, the rifle range and the waterworks demonstrates, this expectation is not always met. We recommend that section 134 be amended to enable former owners to also apply to the Maori Land Court to exercise its jurisdiction with respect to the return of lands no longer needed for the purpose for which they were originally acquired.

#### **12.4.22 Tribunal findings of Treaty breach**

We find that the Crown acted in breach of Treaty principles in that it failed to actively protect those Te Atiawa with interests in Waikawa reserve lands when it:

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214. Office of Treaty Settlements, *Ka Tika a Muri, Ka Tika a Mua: He Tohutohu Whakamarama i nga Whakataunga Kereme e pa ana ki te Tiriti o Waitangi me nga Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: Office of Treaty Settlements, [2002]), p 15

215. Counsel for Wai 927 and Wai 925, opening submissions, p 5

- ▶ took Waikawa reserve lands for a rifle range under the Public Works Act 1908 and Defence Act 1909 when a continuation of the existing lease may have satisfied the Crown's needs while supplying an ongoing source of income to the owners;
- ▶ took an excessive amount of Waikawa reserve lands for the rifle range;
- ▶ failed to return the Waikawa lands taken for the rifle range in 1949 when the army stated that it could not construct a rifle range on the site and that it had no other uses for the land;
- ▶ gifted part of the rifle range lands no longer used for the purpose for which it was taken to Rangitane, without the knowledge of, or recourse to, those from whom the land had been taken;
- ▶ took land in Waikawa 2C2 in excess of that required for waterworks when it could have bought from willing sellers (whether two or more) instead;
- ▶ used the South Island tenths benefit fund to compensate Waikawa 2C2 owners for the taking of their land for Waikawa 2C2 waterworks;
- ▶ applied discriminatory legislation when it took part of Waikawa 1 for roading purposes without compensation
- ▶ failed to adequately explore alternatives to compulsory acquisition of freehold title when it took lands for public works purposes
- ▶ failed in all likelihood to pay compensation in respect of several compulsory takings
- ▶ failed in all likelihood to adequately consult with the owners before applying public works legislation to take their land
- ▶ resorted to compulsory takings without adequately considering whether there was a genuine need to do so as a last resort in a matter of national interest
- ▶ failed to ensure that land vested in a local authority is used for the purpose for which it was taken or returned;
- ▶ failed to ensure that legislation provides for the timely return of land, by local bodies in whom land taken for public works was vested, once that land ceases to be used for the purpose for which it was taken;
- ▶ allowed local bodies significant discretion in deciding the conditions of return of the land under section 40(2)(d) of the Public Works Act 1981;
- ▶ failed to ensure that the Local Government Act 1974 road stopping provisions cannot be invoked by local bodies to avoid the Public Works Act offer-back provisions; and
- ▶ limited those who can apply under section 134 of the Te Ture Whenua Maori Act 1993 for the Maori Land Court to vest land acquired for a public purpose but no longer used for that purpose in descendants of the original owners.

As a consequence the descendants of those Te Atiawa with interests in Waikawa reserve lands have been prejudicially affected.

### 12.5 THE STAFFORD WHANAU (NGATI RARUA) CLAIM REGARDING SUCCESSION TO WAINUI SECTIONS 13 AND 14

#### 12.5.1 The claimants and the claim

Wiremu Tapata Stafford's claim is made on behalf of the descendants of his mother, Hana Ruka Tapata, and his uncle, Werawera Tapata. The claim concerns Hana and Werawera Tapata's succession to their grandfather Inia Ohau's interests in Wainui sections 13 and 14 (sections 13 and 14, square 12, block III, Totaranui survey district), immediately adjacent to the boundary of the Abel Tasman National Park, overlooking Wainui Bay and Inlet.

Following Inia Ohau's death in 1920, the Native Land Court determined that his interests in Wainui section 13 (244 acres) and 14 (243 acres) should be vested in Hana and Werawera Tapata. However, Ohau had previously sold sections 13 and 14 in 1907. The claimants allege that they lost other succession interests through the poor record keeping and poor advice given by the Native Land Court administration in 1920.<sup>216</sup>

#### 12.5.2 Wainui sections 13 and 14

Wainui sections 13 and 14 were part of the Crown's 1855 Separation Point purchase and were acquired from the Crown by Paramene Haereitu in 1862 (see fig 50). With Haereitu's purchase, the sections became European (or general) land. Following Haereitu's death, the Native Land Court appointed three successors to his interests in 1904: Inia Ohau, Harimoana Tamihana and Rangitukua Putangitangi. Haerietu's successors sold the sections to a European in 1907.

When Inia Ohau died in 1920, his grandchildren, Hana and Werawera Tapata, made a claim against his estate, apparently because they felt his will did not make proper provision for them, and in the belief that he still owned sections 13 and 14. Inia Ohau's will appears to have vested all estate and interests in his son, Kawa Inia Ohau (who was the uncle of Hana and Werawera). In November 1920, the Native Land Court heard the application for succession. A will was produced at the hearing but was unable to be located by either the claimants in this inquiry or Crown historian Brent Parker. An agreement was reached between the parties present that Inia's interests in Wainui sections 13 and 14 would be vested in Hana and Werawera Tapata in equal shares on the understanding that they were 'to claim no more' from the estate. The Native Land Court made a succession order on this basis.<sup>217</sup> Although the succession order referred to the 'interest' of Inia Ohau being vested in the pair, it would

216. Stafford, claim Wai 1043, pp 1–2; counsel for Stafford whanau, closing submissions, not dated (doc T2), p 1; Alexander, 'Reserves of Te Tau Ihu', vol 2, p 663

217. The succession order vested Inia Ohau's interests in Wainui sections 13 and 14 in Hana and Werawera Tapata in equal shares, and all Inia Ohau's other land interests (which were in the Nelson tenths) went to Kawa Inia Ohau. Through Inia's will, Kawa held a life interest in other lands, which, upon Kawa's death, would pass to Iharaira Meihana: counsel for Stafford whanau, closing submissions, pp 1–2; Wiremu Tapata Stafford, brief of evidence on behalf of Ngati Rarua, [14 February 2003] (doc J4), pp 3–5.

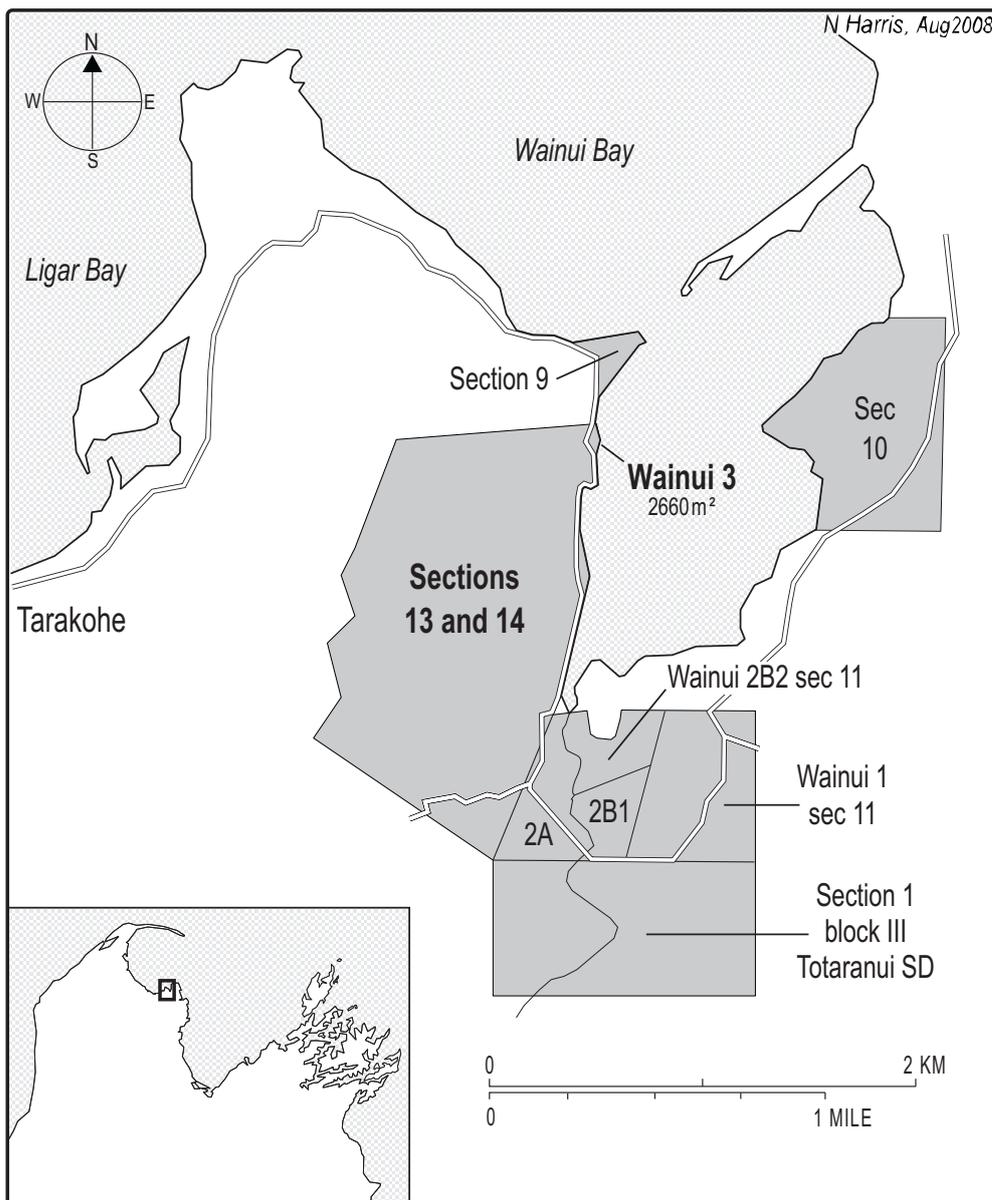


Figure 50: Wainui sections 3, 13, and 14

Source: Vern Stafford, brief of evidence on behalf of Ngati Tama, 12 February 2003 (doc K21), apps 1, 9

seem that the assumption was that they would be the only owners in the two sections. That would not have been consistent with the earlier succession order, in which Inia Ohau himself became one of three successors to the interests of Paramene Haereitu.

The claimants say that this agreement was reached on advice from the Native Land Court administration that Inia Ohau still retained ownership of Wainui sections 13 and 14. Claimant counsel argues that the Tapatas and the judge making the succession order

were misled by an inaccurate record. The Stafford whanau believe that Hana and Werawera would have been ‘absolutely reliant’ on the accuracy of the court’s advice. They argue that the effect of this erroneous advice was that the descendants of Hana and Werawera were alienated from their ancestral lands. Mr Stafford stated that his mother believed that the Wainui land had essentially been lost to the whanau through the actions of the Native Land Court.<sup>218</sup> Today, Hana and Werawera Tapata’s whanau landholdings in the Wainui area are restricted solely to interests in the 0.266 hectare urupa, Wainui 3 (discussed in sec 12.6).<sup>219</sup>

### **12.5.3 The Native Land Court’s role in Hana and Werawera Tapata’s disinheritance: counsel submissions and Tribunal findings**

Claimant counsel argued that that Crown had a duty to ensure that ‘its agent’, the Native Land Court, kept records in such a way as to avoid a judge making an error of such significance. The Crown’s duty of active protection of the claimants’ land interests extended to ensuring that the Native Land Court kept full and accurate records and did not approve succession orders without checking that the land was still owned by the deceased. Counsel argued that Hana and Werawera Tapata and their descendants have been permanently deprived of any interest in Inia Ohau’s ‘valuable’ estate.<sup>220</sup>

Crown counsel argued that, as sections 13 and 14 were European land owned by Maori, the Native Land Court had an interest in the people owning the land (as they were Maori) but not in the land itself. Counsel stated that the court would have had no records of these lands as they had ceased to be Maori land prior to the advent of the Native Land Court. The ‘remaining issue’ was how the court was led to believe that the land was still owned by Inia Ohau. Was it through information of the parties before the court, or the court’s erroneous records?

While the minutes do not provide a detailed transcript, they do inform us that the agreement was one reached by the parties, not the court, and that Hana and Werawera accepted the terms offered by the other side. Crown counsel concludes that the court had little, if any, involvement in the arrangement other than ratifying the agreement by the issue of an order. In doing so, counsel thought, it was ‘most likely’ relying on the evidence placed before it, ‘probably a verbal statement that sections 13 and 14 had remained in the ownership of Inia Ohau.’ Counsel submits that the claim is tenuously linked to a Crown act or omission.<sup>221</sup>

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218. Counsel for Stafford whanau, closing submissions, pp 1–5; W Stafford, brief of evidence, app c, pp 2–3. The claimants appear to attribute to the judge the comment that the Tapatas were ‘to claim no more’, but the minutes suggest that it came instead from their counsel. However, it obviously reflected the agreement arrived at.

219. W Stafford, brief of evidence, pp 6–7

220. Stafford, claim Wai 1043, pp 2–3; W Stafford, brief of evidence, p 3; counsel for Stafford whanau, submissions, 2003 (paper 2.460), pp 2–5

221. Crown counsel, closing submissions, pp 149–151

As we noted earlier, however, the 1920 succession order appeared to be premised upon the assumption that Hana and Werawera Tapata would be the only owners of the two sections. That was inconsistent with the Native Land Court's own previous succession order whereby Inia Ohau became one of three successors to the interests of Paramene Haereitu. In other words, the sections never belonged to Ohau alone and the Native Land Court should have known this based on its own records and queried the arrangements entered into in 1920. This ought then to have led to exposure of the real state of affairs.

In summary, the facts of this claim are that the court acted on incorrect information when it awarded interests in sections 13 and 14 to Hana and Werawera Tapata and failed to carefully check its own records with respect to the earlier succession order. The sections had in fact been sold. The award made in 1920 was premised on the basis that Hana and Werawera Tapata forfeited their claims on the balance of the estate. In fact, as sections 13 and 14 had already been sold, they forfeited their claims to the whole of the estate.

During the hearing of this claim, the Tribunal suggested that an application might be made to the court to question the 1920 order. There appeared to us to be a clear case under section 45 of Te Ture Whenua Maori Act 1993 to bring this matter to the court. If the evidence given to the court in 1920 was incorrect, or the judge made an error in law or in fact in making that order, the order could be cancelled or amended (with due regard no doubt being given to the interests of other successors to the interests of Inia Ohau). Claimant counsel suggested that a section 45 application would be expensive and that the decision would be at the judge's discretion. He preferred the Tribunal forum.<sup>222</sup>

We remain of the view that the appropriate course of action is to bring the matter to the Maori Land Court under section 45 of Te Ture Whenua Maori Act 1993 and we make no findings in respect to this claim.

## **12.6 NGATI TAMA'S CLAIM RELATING TO THE WAINUI BAY URUPA, WAINUI INLET, ADJACENT MOHUA**

### **12.6.1 The claimants and the claim**

Vern Stafford (Tapata) and Russell (Barney) Thomas provided evidence within the broader Ngati Tama claim relating to damage done to an urupa at section 3 Wainui (Maori urupa reserve, section 3 Wainui, block III, Totaranui survey district) through roading and coastal

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<sup>222</sup> Wiremu Stafford, in response to Tribunal questions, eighth hearing, 17–19 February 2003 (transcript 4.8, pp 132–134). We also note that the title to sections 13 and 14 must have been retained in the court for an urupa to be partitioned off in 1981: see section 12.6 below.

## 12.6.2

erosion.<sup>223</sup> Vern Stafford is the son of Werawera Tapata, whose name appeared prominently in the Ngati Rarua claim by Werawera's nephew, Wiremu Stafford (see sec 12.5.1).

The urupa, a one-acre block designated section 3 Wainui, is adjacent to the Takapou native reserve. It was part of the land acquired by Paramena Haereiti in 1862, discussed above, and Vern Stafford views the retrieval of the urupa as the reason Haereiti acquired the land from the Crown. The only marked grave in the urupa is that of Haereiti's daughter, Rangi Paramena, who died in 1880. Paramena Haereiti is said to have been buried beside his daughter in 1902.<sup>224</sup>

The urupa was excluded from the sale of the Wainui sections in 1907.<sup>225</sup> Although the one-acre site was reserved at this point its boundaries were not defined until the early 1980s, with Wainui 3 surveyed around 1980 and set aside as a Maori reservation 'for the purpose of a burial ground' for the descendants of Paramena Haereiti in August 1981. The urupa was then awarded to the descendants of Inia Ohau: Vern Stafford, his sister Ngaio Thelma Kingi (who succeeded to their father Werawera's interests in 1977) and his aunt Hana Ruka Tapata (deceased), and Rangihikoia Putangitangi and Hurimoana Tamihana, both of whom are presumed deceased.<sup>226</sup>

### 12.6.2 Road realignment through the Wainui Bay urupa

Vern Stafford and his sister Ngaio became more familiar with section 3 Wainui and the fact that it was an urupa following an incident with squatters in 1997. In January 1998, Barney Thomas (their nephew) and the Kaupapa Atawhai manager for the Nelson–Marlborough conservancy of DOC took them to Wainui. They also visited the office of Manawhenua ki Mohua, a group representing Ngati Tama, Te Atiawa, and Ngati Rarua ki Mohua, formed to deal with resource management, conservation, and local body issues in Mohua.<sup>227</sup>

The squatters had erected polythene and other rough shelters and had dug a long drop near Rangi Paramena's grave, but the police were powerless to act without first receiving a formal complaint about the squatters. Vern and Ngaio supported the efforts of Manawhenua ki Mohua to have the squatters removed. However, the complaint could not come from the local council, or Manawhenua ki Mohua, as that group did not hold ownership interests in the land.<sup>228</sup>

The original road adjoining the block was a narrow gravel road, formed entirely within the boundaries of the designated legal road, avoiding any burial sites. However, at various

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223. Counsel for Ngati Tama, closing submissions, p 113; Thomas, brief of evidence, p 2; V Stafford, brief of evidence on behalf of Ngati Tama, app 1

224. V Stafford, brief of evidence on behalf of Ngati Tama, pp 2, 4–5

225. Ibid, pp 2–5

226. Ibid, pp 2–4, app 5

227. Ibid, pp 5–6; Thomas, brief of evidence, p 3

228. V Stafford, brief of evidence on behalf of Ngati Tama, pp 6–7

times after the 1960s, local councils improved the Wainui Road, sometimes in response to slips from the hills to the west or from erosion by the sea of the road's eastern edge, and sometimes as part of general road widening and upgrading. In 1996, the surface was tar sealed.<sup>229</sup>

Mr Stafford claimed that during improvements carried out between 1980 and 1996 the section of the road which previously adjoined section 3 was abandoned in favour of a realigned straight section of new road which encroached on section 3.<sup>230</sup> The road has since been renamed Abel Tasman Drive. No evidence has been found of the council acquiring any form of legal right to realign the road anywhere but within the boundaries of the designated legal road or following normal procedures (such as consultation) prior to land being taken. There was no consultation with the registered owners of section 3 Wainui, or the Maori Land Court. There is no correspondence on the Wainui 3 block file referring to the council having consulted anyone about entering onto the land. It appeared to Mr Stafford that the council simply took a unilateral decision to enter illegally onto and take the land, yet most of the maps, which would have had to be perused by planners and designers, show the land as an urupa.

When the road surface was widened and re-formed, immediately prior to sealing in 1996, Trina Mitchell (from Manawhenua ki Mohua) and Jack Walls (a local archaeologist), monitored the engineering works to ensure that disturbance of 'cultural material' was dealt with as required under the Historic Places Act 1993. According to Mr Stafford neither realised that the road was illegally formed through the urupa site. Mr Stafford claimed that several of the claimants' ancestors, those of other Ngati Tama whanau and other iwi, are interred in this urupa, and that the remains of many of those people now lie beneath the tar-seal of the realigned road.<sup>231</sup>

In early January 1998, the Tasman District Council, as 'owner' of the road through section 3, agreed to meet the costs of fencing off the eastern edge of the road or section. This was to ensure that no other squatters or casual campers could use the informal lay by, which had allowed access for vehicles and camping.<sup>232</sup>

Late that month, Barney Thomas and Tui Martin (of Manawhenua ki Mohua) met with Mr Ashworth of the Tasman District Council's Engineering Department to discuss:

- ▶ why the road had been realigned through the middle of the reserve;
- ▶ what consultation the council had had with the owners and whether permission to encroach on the urupa had been obtained and, if so, when and from whom;

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229. Ibid, pp 8–9

230. The improvements were carried out either by the Golden Bay County Council or by its successor, the Tasman District Council.

231. V Stafford, brief of evidence on behalf of Ngati Tama, pp 9–11. Serious flooding in Takaka in 1986 destroyed some records, and other documents were lost in the archiving following the amalgamation of the Golden Bay County Council and the Tasman District Council in the late 1980s.

232. V Stafford, brief of evidence on behalf of Ngati Tama, pp 7–8

## 12.6.3

- ▶ why the council had not sought the necessary authorities such as an order-in-council and gazettals to take the land for roading purposes;
- ▶ why the council had not itself applied for the necessary permits and resource consents to construct the road; and
- ▶ why the council had not gone through the proper procedures following the application for the permits and consents.<sup>233</sup>

Mr Thomas recorded Mr Ashworth's replies as follows:

- ▶ The council was unaware of who the owners or trustees of section 3 were, let alone how to contact them, therefore no attempt had been made to contact anyone;
- ▶ The road had run through the reserve for many years and the latest work was only an upgrade of the existing roadline; and
- ▶ The latest work had been contracted out to Worseldine and Wells.<sup>234</sup>

Of further concern to Ngati Tama is the continuing encroachment of the sea. The coastal boundary of the urupa is being severely eroded and Mr Stafford believes that the council should take steps to protect this area.<sup>235</sup>

The claimants would like an acknowledgement of what was done by the council. They would like the road realigned back to the legal road line and the boundary fenced by the council, and they want the council to erect suitable protective works to avert future coastal erosion problems. They reject any implication by the council that by paying almost \$2000 for fencing off the road boundary after the squatters had been removed it had in some measure made a contribution to compensation. The claimants say that the local authority was required to do this anyway.<sup>236</sup>

### 12.6.3 Counsel submissions and Tribunal findings

Counsel for Ngati Tama claimed generally that, in the case of lands taken under public works legislation, there was inadequate consultation and compensation given. Elaborating further, counsel argued that, when acquiring land for public works, the Crown has failed or refused to instruct its agencies and local authorities to, amongst other things:

- ▶ inquire into the importance of the land for the present and future needs of Ngati Tama;
- ▶ balance those considerations against any national interest;
- ▶ consult with Maori owners and have regard to the existence of wahi tapu;

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233. Thomas, brief of evidence, pp 3-4

234. Ibid, p 4

235. V Stafford, brief of evidence on behalf of Ngati Tama, p 11

236. Ibid, pp 12-13; Thomas, brief of evidence, pp 4-5

- ▶ ensure that those sites were set aside and protected; and
- ▶ enable Ngati Tama to fulfil its roles of manawhenuatanga and kaitiakitanga.

Counsel for Ngati Tama argued in general that the Crown has allowed its agencies and local authorities to acquire land unnecessarily where lands were not actually required. More particularly, counsel stated that, in this instance, the local authority realigned the road by trespassing onto Ngati Tama land and desecrated the graves of ancestors whose remains now lie beneath the tar sealed highway. Counsel for Ngati Tama stated that the Crown has failed to recognise the iwi's role as kaitiaki and provide for the execution of that role.<sup>237</sup> The Crown has not responded to this claim.

The issue was discussed when we visited the urupa during the Ngati Tama site visit. Crown counsel acknowledged the grievance. In September 2006, counsel advised that further research had been commissioned. The research had confirmed that the formed road did encroach on private land (part Wainui section 3). It did not follow the line of the surveyed legal road. Ownership of the road was vested in the local county by section 191A of the Counties Act 1956. Responsibility for the road would have passed to the county at this point.<sup>238</sup>

We find that the Crown has a duty to ensure that local authorities act within the terms of the legislation vesting powers in them. We consider that the council failed to consult with the owners of Wainui section 3, it had no right to place a road on any part of that land and it paid no compensation for the unauthorised taking and use of the land. The fact that the land in question is an urupa should have required that particular care was taken at the time of the taking and the formation of the road. The owners of Wainui section 3 are within their rights to apply to the Maori Land Court for an injunction preventing the council from using the road and to seek damages against the council. However, we think it appropriate for the Crown to take responsibility to assist the claimants to have the road realigned back to its original position and compensation paid.

#### 12.6.4 Tribunal findings of Treaty breach

We find that the Crown acted in breach of Treaty principles in that it failed to actively protect the owners of section 3 Wainui when it did not ensure that local bodies acted within the terms of the legislation vesting powers in them. The owners of Wainui section 3 have clearly been prejudicially affected by the council's actions.

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<sup>237</sup> Counsel for Ngati Tama, closing submissions, p 113; Manson, amendment to claim Wai 723, pp 31–33

<sup>238</sup> Crown counsel, memorandum concerning urupa at Wainui Bay, 15 September 2006 (paper 2.803); see also Brent Parker, brief of evidence on behalf of the Crown, 15 September 2006 (doc v16)

## 12.7 NGATI KOATA AND NGATI KUIA'S CLAIMS IN RELATION TO TAKAPOUREWA (STEPHENS ISLAND)

### 12.7.1 The claimants and the claims

Ngati Koata's claim within the Te Tau Ihu inquiry in respect of Takapourewa, concerns allegations of Treaty breach regarding that iwi's rangatiratanga in relation to the island and its resources (see fig 51). It includes allegations of the Crown's failure to recognise the economic, social, and cultural value of Takapourewa to Ngati Koata and failure to protect Ngati Koata's control and ownership of that island and its endangered species. James Elkington lodged an historical claim, Wai 95, regarding Takapourewa, with the Tribunal in 1989 on behalf of the iwi. However, this claim was withdrawn following a 1994 deed of settlement, which the iwi and the Wai 95 claimant signed with the Crown. The deed states that it represents the 'final settlement of the Wai 95 claim and all other claims whether arising at law or otherwise relating to or arising out of claim Wai 95'.<sup>239</sup> We comment on the meaning of this clause below (sec 12.7.8).

Ngati Kuia complain that they ought to have been included in any deed signed with the Crown relating to Takapourewa, and that they should be involved in the management of the island today. Their counsel alleges that the Crown's failure to include Ngati Kuia in the management of Takapourewa's natural resources is in breach of the principle of partnership.<sup>240</sup> We note too that Rangitane made reference to their exclusion from the Takapourewa agreement in their claim, but did not pursue the allegation with evidence or in their closing submissions.<sup>241</sup>

### 12.7.2 Brief background

Takapourewa was gifted by Tutepourangi of Ngati Kuia, along with other islands, to Ngati Koata around 1825–27, following the battle of Waiorua (see ch 2). As we saw in chapter 8, when the title to Rangitoto was investigated by the Native Land Court in 1883 it and a number of smaller surrounding islands, including Takapourewa, were awarded to Ngati Koata, though at least one Ngati Kuia individual was admitted on to the list of owners, despite the iwi not submitting a separate claim for inclusion. However, when Rangitoto and the adjacent islands were partitioned in 1895 Takapourewa was not included in the awards made, since in 1891 the island had been taken by the Crown under the Public Works Act 1882 as a site for a lighthouse. The lighthouse was completed in January 1894 and compensation of £130 was ordered to be paid in 1895 by the Native Land Court. Ngati Koata say that only five acres of the 370-acre island was needed and that they had believed that only the area on which the

239. James Elkington and others, amendment to claim Wai 566, 10 November 2000 (claim 1.12(a)), p 25

240. Counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), pp 69–70. We note, however, that no allegations relating to Takapourewa are made in Ngati Kuia's statement of claim.

241. Mervyn Sadd and others, fourth amendment to claim Wai 44, 11 May 1993 (claim 1.1(d)), para 146

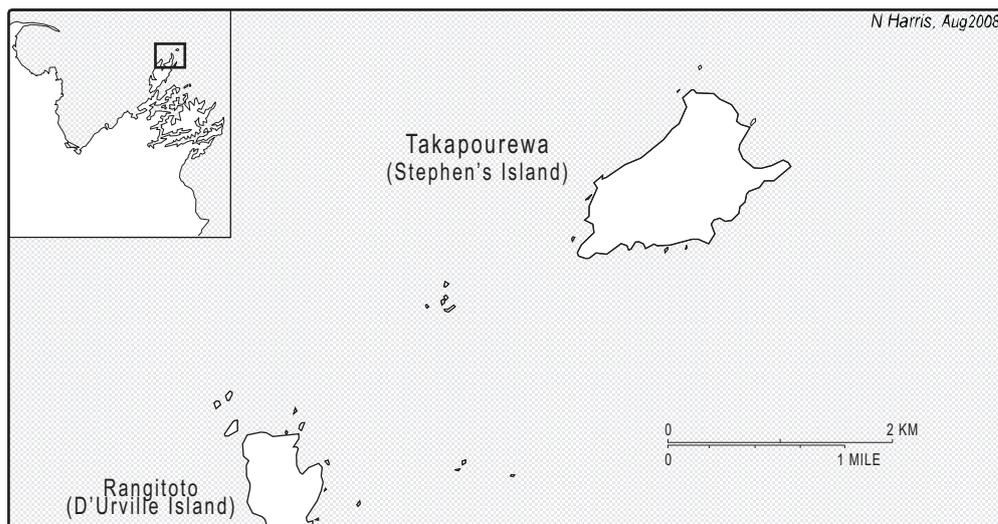


Figure 51: Takapourewa

Source: *Heinemann New Zealand Atlas* (Auckland: Heinemann, 1987), pl 61

lighthouse was built would be taken. They claim that the loss of the rest of Takapourewa affected their access to food resources, their way of living, and the retention of their culture and tikanga. Takapourewa was recognised as a valuable source of titi and penguin, a place to train tohunga and an important seamark and navigation aid for Ngati Koata. The iwi's role as kaitiaki, particularly in relation to the protection and management of the tuatara there, has been emphasised.<sup>242</sup>

Takapourewa became a wildlife sanctuary in May 1966. The Minister of Conservation took over responsibility for the administration of the sanctuary in April 1987. In 1988, the Ministry of Transport automated the lighthouse and the island beyond the lighthouse became surplus to its requirements.

In the November 1994 deed of settlement between the Crown, Ngati Koata, and the Wai 95 claimant, the parties agreed that the island should be made a reserve under the Reserves Act 1977. Except for the immediate area of the lighthouse, controlled by the Ministry of Transport, the remainder of the island is therefore currently a reserve administered by DOC.<sup>243</sup>

242. Bassett and Kay, 'Nga Ture Kaupapa', pp 113–114; Kahurangi Hippolite, brief of evidence on behalf of Ngati Kuia, 21 March 2003 (doc L17), p 7; *Maori Law Review*, November 1994, p 5 (doc B34(B)(19)); *Deed between . . . the Queen and Ngati Koata . . . and James Hemi Elkington*, pp 4–5; B Hippolite, brief of evidence on behalf of Ngati Koata, pp 6, 9

243. Bassett and Kay, 'Nga Ture Kaupapa', pp 113–114; James Elkington, supplementary brief of evidence for Wai 262 on behalf of Ngati Koata, [1999](doc B34(B)), paras 95–100; *Deed between . . . the Queen and Ngati Koata . . . and James Hemi Elkington*, pp 4–5; B Hippolite, brief of evidence on behalf of Ngati Koata, p 6

**12.7.2 The 1994 deed of settlement**

The 29 November 1994 deed was signed by the Crown (through the Minister of Conservation), Ngati Koata no Rangitoto ki te Tonga Trust (representing the descendants of the 79 owners defined by the Maori Land Court in 1883) and James Elkington (the named claimant for Wai 95). It stated that the 'Deed represents final settlement of the Wai 95 claim and all other claims whether arising at law or otherwise relating to or arising out of claim Wai 95'.<sup>244</sup> Certain historical facts were recited as 'agreed' but the Crown did not actually admit the validity of the Treaty claim, even though the deed was to be taken as settling it. Rather, the Crown stated its intention to resolve the future of the island in order to protect its endangered species, and to protect and acknowledge the mana of Ngati Koata.<sup>245</sup>

The deed of settlement recognised the significance of the island for Ngati Koata as a taonga, a major tribal boundary marker, and an important seamark and navigation aid. Ngati Koata were acknowledged as tangata whenua and kaitiaki of Takapourewa.<sup>246</sup>

The parties acknowledged and agreed that the island contains a number of species of flora and fauna which are endangered, rare, or threatened and which require active management and protection to ensure their survival.<sup>247</sup> It was therefore agreed that the entire island, except land required for the lighthouse, should be administered as the Takapourewa Nature Reserve by the Crown under the Reserves Act 1977.<sup>248</sup>

The deed acknowledged Ngati Koata as the tangata whenua of the island and required Crown recognition of this status through consultation with Ngati Koata no Rangitoto ki te Tonga Trust on planning and management matters concerning the island. It was agreed that the trust should be consulted in the preparation of all conservation management strategies and plans drawn up for the reserve; on all non-statutory plans, strategies, or programmes for the protection and management of the natural, cultural, and historic values of the reserve, and on all access permits issued for visits to the reserve (other than visits by the Minister or DOC employees for management and enforcement purposes). The trust would also be invited to become involved with on-site management programmes on the reserve and, if it accepted any such invitation, the Crown would ensure that the trust was properly and actively involved in the programmes.<sup>249</sup>

**12.7.3 Ngati Koata's understanding of the meaning of the deed**

Ngati Koata claimant James Elkington explained that the iwi had initially sought the return of the island, but when the Crown would not agree to this, Ngati Koata decided that it was

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244. *Deed between . . . the Queen and Ngati Koata . . . and James Hemi Elkington*, p 6

245. *Ibid*, pp 5–6

246. *Ibid*, pp 2–4

247. *Ibid*, p 6

248. *Ibid*, p 7

249. *Ibid*, pp 7–8

more important to establish joint authority to enable the island to be administered effectively. Mr Elkington nevertheless referred in his evidence to the transaction having been one whereby Takapourewa was returned to Ngati Koata and then gifted back to the Crown. Ngati Koata expressed the hope that this koha would some day be returned.<sup>250</sup>

In November 1994, the editor of the *Maori Law Review* commented on the deed. He suggested that what the Crown gave was no more than it was obliged to do anyway – to consult Ngati Koata over management of the reserve. The editor noted that under the Reserves Act 1977, ‘Ngati Koata preferences for management may not, as of right, be given any greater weight than those of, say, the Royal Forest and Bird Protection Society’. In addition, he thought that the deed greatly simplified future Crown consultation with Maori over the island, and that it was difficult to see that the iwi had ‘gained from the Crown any tangible legal rights to better protect their interest in the island in exchange for relinquishing the legal right to pursue their claim.’<sup>251</sup>

Mr Elkington disagreed with this interpretation, which did not take Ngati Koata’s understanding and intentions into account. In his view, the deed is ‘an arrangement involving joint authority over Takapourewa’ with DOC. That joint authority gave Ngati Koata ‘a decisive voice or power of veto’ over what happens on the island, including who will be permitted to land there and the approval of the annual management plan, and it gave the Crown (through DOC) the day to day administration of the island.<sup>252</sup> Benjamin Hippolite, also of Ngati Koata, gave evidence on behalf of the claimants but was also employed by DOC at the time of the hearings. He described the situation with respect to Takapourewa this way: ‘Ngati Koata owns the islands, and DOC participates in the protection of the endangered species on those islands’. He saw the partnership as providing that ‘Ngati Koata would retain the mana over Takapourewa and the Crown would administer Takapourewa’. He stated that, if people wanted to go to the island or take tuatara eggs, then this permission would first be referred to Ngati Koata.<sup>253</sup>

Mr Hippolite’s understanding was that ‘there would not just be “consultation”, but that there would be a partnership between Ngati Koata and DOC, and that Ngati Koata would have the power of veto over any decisions DOC made’. In his evidence, discussions between DOC and the claimants had led to their view of the partnership as providing Ngati Koata with ‘an equal say’ over what happened on the island. But he thought that ‘that was not the way that DOC treated Ngati Koata – they thought that as long as they talked to the iwi, then that was partnership’. He believed that the agreement involved Ngati Koata mana being maintained, their tino rangatiratanga recognised, and their traditional responsibilities as kaitiaki continued, despite the gifting of Takapourewa to the nation. Mr Hippolite concluded that,

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250. J Elkington, supplementary brief of evidence for Wai 262, paras 95–100

251. *The Maori Law Review*, November 1994, p 5 (doc B34(B)(19))

252. J Elkington, supplementary brief of evidence for Wai 262, paras 24–25

253. B Hippolite, brief of evidence on behalf of Ngati Koata, pp 5–6

12.7.4

if the deed did not reflect these definitions, ‘then it did not reflect the agreement’. He noted that Ngati Koata ‘had no legal advice at the time of the transaction’ and thought that the deed ‘must [now] be made to reflect that joint authority and responsibility are agreed and intended’. Despite the recognition of the deed as a final settlement, Mr Hippolite recorded, ‘there are still issues within the agreement that need to be resolved’.<sup>254</sup>

Mr Elkington believed there was a need to find a way of recognising Treaty-based Maori authority in respect of local resources to enable partnership to work. He thought that: ‘Being treated as having the subordinate role in these matters is demeaning, demoralising, and bad for our health and our economy, and contrary to the Treaty.’<sup>255</sup>

We address the question below, in section 12.7.8, of whether the iwi’s view is a reasonable construction of the agreement in Treaty terms.

#### 12.7.4 Ngati Kuia’s view on their exclusion from the deed and management of Takapourewa

Mr Hippolite noted that, when Tutepourangi’s tuku was made, Ngati Koata undertook to care for the land, ‘that was part of our deal’.<sup>256</sup> However, Ngati Kuia saw this differently.

Kahurangi Hippolite, speaking for Ngati Kuia, thought that Ngati Koata should have considered including Ngati Kuia in their 1989 claim to the Tribunal, as it was part of the tuku area. She noted that Ngati Kuia ultimately decided to support Ngati Koata’s claim on the basis that Ngati Kuia were to be part of the management of the island alongside Ngati Koata and DOC.

She recalled that representatives of Ngati Koata (from Wai 95) and Ngati Kuia, Ngati Apa, and Rangitane (from Wai 44) met in a conference convened by the Tribunal, held in February 1994, and agreed to adopt a unified front regarding Takapourewa. Environmental groups were thought to be taking advantage of the lack of cohesion amongst iwi on the matter. Ngati Kuia, in particular, but also Rangitane and Ngati Apa, claimed ancestral rights to Takapourewa. Those attending the meeting agreed that the first object was to get the land from the Crown, and then to sort out other problems amongst themselves. Support for Ngati Koata to negotiate with the Crown was given on the basis that Ngati Koata would then establish the composition of the committee of management, including Ngati Kuia and the other iwi.<sup>257</sup>

By contrast, Mr Elkington’s recall of the conference outcome was that, while there was talk of including iwi in the management plan, the final result was total support for Ngati Koata’s claim against the Crown to secure the best it could get for Takapourewa. He remembered Ngati Koata’s commitment being that they would ‘advise and inform and involve

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254. B Hippolite, brief of evidence on behalf of Ngati Koata, pp 6–7

255. J Elkington, brief of evidence on behalf of Ngati Koata, para 81

256. B Hippolite, brief of evidence on behalf of Ngati Koata, p 5

257. Minutes of Wai 95 conference, 17 February 1994 (doc C10), pp 1–6

where possible the iwis with any of the management plans or anything that takes place on Takapourewa. But that did not, in his view, extend to the other iwi being on the management committee or having a power of veto. He understood Ngati Kuia to have supported Ngati Koata going into negotiations against the Crown, and thought it unnecessary to include them in the deed.<sup>258</sup>

According to Ms Hippolite, Ngati Kuia did not believe that the Crown had all the information necessary to determine whether Ngati Koata should be kaitiaki over the area. They should not, she told us, have excluded Ngati Kuia. She thought that Ngati Kuia rights and interests, as the longest-standing tangata whenua in Te Tau Ihu, were ignored by the Crown and that they had been excluded from exercising their rangatiratanga and kaitiakitanga.<sup>259</sup>

Te Kenehi Teira, a descendant of Tutepourangi and Kaihautu, outlined Ngati Kuia's grievance of being excluded from the decision regarding the vesting of Takapourewa in the Crown. He claimed that Ngati Kuia retained a special relationship with Takapourewa and the tuatara. To him, Tutepourangi's tuku did not separate the roles of Ngati Koata and Ngati Kuia as kaitiaki: both iwi would share the role of kaitiaki of the knowledge of the environment and the taonga in those environments. Mr Teira recalled that, while Ngati Kuia were involved at the beginning in negotiations over Takapourewa, they were suddenly 'cut out'. While he acknowledged that some individuals were of both iwi, he criticised the Crown's failure to consider that the histories and tikanga of both Ngati Koata and Ngati Kuia were important. He suggested that it would have been 'good practice' to have both iwi involved. He was also critical of Ngati Koata's role in speaking on behalf of Ngati Kuia in matters pertaining to Ngati Kuia history and tikanga. Mr Teira stated, with regard to the tuku and the relationship between the iwi, that 'we should be acknowledging one another and including one another in the discussions' for places such as Takapourewa. While Ngati Koata had approached Ngati Kuia initially, he understood that the process had broken down.<sup>260</sup>

### 12.7.5 What process did the Crown follow in 1993–94?

The Crown did not provide us with any evidence of the process followed by DOC in the negotiations. Its view (as we describe below) is that Wai 95 has been settled, and any outstanding issues relate solely to implementing the deed. Counsel did not, however, provide a submission on the Ngati Kuia claim that they have been wrongly left out of the Takapourewa arrangements.

From the evidence available to us, it is possible to establish some basic facts about the negotiated settlement. First, the Crown was fully aware of Ngati Kuia and Rangitane claims

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258. James Elkington, under cross-examination, third hearing, 26 February–2 March 2001 (transcript 4.3, pp 148–152)

259. Kahurangi Hippolite, brief of evidence p 8

260. Te Kenehi Teira, under cross-examination, tenth hearing, 6–11 April 2003 (transcript 4.10, pp 194–195)

with regard to Takapourewa. The department had referred earlier proposals for settlement to the Marlborough Conservation Board, which called for public submissions. The resultant process revealed the claims of Ngati Kuia and Rangitane, which included the filing of claims in the Maori Land Court and the Tribunal. The Minister of Conservation wrote to the Tribunal on 22 July 1993, seeking to adjourn mediation ‘pending determination of the Maori group entitled.’<sup>261</sup> The Minister requested the Tribunal to refer the matter to the Maori Land Court under section 30 of the Te Ture Whenua Maori Act 1993, which empowered the court to decide the appropriate representatives of a ‘class or group of Maori.’<sup>262</sup>

On the advice of the Tribunal’s mediator, Buddy Mikaere, an alternative resolution was attempted by mediation.<sup>263</sup> A conference was held in February 1994, involving spokespeople from Ngati Koata, Ngati Apa, Ngati Kuia, and Rangitane, the minutes of which were filed in our inquiry by Ngati Kuia.<sup>264</sup> It appears that an informal agreement was reached, as outlined above in the evidence of Mr Elkington and Ms Hippolite. The agreement was announced publicly in the newspapers.<sup>265</sup> The key problem was that the mediation was discontinued soon after, and there was never any formal or ratified agreement between the iwi.<sup>266</sup> Although, as Mr Elkington told us, Ngati Koata still intended to involve other iwi in management of the island, no formal requirement or mechanism was established to do so.

The mediation was ended in May 1994, after which DOC negotiated the current settlement with Ngati Koata. What had happened in the interim to satisfy DOC that the Crown was dealing with the correct (and all the correct) people? As noted above, it is difficult to be certain in the absence of evidence from DOC, but it appears to us that the crucial factor is the one acknowledged at the beginning of the deed – the settlement was made with the people recognised as owners by the nineteenth-century Native Land Court. This appears to have been the default position of the department at that time. The Rekohu Tribunal noted the department’s policy of acknowledging and dealing with only one iwi on the Chatham Islands, because they were the group that had been recognised as owners by the Native Land Court in 1870. In that Tribunal’s proceedings, however, the department was willing to resile from such a position.<sup>267</sup>

For Takapourewa in 1994, it seems likely therefore that the Crown simply relied on the Native Land Court determination of 1883. It could not have relied on the outcome of the

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261. Chairperson, memorandum directing mediation on customary ownership of Takapourewa, 15 December 1993 (Wai 95 RO1, paper 2.4)

262. Ibid; see also Te Ture Whenua Maori Act 1993, s30

263. Chairperson, memorandum directing mediation on customary ownership of Takapourewa, 15 December 1993 (Wai 95 RO1, paper 2.4)

264. Waitangi Tribunal, Wai 95 conference minutes, not dated

265. See, for example, the *Dominion*, 22 February 1994

266. Chairperson, memorandum advising of unsuccessful mediation and directing registrar to propose hearing arrangements, 13 May 1994 (Wai 95 RO1, paper 2.5)

267. Waitangi Tribunal, *Rekohu*, p 259

Tribunal's mediation, as that mediation had been discontinued (and the informal agreement between iwi had not been finalised).

#### 12.7.6 Counsel's submissions

Counsel for Ngati Koata argued that the Crown has failed to recognise and protect the iwi's rangatiratanga in respect of Takapourewa, to ensure that the island remained in the care and control of the iwi, and that its ownership was not taken. Counsel cited evidence of the importance of the island to Ngati Koata as kaitiaki of its natural resources, including the tuatara, and for its spiritual significance as a training place for tohunga. Counsel criticised the Crown's 'broad brush' approach to Ngati Koata claims to Takapourewa, in which the Crown refuted the claimants' allegations and stated that all claims to Takapourewa had been settled by the 1994 deed.<sup>268</sup>

In the Crown's view, the Tribunal has no jurisdiction to inquire further into Ngati Koata's historical claims, because the claimants have acknowledged the Wai 95 claim as settled and have withdrawn their claim. They cannot, under the provisions of the deed, advance the same historical grievances under a new claim number. If there are any contemporary issues, then resolution should be sought within the provisions of the deed.<sup>269</sup> Crown counsel concluded that 'the words of the deed are clear. Pursuant to the Deed, Ngati Koata settled their historical claim. Aside from possible questions of implementation, there does not appear to be a new or different claim that ought now be considered by this Tribunal.'<sup>270</sup>

Crown counsel noted that clause 11 of the deed records that Ngati Koata will be consulted and involved with certain conservation matters but 'does not expressly, or by implication, provide Ngati Koata with a power of veto over any decision DOC makes.' The Crown does state, however, that it would consider any implementation issues raised by Ngati Koata.<sup>271</sup>

Ngati Kuia claimed that they were wrongly excluded from the 1994 arrangements, despite their customary rights in both the island and its tuatara. Counsel for Ngati Kuia also argued that, in relation to Takapourewa and the DOC estate generally, the Crown had failed to work with Ngati Kuia in the management of Ngati Kuia's natural resources (taonga within article 2 of the Treaty), and its environment, in breach of the principle of partnership.<sup>272</sup> The Crown did not respond to this submission or to Ngati Kuia's evidence that they were wrongly excluded from the settlement by the Crown and Ngati Koata.

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268. Counsel for Ngati Koata, closing submissions, pp 91–92; Bassett and Kay, 'Nga Ture Kaupapa', p 113; B Hippolite, brief of evidence on behalf of Ngati Koata, pp 6–9; Crown counsel, memorandum concerning Ngati Koata's amended statement of claim, p 12

269. Crown counsel, memorandum concerning Ngati Koata's amended statement of claim, p 12

270. Crown counsel, further closing submissions, p 8

271. Ibid, pp 7–8

272. Counsel for Ngati Kuia, closing submissions, pp 69–70

**12.7.7 The Tribunal's analysis and findings**

The Wai 95 claim has been acknowledged as settled by Ngati Koata, who have formally withdrawn the claim.<sup>273</sup> We agree with the Crown that, as clause 8 puts it, the deed 'represents final settlement of the Wai 95 claim and all other Claims whether arising at law or otherwise relating to or arising out of claim Wai 95'. Although there has been no settlement legislation to formally remove the Tribunal's jurisdiction, it is our view that we ought not to report on any aspects of the claim that have already been settled.<sup>274</sup> We should not, therefore, address any historical issues regarding the taking of the land for public works, insofar as those issues involve the grievances of Ngati Koata. There is nothing in clause 8, however, or any other part of the deed, which prevents us from considering Ngati Koata's claim about interpretation of the deed itself, and the consistency of its disputed provisions with the Treaty of Waitangi. In the absence of settlement legislation, our jurisdiction in that respect is unimpaired.

We do not, however, have detailed evidence about exactly how the deed has been carried out. In this regard, we note that since the close of the hearings phase of our inquiry, a tourism company (Tuatara Maori) had applied to DOC for a permit to take a limited number of trips to the island to view tuatara. We note reports that Ngati Koata are a 10 per cent shareholder in this company. We finally note that DOC declined this application on the grounds that tours would increase the potential for pests and disease to spread to the island.<sup>275</sup> We have no information on how the parties who appeared before us were involved in the decision-making process that led to its being declined. We make no findings on the implementation of the deed.

There remains, however, a high level of discrepancy between the parties' views as to the meaning of the deed, and in particular the meaning of consultation within the deed. Mr Elkington and Mr Hippolite, for Ngati Koata, believed that the deed would give effect to their tino rangatiratanga. The tribe agreed to the island becoming a reserve for the nation, in which conservation imperatives (shared by the Crown and Ngati Koata) would be a primary consideration. But they also believed that the recognition of their mana and their tino rangatiratanga meant more than the right to be consulted and involved in management. They expected their authority to be recognised to the extent of their having the final, or at least a truly equal, say in decision-making. Although we heard no evidence from DOC officials (other than Mr Hippolite), Crown counsel has submitted that this was not the department's understanding when it entered into the deed. The claimants argue that, if the legal

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273. The claim was formally withdrawn by James Elkington on 27 January 1995: Waitangi Tribunal, memorandum directing registrar to note settlement and withdrawal of Wai 95 claim, 8 February 2008 (paper 2.811).

274. Crown counsel, memorandum concerning Ngati Koata's amended statement of claim, p 12; *Deed between . . . the Queen and Ngati Koata . . . and James Hemi Elkington*, p 6

275. 'DOC Rebuffs Bid for Tuatara Island Tours', *Nelson Mail*, 28 August 2007

meaning of the deed is not in accord with their understanding, then the deed must now be amended. We observe that, if Ngati Koata had received independent legal advice prior to signing the deed, then any discrepancies between the parties as to its meaning may have been signalled at the outset. The lack of legal advice was in our view prejudicial to Ngati Koata interests, but since we received no explanation for how this situation arose we take the matter no further.

One issue for the Tribunal is: was the degree of authority claimed by Ngati Koata reasonable for them to have expected under the agreement, which was a resolution of their Treaty claim? It must be remembered that the settlement is not simply an agreement between the Crown and iwi as to how the island and the taonga it protects and sustains (such as the tuatara) are to be managed. It is the settlement of a Treaty claim. As such, it ought to have restored the Treaty relationship between the Crown and the iwi concerned. One of the Crown's stated intentions in the deed was to protect the mana of Ngati Koata (or, in Treaty terms, their tino rangatiratanga). As has been noted by the Tribunal many times, this Treaty duty of protection is an active, not a passive, one.

That being the case, we note the findings of the Tribunal's *Napier Hospital and Health Services Report*, which considered the processes and standards of consultation laid down by the courts. The report stresses that consultation is not merely to inform or present information, but to propose, take serious account of what others have to say, and decide what will be done considering others' responses. It is not a process that has as its object arriving at agreement necessarily, although it may result in that.<sup>276</sup>

In particular, we note that:

- ▶ The party consulted does not acquire a right of veto over the decision to be made, or the right to cause unreasonable delay. The Treaty placed an obligation of reasonable cooperation on Maori in responding to consultation in a timely and appropriate manner. It is an aspect of the principle that Treaty obligations are reciprocal.
- ▶ Crown agencies embarking on consultation must be prepared to alter their original proposal once they have talked to the community. It is inappropriate for people to be confronted with a *fait accompli*. That would not represent the spirit of the principle of partnership.<sup>277</sup>

The findings of the *Napier Hospital and Health Services Report* involved a site of importance to Maori, and the question of consulting Maori (and the wider community) on issues of health policy. There are occasions, however, where full and equal authority for Maori, including a right of veto, may be appropriate under the Treaty. The Whanganui River Tribunal, for example, considered that, in the instance of Atihaunui and their ancestral river,

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<sup>276</sup>. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), pp 70–71, 73

<sup>277</sup>. *Ibid*, pp 70–71, 73

consultation fell short of the requirement to give effect to tribal authority. Something greater was required, such as making the tribal trust board a consent authority for the river.<sup>278</sup>

The question is whether ‘consultation’ and involvement in management, as per the wording of the 1994 deed, ought to have meant equal authority for DOC and Ngati Koata. If so, we think that both the Government agency and the tribe would still be subject to the final decisions of the Minister, representing the Crown and the public interest. That is appropriate, given the conservation values at stake. From the evidence of Mr Elkington, we conclude that there is no fundamental divergence between the conservation goals and responsibilities of the Crown and of Ngati Koata. The question is one of partnership. We suggest that the Crown and Ngati Koata work together to clarify the issue, and note the Crown’s stated willingness to do this. We do not, at this stage, make any finding of Treaty breach. We consider that the matter is still capable of being resolved. For the guidance of parties, we note our view that the island and its taonga, especially the tuatara, are very important to the identity, culture, and spiritual well-being of Ngati Koata. That point was established clearly in their evidence to us. Consultation alone, in the sense meant by the courts and by the *Napier Hospital and Health Services Report*, may not suffice to give effect to the tino rangatiratanga of Ngati Koata.

We turn next to Ngati Kuia’s claim. Ngati Kuia, as their evidence before us demonstrated, are tangata whenua of Takapourewa. As we discussed in chapter 8, they lost their customary rights to Rangitoto and the surrounding islands (including Takapourewa) in 1883. The tuku of Tutepourangi remained (and remains) in force. There is disagreement today between the tribes as to the meaning and effect of the tuku. We leave that matter for them to resolve. Here, we are concerned with whether the Crown actively protected the Treaty rights and interests of Ngati Kuia (and other Kurahaupo tribes) when it settled the Wai 95 claim. Although we have no detailed evidence on the process followed by DOC, it appears that the department at first hesitated to settle the claim in 1993, in view of the public challenge from Ngati Kuia and Rangitane. Then, at some point in 1994, it decided to rely on the Native Land Court decision of 1883, as stated in the deed. It may also have relied on the Tribunal’s mediation between the iwi, but (as discussed above) this was informal and incomplete.

In our view, it is still possible for the Crown to settle Ngati Kuia’s claim. There is nothing necessarily exclusive about the redress provided to Ngati Koata in the 1994 deed. As a result, we make no finding of Treaty breach with regard to that deed. At the time of the signing, Ngati Koata kaumatua Pene Ruruku was quoted as saying that ‘the island was also important to other tribes in the area and they would be included in management consultation.’<sup>279</sup> In our inquiry, Mr Elkington expressed willingness to consult and include the other iwi with ancestral rights. Dennis Gapper, a witness for Ngati Apa, described positive discussions between Ngati Koata and Ngati Apa about Takapourewa (among other things) as

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278. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 344

279. Minister of Conservation, press release, 29 November 1994 (doc B34(B)(20))

having taken place in 1999.<sup>280</sup> We expect that discussion between the parties could formalise a proper arrangement for Takapourewa, although it may not be easy to reach consensus. We recommend that the Crown negotiate with the Kurahaupo iwi with a view to settling their claims about the extinguishment of their customary rights to Takapourewa in 1883, and with a view to including them in arrangements for the management of the island and its taonga. We consider that it is for the iwi involved to discuss and consider the relativities between themselves and not a matter for this Tribunal. We do not think, however, that in acknowledging the mana of others, there will be any diminution of the mana and authority of Ngati Koata.

## 12.8 OTHER CLAIMS

### 12.8.1 Introduction

There remain five other claims for us to consider in this chapter. We discuss them in the following sections. Unlike the claims discussed in previous sections of this chapter, we have only been able to make limited comment on the claims covered here given the limited nature and extent of evidence we received.

### 12.8.2 Tahuaroa whanau claim (Wai 124)

#### (1) *The claimants and the claims*

Wai 124, submitted by Neville Tahuaroa in February 1990, concerns land on Arapawa Island. The Tahuaroa whanau seek the return of land surrounding their family urupa, which is currently held in various Crown reserves and administered by DOC. The claimants allege that DOC is failing to properly administer or protect the land.<sup>281</sup> The history of the Crown reserves is outlined in Mr Tahuaroa's evidence, which was presented to us at the January 2003 Te Atiawa hearing, and in a Waitangi Tribunal commissioned report by Joy Hippolite.<sup>282</sup>

The Tahuaroa whanau, members of the Puketapu hapu of Te Atiawa, own parts of the Oamaru block, which was reserved in the Waipounamu transaction in 1856. The claimants assert that the transaction was flawed and that the land they are currently claiming should have been included in the Oamaru reserve rather than being used for Crown purposes. The land under claim includes a watering place reserve, a strip of land along the foreshore (Queen's chain) and a separate part of the foreshore reserve adjacent to Umukuri

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280. Dennis Gapper, brief of evidence on behalf of Ngati Apa, not dated (doc N6, pp12-13, supporting documents)

281. Neville Tahuaroa, claim Wai 124 concerning Waikawa lands, 8 February 1990 (claim 1.5)

282. Neville Tahuaroa, 'First Claim: Watering Place Reserve', brief of evidence on behalf of the Tahuaroa whanau, 2 January 2003 (doc 116); Joy Hippolite, 'Arapawa: The Path of Smoke', report commissioned by the Waitangi Tribunal, 1998 (doc A37)

Bay urupa. Neville Tahuaroa submitted that the loss of this land entailed the loss of wahi tapu and impacted on the ability of the occupants to sustain themselves. Successive Crown administrators of the reserves have failed to properly manage or protect the reserves. With respect to the urupa, this failure has resulted in damage through erosion.<sup>283</sup>

The watering place reserve of approximately 80 acres was gazetted as a Crown reserve in 1857. Reserved for water supplies and ‘other purposes’ it has remained in Crown administration since then, coming under DOC’s administration in the 1980s. A proposed exchange of the reserve with private parties, who were seeking waterfront access for an adjacent property, prompted Mr Tahuaroa to lodge the claim to the Waitangi Tribunal. Mr Tahuaroa argued that DOC should have offered the reserve back to the original owners before considering disposing it to a third party. With the lodging of the claim, DOC ceased discussions with the private party about a possible exchange involving the reserve.<sup>284</sup>

In 1896, a 100-link strip along the water’s edge, adjacent to Oamaru native reserve and the watering place reserve, was set aside for roading purposes.<sup>285</sup> Mr Tahuaroa was highly critical of this, stating that it would have been impossible to actually construct a road here and that it was unlikely that the government of the day genuinely intended to road that ‘then rather isolated island region.’ He argues that it was another example of the Crown securing ownership over scarce ‘viable low lying areas.’ As with the watering place reserve, the Crown has retained ownership of the chain strip, which became known as foreshore roads and reserves in 1926. The Tahuaroa whanau were never compensated for the loss of this one-chain strip.<sup>286</sup> The chain strip was taken under provisions allowing the Crown to acquire up to 5 per cent of any Maori block of land for roading purposes without compensation or consultation. We discussed these provisions earlier in this chapter and concluded that these were discriminatory and contrary to the Treaty and its principles.

This foreshore reserve cut through land on which Tahuaroa’s great-grandfather had built a shearing shed in the 1880s (adjacent to Oamaru 1A and 1B). In the 1970s, the body then administering the reserve, the Marlborough Maritime Parks Board, ordered the removal of the building. The whanau also had a foreshore licence for a bach on the reserve (a converted boat shed) and in the early 1980s they were informed they could renew the licence on the condition that they upgraded the bach and removed the remaining standing portions of the wool shed. Mr Tahuaroa stated that he reached a verbal agreement with the board to make these changes on the condition that they could reconstruct a replacement services shed and slipway. The whanau’s licence was renewed in 1984, for a term due to expire at the

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283. Tahuaroa, ‘First Claim’, pp 1, 9–11, 15–16, 20; Neville Tahuaroa, ‘Second Claim: Ownership of the Foreshore Reserve’, brief of evidence on behalf of the Tahuaroa whanau, 2 January 2003 (doc 116), pp 1–2; Neville Tahuaroa, ‘Third Claim: Urupa Foreshore Reserve’, brief of evidence on behalf of the Tahuaroa whanau, 2 January 2003 (doc 116), pp 1–2

284. J Hippolite, ‘Arapawa’, pp 14, 23–24, 27; Tahuaroa, ‘First Claim’, pp 18–19

285. J Hippolite, ‘Arapawa’, p 32

286. Tahuaroa, ‘Second Claim’, pp 1–3

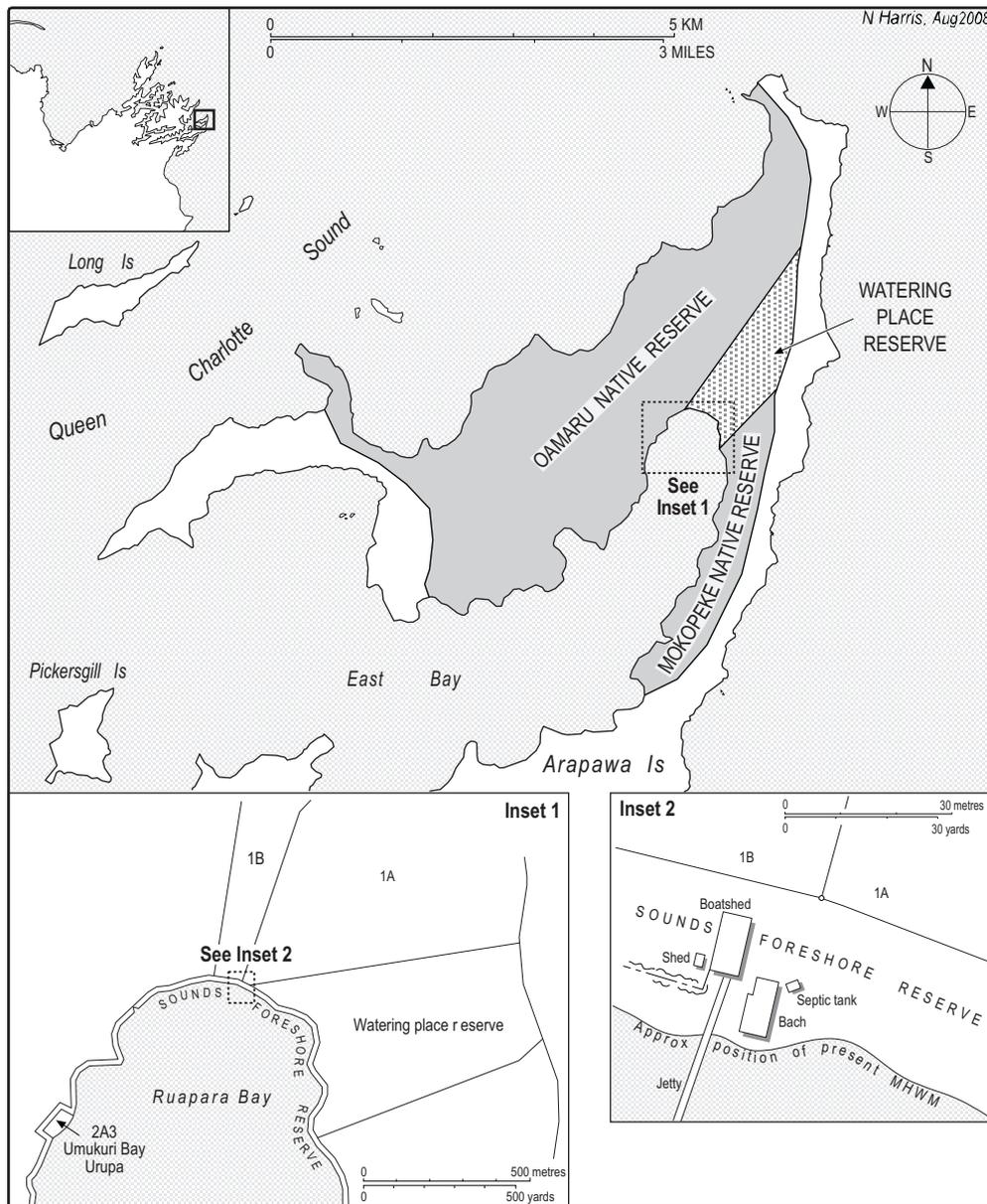


Figure 52: Arapawa reserves

Source: Joy Hippolite, 'Arapawa: The Path of Smoke', report commissioned by the Waitangi Tribunal, 1998 (doc A37), figs 3, 8

end of 1990.<sup>287</sup> Control of the reserve passed to DOC later in the 1980s. In 1989, Mr Tahuaroa informed DOC that he intended to rebuild the boatshed and slipway, as per his agreement with the maritime board, but was told he first needed approval of DOC and the Nelson District Council. As at 2003, Tahuaroa had not yet applied for a permit and was waiting

287. Ibid, pp 4-5

## 12.8.2(2)

until the resolution of his Tribunal claim.<sup>288</sup> The foreshore licence was renewed at nil-rental pending the resolution of the claim.<sup>289</sup>

The Tahuaroa whanau are seeking the return of the watering place reserve and this part of the foreshore reserve. Mr Tahuaroa emphasised the cultural importance of the land to the whanau. He noted, for example, that his grandmother had buried the pito of her 22 children on this land. The whanau seek the return of the land and monetary compensation to be used in reforesting the property with native trees. Mr Tahuaroa states that as ‘residing iwi [we] can carry out the role of good and sound kaitiaki . . . and we can do so in a manner far more successfully than the current administrators.’<sup>290</sup>

The Crown’s one-chain strip foreshore reserve also borders the urupa at Umukuri Bay (Oamaru 2A3). As figure 52 shows, the urupa is bound by the reserve on three sides and the sea on the other side. The cemetery was reserved in 1911 and remained in the whanau’s control until 1980, when it was gazetted as a Maori reservation under section 439 of the Maori Affairs Act 1953 for all of Te Atiawa. Mr Tahuaroa is dismissive of this wider iwi status, commenting that the burial ground was already practically full by that date.

Erosion has been a long-standing problem for the urupa. During the late 1980s and early 1990s, there were difficulties between the Tahuaroa whanau and DOC with respect to fencing off the land boundaries. These had been resolved by the end of the 1990s, with DOC having supplied the whanau with fencing material. However, an outstanding problem is erosion from the sea and Mr Tahuaroa maintains that the department’s response to this has been inadequate. Erosion through the continual encroachment of the sea has been a problem since at least the 1920s (at which time, Mr Tahuaroa’s mother and aunts filled various cavities in the sea bank with old fencing wire and rocks). Today, the whanau would like to establish a kaitiaki committee to care for the urupa and they seek the return of the one-chain strip.<sup>291</sup> In response to questioning during our hearing, Mr Tahuaroa stated that:

I am asking the Crown to give us the resources, return to Te Atiawa the one chain strip adjacent to the three sides of that urupa, wherein which we know we have tupuna. And give us the resources to be able to set up an administration and management structure to look after it.<sup>292</sup>

## (2) *Tribunal discussion and finding*

In her concluding chapter, Hippolite outlines the main issues for the Tribunal to consider.<sup>293</sup> These include:

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288. Tahuaroa, ‘Second Claim’, p 7

289. J Hippolite, ‘Arapawa’, p 42

290. Tahuaroa, ‘First Claim’, p 21; Tahuaroa, ‘Second Claim’, pp 6, 8

291. Tahuaroa, ‘Third Claim’, pp 2–3; J Hippolite, ‘Arapawa’, pp 47–50

292. Neville Tahuaroa, under cross-examination, seventh hearing, 27–31 January 2003 (transcript 4.7, p 75)

293. J Hippolite, ‘Arapawa’, pp 51–52

- ▶ Should the watering place reserve have been reserved at the time of the Crown purchase?
- ▶ Should the chain strip have been reserved?
- ▶ Is there a case for returning these reserves? In Hippolite's view, DOC's earlier consideration of disposing of this land to a third party indicates that such a return might be feasible.
- ▶ Is it appropriate that the Umukuri Bay urupa was reserved for the benefit of Te Atiawa in 1980 and not just the original owners of the reserve?
- ▶ If the chain strip is not to be returned to Maori then what are the various responsibilities of both DOC and Tahuaroa for managing erosion of the urupa at Umukuri Bay?

Another issue is whether any return of Crown reserve land should be specific to the Tahuaroa whanau or to the wider Te Atiawa iwi. Crown counsel, Andrew Beck, raised this question during our hearing. In response, Mr Tahuaroa stated that 'this is a possibility . . . yes, there could well be iwi involvement within whatever develops should this claim be successful'. Mr Tahuaroa explained that in 1989 there had been an urgent need to submit the claim, following the proposed exchange of reserve land, and he had therefore proceeded with the claim without wider consultation with Te Atiawa.<sup>294</sup>

In many ways, the Tahuaroa whanau claim typifies the experience to Te Tau Ihu Maori following the era of large-scale Crown purchasing in the 1840s and 1850s. With the Crown's Waipounamu purchase in 1856, the whanau's interests were confined to the occupation reserve at Oamaru, the boundaries and ownership of which were not defined till much later in the century. With definition and legal title came a reduction in the size of the reserve through the Crown's compulsory acquisition without compensation for roading (later foreshore reserve). The late-twentieth-century relationship between the whanau and local Crown representatives has also been fractious on occasion.

As noted above, during the hearing, Neville Tahuaroa signalled a willingness to cooperate with the wider Te Atiawa iwi in settlement of the claim. Given the current context of the Treaty settlement process this would seem to be the best way forward for the whanau. Without legal submissions or a Crown response to the Wai 124 claim we are reluctant to make full findings on this claim. However, the claim appears on a prima facie basis to be well-founded and we would encourage the Crown to consider this specific claim in the course of its negotiations with Te Atiawa.

We did receive submissions on the creation of the foreshore reserve from Te Atiawa, which we have discussed in chapter 7. Like Neville Tahuaroa, counsel for Te Atiawa submitted that they were neither consulted nor gave their consent to the taking of the foreshore reserves. Nor were they compensated for their loss.<sup>295</sup> To reiterate our findings in that

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294. Neville Tahuaroa, under cross-examination, seventh hearing, 27–31 January 2003 (transcript 4.7, p73)

295. Counsel for Te Atiawa, supplementary closing submissions, 18 February 2004 (doc T10(a)), pp 18–19

chapter, we accepted these submissions, concluding that Te Tau Ihu Maori were not given the opportunity to either give or withhold their consent for the taking. Clearly, there was no need for a road, or any intention to build one, despite which the Crown has retained the foreshore reserve. The loss of this land had a prejudicial impact on Maori reserve owners, taking away many of the scarce flat areas, impacting on the direct access to the sea and reducing the monetary value of the adjoining land. Furthermore, the legislation under which the foreshore reserve was taken appears to have been discriminatory against Maori. The land was taken under section 93 of the Native Land Court Act 1886, under which Maori land could be taken without compensation. This discriminatory provision was in clear breach of article 3 of the Treaty. As we noted in an earlier section, if there was a compelling reason for taking land, and compulsory acquisition was a last resort in a matter of national interest, then the taking should have proceeded under the Public Works Act, thus at least enabling the owners to receive compensation. Instead, Crown officials often appear to have found it all too convenient to simply claim up to 5 per cent of any block for roading purposes, however improbable or unlikely it was that the area taken would actually be required for these purposes. In Te Tau Ihu, where many Maori were already confined to inadequate reserves, this was land that hapu and whanau could often ill afford to lose.

### **12.8.3 The Ngawhatu Hospital claim (Wai 822)**

The Ngawhatu Hospital claim, filed by Sharon Gemmell and others, relates to the Crown's contemporary policy of protecting and recognising sites of significance. Wai 822 claims that the sites of significance policy is flawed and that it was not followed correctly in the sale of Ngawhatu Hospital.<sup>296</sup>

The sale was due to become unconditional on 9 November 2001, prior to which the Waitangi Tribunal agreed to convene an urgent hearing to consider whether the sites of significance policy had been correctly implemented.<sup>297</sup> On 30 October 2001, Judge Isaac, Mr Maaka, and Professor Sorrenson were appointed to the Wai 822 Tribunal.<sup>298</sup> Following a teleconference amongst parties, the Crown acknowledged the distress that had been caused to Te Atiawa through the sale of Ngawhatu and agreed to facilitate discussion between the vendor agency, the buyer, and the claimants to obtain agreement as to the appropriate protection or recognition of the sites of significance at Ngawhatu. Leave was reserved for the claimants to return to the Tribunal if an agreement could not be reached. This did not prove necessary. On 23 October 2002, Crown counsel informed counsel for Wai 822 claimants of

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<sup>296</sup>. Sharon Gemmell and others, claim Wai 822 concerning Ngawhatu Hospital, 16 November 1999 (claim 1.17)

<sup>297</sup>. Deputy chairperson, memorandum granting urgency for hearing of claim Wai 822 on papers only, 13 October 2001 (paper 2.278)

<sup>298</sup>. Deputy chairperson, memorandum appointing members to Wai 822 Tribunal, 30 October 2001 (paper 2.286)

the settlement of a conditional offer for sale.<sup>299</sup> The Wai 822 Tribunal did not consider the substantive claim that the sites of significance policy and process was inherently flawed and this allegation forms part of our inquiry.<sup>300</sup>

The sites of significance policy attempts to meet Maori concerns where a Crown land sale might affect a significant site. The process involves the applicants negotiating with the vendor agency (whether a Government department, Crown entity, or State-owned enterprise) with the negotiation process being facilitated by Te Puni Kokiri. If no agreement is reached, the issue is referred to an officials committee which will attempt to facilitate agreement between the parties. If that fails, the committee may recommend to the Government the preferred form of protection for the site. In order to be referred through the committee process, sites must have identifiable boundaries and fall into one of six categories: burial place; rua koiwi; sacred shrine; underwater burial place or cavern; waiora or source of water for healing; or source of water for death rites.<sup>301</sup>

The claimants contend that the list of categories is too narrow and would exclude legitimate claims relating to Maori sites of significance from being considered by the officials committee. They also refer to Te Puni Kokiri's definition of sites of significance as 'places which hold special historical, spiritual or cultural associations for Maori'.<sup>302</sup> This definition, they claim is much wider than the more specific list of sites where officials may intervene. The claimants argue that legitimate applications regarding sites of significance may therefore remain unresolved if negotiations with the vendor are inconclusive, as the applications will be unable to progress to the officials committee stage of the process.

Although we received evidence commissioned by the Crown on the sites of significance policy and process, we consider that the brief of evidence of Paetahi Park, a senior adviser at Te Puni Kokiri and manager of the sites of significance process, focused mainly on the application of that policy to the Ngawhatu hospital site.<sup>303</sup> He nevertheless did acknowledge three problems in implementing the policy in accordance with tikanga Maori. Those problems related to the ability of groups or individuals to lodge sites of significance applications over lands where they had no mana whenua or where the applicant was not required to provide proof of their mandate, leading to applications with no basis in tikanga Maori terms.<sup>304</sup> The generic issues underlining the Gemmell claim were not addressed in closing submissions either by Te Atiawa or the Crown. Nevertheless, we concur with the concerns raised by the claimants. The six categories of sites of significance under which an application must

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299. Michael Doogan to Kathy Ertel, 23 October 2002 (Wai 822 RO1, paper 2.43)

300. Waitangi Tribunal, memorandum following 1 November 2001 telephone conference, 6 November 2001 (paper 2.289)

301. Te Puni Kokiri, *Sites of Significance: A Step by Step Guide to Protecting Sites of Cultural, Spiritual and Historical Significance to Maori* (Wellington: Te Puni Kokiri, 1996), pp10–12

302. Ibid, p7; Paetihi Park, brief of evidence on behalf of herself and the Crown, 24 October 2001 (doc D10), pp3–5

303. Ibid, pp6–9

304. Ibid, p6

**12.8.4**

fall in order to be referred to the officials committee are clearly much narrower than the broader definition adopted by Te Puni Kokiri. We would urge the Crown to consider widening the categories in order to avoid a situation in which genuine sites of significance are not protected under the policy.

**12.8.4 The Ropata Taylor claim (Wai 830)**

Wai 830, filed by Ropata Taylor, concerns the vesting of lands in the Wakatu Incorporation. We have discussed this claim in chapter 9 (see secs 9.7.1, 9.7.3(2), 9.8.7(2)). In an amended statement of claim, Ngawaina Joy Shorrocks made claims also in respect of the alienating of lands in Tapu Bay and the alienation of lands, forests, foreshore, seabed, rivers, streams, and wahi tapu, in both Sandy and Tapu Bays, including the natural resources and taonga associated with these areas.<sup>305</sup>

We received evidence in support of the claims concerning the alienation of section 27 and section 157 at Sandy Bay and Pakawau from Te Waiho Taiko-Paratene and Ngawhakaara Sarah Raewyn Coldwell.<sup>306</sup> There was no specific evidence filed in support of the amended statement of claim as it related to land alienation. We note that in general terms the scope of the amended claim related to the many impacts of alienation. We consider that these issues have been discussed in our chapters on the administration of the tenths reserves, socio-economic issues and environmental issues.

**12.8.5 The Mabel Grennell claim (Wai 922)**

Wai 922, filed by Mabel Grennell on behalf of the children of Kuini Watson, relates to the placement by the State of the claimant and her two younger sisters in the care of three separate Pakeha families and the sale of their mother's land through the Maori Trustee.<sup>307</sup>

The first aspect of the claim relates to the placement in care of the three sisters. In 1943, when the claimant was aged three, her mother was committed to care at Ngawhatu Hospital, where she remained until her death in 1984. After their mother's committal, the claimant and her sisters were separated and placed into Pakeha foster families. The claimant's two younger sisters were later formally adopted and did not learn that their mother was still alive until 1967. In her evidence to this Tribunal, Mabel Grennell described their alienation from their whanau, hapu, and iwi, as well as their whenua, as a result of their place-

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305. Ngawaina Shorrocks, amendment to claim Wai 830

306. Te Waiho Taiko-Paratene, brief of evidence on behalf of Te Atiawa, not dated (doc G22); Ngawhakaara Coldwell, brief of evidence on behalf of Te Atiawa, [2002] (doc G21); Kororia Jordan, brief of evidence on behalf of Te Atiawa, not dated (doc G20); Andrew Wilkie, brief of evidence on behalf of Te Atiawa, 2 December 2002 (doc G31); Makangarangi Niwa, brief of evidence on behalf of Te Atiawa, not dated (doc G19)

307. Mabel Grennell, claim Wai 922 concerning taking of land from Kuini Watson and social policy, not dated (claim 1.23)

ment with Pakeha families.<sup>308</sup> She identified the Government's policies of the time as the underlying cause of the sense of alienation and lack of identity. The consequence of those policies, she stated, was a long and painful journey to regain her rightful place within her whanau.

The second aspect of the claim relates to the fact that the Maori Trustee took control of Kuini Watson's share in land as a result of her placement in care. The claimant's mother held 0.29304 shares in the Omihi K1 block, along with interests in Waikawa Village block 15A3B. The Omihi K1 block was sold in 1973 with the Maori Trustee representing Kuini's interests. It is also alleged that the Maori Trustee failed to protect Kuini's interests in terms of succession rights to the sole interests of her brother Wiremu Takurua in Waikawa Village section 15B. In 1977, following Mr Takurua's death, one of Kuini Watson's sisters wrote to the Maori Trustee for consent to become the sole successor to his interests in the block. The claimant notes that this consent appears to have been given, thus failing to protect her mother's share and her own inheritance. In respect of Waikawa Village block 15A3B, the action taken by the Maori Trustee in 1969 to sell Kuini's shares in the block in spite of Kuini's advice that she was not fit to consider her business affairs is also noted in the statement of claim. The claimant alleges that the failure of the Maori Trustee to retain all of her mother's land has resulted in the three sisters 'being dislocated from our land and therefore our identity'.<sup>309</sup>

In closing submissions counsel for the claimant asked whether the Treaty placed a duty upon the Crown to actively protect the whanau and the claimant's right of succession and if so, whether the Crown had discharged that duty.<sup>310</sup> Counsel seeks from this Tribunal an interpretation that the maintenance of family bonds is a taonga protected under the Treaty. In response, the Crown submitted that there was insufficient evidence for the Tribunal to find that there had been a failure of policy or process when the children of Kuini Watson were placed in care outside the whanau.<sup>311</sup> Nevertheless the Crown went on to conclude from the available evidence that the placement of the children outside the whanau had been considered to be in their interests at that time. The Crown's submissions made no reference to the issues raised by the claimant as to the sale of the land interests of Kuini Watson by the Maori Trustee or her disinheritance through the Maori Trustee's actions of any share in her uncle's land.

We agree with the Crown that there is insufficient evidence to enable us to make a finding on the application of the relevant legislation in respect of the original placement of the children of Kuini Watson with separate Pakeha families, and the protection of Kuini Watson's land interests. We cannot agree with the Crown however that the evidence suggests that placement outside the whanau was considered to be in the best interests for the children at

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308. Mabel Grennell, brief of evidence on behalf of the Grennell whanau, not dated (doc Q17)

309. Ibid, p7

310. Counsel for Wai 922, closing submissions, 19 February 2004 (doc T17)

311. Crown counsel, further closing submissions, p 8

that time because we do not know what consideration was given to this matter. We are also hampered in making findings with respect to the actions of the Maori Trustee by the lack of detailed evidence presented to us on this issue. However, we conclude that the claimant lost out on her land inheritance through the actions of the Maori Trustee. We find that the Crown failed to fulfil its Treaty obligation to actively protect Maori interests in allowing this to occur.

#### 12.8.6 The Kinana hapu claim (Wai 924)

Wai 924, filed by ‘the hapu of Kinana (Keenan)’ on behalf of six others, concerns the acquisition of the Crown of certain areas of land for public purposes and the failure to return that land when it is no longer required. The land in question comprises several individual parcels: Waikawa Village block 1A ; Cooper Point (Whakauruhunga); Mokepeke climatic and timber reserve; Ngaruru and Iwituaroa; Ngakuta and Waikawa 2C; Whatamango climatic and timber reserve; Waikawa Village 21; Waikawa West; Crown grant 1655; Toreamoua-Kumutoto; and Kura Te Au (Tory Channel). The claimants seek the return of the land or an offer back under the Public Works Act and compensation.

Waikawa Village 1A, consisting of six acres, was partitioned out of the Waikawa 1 block in 1912.<sup>312</sup> According to the evidence of Anthony Keenan, when the land was first laid off as a reserve in 1889 a portion of the block was taken for roading purposes.<sup>313</sup> Mr Keenan states that no road has ever been built upon the area taken, part of which is still a road reserve and another portion of some 0.392 hectares having been transferred to the Picton Borough Council in 1982.<sup>314</sup> We commented on this taking in section 12.4.21. However, we repeat our earlier finding that legislation allowing the Crown to compulsorily acquire up to 5 per cent of any Maori land block without compensation was discriminatory and in breach of the Treaty and its principles.

Grievances relating to the taking of land at Cooper Point are next raised in the statement of claim. We discussed this land earlier at section 14.2.20. However, we note some uncertainty surrounding the circumstances under which the land was lost to Maori ownership. Mr Keenan was noted earlier as having explained that his great-grandfather Riwai Keenan had gifted 20 acres to the Crown in the 1940s as a reserve for a pilot and signal station. Nothing was ever built on the land, which was set aside as a scenic reserve in 1985 and is now administered by DOC.<sup>315</sup> The Wai 924 claim refers to the land as having been ‘taken’ but provides no further details. However, we would note that it was not uncommon for lands to be compulsorily acquired in a legal sense, even if these may in practice have been

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312. Alexander, ‘Reserves of Te Tau Ihu’, vol 1, p 198

313. Keenan, brief of evidence, p 2

314. Ibid, p 3

315. Ibid, p 10

gifted, in order to facilitate the transfer of title. Hence the two statements are not necessarily incompatible. We noted in section 12.4.21 our view that, if the land is owned by the Crown, and not used for the purpose for which it was gifted, it should be returned under section 134 of the Te Ture Whenua Maori Act 1993. As we also noted earlier, current Crown settlement policies acknowledge Maori grievances in respect to lands gifted for one purpose and not returned once the purpose has been fulfilled.<sup>316</sup>

The acquisition of land at Mokepeke Bay for a climatic and timber reserve is the next issue raised in the statement of claim, but few further details are provided and we received no evidence on the taking. We are accordingly unable to comment further on this issue.

The taking of land at Ngaruru for scenery preservation purposes, the next compulsory acquisition referred to by the claimants, is discussed in some detail in the evidence of David Alexander.<sup>317</sup> We also referred to the taking in chapter 7. The acquisition of land in this area for scenery preservation purposes had first been floated in 1906, and by 1908 the Scenery Preservation Board had formally recommended that the whole of the reserve 'or such lesser area as closer inspection may prove to be suitable' should be acquired for scenery preservation purposes.<sup>318</sup> Although the area was subsequently inspected and a survey prepared, it was not until 1912 that ministerial approval was sought for 392 acres to be taken under the Public Works Act. By this time, the Government valued the land at 25 shillings an acre, but one European settler whose land adjoined the reserve had indicated he was prepared to pay £2 per acre. However, there was no further action until 1919, when an application to settle on the land by a returned soldier prompted the Government to again revive the scenic reserve proposal. An intention to take the whole of the reserve, with the exception of a three-acre 'tauranga waka' (fishing station) was gazetted in April 1920, prompting 15 of the owners to indicate their objections in writing:

These portions of land in question are very insignificant for the purpose of scenic reserve, but are of very great value to us, not commercially, but for comfort purposes. The portions in question are used by us for camping grounds during the fishing seasons, and they are the only portion of Native land that is left for us to gather our wood from and earn a few shillings to keep us going. Take this privilege from us and you deprive us Natives of a living, and also wood required by us. We would respectfully point out to you . . . that practically all the Native land of any value to us has now been taken for Scenic or other purposes. If this continues, we would be completely depleted of every chance of obtaining firewood and assistance towards a livelihood. We would point out that no matter what monetary value you gave us in exchange, you cannot adequately reimburse us for the loss that we will suffer. We therefore object to its being taken and our privileges being stopped.<sup>319</sup>

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316. Office of Treaty Settlements, *Ka Tika a Muri*, p 15

317. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 345–355

318. *Ibid*, p 346

319. *Ibid*, pp 350–351

This letter eloquently summed up the experience now facing many Te Tau Ihu Maori in the early twentieth century, left with inadequate reserves from which they eked out a precarious existence but finding their ownership of even these small areas of land under threat. Asked to report on the objection raised by the owners of Ngaruru, the commissioner of Crown lands dismissed the opposition as of little consequence, and implied the owners, having earlier written that the reserve ‘is a beautiful scenic country, and the natives have not ventured to spoil its virgin splendour, so why should the white man attempt to spoil what the Maori has endeavoured to preserve’, were now acting contrary to this. He informed the Under-Secretary for Lands that ‘Now that we wish to preserve it for ever, the wily native wants to sell it for firewood at famine prices.’<sup>320</sup>

With attitudes such as these in evidence from a senior official, it is hardly surprising that the Crown proceeded with the taking for all but three acres of the 518-acre block regardless. The proclamation to this effect was gazetted in October 1920, prompting a group of owners to petition Parliament on the matter a year later. The petitioners stated that they had been awarded the reserve ‘because they were landless’, and prayed for the return of the land taken from them. In March 1922, the Native Land Court sat to determine compensation, at which time the owners made a last-ditch plea to be allowed to retain an area of some 30 acres from which they regularly collected firewood. This was agreed to and compensation of £2 per acre awarded by the court. Ironically, the area estimated at 30 acres which was excluded from the taking was later found to be more than double this at 88 acres in extent. This meant that the Crown had compulsorily acquired some 426 acres in total, with total compensation of just over £852 payable.<sup>321</sup>

Although we did not receive submissions on the Ngaruru taking, the evidence as outlined above clearly indicates that the owners of the reserve did not wish to part with their land. Their objections were simply ignored by the Crown, with the exception of about 17 per cent of the block which they were eventually permitted to retain. We discussed the general issue of occupation reserves which were compulsorily acquired for scenic reserve purposes in chapter 7. As we noted, from 1933 legislative provisions allowed for private lands to be declared scenic reserves, subject to any exemptions negotiated between the owners and the Crown. Given this provision was sometimes still overlooked in favour of outright Crown acquisition of the land, had it been in place in 1920 this may still not have been enough to protect the owners of the Ngaruru reserve. Nevertheless, regardless of the legal regime in place at the time, the basic test remains whether the taking was a last resort under exceptional circumstances and concerning a matter of national interest. That was clearly not the case with the Ngaruru taking, and we accordingly find the Crown’s actions in compulsorily acquiring 426 acres of the reserve contrary to the Treaty and its principles.

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320. Alexander, ‘Reserves of Te Tau Ihu’, vol 1, pp 351–352

321. *Ibid*, pp 353–355

The 1623-acre Iwituaroa block, purchased by the Crown in 1916 for the sum of £2203 and onsold to the Pakeha lessees for the same sum is the next grievance raised by the claimants. The claimants allege that the landowners 'never offered to sell' and that the sale was 'a result of forced compensation with an act of deceit' by the Crown. We discussed this Crown purchase in chapter 7, and briefly note some of the pertinent features of the transaction here. The two sections which together comprised the reserve had long been under lease. At the instigation of the lessees, in 1916 some of the owners offered to sell the block. According to both David Alexander and Dr Morrow, the authors of this offer were all absentee owners from Taranaki. None of the owners resident in Marlborough signed the offer to sell.<sup>322</sup> A meeting of owners held at Waitara in Taranaki in July 1916 resolved to sell the reserve to the Crown, and although there was subsequent confusion as to whether the price payable should include some £437 of lessees' interest in the land, the higher price of £2203, which included this amount, was eventually paid in October 1917. Dr Morrow notes in her report that 'The permanent alienation of an enormous quantity of Maori reserve in Queen Charlotte Sound and the Crown's part in bringing this about did not apparently arouse even momentary concern.'<sup>323</sup> There must also be serious questions around the extent to which resident owners consented to the decision to sell. However, Mr Alexander was unable to locate a copy of the minutes of the owners' meeting, in the absence of which it is impossible to accurately gauge the extent to which resident owners may or may not have been involved. We take the issue no further here, but repeat our observations from chapter 7 that given the particular circumstances of Te Tau Ihu after the 1850s active protection required the Crown to prevent the alienation of the remaining (and inadequate) reserves, not to actively facilitate the sale of these, as it did in the case of the Iwituaroa block.

The Ngakuta reserve of some 1515 acres, the next reserve mentioned in the statement of claim, was sold into private ownership in 1910, with the exception of an area of some 10 acres taken for roading. The block was sold into private ownership in 1910. We noted Anthony Keenan's concern about how quickly this reserve was lost to the Maori owners in chapter 7.

We have considered the issues surrounding the taking of most of Waikawa 2c2 for catchment purposes in some detail earlier in this chapter and although the issue is also raised in this claim we see nothing further to add on the subject.

The small Whatamango reserve (just over 4 acres), which was purchased by the Crown from the Maori Trustee in 1966 for £1200 as a recreation reserve, is also listed in the statement of claim. The adjacent waters were an important source of kaimoana, and the claimants allege that its purchase was 'unnecessary' and contrary to the Treaty. Dr Morrow notes that the descendants of the original owners of the block 'were neither awarded the land

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322. Ibid, p 277; Morrow, 'Legacy of Loss', p 61

323. Morrow, 'Legacy of Loss', p 65

**12.8.7**

nor directly involved in its sale.<sup>324</sup> Local Maori were nevertheless deprived of an important fishing ground they could scarcely afford to lose.

We heard little evidence concerning Waikawa Village 21, which the claimants allege was gifted to the Crown for educational purposes. The same applies with respect to portions of the Waikawa West B and C blocks, the acquisition of land from which it is alleged was ‘excessive, unnecessary and in breach of the treaty’. The claim also refers to Crown grant 1655, being a parcel of land granted to a settler in 1858. The claimants allege that the land so granted was not included in the Waitohi purchase and was granted against the objections of their tupuna.<sup>325</sup> We are unable to comment further on this matter.

The alienation of the Toreamoua–Kumutoto reserve, the next grievance raised by the claimants, was covered in some detail in chapter 7. Finally, the claimants raise a number of issues associated with the ownership and environmental management of Kura Te Au (Tory Channel). We addressed these issues in a general way in the previous chapter.

**12.8.7 The Sharon Gemmell claim (Wai 926)**

Wai 926, filed by Sharon Gemmell, concerns the decision made by the Maori Land Court to issue an injunction against the claimant to halt proceedings on the building of a dwelling on land over which the claimant had been granted an occupation order.<sup>326</sup> The land in question is described as Anatohia 90B2 Gore blocks XVIII and XIX, comprising 1000 square metres. The claimant alleges that the Maori Land Court denied her a fair and proper hearing before issuing the injunction. She seeks a recommendation from the Tribunal that the Maori Land Court process as it applied to her situation be reviewed.

During the course of the hearing no evidence was placed on the record of inquiry. Nor was this claim progressed further through closing submissions. We respectfully suggest that this is a matter for the Maori Land Court rather than the Waitangi Tribunal.

**12.8.8 The Stephens Whanau Trust claim (Wai 956)**

Wai 956, filed by Miriana Ikin on behalf of the Warren Pahia and Joyce Te Tio Stephens Whanau Trust, concerns issues of succession to shares in the Wakatu Incorporation and Parininihi ki Waitotara.<sup>327</sup> By direction this claim was subsequently consolidated with the Wai 785. The claimant states that her uncle, David Rawiri Stephens, died intestate in March 1973. He left no children or surviving parent. As a result, his Pakeha wife succeeded to all of

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324. Morrow, ‘Legacy of Loss’, p 81

325. See also Keenan, brief of evidence, p 9

326. Sharon Gemmell, claim Wai 926 concerning the Maori Land Court, [2000] (claim 1.27)

327. Mariana Ikin, claim Wai 956 concerning section 38(1) of the Maori Affairs Amendment Act 1967 and section 77 of the Administration Act 1969, 20 July 2001 (claim 1.30)

his Maori land interests, and Mr Stephens' shares in Wakatu Incorporation and Parininihi ki Waitotara legally became his widow's property. The claim alleges that the effect of the legislation which allowed this to occur 'has disinherited the nearest of kin to the deceased by that line of descent through which the deceased's right to the land was derived'. We received no submissions or evidence on the claim. However, we note that the circumstances described in the statement of claim are consistent with statutory law as it applied at the time of Mr Stephens' death. Section 76 of the Maori Affairs Amendment Act 1967 declared that where any person died intestate on or after 1 April 1968 succession to their property was to be 'determined in the same manner as if the deceased person were a European'. This provision was amended by section 25 of the Maori Affairs Amendment Act 1974, but the change did not take effect until 1 January 1975, thus creating what has been described as 'a very complex situation with regard to intestate successions' between April 1968 and January 1975.<sup>328</sup> We consider section 76 of the 1967 Act to be contrary to the principles of the Treaty. Although this was remedied by virtue of the 1974 amendment, in the interim the whanau of those who had died intestate were prejudicially affected.

#### 12.9 SUMMARY AND CONCLUSION

We noted in the introduction that, although the issues traversed in this chapter are many and varied, a common thread to a number of the whanau and specific claims considered here concerns the aftermath of the period of very heavy land loss prior to 1860. Many of the claims are focused on the ownership and management of the few lands remaining to Te Tau Ihu Maori after that time. Other claims raise issues that, for want of a better term, might be described as matters of social and cultural marginalisation. Such issues were accentuated as the iwi, hapu, and whanau of Te Tau Ihu became a small minority of the total population of the district. Their ability to manage and control their own affairs declined accordingly, as Crown agencies increasingly came to decide matters previously resolved by rangatira and their communities in accordance with Maori tikanga. Moreover, although the small area of land remaining to local Maori became doubly important to tangata whenua for precisely this reason, the Crown found itself able to compulsorily acquire significant areas of that land for a variety of public works purposes. We noted that, in the particular circumstances of Te Tau Ihu after 1860, there was an especially strong Treaty requirement for it to think long and hard about the necessity for such takings before implementing these. Consideration of the extent to which the Crown did follow such a path was therefore a major focus of several claims examined in this chapter, along with some more recent efforts to restore lands to Te Tau Ihu Maori and the extent to which these were undertaken in a manner consistent with

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328. Professor Richard Boast et al, *Maori Land Law*, 2nd ed (Wellington: LexisNexis, 2004), pp 114–115

the Treaty and its principles. Given the nature of many of the claims discussed in this chapter, we do not provide a detailed summary of each and every one of these here, but instead focus on some of those grievances for which the evidence presented to us enabled a fuller discussion in the chapter.

The first such claim discussed was that of the Te Kotua Whanau on behalf of the descendants of George and Thomas Toms, the children of early Cook Strait settler Joseph Toms and Te Ua Torikirikiri, the daughter of senior Ngati Toa chief Nohorua. As we saw, Joseph Toms had married Te Ua in accordance with Maori custom some time before 1840 and had been gifted lands by Nohorua, along with other Ngati Toa and Ngati Rahiri (Te Atiawa) rangatira by two documents executed in 1838 and 1839. With the exception of lands at Titahi Bay deemed to have been given in trust for the children, Commissioner William Spain concluded (wrongfully, in our view) that these transactions were absolute land sales. This decision, combined with Toms' later remarriage following the death of Te Ua and the non-disclosure of an 1840 will in which he had stipulated that all his children would inherit his estate equally, served to ensure that the intentions of Nohorua and the other rangatira were subverted. Neither the Marriage Ordinance 1847 nor the Marriage Act of 1854 recognised customary Maori marriages, thus rendering George and Thomas illegitimate in the eyes of the law and ineligible to succeed to Joseph Toms' estate. A younger half-sibling from Joseph's later, legally recognised, marriage to a Pakeha woman was instead deemed the sole heir. While we do not need to detail here the extraordinary lengths to which Joseph Toms' older sons from his marriage to Te Ua went to in order to secure what they perceived to be their rightful inheritance, we found that legislation rendering the children of customary Maori marriages illegitimate was discriminatory and contrary to the Treaty and its principles. Although this was partly remedied in 1867 through legislative amendment, this provision took no account of ongoing hapu and iwi interests. We further found the Crown's delay in dealing with petitions in relation to the Toms' estate to be contrary to Treaty principles.

In chapter 9, the circumstances under which lands at Whakarewa were granted to the Anglican Church for an industrial school were examined. The second issue examined in this chapter concerned the return of these lands in 1993 to NRAIT. According to the claim of the Georgeson whanau, on behalf of the descendants of Hohaia Rangiauru, the lands should instead have been returned to the descendants of the original owners. The claimants maintain that they were not fully consulted over the vesting in NRAIT, which they regard as effectively a transfer to Ngati Rarua. We noted that all parties to our inquiry agreed that the Whakarewa lands should have been returned to their former owners once these were no longer required for 'native purposes' from the 1880s. The failure to return the lands prior to 1993 was, we found, in breach of the Treaty principle of redress. The question of whether NRAIT was an appropriate entity in which to vest the lands once finally returned and whether the process by which this occurred was consistent with Treaty principles was a more complex matter. For one thing the trust deed negotiated between Anglican Church

authorities and Motueka Maori, which saw interests in the new body split at 80:20 in favour of Ngati Rarua over Te Atiawa, was not a matter in which the Crown was involved. Legislation was nevertheless required to give effect to this deal, and although this was in the form of a private member's Bill introduced by the Minister of Maori Affairs, we concluded that the Crown nevertheless remained responsible for ensuring that any such legislation remained consistent with the Treaty. We received too little evidence to make any finding as to whether the Crown adequately discharged this responsibility, most especially with respect to the claim that Te Atiawa had accepted a 20 per cent share under duress, and in the belief that this could be revised at a future date. In our view the return of the lands to an iwi trust was, however, appropriate and we do not accept that any individual right requiring the separate return of lands to the descendants of Hohaia Rangiauru was required. We do, though, urge the trust to consider ways in which the relationship of whanau groups with their ancestral lands might be provided for. Finally, we also noted our view that the 1993 arrangements can not be seen as a settlement of Treaty claims with respect to Whakarewa. That will remain a matter for negotiation between the Crown and Motueka Maori.

In the next section, we considered a number of whanau and specific claims from Te Atiawa groups concerning lands at Waikawa taken for various public works purposes. The first of these concerned an area of 133 acres taken for a rifle range in 1912. We concluded that this taking was excessive and probably unnecessary in that alternatives to the taking were not fully explored. Earlier Tribunals have concluded that the compulsory acquisition of Maori lands for public works could be justified only as a last resort in a matter of national interest. We concur with this analysis and found the rifle range takings did not meet this test. We also found the lengthy delay in returning these lands to their original owners once they were no longer required for the purpose originally taken to be contrary to Treaty principles, but concluded that there was insufficient evidence for us to make a finding on the transfer of a small part of the land to the Waikawa Marae Trustees. We applied the same test of Treaty consistency pertaining to public works takings with respect to the compulsory acquisition of just over 305 acres for waterworks purposes in 1957 and again found the taking contrary to Treaty principles. In this case the area taken was more than twice that identified as necessary for the work, and some of the owners had offered to sell the required area. The taking was thus both excessive and unnecessary, and this has been further compounded by the lengthy delay in any decision as to whether the land is still required or should be offered back to the owners under the relevant provisions of the Public Works Act 1981. Lands taken for roading purposes in the 1880s, most likely under legislative provisions allowing up to 5 per cent of any Maori block to be reserved for these purposes without consultation or compensation, was the next matter considered. We noted the findings of previous Tribunals concerning the discriminatory nature of this provision. We found that the land in question, occupied since the 1920s by a number of dwellings, should have been returned to the owners once it was no longer required for roading. Despite this, the Local Government Act 1974

provides a legal loophole whereby the offer-back provisions of the 1981 Act can be avoided. We concluded that there is a clearly Treaty obligation upon the Crown to ensure lands no longer required for the purposes for which they were originally taken are returned to their former owners in a timely manner.

We declined to make findings on a claim from the Stafford Whanau concerning succession to the interests of Inia Ohau and an error made by the Native Land Court in this matter in 1920, considering the appropriate course of action to be an application under the provisions of the Te Ture Whenua Maori Act 1993. Another part of the Stafford Whanau made a further claim concerning the realignment of a road through an urupa reserve at Wainui Bay. We concluded that the local council had no right to place a road through any part of the reserve, and the Crown was in breach of Treaty principles in failing to actively protect the owners from the incursion on to their property. The fact the land was an urupa required particular care to be exercised, but that was not demonstrated in this instance.

The next set of issues considered were focused on the management of Takapourewa (Stephens Island). A Ngati Koata iwi claim filed in 1989 raised a number of issues pertaining to the island and its resources, and alleged that the Crown had failed to protect Ngati Koata's control and ownership of the island and its endangered species. This claim was withdrawn following a 1994 deed of settlement with the Crown concerning the management of the island. Although no settlement legislation has formally withdrawn the Tribunal's jurisdiction with respect to Ngati Koata's historical claims concerning Takapourewa, we nevertheless deemed it inappropriate to comment further on these issues. We did, however, receive evidence suggesting considerable discrepancy between Ngati Koata and the Crown concerning the interpretation of the 1994 deed of settlement, and in particular the meaning of consultation within the deed. Ngati Koata maintained their understanding that the deed required more than a duty of consultation, and had accorded them a significant stake in decision-making. Crown counsel submitted that this was not DOC's understanding when it entered into the deed. We noted our view that, although it is appropriate for the Minister to have a final veto given the conservation issues at stake, there appeared no fundamental divergence between the parties when it came to the conservation goals and responsibilities of the Crown and Ngati Koata. The question is one of partnership and can be resolved, we believe, with further dialogue between the parties.

The second claim regarding Takapourewa came from Ngati Kuia and concerned their exclusion from the deed of settlement and from the management of the island. It was apparent on the basis of the limited evidence presented to us on this subject that the Crown was well aware of the Ngati Kuia claim for inclusion prior to signing of the deed with Ngati Koata, and had initially hesitated before at some point prior to the 1994 deed determining to rely on the Native Land Court's 1883 judgment in support of its single-iwi settlement. We noted that there is nothing about the 1994 settlement that precludes the Crown from seeking to settle Ngati Kuia interests with respect to Takapourewa, and nor should such

acknowledgement be seen as in any way diminishing the mana of Ngati Koata. Indeed, in evidence to us Ngati Koata kaumatua expressed a willingness to consult and include other iwi with ancestral rights in the island.

In the final section, we more briefly traversed a number of other claims for which less evidence was presented to us. These included a number of further claims involving public works takings, including the loss of lands due to the provision allowing 5 per cent to be taken for roading purposes and others relating to takings for scenery preservation purposes, a claim concerning recent Crown policies with respect to the disposal of surplus Crown properties, a claim regarding historical adoption policies and the actions of the Maori Trustee, and finally a claim concerning succession to Maori land interests by a Pakeha spouse. We were able to make limited or no findings on several of these claims given the paucity of information available to us.

We have noted several times in this chapter that the Crown had (and continues to have) a Treaty responsibility to consider the particular circumstances of Te Tau Ihu Maori – circumstances, we might add, largely of the Crown's own making – before resorting to measures that further reduced an already inadequate land base. The detailed case studies presented in this chapter indicate that, without exception, it failed to do so. Public works takings that should only ever have been a last resort as a matter of national interest were instead all too often the only option considered. Takings were frequently excessive, hasty, unnecessary, and devoid of meaningful consultation with Maori. In some cases, as we saw, the Crown has allowed local bodies to retain lands taken in this way long after the need to retain them for the purpose originally acquired has either ended or at least become uncertain. We have made recommendations in this chapter for ways in which these matters may be remedied by legislative reform. Otherwise, some of the Treaty breaches described in this chapter may be perpetuated and repeated in the future.

The chapter has also considered a number of other issues besides compulsory land takings. Although the matters explored have been varied, and we have been unable to uphold all of the claims presented to us, we have no doubt that many of the claims discussed here can be viewed as the legacies of a form of colonisation in which initial promises of partnership for the benefit of all were soon replaced by an altogether different reality. That reality was one in which the whanau, hapu and iwi of Te Tau Ihu became marginalised, not just economically, but politically, socially, and culturally as well. The whanau and specific claims considered in this chapter can therefore be seen as further reminders of the broader themes to emerge elsewhere in our report.



## CHAPTER 13

### **THE 1990 MAORI APPELLATE COURT DECISION AND THE SUBSEQUENT NGAI TAHU LEGISLATION**

In this chapter, we examine the claims of Te Tau Ihu iwi relating to the 1990 Maori Appellate Court decision and the legislation which was enacted as a result of it, culminating in the Ngai Tahu Claims Settlement Act 1998. We consider the referral of the boundary issue to the Maori Appellate Court, the Crown's role at the court hearing, and whether the Crown was in breach of its Treaty obligations to Te Tau Ihu iwi when it enacted the legislation which was based on the court's findings. In carrying out this examination, we consider the court's decision, which formed the basis for the Te Tau Ihu grievance against the Crown.

The chapter opens with a narrative of these events. We then consider the issues raised by Te Tau Ihu claimants, notably Ngati Toa and Ngati Apa, who made the most detailed submissions on this question. We conclude with our assessment of whether or not the Crown breached its Treaty obligations to Te Tau Ihu iwi.

#### **13.1 BACKGROUND TO THE ESTABLISHMENT OF THE NGAI TAHU STATUTORY TAKIWA**

##### **13.1.1 The background to the 1990 decision**

In chapter 1, we briefly outlined the reason for referring the competing claims of Ngai Tahu and the Kurahaupo Waka Society to the Maori Appellate Court. In this section, we give a more detailed explanation of the background to the 1990 Maori Appellate Court decision.

The Tribunal's primary responsibility is to inquire into and make recommendations regarding allegations of Treaty breach by the Crown, not to adjudicate on disputes between iwi. In 1987–88, in order to settle the competing claims of Ngai Tahu and the Kurahaupo Waka Society, the Ngai Tahu Tribunal recommended that legislation be introduced to allow the Waitangi Tribunal to state a case to the Maori Appellate Court when tribal boundaries or customary title were at issue.<sup>1</sup> Amending legislation adopting this recommendation was introduced by Peter Tapsell on behalf of the Minister of Maori Affairs. Tapsell stated that:

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1. Waitangi Tribunal, 'Preliminary Decision of Tribunal on Kurahaupo Waka Claim', typescript, 26 November 1987 (Wai 27 ROI, doc D9), p 6

The tribunal's essential role is to adjudicate claims between Maori people and the Crown. It does not necessarily have the experience or the expertise to determine disputes between Maori people that may arise during a hearing. The Maori Land Court and the Maori Appellate Court do have that expertise and experience. Such a case-stated procedure will enable the tribunal to concentrate on its primary role while the technical and investigative matters are dealt with by the Maori Land Court.<sup>2</sup>

In 1988, the Treaty of Waitangi Act 1975 was accordingly amended with the insertion of the following section:

**6A. Power of Tribunal to state case for Maori Appellate Court or Maori Land Court—**

- (1) Where a question of fact,—
- (a) Concerning Maori custom or usage; and
  - (b) Relating to the rights of ownership by Maori of any particular land or fisheries according to customary law principles of 'take' and occupation or use; and
  - (c) Calling for the determination, to the extent practicable, of Maori tribal boundaries, whether of land or fisheries—
- arises in proceedings before the Tribunal, the Tribunal may refer that question to the Maori Appellate Court for decision.

The way was now open for the Ngai Tahu Tribunal to refer the boundary issue to the Maori Appellate Court for determination. The Tribunal called for submissions from the parties to the case, the Ngai Tahu Maori Trust Board and the Crown, to assist in formulating the case stated. Te Tau Ihu iwi were not parties to the case and were not involved in preparing the questions to be put to the court.

On 17 March 1989, the Tribunal asked the Maori Appellate Court to determine who held rights of ownership with respect to the land purchased by the Crown in the Kaikoura and the Arahura deeds, dated 29 March 1859 and 21 May 1860 respectively. The case stated asked:

1. Which Maori tribe or tribes according to customary law principles of 'take' and occupation or use, had rights of ownership in respect of all or any portion of the land contained in those respective Deeds at the dates of those Deeds?
2. If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries?<sup>3</sup>

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2. Peter Tapsell, 5 May 1988, NZPD, 1988, vol 488, p 4018

3. *Case Stated on a Question to Determine Maori Land and Fisheries Tribal Boundaries* unreported, 17 March 1989, McHugh MLCJ, Maori Appellate Court (Wai 27 ROI, doc Q33)

### 13.1.2 The 1990 Maori Appellate Court decision

The substantive proceedings came before the Maori Appellate Court at Christchurch on 18 June 1990. There were four claimant parties represented:

- ▶ Rangitane ki Wairau;
- ▶ Runanganui o te Ihu o te Waka a Maui representing Ngati Apa ki te Ra To; Ngati Kuia, Ngati Koata, Ngati Rarua, Ngati Tama, Ngati Toarangatira ki Waipounamu, Ngati Wai-kauri, Rangitane ki Wairau, and Te Atiawa;
- ▶ Ngati Toa; and
- ▶ the Ngai Tahu Maori Trust Board.

After hearing evidence from these parties over a nine-day period, the court issued its decision in favour of Ngai Tahu's exclusive rights in all the area encompassed by the two deeds.<sup>4</sup>

Norman Smith's influential study *Maori Land Law* was extensively quoted by counsel for Ngai Tahu and was taken by the court as its basic authority. Smith's analysis, based largely on Native Land Court writings and judgments, outlines four 'take' or rights – discovery, ancestry (take tupuna), conquest (take raupatu), and gift (take tuku). All these rights, he argues, must be supported by actual occupation to give rights akin to ownership in land. In Smith's view, as cited by the court, various principles are to be considered when weighing those rights. These include consideration of whether occupation is either complete and continuous for three generations (in the case of a claim based on ancestry or gift) or complete and absolute in the case of conquest ('it must be shown that the conquerors seized the land and reduced it into possession and retained it following, and by reason of, such conquest').<sup>5</sup> Other situations might arise. In particular, purported 'owners' might be absent but have their rights kept alive by relatives; they might have occupied but been absent at 1840; or occupation may have been very recent in its origin, even though the take argued was one of ancestry.

Having outlined these principles, the court discussed its findings on the 1840 rule, which had earlier been considered in an interim decision. In August 1989, the court had found that the 1840 rule was established to prevent the continuation of inter-tribal warfare and imposed an exception to customary law by excluding take raupatu following the acquisition of sovereignty by the Crown. The rule left the rest of Maori customary law intact.<sup>6</sup> Reiterating these findings in its 1990 decision, the court also commented on cases where an iwi had demonstrated one of the customary take, supported by occupation, but had been absent in 1840. The court found that 'they could revive their ahi kaa, as long as the reoccupation was peaceful and within three generations of leaving the area.'<sup>7</sup>

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4. *Ngai Tahu Trust Board and Another v Her Majesty the Queen*, 15 November 1990, South Island Appellate Court, minute book 4, fol 672

5. *Ibid*, fol 675

6. *Ngai Tahu Trust Board and Another v Her Majesty the Queen*, 15 August 1989, South Island Appellate Court, minute book 3, fols 264–266

7. *Ngai Tahu Trust Board and Another v Her Majesty the Queen* (1990), fol 676

The court then tackled the historical questions as they affected questions of custom and title, beginning with an outline of the various deeds that the Crown had signed with different parties on the east coast. The court concluded that these deeds were ‘questionable’ evidence of ownership and that ‘clearly, Ngati Toa received favoured treatment at the hands of the Crown’. It then described Rangitane’s claim and their evidence regarding ‘the sacred boundary’ at Waiiau-toa, before turning to Ngai Tahu’s account of the history of the area prior to 1828. The court proceeded to describe the impact of the northern invasions in the decades just prior to 1840 and outlined the questions that needed to be addressed in order for the court to come to its final decision. They were as follows:

- ▶ What was the ‘title situation’ prior to the invasion?
- ▶ What was the effect of the invasion?
- ▶ What was the situation in and around the 1840s?
- ▶ What was the situation at 1859–60, when the deeds defining the area under consideration were actually signed?<sup>8</sup>

The court concluded that the invasions had resulted in the conquest of the Kurahaupo tribes but that the northern tribes had failed to follow up their incursions into Ngai Tahu territory with occupation. In the court’s consideration, the question of how far south the rights of Ngati Apa and Rangitane extended was rendered largely irrelevant by those tribes’ thoroughgoing defeat. And, while the question of who held the dominant hand – Ngai Tahu or the northern iwi – was unsettled at 1840, Ngai Tahu were seen as able to fully recover their position in the 20 years after, as demonstrated by the Crown’s recognition of their rights in the Kaikoura and Arahura purchases.

With respect to the Kaikoura deed, the court found that, while Rangitane had undoubted cultural associations with sites within that area, they could not show that the tribal boundary lay at the Waiiau-toa, which Rangitane had argued was the southerly extent of their traditional association. The northern tribes had conquered the area but had failed to remain in occupation south of the Wairau. Ngai Tahu had been defeated, but their subsequent military resurgence and return to their settlement at Kaikoura meant that they had revived their ahi ka and that, according to customary law principles, they had ownership rights vested in them at the time of the signing of the deed in 1859.<sup>9</sup>

The court then dealt with the Arahura deed, first considering Ngati Apa’s argument that their ownership rights to land, particularly at the Kawatiri (Buller River), had been recognised at the time of sale by the inclusion of members of their iwi in payments and provision of reserves. The Maori Appellate Court rejected Ngati Apa’s case on the ground that they were post-1840 arrivals and able to occupy the land only with the permission of Ngai Tahu. Ngati Toa were deemed to have no ‘cultural tradition’ relating to the area other than

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8. *Ngai Tahu Trust Board and Another v Her Majesty the Queen* (1990), fol 677

9. *Ibid*, fol 691

a leading role in the early stages of the invasion with their allies and the court found no interest on their part 'sufficient to satisfy the criteria to establish ahi kaa'. Having outlined Ngai Tahu's case – the battles fought against Ngati Wairangi, Ngati Tumatakokiri, and a large Ngati Toa taua in about 1820, as well as their history of working pounamu – the court turned to the question of the impact of the Ngati Rarua invasion. Their case, along with that of their allies, was also rejected. In the view of the court, Ngati Rarua had occupied temporarily but had withdrawn completely from the area by 1840. As on the eastern side, the deeds signed with non-Ngai Tahu for the West Coast were rejected as insignificant, an indication only of the Crown's willingness 'to deal with any Maori other than those living in the area'. In contrast, Mackay, who was the first Crown official to visit the area, after long meetings with the people then in occupation, was 'convinced that it was proper for the Crown to deal with Ngai Tahu in respect of lands as far north as Kahurangi Point'. The court thus found that, while Ngati Apa and possibly 'other northern tribe remnants' were occupying land along the Kawatiri, there was no evidence of 'a customary take to support something more than a mere right of residence'.<sup>10</sup>

In conclusion, the Maori Appellate Court found that:

The Ngai Tahu tribe according to customary law principles of 'take' and occupation or use had the sole rights of ownership in respect of the lands comprised in both the Arahura and Kaikoura Deeds of Purchase at the respective dates of those deeds.

The second question of the case stated, 'If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries?', did not require an answer because 'Ngai Tahu only is entitled'.<sup>11</sup>

### 13.1.3 The Ngai Tahu Report 1991 and subsequent legislation

The decision of the Maori Appellate Court set out above was binding on the Ngai Tahu Tribunal, and in its 1991 report, the Tribunal found that Ngai Tahu's grievances arising from the Crown's South Island land purchases were well founded. More specifically, in respect to the Arahura and Kaikoura purchases, the Tribunal found that the Crown had not acted honourably in its negotiations to purchase the land blocks and had not provided sufficient reserves for the existing and future needs of Ngai Tahu.<sup>12</sup>

Following the release of the *Ngai Tahu Report 1991*, the Tribunal issued a short supplementary report which recommended that legislation be introduced to create a tribal structure with the power to undertake a settlement with the Crown on Ngai Tahu's behalf. In

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10. Ibid, fols 691–696

11. Ibid, fol 672

12. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 1, pp 115–127

1996, the Te Runanga o Ngai Tahu Act was passed to enable the establishment of a representative tribal body to fulfil that responsibility.

The Te Runanga o Ngai Tahu Act 1996 adopted the boundaries described by the Maori Appellate Court, which in turn had adopted those of the Crown's purchase deeds with Ngai Tahu in Kaikoura (in 1859) and in Arahura (in 1860), as set out in the case stated. Under section 5 of the 1996 Act, the Ngai Tahu takiwa is defined as follows:

The Takiwa of Ngai Tahu Whanui is all the area of Te Waipounamu south of the northernmost boundaries described in the decision of the Maori Appellate Court in *Re a claim to the Waitangi Tribunal by Henare Rakiihia Tau*, 12 November 1990.<sup>13</sup>

Section 5 then sets out a detailed survey description of the Ngai Tahu takiwa boundaries, as illustrated in figure 1.

Following the Te Runanga o Ngai Tahu Act 1996, the Crown and Te Runanganui o Ngai Tahu entered into a deed of settlement in which the Crown acknowledged that Ngai Tahu had suffered grave injustices which had significantly impaired their economic and social development. The deed also recorded the steps required to give effect to a settlement of all Ngai Tahu's historical claims. The result was the Ngai Tahu Claims Settlement Act 1998, which also adopted the Maori Appellate Court boundaries and confirmed Ngai Tahu's authority within them. Section 6(7) of that Act states:

The Crown apologises to Ngai Tahu for its past failures to acknowledge Ngai Tahu rangatiratanga and mana over the South Island lands within its boundaries, and, in fulfilment of its Treaty obligations, the Crown recognises Ngai Tahu as the tangata whenua of, and as holding rangatiratanga within, the Takiwa of Ngai Tahu Whanui.<sup>14</sup>

Further, sections 461 and 462 state that the settlement of Ngai Tahu claims was to be final and that the Waitangi Tribunal had no jurisdiction to inquire further into or make findings or recommendations in respect of Ngai Tahu claims.<sup>15</sup> As we noted in chapter 1, this did not prevent the Waitangi Tribunal from hearing and reporting on Te Tau Ihu iwi claims within the Ngai Tahu statutorily defined takiwa.

### 13.2 THE CLAIMS OF TE TAU IHU

We now turn to consider the Te Tau Ihu claims against the Crown which relate directly to the Maori Appellate Court decision and the Ngai Tahu legislation that followed. These grievances encompass the following issues:

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13. Te Runanga o Ngai Tahu Act 1996, s 5

14. Ngai Tahu Claims Settlement Act 1998, s 6(7)

15. *Ibid*, ss 461, 462

- ▶ the Treaty of Waitangi Amendment Act 1988 and the reference of the boundary issue to the Maori Appellate Court;
- ▶ the role of the Crown in the Maori Appellate Court; and
- ▶ the Crown's treatment of Te Tau Ihu iwi rights in the course of negotiations with Ngai Tahu and in the enactment of the Ngai Tahu legislation in 1996 and 1998.

### 13.3 THE TREATY OF WAITANGI AMENDMENT ACT 1988

#### 13.3.1 Te Tau Ihu submissions

We received submissions on the impact of the 1988 amendment to the Treaty of Waitangi Act 1975 from Ngati Toa and Ngati Apa. Ngati Toa argued that the hastily devised amendment had limited the Maori Appellate Court's inquiry into which Maori tribe or tribes had rights of ownership in respect of all or any portion of the land contained in the Arahura and Kaikoura deeds at the date of those deeds. Ngati Toa counsel also submitted that section 6A 'did not permit Ngati Toa or any other Te Tau Ihu iwi to participate in the formulation of the Case Stated, although their interests were to be adjudicated upon'.<sup>16</sup>

Furthermore, section 6A made no provision for appealing the appellate court's decision. In their closing submissions, Ngati Toa cited Matiu Rei's statement that 'you should have the right to appeal. That there should never be legislation constructed so that you only get to go once, and that's it.' Ngati Toa had been casualties of the legislation and the circumstances surrounding the case had been 'grossly unfair' both to them and to the other Te Tau Ihu iwi.<sup>17</sup> They claimed that the Crown had enacted the amendment to resolve problems it was facing with the Ngai Tahu claim but that this came at the expense of Te Tau Ihu iwi.<sup>18</sup>

Ngati Apa was also critical of the Act, but on somewhat different grounds. Their counsel argued that the 1988 amendment to the Treaty of Waitangi Act breached the Treaty because it required 'European-style boundaries to be fixed by the Maori Appellate Court when such boundaries were artificial in terms of traditional Maori custom'.<sup>19</sup> In counsel's view, the idea that deed boundaries could show tribal boundaries was particularly problematic. The line described in the Arahura deed at Kahurangi was not customary at all but was upheld by the court 'as a customary line because of inadequate evidence, and in the absence of the types of evidence and submissions now before the Tribunal'. Counsel also pointed out that the Ngati Awa Tribunal had later rejected an application to use section 6A, deeming it an inappropriate mechanism by which to determine customary rights.<sup>20</sup>

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16. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), p 123

17. Ibid, pp 123–124

18. Ibid, pp 126–127

19. Counsel for Ngati Apa, closing submissions, 2004 (doc T3), p 35

20. Ibid, pp 36–37

**13.3.2 Ngai Tahu submissions**

Ngai Tahu submitted that the issues raised by Te Tau Ihu concerning the introduction of section 6A of the Treaty of Waitangi Act lay between Te Tau Ihu and the Crown. Ngai Tahu was 'not responsible for defending the actions of the Crown' with respect to introducing the amendment to the Treaty of Waitangi Act so that the Maori Appellate Court could determine the case stated. The legislation had been amended following representations from the Tribunal, and the case stated went to the Maori Appellate Court from the Tribunal as a result of the amendment. In Ngai Tahu's view, the appellate court's decision was correct.<sup>21</sup>

**13.3.3 Crown submissions**

Crown counsel submitted that, in supporting the referral of the question of customary title to the Maori Appellate Court, it had acted within the standards required by the Treaty. In fact, the Crown had been acting in compliance with the wishes of the Tribunal:

When the cross-claim issue first emerged at the start of the Wai 27 inquiry in 1987, the Crown supported the introduction of amending legislation to enable the Waitangi Tribunal to state a case to the Maori Appellate Court. The Crown did so because it was in agreement with the Tribunal's view that the Maori Appellate Court was better placed than the Tribunal to consider and determine intra Maori disputes concerning historical customary interests.<sup>22</sup>

**13.3.4 Tribunal discussion and findings**

In our view, section 6A was poorly conceived but was not in breach of the Crown's Treaty obligations to Te Tau Ihu iwi.

The Tribunal's role is to inquire into and report on claims by iwi against the Crown. It may be required to investigate customary rights, but it does not inquire into and adjudicate upon disputes between iwi groups. In these circumstances, the Ngai Tahu Tribunal requested the enactment of powers to allow it to refer such matters to the forum that at the time was considered to have the appropriate experience and expertise – the Maori Appellate Court. We therefore agree with the Crown that it cannot be held in breach of its Treaty obligations by setting in place legislation intended to allow the determination of a customary question.

Nor was the exclusion of Te Tau Ihu in the formulation of the case stated a result of the legislation. This outcome was not demanded by the legislation itself but resulted from the decision of the Wai 27 (Ngai Tahu) Tribunal to call for submissions only from Ngai Tahu

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21. Counsel for Ngai Tahu, closing submissions, 16 February 2004 (doc T13), pp 24–25

22. Crown counsel, closing submissions, 19 February 2004 (doc T16), pp 131–132

and the Crown in formulating the questions to the Maori Appellate Court. It chose not to include Te Tau Ihu iwi to assist in formulating those questions.

The main focus of the Wai 27 Tribunal was to inquire into alleged Treaty breaches by the Crown against Ngai Tahu. To achieve this goal, it determined that it did not require Te Tau Ihu iwi to participate in formulating the questions to the Maori Appellate Court. In terms of the Wai 27 inquiry, that may have led to the answer it was seeking in its inquiry.

In contrast, our inquiry focuses on the Crown's treatment of Te Tau Ihu iwi rights. From our perspective, the decision of the Ngai Tahu Tribunal not to involve Te Tau Ihu iwi in formulating the case stated had serious consequences for them. The result was that the questions put to the Maori Appellate Court were framed entirely in terms of the Crown's engagement with Ngai Tahu in the late 1850s, rather than in terms of who held customary rights in the area. Crown purchase deeds should not be the context to determining who held customary rights. The last two Ngai Tahu deeds and the dates on which they were signed were adopted as setting the parameters of the Maori Appellate Court's determination.

This was crucial to the way the court looked at the question of 'rights of ownership', and we consider that it placed Te Tau Ihu iwi at a disadvantage. Their customary rights became secondary to those of Ngai Tahu, and only rights of ownership at the date of the Ngai Tahu deeds were to be considered. This allowed the court to set aside other types of rights as irrelevant to the question and to ignore the possibility of a shift in right-holding as a consequence of 20 years of Crown dealing since 1840.

The Maori Appellate Court's jurisdiction was restricted to the Kaikoura and Arahura deeds in the case stated. This Tribunal can range widely over all relevant Crown purchases and set them in the context of Crown policy and its application by its land purchasing agents. As demonstrated in our earlier chapters, we see the Kaikoura and Arahura purchases as a culmination of a succession of blanket purchases, starting with the Wairau in 1847, whereby the Crown purchased the interests of one iwi after another. The Arahura and Kaikoura transactions represented the final acquisition of Ngai Tahu rights, after the rights of the northern invaders and some Kurahaupo iwi had previously been acquired over much the same territory by means of the Wairau and Waipounamu deeds. To award exclusive title to the last sellers was to ignore the interests of the first sellers – and those of the Kurahaupo iwi not recognised in the earlier purchases.

While we have found that the legislation was not in breach of the Treaty, we do consider that the legislation was poorly conceived. It represents an uneasy mix of customary and non-customary concepts. It assumes that principles of 'take' confirmed by use and occupation, as developed through the Native Land Court, are the only ones that apply. The Act identified 'rights of ownership' as the only sort of right to be determined, and it presumes that tribes consistently occupied areas encompassed within set tribal boundaries. As we have discussed in chapter 2, this has not been the view of the Tribunal in other inquiries, nor the view of most historians. The Ngati Awa Tribunal emphasised the overlapping

nature of customary rights and viewed the concept of exclusive tribal boundaries as one that had arisen from ‘colonial influence’. In the opinion of that Tribunal, ‘the essence of Maori existence was founded not upon political boundaries, which serve to divide, but upon whakapapa or genealogical ties, which serve to unite or bind. The principle was not that of exclusivity but that of associations.’<sup>23</sup> Moreover, when the Ngati Awa Tribunal faced a similar issue to the one faced by the Ngai Tahu Tribunal, it rejected an application for referral to the Maori Appellate Court under section 6A. The Tribunal stated:

Section 6 may itself not be consonant with custom for it assumes that the applicable customary law principles are exclusively those of “take” and occupation or use, that the relevant rights were exclusively ‘rights of ownership’, that ‘tribal boundaries’ were a norm and that there were prescribed tribes that consistently [inhabited] the area within them.<sup>24</sup>

Notwithstanding our reservations about section 6A, we confirm that the Crown was not in breach of its Treaty obligations to Te Tau Ihu iwi by introducing section 6A of the Treaty of Waitangi Act 1975, and nor was the section itself in breach. In our view, the problem lay primarily with the way the questions referred to the Maori Appellate Court were formulated and, in particular, the misleading emphasis on what was really only the final stage of a long drawn-out process of Crown extinguishment of rights in the region. The Act did not preclude the involvement of the Te Tau Ihu claimants in the formulation of the case stated, nor was there any necessary equation with boundaries set by sale deeds or any requirement that the court find only one tribal group in possession of ‘rights of ownership’.

The final issue raised by Te Tau Ihu iwi with respect to section 6A was that it did not permit an appeal against the Maori Appellate Court’s decision. This was said to be ‘grossly unfair’. On its face, if a question is referred from a Tribunal panel to the Maori Appellate Court pursuant to section 6A, there are no appeal rights and the court’s decision is binding on that panel. However, as will be discussed in the following section, there is scope for judicial review in relation to the procedural correctness of such a decision. Also, prior to the establishment of the New Zealand Supreme Court in 2003 and providing there were no statutory limitations, a prerogative right to petition the Crown for leave to appeal to the Judicial Committee of the Privy Council existed.<sup>25</sup> Therefore, notwithstanding that section 6A says that the decision of the Maori Appellate Court is binding on the Tribunal, avenues did exist to challenge that decision.

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23. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p 133

24. Waitangi Tribunal, memorandum concerning procedure, evidence, and issues in the Wai 46 (Ngati Awa raupatu) inquiry, 11 November 1994 (Wai 46 ROI, paper 2.59), p19

25. *Re the Will of Wi Matua* [1908] AC 448. We note that *De Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385 (PC) distinguished the *Wi Matua* case. However, those comments are *obiter dicta* in the context of cases stated to the Maori Appellate Court.

**13.4 THE ROLE OF THE CROWN IN THE MAORI APPELLATE COURT HEARING**

The submissions we received from claimant counsel on the role of the Crown in the Maori Appellate Court hearing asked us to focus on two matters:

- ▶ whether the procedures adopted by the court were in breach of Treaty principles; and
- ▶ whether the Crown's role in the case breached Treaty principles.

**13.4.1 Were the procedures adopted by the Maori Appellate Court in breach of Treaty principles?**

We will deal briefly with the matter of whether the procedures adopted by the Maori Appellate Court were in breach of Treaty principles. Te Tau Ihu claimants made submissions on the procedural impropriety in the court. These included alleged disparities of funding between themselves and Ngai Tahu and alleged breaches of the rules of natural justice in respect to adequate notice and a reasonable opportunity to be heard. We do not detail the submissions here because these matters have already been extensively litigated in the High Court, Court of Appeal, and Privy Council.<sup>26</sup> All these courts found that the Maori Appellate Court did not breach the rules of natural justice, that Te Tau Ihu iwi did have a reasonable opportunity to be heard, and that Te Tau Ihu iwi were represented in the Maori Appellate Court proceedings.

On this issue, Ngai Tahu submitted that we cannot substitute the decisions of these courts with our 'own view on the legality or propriety of procedures followed' by the Maori Appellate Court.<sup>27</sup> We agree. This matter has been determined by the courts and will not be revisited by this Tribunal.

However, the issue of whether the Crown's role in the Maori Appellate Court hearing breached its Treaty obligations to Te Tau Ihu iwi has not been determined by the courts and falls within our jurisdiction.

**13.4.2 Did the Crown's role in the Maori Appellate Court breach its Treaty obligations to Te Tau Ihu iwi?****(1) Te Tau Ihu submissions**

Counsel for Ngati Toa submitted that the Crown, having given the Maori Appellate Court the power of deciding customary title on terms inherently favourable to one of the contending parties, then stood aside and did not disclose evidence that may have altered the court's view of Ngai Tahu rights as being exclusive in the region. It was submitted that:

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<sup>26</sup> *Ngati Apa ki te Waipounamu Trust v Attorney-General* [2003] 1 NZLR 779; *Ngati Apa ki te Waipounamu Trust v Attorney-General* [2004] 1 NZLR 462 (CA); *Ngati Apa ki te Waipounamu Trust v Attorney-General* [2006] UKPC 49; [2007] 2 NZLR 80 (PC). The latter decision was not available at the time we concluded our hearings in 2004.

<sup>27</sup> Counsel for Ngai Tahu, closing submissions, p 25

## 13.4.2(1)

The Crown was instrumental in the passage of Section 6A, and did participate in the formulation of the Case Stated. Yet it did not participate in the Maori Appellate Court case itself, despite having for the Ngai Tahu inquiry commissioned extensive relevant expert historical evidence . . . had this evidence been accessible to the Court it would have been highly influential.<sup>28</sup>

Ngati Apa's counsel also argued that the Crown had deliberately withheld important evidence from the Maori Appellate Court, giving a number of instances in which documents in the possession of the Crown had not been brought to its attention. These were identified as:

- ▶ Wereta Tainui's 1849 account to Walter Mantell of 80 Ngai Tahu living in the West Coast region, south of Mawhera with 20 Ngati Apa people residing at Kawatiri;
- ▶ Wereta Tainui again recounting that position in 1878 in his petition to the Smith and Nairn Commission;
- ▶ The acknowledgement to the Native Land Court in 1921 by the Ngai Tahu rangatira Mr Te Uru of Ngati Apa rights in the Kawatiri area;
- ▶ The Native Land Court decision of 1926 when Judge Gilfedder which awarded Ngati Apa a beneficial interest in six schedule B reserves between Kawatiri and the Heaphy River totalling 179 acres.<sup>29</sup>

Ngati Apa argued that the Crown possessed and knew of all this evidence and that it was the Crown's duty to all the parties – Ngai Tahu, Ngati Apa, and the court – to ensure that any evidence relevant to the customary boundary issue was made available. Ngati Apa argued that they were also unlikely to have been able to produce the archival documents in support of their claim, documents that the Crown already had in its possession. Ngati Apa maintained that, in not providing this information and in failing to take an active role in the proceedings, the Crown breached its duty of protection to Ngati Apa.<sup>30</sup> As a result of this failure to actively protect, the Maori Appellate Court largely heard 'Ngai Tahu's detailed partisan history' rather than a balanced account of customary rights.<sup>31</sup>

Ngati Rarua also submitted that the Crown failed to give evidence, failed to meet its obligation to inquire, and failed to ensure that Ngati Rarua were properly protected and represented.<sup>32</sup>

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28. Counsel for Ngati Toa Rangatira, closing submissions, p 123

29. Counsel for Ngati Apa, closing submissions, p 37

30. Ibid, pp 35–36

31. Ibid, pp 38–39

32. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 126–127

**(2) Ngai Tahu submissions**

Ngai Tahu submitted that this Tribunal had received little more than the Maori Appellate Court had received in 1990. Wereta Tainui's petition was the 'only significant material relating to Ngati Apa that was presented to the Wai 785 Tribunal'. In Ngai Tahu's view, this petition did not show that 'the people of Ngati Apa descent had anything other than residence rights at Kawatiri' and it would therefore not have altered the Maori Appellate Court's decision.<sup>33</sup>

**(3) Crown submissions**

The Crown maintained that there was no evidence to show that it had knowingly withheld documentary evidence from the Maori Appellate Court. Counsel argued that the Crown was not a 'keeper of the archives' and it was for the parties concerned to bring evidence to support their case, while non-archival material of a more recent nature could be accessed through the Official Information Act 1982. The Crown referred to the High Court's finding (outlined below) that the information not seen by the Maori Appellate Court was 'not of such relevant or probative value as to give rise to procedural impropriety, particularly in light of the Maori Appellate Court's reasoning in its decision.'<sup>34</sup>

**(4) Tribunal discussion and findings**

As we have noted, the Crown did not wish to enter into disputes between iwi. As a result it did not actively participate in the Maori Appellate Court hearing, holding a 'watching brief' only and abiding the final decision of the court. In our view, this approach would have been acceptable if the Crown had no information or evidence which had the potential to assist the court. But the Crown was clearly not in that position. Not only had it assisted in formulating the questions to be answered by the Maori Appellate Court, but it also possessed evidence which was, in our view, crucial to the establishment of rights in this area.

Furthermore, as the Crown held a 'watching brief' and was involved in the proceedings, we consider that it had a positive duty to assist the court. The evidence held by the Crown was not made available to the court and therefore the Crown failed in its duty.

We note here the Crown's submission that there is no evidence that the Crown knowingly withheld documentary evidence from the court. It was shown, however, that the Crown had actively considered one of those pieces of evidence, the Wereta Tainui petition, by having it translated just prior to the court case in 1989. It may be that the failure to bring this evidence to the attention of the court was the result of an oversight, rather than a deliberate decision to not make the evidence available to the court, but in our view this does not alter the case. When considering whether the Crown has breached the Treaty, we examine

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33. Counsel for Ngai Tahu, closing submissions, pp 37-38

34. Crown counsel, closing submissions, pp 133-134

its acts and omissions rather than its intentions per se (although these may exacerbate the prejudice inflicted). Whether the failure of the Crown to provide the evidence it held was done in innocence or ignorance does not excuse it of its duty to the Maori Appellate Court or of its obligations under the Treaty.

The result was that an opportunity for the Crown to balance the partisan history as presented by Ngai Tahu was lost. We thus find that the Crown failed in its duty to protect Ngati Apa and breached the principle of equal treatment. That failure is exacerbated by the Crown's awareness of the nature of its duty, and we cite here the Crown's own statement in closing submissions:

The Crown does not consider itself in the position of an orthodox defendant whose task is to 'defend' itself against claims made. In responding to the historical claims made by Maori, the Crown recognises a duty to assist the Tribunal to try and get to the truth of the matter. This includes a responsibility to test the claimant evidence and put forward alternative ways of considering the historical events at issue. It also includes a duty to put before the Tribunal relevant material of which the Crown is aware that would assist the Tribunal, whether such material affects adversely on the Crown's historical actions or not.<sup>35</sup>

In an inquiry such as the one that the Maori Appellate Court was conducting, which was instigated by the Ngai Tahu Tribunal to assist it to find the truth about customary relationships between the Ngai Tahu and Te Tau Ihu claimants, we consider that the Crown had a similar duty to place all known relevant information in its possession before the court.

By failing to make this evidence available, we consider that the Crown was in breach of its duty not only to protect all parties who would be affected by the decision but also to act fairly as between Ngai Tahu and Te Tau Ihu iwi. This was a breach of the Treaty principles of active protection and equal treatment.

### **13.5 THE CROWN'S TREATMENT OF TE TAU IHU IWI RIGHTS IN ITS NEGOTIATIONS WITH NGAI TAHU AND IN THE ENACTMENT OF THE NGAI TAHU LEGISLATION IN 1996 AND 1998**

#### **13.5.1 Te Tau Ihu submissions**

Claimant submissions on this issue focused on the Crown's failure to protect the rights and interests of Te Tau Ihu iwi when it followed the 1990 Maori Appellate Court decision and enacted the Ngai Tahu Claims Settlement Act 1998. In their view, the decision of the Maori Appellate Court was flawed. They would be prejudiced by the subsequent statutory recognition of that decision if this meant that Te Tau Ihu iwi claims would be rejected outright

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35. Crown counsel, closing submissions, p 8

when they came to negotiate their own settlement with the Crown in respect to parts of the takiwa. It should be emphasised that none of the Te Tau Ihu submissions sought exclusive rights or interests south of the border, or to interfere with the Ngai Tahu settlement with the Crown. However, the claimants did seek an acknowledgement from the Crown of their independent rights and interests, and of breaches of the Treaty in certain aspects of its purchase and reserve policy within the Ngai Tahu takiwa.

Accordingly, Ngati Apa counsel argued that:

Unless this Tribunal takes a very strong stance on the nature of rights in the Kawatiri to Kahurangi Point area, then when Ngati Apa go to treat for compensation with the Treaty Settlements Division of the Crown, it will meet the answer '*The Crown is entitled to rely upon the decision of the Maori Appellate Court.*' . . . Ngati Apa have already been shown the door in 1997 by the Minister of Treaty Negotiations on one occasion and that will simply recur.

The Crown's formal response is a rejection entirely of Ngati Apa claims on the West Coast. The decision of the Maori Appellate Court gave exclusive rights to Ngai Tahu. For the Crown to say '*it is entitled to rely upon the decision of the Maori Appellate Court*' is another way of saying, yet again, that Ngai Tahu have exclusive rights to Kahurangi Point, and Ngati Apa will receive nothing by way of compensation. [Emphasis in original.]<sup>36</sup>

Ngati Apa submitted that the Crown had breached its Treaty obligations to them in giving effect to the 1990 decision, in failing to accept, listen, or act on Ngati Apa's representations with respect to the injustices of the decision, and in failing to act on or heed the Tribunal's views on boundaries, as expressed in the Muriwhenua and Ngati Awa inquiries.<sup>37</sup>

Also, Ngati Apa maintained that the Ngai Tahu Claims Settlement Act 1998 impinged on Ngati Apa's ability to seek redress in their claim with respect to the perpetual leases issue. In Ngati Apa's view, this demonstrated the result of the Crown's reliance on the 1990 decision. The idea of exclusive rights on the part of Ngai Tahu has become entrenched in Government policy.

Ngati Apa also argued that the Crown misled them into believing that the settlement with Ngai Tahu would not impact on any future negotiations between themselves and the Crown. This was clearly not the outcome of the binding settlement with Ngai Tahu, which 'effectively removed assets and resources from any future settlement with Ngati Apa'. The Crown failed to adequately consult with Ngati Apa during its negotiations with Ngai Tahu. Ngati Apa stated that the Crown refused to meet, negotiate, or hear submissions from Ngati Apa, with only one exception – a 10-minute hearing at the select committee stage of considering the Ngai Tahu Settlement Bill.<sup>38</sup> The Crown's settlement with Ngai Tahu had also

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36. Counsel for Ngati Apa, closing submissions, pp 42–43

37. Ibid, p 36

38. Kathleen Hemi, amendment to claim Wai 521, 9 June 1995 (claim 1.10(a)), p 9

‘effectively removed all potential assets and resources south of Kahurangi Point that were being vested in Ngai Tahu from any recourse in the course of any subsequent Ngati Apa Waitangi Tribunal claim.’<sup>39</sup>

Ngati Toa submitted that the Crown breached its Treaty obligations by relying exclusively on the 1990 decision in its statutory definition of the Ngai Tahu takiwa. Ngati Toa argued that the Maori Appellate Court specifically stated that its decision was related only to a limited question: namely, customary interests in a specific area at a specific time. The court had not intended its decision to be an authoritative guide on tribal boundaries in general. The Crown was wrong to rely on the decision to set the boundary in the Te Runanga o Ngai Tahu Act 1996 and the Ngai Tahu Settlement Act 1998. Ngati Toa argued that the Crown’s reliance on the 1990 decision breached the principle of active protection.<sup>40</sup>

Ngati Toa also stated that the Crown failed to consult with them during negotiations with Ngai Tahu. The Crown was not apprised of the extent and nature of Ngati Toa’s interests or the effect that the settlement would have on Ngati Toa’s rights. Ngati Toa claimed that the Ngai Tahu settlement prejudicially affected them. Some of the areas vested in Ngai Tahu or subject to special statutory entitlements in favour of Ngai Tahu were areas that Ngati Toa claim as lying within their rohe.<sup>41</sup>

Ngati Rarua also pointed to the Crown’s failure to take notice of subsequent protests from Te Tau Ihu iwi. Ngati Rarua’s amended statement of claim pointed to the failure of a petition to the New Zealand House of Representatives from Te Tau Ihu iwi in 1999. The petitioners sought a Government inquiry into whether the 1990 decision was correct, given the new evidence then available; whether or not section 6A should be repealed; and what was the most appropriate procedure to follow to ensure that Te Tau Ihu iwi could proceed with their claims without further delay.<sup>42</sup> Kathleen Hemi and various trusts representing Te Tau Ihu iwi interests submitted the petition in 1996.<sup>43</sup> In 1998, the petition was referred to the Justice and Law Reform Committee and was then passed on to the Maori Affairs Select Committee. On 18 February 2000, the clerk of the committee informed Mrs Hemi that the petition’s requests were ‘declined at this time’ because ‘the matters raised in the petition are before the Court of Appeal and as such, [are] *sub judice*’. Two years later, the Maori Affairs Select Committee reconsidered the petition. The committee’s report of 21 February 2002 merely stated that ‘We have no matters to bring to the attention of the house.’<sup>44</sup>

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39. Counsel for Ngati Apa, closing submissions, p 45

40. Akuhata Wineera and others, fourth amendment to claim Wai 207, 21 May 2003 (claim 1.7(d)), pp 47–48; counsel for Ngati Toa Rangitira, closing submissions, pp 122–126

41. Akuhata Wineera and others, fourth amendment to claim Wai 207, pp 47–48

42. Barry Mason and others, first amendment to claim Wai 594, 14 July 2000 (claim 1.13(a)), pp 28–29

43. The petitioners were Kathleen Hemi, the Ngati Apa ki te Waipounamu Trust, the Te Atiawa Manawhenua ki te Tau Ihu Trust, the Te Runanga o Ngati Kuia Trust, the Ngati Rarua Iwi Trust, Te Runanga o Rangitane o Wairau Incorporated, and the Ngati Tama Manawhenua ki te Tau Ihu Trust.

44. *Inquiry into the Petition of Kathleen Hemi QSM and the Ngati Apa ki te Waipounamu Trust (and Others)*, MA/02/09, Parliamentary Library, Wellington

We also received submissions from Rangitane and Te Atiawa on access to their ‘landless native reserves’, granted to them in the late nineteenth and early twentieth centuries, which lay within the Ngai Tahu takiwa. Rangitane claimed that the Ngai Tahu Claims Settlement Act 1998 prevents them from accessing their landless native reserve on Stewart Island.<sup>45</sup> Te Atiawa’s claim also concerned a landless native reserve: Whakapoai, on the Heaphy River, which was originally granted to Ngati Apa and Te Atiawa. The Crown allegedly breached its Treaty obligations to Te Atiawa by including the reserve in the Ngai Tahu deed of settlement.<sup>46</sup>

### 13.5.2 Ngai Tahu submissions

Ngai Tahu submitted that they had no responsibility in this matter. However, they contended that the Maori Appellate Court decision was correct and thus, it was implied, the Crown could not be faulted for having relied on it in passing subsequent laws.

### 13.5.3 Crown submissions

The Crown argued that it was entitled to rely on the recommendations of the Tribunal and the findings of the Maori Appellate Court. Crown counsel stated:

Following the 1990 Maori Appellate Court decision, the Wai 27 Tribunal adopted the findings of the Maori Appellate Court and the findings of that Tribunal were an important consideration in the subsequent negotiation and settlement of the Ngai Tahu claims. The Maori Appellate Court finding had been incorporated into the legislation giving effect to the Ngai Tahu settlement. The Crown was entitled to rely on the decisions of a Court of competent jurisdiction.<sup>47</sup>

Crown counsel also submitted that ‘The Crown is honour-bound to respect and uphold its settlement with Ngai Tahu.’<sup>48</sup>

### 13.5.4 Tribunal discussion and findings

The Te Tau Ihu claimants contended that the Maori Appellate Court decision was flawed and that the Crown was wrong to rely on it.

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45. Mervyn Sadd and others, fifth amendment to claim Wai 44, 31 January 2003 (claim 1.1(f)), pp 47, 51

46. Ngai Tahu subsequently opted for the reserve to be vested in the descendants of the original grantees, so it was not actually transferred to Ngai Tahu by the 1998 Act. As at 2004, the Crown had not investigated the ownership of the reserve: Jane Du Feu and others, third amendment to claim Wai 607, 14 February 2003 (claim 1.14(c)), p 20; counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 212–214.

47. Crown counsel, closing submissions, pp 134–135

48. Ibid, p 122

We have reached a very different conclusion from that of the Maori Appellate Court. As we pointed out earlier, our starting perspective was very different to that of the court. There, the Ngai Tahu case against the Crown provided the context for the questions posed to the court by the Tribunal. The questions set the date of Ngai Tahu sales with the Crown as the point to determine customary ownership and were instrumental to the manner in which the court considered rights of ownership. This placed Te Tau Ihu iwi at a disadvantage, as their customary rights and rights admitted by earlier Crown purchases became secondary to rights of ownership as at the dates of the Arahura and Kaikoura sale deeds with the Crown.

The parameters set for the court enabled it to arrive at its decision that Ngai Tahu had exclusive rights south of the statutorily defined boundary.

By contrast, our starting point was to consider whether Te Tau Ihu iwi also had customary rights within the Ngai Tahu takiwa. In undertaking this inquiry, it should be made very clear that this Tribunal is not an appellate body. Our role is not to consider whether the Maori Appellate Court decision was right or wrong. Our role is to examine all the evidence submitted to us by Te Tau Ihu iwi and arrive at our own conclusions based on that evidence.

In chapter 2, we set out our conclusions as to the customary rights of iwi within the Ngai Tahu takiwa. We found that, in the critical period between 1840 and 1860, Ngai Tahu did not have exclusive rights in the area in dispute.

There was intermarriage, the sharing of resources, and a fluidity of movement that existed between Ngai Tahu to the south and Te Tau Ihu to the north. On the east coast, Rangitane claimed ancestral associations with special features of the land (Tapuae-o-Uenuku, Waiautoa, and Kaparatehau) well within the territory claimed by Ngai Tahu. On the West Coast in the 1840s, an identifiable community of Ngati Apa were living within what subsequently became the Arahura block. In both cases, we considered the tangata heke to have created rights to lands formerly under the control of Rangitane and Ngai Tahu on the Kaikoura coast and Poutini Ngai Tahu and Ngati Apa on the West Coast. At 1840, none of these iwi could demonstrate exclusive rights in these lands, and the question of where any boundary lay between these iwi remained unsettled after the disruption caused by the invasion from the north. In any case, in these rugged coastal stretches, the boundary between different iwi was thought of in terms of access to, and use of, resources, not as exclusive possession of a whole area.

It is fair to say that thinking has changed on the nature of customary rights since the Maori Appellate Court decision. It has moved from a reliance on a set of hard and fast rules, formulated in the Native Land Court, to demonstrate ownership to a greater appreciation of the importance of marriages between different groups and of the ongoing nature of ancestral association, despite conquests. We are more alive to the possibility that customary

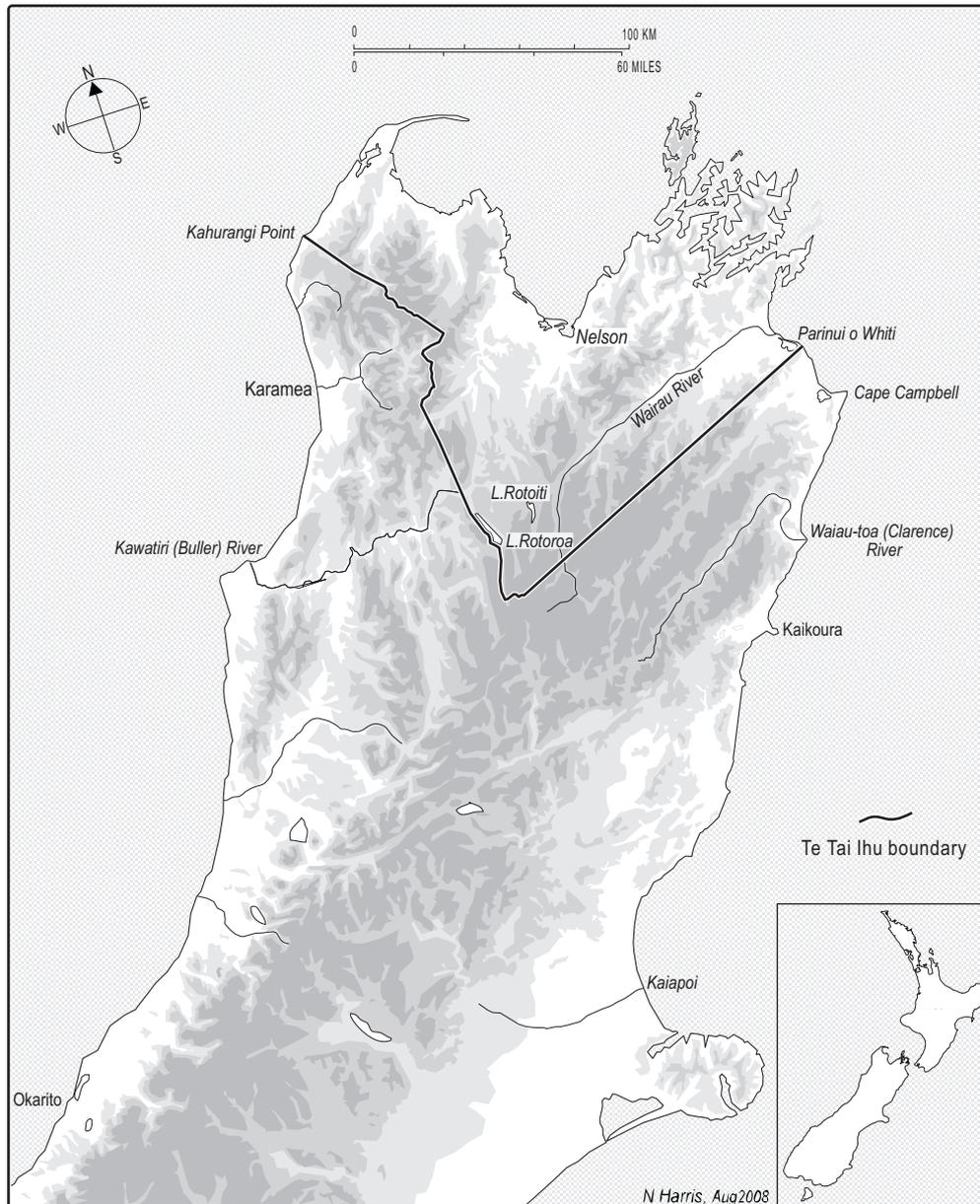


Figure 53: Ngai Tahu takiwa

society might operate on rules other than those founded solely in force or conquest and that associations with the land might be intangible as well as physical.

As has been stated previously in this report, the Waitangi Tribunal has been reluctant to fix boundaries for any one iwi. The Tribunal now thinks in terms of ‘overlapping’ rather than ‘cross’ claims, and its methodology has shifted from investigating the claim of a single tribal entity to inquiring into those of all claimant groups within a particular area of inquiry.

Many Tribunal panels and historians have accepted that it was possible for more than one iwi to exercise rights in the same land, the same mountain, the same river, or the same battle site. With customary tenure, there exists an intricate system of overlapping and competing rights held by members of different kinship groups. This was particularly the case where territory was subject to disputes and migration over time.<sup>49</sup>

As we have shown in chapter 2, this view is appropriate when considering the intricate web of whakapapa relationships between Te Tau Ihu and Ngai Tahu iwi.

In our opinion, the straight line boundary determined by the 1990 Maori Appellate Court decision was not appropriate when considering the overlapping rights of Te Tau Ihu iwi and Ngai Tahu in this area. The boundary had the effect not only of drawing a line directly through whakapapa but also of driving a wedge between some of the whakapapa relationships. Rights and interests derived from shared whakapapa cannot be extinguished or modified by drawing a straight boundary line on a map – the practical effect of the 1990 Maori Appellate Court decision (see fig 53).

We now turn to consider the legislation which followed that decision.

The courts have made it clear that neither the Te Runanga o Ngai Tahu Act 1996 nor the Ngai Tahu Claims Settlement Act 1998 prevents the Crown recognising and settling claims of other iwi. The legislation adopts the boundaries of the Maori Appellate Court's decision but not the notion of exclusivity. The Court of Appeal in the Ngati Apa case was clear on this point. Justice Keith stated:

the references to the 1990 decision in the 1996 and 1998 Acts . . . do not incorporate the notion of exclusivity over the whole of the area within the takiwa with the consequence that no claims by other tribes were still possible. To repeat, so far as the 1990 decision is concerned, the Acts make direct use only of the boundary it indicates.<sup>50</sup>

Nor do sections 461 and 462 of the Ngai Tahu Claims Settlement Act have this effect. Justice Keith wrote:

I do not see either s 461 or s 462 as preventing in any absolute way the presentation of Ngati Apa claims to a Court or tribunal and in particular to the Waitangi Tribunal. The main purpose of s 461 is to provide for a Crown release in respect of claims made by Ngai Tahu . . . As well, in terms of s 461(3) of the Settlement Act and s 6(9) of the Treaty of Waitangi Act, the deed of settlement and the Act can not be challenged, for instance, before the tribunal.<sup>51</sup>

And Chief Justice Elias stated:

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49. Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from 1769 to c1945* (Wellington: Victoria University Press, 1998), pp 194–200

50. *Ngati Apa ki te Waipounamu Trust v The Queen* [2000] 2 NZLR 659, 682 (CA)

51. *Ibid*, p 683

It is significant that these provisions do not preclude claims or inquiries except in respect of the 'Ngai Tahu claims'. It is those claims only which are finally settled by the Settlement Act. The s10 definition of Ngai Tahu claims is explicitly limited to claims made by any Ngai Tahu claimant. It would have been easy for the legislation to provide that no claim by any tribal group might be brought in respect of the breaches of the Treaty arising out of the tribe's use or occupation or ownership of land within the takiwa of Ngai Tahu, if that had been intended. For reasons given below, it is inconceivable that Parliament could have intended by implication to preclude a Ngati Apa claim to the Waitangi Tribunal that the Crown has breached its Treaty promises of protection of properties of Ngati Apa.<sup>52</sup>

We agree that the Te Runanga o Ngai Tahu Act 1996 and the Ngai Tahu Claims Settlement Act 1998 apply only to Ngai Tahu. They do not preclude the Te Tau Ihu iwi from making claims or having their claims determined. We are of the view that the principle of non-exclusive redress, if coupled with the provision of redress to others later in good faith, is an acceptable way to settle claims in areas of overlap.<sup>53</sup> In this respect, the legislation in our view does not breach the Crown's duty of protection to Te Tau Ihu iwi.

Even non-exclusive redress has to be delivered in such a way as to not prejudice the legitimate claims of others. The next question is whether this has been the case. Has the Crown interpreted and acted on this legislation in a manner consistent with its Treaty duty to act fairly as between Te Tau Ihu iwi and Ngai Tahu? Some of the evidence presented to us suggests that the Crown has failed in this duty and has treated exclusively with Ngai Tahu within that part of the Ngai Tahu takiwa in which Te Tau Ihu iwi claim to have customary interests.

An example of the Crown dealing exclusively with Ngai Tahu can be seen in relation to the Parinui o Whiti conservation lands. In chapter 2, we found that Rangitane and Ngati Toa held customary rights in this area. By section 121 of the Ngai Tahu Claims Settlement Act 1988, the Crown has vested the sole ownership of this land in Ngai Tahu. Te Tau Ihu iwi interests in this land have been lost.

In incorrectly interpreting the legislation to give Ngai Tahu an exclusive interest in the takiwa, the Crown has limited the assets available for settlement with Te Tau Ihu iwi. Land vested in Ngai Tahu is now privately owned within the meaning of the Treaty, and it would be inappropriate – and, in any case, outside our powers – to make a recommendation to reopen that question. It should also be emphasised that none of the Te Tau Ihu claimants has sought to interfere with Ngai Tahu's settlement with the Crown.

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52. Ibid, p 670

53. Waitangi Tribunal, *The Ngati Maniapoto/Ngati Tama Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2001), pp 18, 22-23

The opportunity to include assets in the takiwa in any future settlement with Te Tau Ihu iwi has been lost. Instead, we recommend that the Crown negotiate with Te Tau Ihu iwi to agree on equitable compensation.

There was also no consultation with Te Tau Ihu iwi during the Crown's negotiations with Ngai Tahu, with the exception of a 10-minute hearing before the select committee, notwithstanding the protests that it had received.

In our view, the Crown's fault lay in following the Maori Appellate Court decision, which created exclusivity for Ngai Tahu within its takiwa, rather than following the legislation, which did not. As a result of the Crown's actions, Te Tau Ihu iwi have lost interests in land that cannot be recovered. Moreover, the Crown's refusal to negotiate with Te Tau Ihu iwi in relation to rights within the Ngai Tahu takiwa has been prejudicial to the mana of Te Tau Ihu iwi. The loss of mana can be recovered, but it will need positive action by the Crown to educate Government departments and local authorities that the Ngai Tahu Claims Settlement Act does not give Ngai Tahu exclusive rights within their takiwa.

As demonstrated, Te Tau Ihu iwi have rights, and these rights must be acknowledged and protected by the Crown. Unfortunately, this has not been the case. The Crown by its actions has failed in its duty to act fairly as between Te Tau Ihu iwi and Ngai Tahu, notwithstanding that the Ngai Tahu legislation does not provide for exclusivity. In our view, the Crown has continued a common theme of not dealing with all iwi in an equal manner. This policy was evident in the nineteenth century and continues today.

In breaching the principle of equal treatment, harm has resulted for Te Tau Ihu iwi. This prejudice will be increased if our findings and recommendations on this issue are ignored on the ground that claims within the Ngai Tahu takiwa have been settled. They have been for Ngai Tahu, but have not yet been for Te Tau Ihu iwi.

We find that the Crown has not breached its Treaty obligations to Te Tau Ihu iwi by the passing of, or the content of, the Te Runanga o Ngai Tahu Act 1996 or the Ngai Tahu Claims Settlement Act 1998. However, in dealing with Ngai Tahu exclusively within the Ngai Tahu takiwa, the Crown has breached the principles of active protection and equal treatment, and Te Tau Ihu iwi have been prejudiced as a result. We strongly recommend that the Crown take urgent action to ensure that these breaches do not continue. If the Crown does not accept this recommendation, it will not only perpetuate the breaches set out above but will also add unnecessary and increased tension to the relationships between Ngai Tahu and Te Tau Ihu iwi.

## CHAPTER 14

### CONCLUSION

#### 14.1 INTRODUCTION

Claims against the Crown were brought to this Tribunal by the eight iwi of Te Tau Ihu o te Waka a Maui: Ngati Toa Rangatira, Ngati Rarua, Ngati Koata, Ngati Tama, Te Atiawa, Rangitane, Ngati Apa, and Ngati Kuia. The claims relate to:

- ▶ the New Zealand Company's transaction of 1839–41;
- ▶ the Crown's investigation of that transaction and its grant of land to the company;
- ▶ the Crown's massive purchase of almost the entire region in a single decade (1847–56);
- ▶ the creation (and then attrition) of insufficient reserves;
- ▶ the Crown's acquisition of control over, or possession of, natural resources and the subsequent environmental degradation of many of those resources; and
- ▶ the social, cultural, and economic harm alleged to have followed from these Crown actions.

The claimants argued that almost all of their land was alienated without their full, free, and informed consent, without adequate compensation, and without leaving them sufficient land either for their traditional resource use or to benefit from the new economy. All of these matters, they claimed, were in breach of the Treaty of Waitangi and resulted in serious prejudice to them.

Many of the events at issue took place in the 1840s and 1850s, but the effects have been lasting and the sense of grievance has been handed down from generation to generation. As we saw at our hearings, it still remains heartfelt today. Puhanga Patricia Tupaea of Ngati Koata, who was born on Rangitoto in 1932, explained her understanding of history, as passed down to her by her kuia:

Aunty Maria Tuo Hippolite gave me the korero about the land we lost to the Crown. She had said that we had been promised free health, free education and jobs in return for letting those settlers come and live on our land, and that we would participate, not be excluded – that our mana would be respected.

Aunty Tuo told me that when Queen Victoria in England heard what had happened to all her Maori subjects and saw the imbalance between Maori and Pakeha, she told those men

who had made all the deals to go back to New Zealand and make things right. She said that they had taken so much, and asked what they would do to make it right.

I feel great grief at the loss of our land and at the loss of our treaty relationship. We have always acknowledged that the Pakeha Europeans had great benefit to bring. We were and are willing to welcome them among us and share what we had, but not to have our mana customs and laws disregarded and our lands and resources taken. These must be restored and rangatiratanga recognised so that the partnership will resume on the right footing.

Pakeha had a lot to offer us, but we didn't invite them amongst us to become our masters.<sup>1</sup>

The iwi of Te Tau Ihu seek redress for their grievances and the rehabilitation of their Treaty relationship with the Crown. In our inquiry, we have sifted the detailed evidence of tangata whenua, professional historians, and other witnesses, and we have evaluated the submissions of counsel for the claimants and the Crown. We have made findings on whether the grievances of Te Tau Ihu iwi have arisen from actions or inaction of the Crown in breach of the Treaty of Waitangi, and what (if any) prejudice has resulted.

#### 14.2 THE TREATY OF WAITANGI

The Treaty of Waitangi was signed in parts of Te Tau Ihu and the Cook Strait region in 1840. Sixteen years later, almost the entire district had been acquired by the New Zealand Company and the Crown, leaving the iwi with tiny, scattered reserves, the tenths endowment reserves, and just three sizable pieces of land (Taitapu, Wakapuaka, and Rangitoto). This outcome was the result of actions of the Crown: first, it confirmed the validity of the New Zealand Company's 'purchase' and granted the company a Crown-derived title and, secondly, its governors and officials purchased almost all the remaining land.

The Treaty was intended to protect Maori rights while allowing the Crown to purchase such land and other resources as Maori were prepared to alienate. It set the standards for how land should be acquired for settlement, and those standards were informed by the instructions given to governors by the British Government in London. As we have shown in our report, in the 1830s Britain was concerned about the effect that colonisation in various parts of the world was having on indigenous peoples. The Treaty standards (as promulgated and explained at the time) were designed to secure a different outcome in New Zealand; Maori and settler were both to prosper in the circumstances of the new colony. The basis of that prosperity was to be the land and natural resources, with the assumption that a fair share would be transferred to the settlers.

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1. Puhanga Patricia Tupaea, brief of evidence on behalf of Ngati Koata, not dated (doc B15), paras 40–43

The Treaty (and the various official instructions surrounding it) required strict standards to be met in such transfers of land. The Crown was required to identify all those with a customary interest in the land and resources under Maori law. In the plain words of the Treaty, this encompassed the *tino rangatiratanga* of tribal or hapu communities over their lands, forests, fisheries, estates, and *taonga* (treasured things). Having identified those who exercised *tino rangatiratanga*, the Crown was then required to obtain their free, full, and informed consent to the transfer of the land. It was not to purchase any land required for the safety or comfort of the indigenous owners, nor was it to let them agree to transactions by which they might unknowingly injure their own interests. A relatively low price was permitted as long as a share of the proceeds of on-sale were spent on Maori welfare. Principally, however, the Crown was to ensure that Maori retained sufficient land to walk in both worlds – to continue their traditional economy as they wished, and to prosper in the new colonial economy as well. The resultant prosperity from the rising value of retained land was to be the true payment for alienating the rest.

These standards were known and promulgated at the time. As the Orakei Tribunal noted, ‘Considerable light can be shed on the terms of the Treaty as finally settled by Hobson by reference to the Instructions under which he was acting.’<sup>2</sup> They provide a context for the principles of the Treaty of Waitangi, as explained in many of the Waitangi Tribunal’s reports to date. The principle of partnership required the Crown to act with scrupulous honesty and fairness towards its Treaty partner, and in a spirit of mutual respect and, where appropriate, joint decision-making. The Crown also had to act fairly as between Maori and settlers (the principle of equity) and as between Maori tribes (the principle of equal treatment). Further, the principle of active protection meant that the Crown had to protect the *tino rangatiratanga* (authority) and interests of its Treaty partner, and that this protection must be active and not merely passive. There was a check, however, on inclinations towards paternalism – the Crown had to consult Maori and act in partnership with them. The principle of mutual benefit envisaged both Maori and settlers prospering from the economic development consequent upon colonisation. The principle of options allowed for Maori to make choices: to retain sufficient land for maintaining their traditional resource use or for farming it in the new colonial economy, or for both. Although the language in which the Tribunal describes these principles may be modern, they were in fact the standards known and officially proclaimed by the Crown in the nineteenth century. As the central North Island Tribunal noted, the problem was not that these standards were unknown but that they were not kept.

Was it possible for the Crown to keep to its standards, and to give effect to its guarantee of *tino rangatiratanga*, in the circumstances of Te Tau Ihu? In our view, the answer is ‘Yes’. The Crown made two key arguments. First, it pointed to a fluidity in rights following the recent conquests, and to the difficulties of dealing with competing or conflicting tribal interests.

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2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 193

We note, however, that at the inter-tribal hui which followed the Spain award, the Tasman Bay iwi debated and agreed a division of the compensation among themselves. Further, the inter-tribal hui of 1852 which consented to the Pakawau purchase demonstrated that the iwi of Te Tau Ihu could in fact agree on their own entitlements through their own customary institutions, with the assistance of officials as necessary, and make a decision to alienate particular blocks of land. It was entirely possible, therefore, for the Crown to have kept the Treaty in these circumstances. Secondly, the Crown argued that it was not possible to forecast precisely what changes might occur in land or resource use, and therefore to be sure of how much land Maori needed to retain. We note, on this issue, the very early views of officials that too little had been retained for present and foreseeable needs. The Crown accepted Dr Angela Ballara's evidence on this point. In our view, it was therefore feasible for the Crown to have kept the Treaty in this respect as well.

#### **14.3 BREACHES OF THE TREATY OF WAITANGI**

In our report, we have identified some serious breaches of the Treaty in the Crown's relations with Te Tau Ihu iwi. Before discussing the detail, we note the salient points here. First, the Crown promised an inquiry into the validity of pre-Treaty transactions, and legislated to establish such an inquiry (the Spain commission). Its officials then encouraged a switch from inquiry to 'arbitration', in which the iwi of Tasman and Golden Bays were required to accept compensation (characterised officially as a gratuitous payment) and to sign deeds of release. Commissioner Spain's award (and subsequent Crown grants) validated the New Zealand Company 'purchase' in Te Tau Ihu, when the most of basic of inquiries would have exposed that no alienation had in fact taken place. The deeds of release did not correct this basic flaw, and the Crown granted land to the company that still belonged to Maori. It imposed this solution (and an unfairly low amount of compensation) on iwi. In doing so, it breached the plain meaning of article 2 of the Treaty, and the principles of partnership, active protection, and equity. The iwi of Tasman Bay and Golden Bay thus lost large amounts of land without their free, full, and informed consent, without fair payment, and to the significant injury of their interests. Moreover, the presence of settlers in the district hardly justified such arrangements. Many Te Tau Ihu Maori had welcomed and actively assisted newly arrived settlers and would likely have been willing to enter into fair and equitable arrangements that could have accommodated the interests of both Maori and Pakeha. Instead, Crown officials chose to override and ignore Maori rights in order to prioritise the needs of the Company and its settlers.

Secondly, Crown officials acquired the vast majority of remaining land in a manner totally inconsistent with Treaty principles. They conducted vast, 'blanket' purchases without

specifying what land or resources were actually being alienated, and recorded them in inaccurate and largely invalid deeds. They failed to inquire properly as to which Maori groups exercised tino rangatiratanga, how customary ownership could be transferred, or even what land Maori wished to retain, let alone what land they truly needed for their future prosperity. The two major purchases – the Wairau and Waipounamu – were initiated with a pre-selected minority of non-resident owners, and the resultant transactions were then imposed on all the rest. Millions of acres were thus acquired without the free, full, or informed consent of their owners. Also, prices were admitted to have been too low, in respect of the vast acreages and resources acquired. Major Richmond, for example, admitted that he kept the price of Pakawau low by concealing its real value from its owners. Governor Grey observed that the price for the Wairau was so low that the transaction was more a giving up of the land for the common good (and as *utu*) than an actual purchase.

All of these things were in breach of the clearly articulated standards that the Crown required of itself at the time. The Crown's purchase of the vast Te Tau Ihu district, particularly through the Wairau and Waipounamu purchases, was in breach of the plain meaning of article 2 of the Treaty. It was also in breach of the Treaty principles of partnership, active protection, and equal treatment.

Thirdly, the Government's acquisition of millions of acres without genuine consent and without paying a fair equivalent was compounded by its failure to ensure the retention of a sufficient tribal land base for 'present and future needs' (as it was put at the time). Officials knowingly restricted the Te Tau Ihu communities to tiny, scattered reserves, too small or of too poor a quality to sustain either traditional resource use or the kind of farming necessary for prosperity in the new economy. Maori had to use land that they had sold to maintain their traditional economy (until they could no longer do so because it became occupied by settlers). At the same time, as the Mackays soon observed, any significant development of pastoral farming was never going to be an option on the purchase reserves.

There were four possible factors in mitigation:

- ▶ the reservation of company tenths;
- ▶ the retention of three large unsold blocks;
- ▶ the re-purchase of their own sold land from the Government;
- ▶ and the Crown's late nineteenth-century remedy of landless natives reserves.

Taking these points in turn, we note that the tenths estate was never sufficient to compensate for the Crown's failure to make adequate purchase reserves. Company and Crown officials had reserved too little land for occupation in Tasman and Golden Bays. At the same time, what little occupation land they did reserve was mainly subtracted from the tenths estate, so that it was not available as an endowment for other groups. The estate itself was never the promised full tenth as awarded by Spain. Even so, it was further reduced by the abolition of almost half the town reserves, the failure to reserve the promised rural sections,

and some alienations of sections that had been reserved. Some of its income was spent on services provided elsewhere by the Government. A promising initiative was thus fatally compromised. Further, as well as alienating some sections or interests in sections, many tenths reserves (and purchase reserves) were tied up in perpetual leases. Although these did guarantee tenancy and income over a long period, they resulted in artificially low rents and the virtual permanent alienation of the estate from its Maori owners.

Even so, in the 1970s a relatively substantial estate was returned to the Wakatu Incorporation, which has had significant commercial success in recent decades. The estate is, however, small in absolute terms, and much smaller than could reasonably have been expected from Crown and company undertakings. Nohorua Kotua suggested to us:

When you live in a culture where you are very much the minority, you either blend or you hide. If we were living on Rangitoto with the rest of our iwi then there would not have been an issue. If we'd owned a Tenth part of Nelson, then it would not have been an issue either. It would have given us our economic base on which to support some sort of economic development for ourselves, and we would have been able to afford some of the things that others had, and participated and contributed more to society.<sup>3</sup>

Turning from the tenths to the land still unsold at the end of the Waipounamu purchase, we note that two of these three large blocks did not long survive the Native Land Court process of granting title to individuals in the 1880s. Taitapu was sold almost immediately. It was of limited use because it was tied up as a goldfield, yet its Maori owners had not been able to profit sufficiently from its valuable gold resources. Title was granted to four individuals of just one of the interested tribes. Wakapuaka was granted to a single individual in defiance of both the requirements of the native land legislation and Maori customary law. The other Maori inhabitants were driven off later and parts of the land sold. Rangitoto lasted longer in Maori ownership, but it proved relatively difficult to use its resources in the settler economy. Thus, the three large blocks could not long compensate their particular communities for the inadequacy of the Crown's purchase reserves.

The 're-purchase' of some of their own sold land did supplement Te Tau Ihu reserves for a time, but the quantities that could be afforded were not great, and much of it had to be sold in the late nineteenth century anyway. Matters had reached such a plight that the Government, advised of the scandalous problem by its own officials since the 1860s, finally acted to remedy matters in the 1890s and early 1900s. The resultant landless natives' reserves were in many ways a 'cruel hoax'. Many were promised but not actually created or granted, and those that were created ended up in remote areas, where they simply mirrored the existing problems of limited access, poor quality, and insufficient size. Governments refused to do what they had done for settlers; namely, providing them with access to State

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3. Nohorua Te Kotua, brief of evidence on behalf of Ngati Koata, 1 February 2001 (doc B14), para 29

finance and buying private land to ensure they received good land. The Crown's opportunity to remedy its mid-century Treaty breaches resulted simply in additional breaches and further prejudice to Te Tau Ihu Maori.

The Crown conceded that it failed in its Treaty responsibility to ensure the retention of a sufficient land and resource base for all of the Te Tau Ihu tribes. In our view, this involved breaches of the Treaty principles of partnership, active protection, equity, mutual benefit, options, and redress. As we found in chapter 10, the social, economic, and cultural harm to Te Tau Ihu Maori was significant and of lasting effect.

In sum, the great majority of Te Tau Ihu land was acquired from its Maori owners in breach of the Treaty. The New Zealand Company's claim was wrongly validated and much unsold Maori land was granted to it. Later fix-up deeds, with inadequate compensation, inadequate reserves, and no real choice, did not remedy this fundamental flaw. The great remainder of the land was purchased by governors and officials without the free, full, and informed consent required by the Treaty. Maori were not permitted to decide their own customary entitlements or to exercise their *tino rangatiratanga*. Transactions were instead commenced with a picked minority of right holders (usually non-resident), and then imposed on the rest. Prices were absurdly low. The 'true' payment envisaged by Normanby, in which retained land would rise in value so that the mutual prosperity of both vendors and buyers was assured, never eventuated. This was because officials reserved too little or too poor land even for subsistence, let alone for development in the new economy. This crucial failure on the part of the Crown was drawn to the Government's attention by its own officials from the 1860s to the 1890s. The Crown conceded in our inquiry that it had failed to ensure that Maori retained sufficient land for either traditional pursuits or economic development, and that its landless natives reserves were an inadequate remedy, and that this was in breach of its Treaty obligations.

The result of these actions of the Crown, which were all in breach of the Treaty, was poverty, social dislocation, and cultural harm. The prejudice suffered by Te Tau Ihu tribes was immense and of lasting effect.

We turn now to summarise the detail of our findings.

#### **14.4 WHO HAD CUSTOMARY RIGHTS?**

In chapter 2, we outlined our view of customary right-holding in the Te Tau Ihu district, setting out the complexities of the history and relationships of the eight *iwi*. There is no single, universally accepted narrative of the events of the 1820s and 1830s. Nor is there a single, universally accepted interpretation of how customary law applied to the rights of the conquerors, the defeated (still-occupant) peoples, and those *Ngati Toa* chiefs (especially Te Rauparaha) who led the *taua*. In that situation, we weighed the evidence of the

tangata whenua experts and their historians and reached a view on how customary law applied to the rights of the claimants at the time of the New Zealand Company and Crown transactions.

There is a danger, in summarising our view here, that the subtleties and qualifications will be overlooked. Nonetheless, we provide a brief outline of our conclusions. First, we noted that customary law was relatively settled, with the main points shared by all iwi, at the time of the northern migrants' arrival in Te Tau Ihu. The battles, tuku, settlement, acts of ahi kaa, respect for tohunga, and subsequent intermarriage all appear to have been conducted according to the tikanga of the time. Although the defeated peoples later challenged whether the take (causes of the invasions) were tika, it was our view that both sides were in fact operating according to a shared tikanga, and that their rights were derived from a known system of customary law.

As at 1820, the Kurahaupo iwi – Rangitane, Ngati Apa, and Ngati Kuia – were the tangata whenua of Te Tau Ihu. Their authority over (and exclusive possession of) the district was altered in the 1820s and 1830s by the arrival of the migrant iwi from Kawhia and Taranaki. Ngati Koata settled first, in a region gifted to them by the leading Kurahaupo rangatira of the day, Tutepourangi. This tuku formed a lasting relationship between Ngati Koata and (particularly) Ngati Kuia, with reciprocal rights and obligations. In the testimony of both iwi, the tuku and relationship have continued to the present day. Although their evidence did not agree on the exact nature of their respective rights, it was our view that both the givers and the recipients of the tuku had customary rights in the area concerned. Both had mana. Both had authority, but the leadership and balance of authority rested with Ngati Koata, as the protectors of those Kurahaupo who made the gift.

The other migrant iwi – Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa – arrived slightly later and established customary rights by conquest (raupatu), followed by occupation (residence or seasonal visits and resource use). Over time, their whakapapa became embedded in the whenua through intermarriage with the defeated peoples, the burial of placenta (whenua) and the dead, residence, and the development of spiritual links.

For their part, the defeated peoples – Ngati Kuia, Rangitane, and Ngati Apa – remained in unbroken occupation of some of their ancestral land. In part, their rights survived at the time of the New Zealand Company and Crown transactions because of the survival of small, independent communities in the interior. Also, there were tributary communities in the more coastal areas of Te Tau Ihu, under their own rangatira and exercising rights of occupation, thus ensuring the survival of their take tupuna and their ahi kaa. Although they recognised the authority of leading migrant chiefs, especially of Ngati Toa, these communities still had mana and were increasingly independent after 1840. At the time of the company and Crown transactions, too little time had elapsed for their rights to have been totally extinguished in any case. The Kurahaupo people had customary rights in the 1840s and 1850s, and those rights were protected and guaranteed by the Treaty of Waitangi. In

our view, the available records showed that their rights were mainly acknowledged by the northern rangatira of the time, either implicitly (by not challenging and removing people as they did in other cases) or sometimes explicitly, so long as their own authority was also recognised. It was not until the competition for too-small reserves in the 1880s and 1890s that a more exclusive line was uniformly advanced by the conquering tribes.

Among the northern iwi, we found that they were largely equal and independent in the establishment of their own customary rights. The leadership of Ngati Toa and Te Rauparaha was acknowledged by most, although Te Atiawa had come into fairly serious conflict with him by the 1830s and was disputing not just Ngati Toa's leadership but Ngati Toa's rights and occupation on the ground in eastern Te Tau Ihu. In our view, the roherohetanga by which Te Rauparaha allocated the lands of eastern Te Tau Ihu was an act of mana on his part, summarising (and perhaps shaping) a consensus of where the conquering tribes should settle. It did not imply primary rights to sell land, which became the key issue of the 1840s and 1850s. Such rights rested with the communities in occupation and their leaders (wherever they lived). The overwhelming evidence from the nineteenth century (and today) is to that effect.

In the west, where Te Rauparaha and Ngati Toa were not directly involved in the taua, they did not seek to settle, either permanently or by means of frequent visits and the use of resources. Nonetheless, the history of western Te Tau Ihu shows clearly that all the migrant iwi had a right to settle there after the conquest. Later arrivals could reasonably expect to receive a tuku. Te Rauparaha and Ngati Toa, as overall leaders of the whole expedition, would still have possessed that right at the time of the company and Crown transactions. Although this was not a primary authority, as claimed by that tribe, it was our view that Ngati Toa had a layer of customary rights in western Te Tau Ihu that were rightly acknowledged by the Crown.

For some years, groups maintained a migratory lifestyle in which they had pa, kainga, cultivations, and areas of resource use on both sides of Te Tau Ihu and Raukawa Moana (Cook Strait). Ngati Rarua, Ngati Koata, and the resident Ngati Tama were mainly focused on their lands in eastern and western Te Tau Ihu. Ngati Toa were mainly based in the North Island. The many hapu of Te Atiawa appear to have been intent on living and using resources in coastal areas on both sides of the strait. There were tributary communities of Kurahaupo peoples living in the more coastal areas, and small, independent communities in the interior. The principles from which the rights of these various people were derived – a system of Maori customary law – was settled and relatively well known to Spain, McLean, Grey, and other Crown officials. Also, leaders and their kainga were known and settled by the time the company (and then the Crown) agents arrived. We did not accept, therefore, the Crown's argument that customary rights were either unsettled or so much in flux as to be undefinable. The situation continued to evolve on the ground, as was customary, but it was ascertainable upon due and timely inquiry.

**14.5 DID TE TAU IHU IWI HAVE CUSTOMARY RIGHTS IN THE NGAI TAHU TAKIWA?**

In chapter 3, we further considered the question of customary rights within the statutorily defined Ngai Tahu takiwa. In 1990, the Maori Appellate Court found that Ngai Tahu had sole rights of ownership in the Kaikoura and Arahura blocks when they were purchased by the Crown in 1859 and 1860. The northern boundaries of these blocks, at Parinui o Whiti (White Bluffs) on the east coast and Kahurangi Point on the west, became the northern boundary line of the Ngai Tahu takiwa, defined by legislation in the 1990s.

Te Tau Ihu iwi submitted that they also had customary rights in the Kaikoura and Arahura blocks, and thus in parts of the statutorily defined takiwa. They argued that Ngai Tahu's rights were not exclusive and claimed that the Crown's treatment of the interests of Te Tau Ihu iwi within the takiwa had breached the Treaty and its principles. Such breaches had resulted from the Crown's actions and omissions in the course of its purchases and its allocation of reserves in the nineteenth century, and in its negotiation and settlement of the Ngai Tahu claim in the late twentieth century. An important component within the submissions of Te Tau Ihu iwi was the impact that the Maori Appellate Court decision had on the Crown's treatment of their interests during the settlement process with Ngai Tahu.

To assess these claims, it was necessary for us to first establish whether Te Tau Ihu iwi did, in fact, have customary interests in the takiwa. In chapter 3, we outlined our view on this matter, prefacing our discussion with a caution on the difficulties of reconstructing traditional history. We noted that it is possible for different versions of the same event to be held within the traditions of one or several iwi, and we stressed that the emphasis on war and conquest in these traditions obscured the significance of peace-making and intermarriage in relations between iwi and in establishing and maintaining rights in lands and resources.

In our view, customary rights can be seen in terms of 'bundles' of rights. An iwi's rights were comprised of a bundle of elements, such as raupatu, occupation, and resource use, and were not dependent on one factor alone. Over time, the importance of different elements within the bundle could change, as could the size of the bundle held by an iwi.

The notion of fixed tribal boundaries was not customary and was introduced to Te Waipounamu during transactions undertaken by New Zealand Company and Crown officials. Maori thought in terms of places of significance, not of the lines connecting them, which the Crown often used for its purchase boundaries. Under Maori customary law, iwi and hapu had core territories, edged by zones of overlapping rights. Control over these buffer zones could be, and was, contested, but resource use by one side could also continue for long periods without apparent challenge from the other. Tribal boundaries were not necessarily exclusive.

We concluded that, at 1820, both Ngai Tahu and Rangitane had interests in land and resources between Parinui o Whiti and the Waiiau-toa and that neither could claim exclusive rights in this part of the takiwa. Both iwi held traditions associated with the region, could demonstrate whakapapa links to tupuna, and could recall significant battles that had taken

place there. In our view, ancestral associations must be respected as long as such memories are held. We specifically rejected the argument that Rangitane had no independent traditions concerning that area and that they had borrowed and misused those of Ngai Tahu.

The interests of Ngai Tahu and Rangitane were disrupted but not displaced by the Ngati Toa-led taua from the north in the 1820s and 1830s. We stressed that Ngai Tahu counter-attacks in the early 1830s included several on Rangitane kainga along the east coast from Waipapa (near the mouth of Waiiau-toa) northwards, indicating that Rangitane were still in occupation after their defeat at the hands of Ngai Toa and their allies. We acknowledged that Ngai Tahu's military retaliation demonstrated that their 'conquest' by Ngati Toa was far from complete, despite defeats at Kaiapohia and elsewhere. Although Ngai Tahu withdrew from the east coast and did not reoccupy the area around Waipapa until the 1850s, they strongly challenged the right of Ngati Toa to dispose of those lands. In any event, we do not think that ancestral rights could be sundered in the short time between the northern invasions and the coming of British rule in 1840. This conclusion applies equally to Rangitane and Ngai Tahu, even though the impact of those invasions was greater for Rangitane, whose core territory around the Wairau and the Sounds had been occupied.

Ngati Toa began consolidating their rights in the takiwa on the east coast, more particularly at Kaikoura, in the latter part of the 1830s with 'takawaenga' or peace-making marriages with Ngai Tahu. They were not particularly visible in the northern part of the east coast takiwa, but we need to remember that this was an area of seasonal resource use that was not necessarily permanently settled. Moreover, Ngati Toa preferred to live in the more fertile area of the Wairau Valley and around the whaling entrepots in the Sounds rather than establish kainga along the inhospitable coast south of Parinui o Whiti. In our view, neither iwi was able to establish unchallenged occupation, and the history of attack, counter-attack, and peace arrangements in the 1830s left neither side in ascendancy.

Ngati Toa failed to respond to the raids mounted by Ngai Tahu, but we were of the opinion that this was largely because of their engagements to the north, on both sides of Raukawa Moana. Their more general withdrawal from the region was not in fear of attacks from Ngai Tahu, who themselves had withdrawn to Kaiapoi. But, just as insufficient time had elapsed to extinguish the rights of Ngai Tahu – or those of Rangitane – so, too, had insufficient time passed to fully establish that Ngati Toa had abandoned this outer zone of their influence. There was a latent right available to Ngati Toa which the Crown foreclosed when it purchased their interests in the eastern side of the island as far as Kaiapoi in 1847.

Thus, we concluded that all three iwi – Ngati Toa and Rangitane, as well as Ngai Tahu – had legitimate overlapping customary rights in the area between Parinui o Whiti and Waiiau-toa, and these rights had not been completely lost by the time of that first Crown purchase within the takiwa in 1847. Though none of the three iwi was in occupation in any force as a community, all were probably using resources in the district. None could demonstrate exclusivity of interest.

We concluded also that Ngai Tahu could not demonstrate exclusive rights on the western side of the takiwa between Kawatiri (Buller) and Kahurangi Point (the northern boundary). A similar situation applied there as on the east coast. The northern part of the takiwa was inhospitable with few resources, and occupation there was migratory and seasonal. It was the pounamu at Arahura to the south and the knowledge held by the local people that were valued. For the tangata whenua, the remoteness of its hinterland provided a measure of safety in times of warfare.

Prior to 1820, Ngati Apa had established rights in the district, beginning with their raupatu against Ngati Tumatakokiri and intermarriage with them. How far south those rights extended and exactly when they began was disputed in the evidence presented to us. Neither Ngati Apa coming from the north nor Ngai Tahu coming from the south were particularly visible in this portion of the takiwa. The area was a borderland where the exercise of rights was intermittent and left little trace. Neither Ngai Tahu nor Ngati Apa could show exclusive control of the area between Kahurangi and Kawatiri in the period before occupational patterns were disturbed by the northern taua, nor could either group demonstrate an exclusive connection to the whakapapa associated with it.

Again, we consider that the raupatu and subsequent migrations of the 1820s and 1830s did not displace the customary rights of Ngai Tahu and Ngati Apa. There is no doubt that Ngati Apa's influence in western Te Tau Ihu was severely affected, but the iwi was not completely wiped out and some of its members later emerged in the West Coast districts. The consequences were far less severe for Poutini Ngai Tahu, although they had been obliged to share their kainga and resources for a time. The victors' control became far less certain after 1837, when one of their most senior rangatira, Te Puoho, was himself defeated and killed far to the south in Murihiku. Thereafter, the area between Mawhera and Kahurangi remained unoccupied, and exercise of rights a matter of insubstantial resource use. However, a small mixed community of Ngati Apa and Ngai Tahu (and some members of the northern tribes) was to resettle the Kawatiri area in the mid-1840s.

Supported by Ngati Tama and Te Atiawa, the Ngati Rarua rangatira Niho and Takerei had led the migration to the western side to its most southerly reach. The three iwi initiated their right by means of raupatu over Ngati Apa and Poutini Ngai Tahu, which they then developed through occupation (including settlement and resource use at Mawhera) up until the late 1830s. We place considerable significance on the high-ranking marriage that was undertaken with Poutini Ngai Tahu and the fact that Niho and Takerei protected the community at Mawhera from further taua. These rights were diminished following a withdrawal of many of them after the defeat of Puoho and Ngati Tama in 1837. Their claims were not entirely abandoned, however, being maintained by ongoing resource use and continued residence by individuals. Their right to occupy – or the freedom to return and take up that right – had not terminated by 1840.

When it set about purchasing the district, the Crown had to consider a claim by Ngati Toa, who had not been directly involved in the taua that had established the occupation of their northern allies in western Te Tau Ihu and on the West Coast. Nonetheless, Ngati Toa claimed that the mana of Te Rauparaha, and their leadership in the taua and subsequent heke to Te Wai Pounamu, also gave them rights in lands to the full extent of their strategic control. They maintained, in the context of Crown efforts to purchase land there in the 1850s, that their allies were obliged, on the West Coast as elsewhere, to acknowledge the 'overriding mana and authority of Ngati Toa'.<sup>4</sup>

Those allies – Te Atiawa, Ngati Tama, and Ngati Rarua – rejected such claims and with increasing vigour as time passed. Nor do we endorse Ngati Toa's argument of an 'overlordship'. 'Conquerors' had to live on the land or exercise other acts of 'ownership' to develop rights in it. Although a claim might ultimately trace back to raupatu, it was sustained occupation that gave recognised rights. While we agree that occupation need not be based on permanent residence to have effect (as was the case on the east coast) it did need to be of a more tangible character than that of a strategic control of the West Coast exercised from a stronghold in the North Island. This was a very small stick in the bundle indeed – a recognition of Te Rauparaha's mana and Ngati Toa's participation in the wider campaigns that had successfully established new homelands for the northern iwi. We have described this as a notional or potential right. That such a right existed was backed by evidence that Poutini Ngai Tahu rangatira Tuhuru had been brought to Te Rauparaha when he was at Rangitoto. While this was insufficient to establish that Te Rauparaha had a claim, it does indicate that the other northern rangatira might have respected it had he chosen to make one at the time. There was, however, little further opportunity for Ngati Toa to begin adding to the bundle, or to make any demand to participate in Niho's capture of the pounamu trade. They certainly evinced no interest in residing anywhere along the western side, but insufficient time had lapsed by 1840 to entirely negate this latent right.

Our overall conclusion was that Te Tau Ihu iwi had customary rights in the takiwa, which overlapped the acknowledged rights of Ngai Tahu. At 1840, Rangitane and Ngati Toa held customary interests in the east coast portion of the takiwa north of Waiiau-toa that had been included in the Kaikoura purchase. Ngati Apa, Ngati Rarua, Ngati Tama, and Te Atiawa held continuing customary rights in the West Coast portion, from Kawatiri northward, that had been included in the Arahura deed. We were of the view that Ngati Toa had a latent right in that area, but the opportunity was not developed and it remained notional only.

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4. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), p 50

**14.6 THE CROWN'S FAILURE TO CARRY OUT ITS TREATY DUTY: GENERIC ISSUES****14.6.1 Standards for Crown purchasing**

In chapters 4 to 6, we analysed the Crown's Treaty duty in terms of the principles of the Treaty in the circumstances of the time. We found that there was broad agreement in the period 1840 to 1846 that the correct Maori owners must be identified for consent and payment before the Crown could either confirm that a valid alienation had taken place (to the New Zealand Company or to private purchasers) or purchase land itself. In our reading of the evidence, the accepted standard for Crown purchasing up to 1846 was that there should be:

- ▶ a clearly delineated and relatively small block of land, which was sometimes defined by the walking of its boundaries;
- ▶ a prior investigation of the title to the land;
- ▶ identification of all right holders; and
- ▶ an agreement between them as to their relative distribution of rights or, in the event of a dispute, reference to a proposed register or Maori court.

The actions of Grey and McLean substantially departed from this standard after 1846, in serious breach of the principles of the Treaty and to the significant prejudice of those Te Tau Ihu iwi that lost land and resources as a result, without their proper and meaningful consent.

What was not entirely resolved by 1846, however, was whether the correct 'owners' and the nature of their rights should be determined by Maori law or by British law and policy. The so-called 'waste lands policy' was critical to the outcome of that debate. The correct answer, in Treaty terms, was known at the time and was articulated by Lord Stanley when he told the British Parliament:

I am not prepared to say that there may not be some districts wholly waste and uncultivated – there are such in the northern island – but they are few in number; but I know that a large portion of the district in question is distributed among various tribes, all of whom have as perfect a knowledge of the boundaries and limits of their possessions – boundaries and limits in some places natural, in others artificial – as satisfactory and well defined, as were, one hundred years ago, the bounds and marches of districts occupied, by great proprietors and their clans, in the Highlands of Scotlands [*sic*]. (hear, hear.) With respect to the greater portion of New Zealand, I assert that the limits and rights of tribes are known and decided upon by native laws. I am not prepared to say what number of acres in New Zealand are so possessed; but that portion which is not so claimed and possessed by the natives, is, by the act of sovereignty, vested in the crown. But that is a question on which native law and custom have to be consulted. That law and that custom are well understood among the natives of the islands. By them we have agreed to be bound, and by them we must abide. These laws, these customs, and the right arising from them, on the part of the Crown, we have

guaranteed when we accepted the sovereignty of the islands; and be the amount at stake, smaller or larger, so far as native title is proved, – be the land waste or occupied, barren or enjoyed, – these rights and titles the Crown of England is bound in honour to maintain, and the interpretation of the treaty of Waitangi, with regard to these rights is, that except in the case of the intelligent consent of the natives, the Crown has no right to take possession of land, and having no right to take possession of land itself, it has no right – and so long as I am a minister of the Crown, I shall not advise it to exercise the power – of making over to another party [ie, by Crown grant] that which it does not possess itself. (cheers).<sup>5</sup>

Lord Stanley agreed with the New Zealand Company that there might be unowned waste lands in the South Island but that this could be determined only by an inquiry into Maori customary law and right-holding on the spot. The Treaty guaranteed Maori possession of whatever they ‘owned’ according to their own law. The Secretary of State instructed the Governor to register all Maori land and to purchase land for the company’s requirements if necessary. In all such purchases, he was to:

bear in mind the importance of endeavouring to ascertain, so far as circumstances will permit, that the natives by whom, or on whose behalf, the sales are made, are actually the parties who have the right and titles to the land, and not merely parties pretending such rights and titles. It is, of course, important both for the Government and New Zealand Company that in each case the native title should be effectively extinguished.<sup>6</sup>

These, then, were standards by which Grey’s actions in the purchase of Te Tau Ihu land between 1847 and 1853 may be judged.

Maori customary law was guaranteed and protected by the Treaty. Instead of respecting that law or ascertaining Maori rights under it, Governor Grey and Donald McLean applied a virtual waste lands policy both to the blanket purchase of Maori land and to the amount of land that they permitted Maori to retain. Grey’s conduct of the Wairau and Waipounamu purchases was ultimately based on his belief that Maori resource-use rights and customary claims to uncultivated ‘waste’ land were invalid. He did not, as instructed, investigate those claims according to Maori custom and reach a considered and informed determination of that point. The application of a virtual waste lands policy to Maori customary rights during Crown purchasing and reserve-making was in serious breach of Treaty principles. Relevant aspects of the Wairau (1847) and Waipounamu (1853–56) purchases were, therefore, in serious breach of Treaty principles.

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5. Dr Donald Loveridge, “An Object of the First Importance”: Land Rights, Land Claims, and Colonization in New Zealand, 1839–1852, report commissioned by the Crown Law Office, 2004 (Wai 863 RO1, doc A81), p 264 fn 645. This speech was published in the Auckland newspaper the *New Zealander* on 13 December 1845.

6. Secretary of State to Governor, 15 August 1845 (Michael Macky, ‘Crown Purchases in Te Tau Ihu between 1847 and 1856’, report commissioned by the Crown Law Office, 2003 (doc s2), pp 24–25)

Under the Treaty of Waitangi and by the standards of the time, any purchase of Maori land, or confirmation of private purchase, required the Crown to ascertain:

- ▶ the correct right holders according to Maori custom;
- ▶ the rights that they wished to convey to the Crown;
- ▶ the rights that they wished to retain; and
- ▶ the rights that they needed to retain to ensure, in Normanby's words, their own comfort and subsistence.

The Crown also had to check that the decision of what to convey and what to retain had been made by, to paraphrase Normanby, the appropriate customary decision makers, according to their own established usages (tino rangatiratanga).

These were the standards that the Treaty guaranteed and that British policy in the 1840s was officially committed to meeting. In chapter 6, we noted that the Crown failed on all these counts in Te Tau Ihu. First, it admitted that it did not properly inquire into the identity of the correct right holders, or the nature of their customary rights, when it confirmed the company transactions (1844) and made its own major purchases (1847–56). Secondly, we found that there were mechanisms available to the Crown for it to have recognised, respected, and protected the tino rangatiratanga of Te Tau Ihu Maori in transactions for their land. At the least, the Crown possessed the resources and skill sets for it to have investigated customary title by commissions of inquiry or by detailed, official, on-the-ground inquiries, but it failed to do so. Also, suggestions for a Maori court, which could have been used to resolve disputes and have Maori decide their own entitlements, were not carried out.

The best way to have dealt with matters, however, was for Te Tau Ihu Maori to have exercised their tino rangatiratanga in partnership with the Crown, deciding their own entitlements through their own customary mechanisms with officials in attendance (as happened for the Pakawau purchase in 1852). Such empowerment carried the risk, however, that Maori might say 'No', as they did at that hui to the proposed purchase of the West Coast. This risk was unacceptable to Grey and McLean, who thereafter deliberately undermined or circumvented tino rangatiratanga in the Waipounamu purchase, in order to obtain virtually the whole of Te Tau Ihu for the Crown.

In sum, we found that the Crown, in the circumstances of the time, considered the prior investigation of Maori customary rights, as determined by their own customary law, to be a vital prerequisite to its acceptance of any decision to sell. Yet, it failed to carry out such investigations in an adequate manner, if at all. Its failure to abide by its own standards, more particularly during the transactions of 1844 to 1856, was in serious breach of the Treaty principles of partnership, autonomy, reciprocity, and active protection, and its guarantee of Maori tino rangatiratanga.

In particular, the Crown failed actively to protect the interests of Maori by ensuring that

their entitlements were fairly identified by themselves, according to their own laws, before commencing to buy them. It failed to act in partnership with Maori or to respect their autonomy, when it failed to establish official mechanisms, the decisions of which would be binding on both sides, for the negotiation of purchases and the resolution of disputes. It failed to respect and provide for tino rangatiratanga, not permitting Maori to debate and decide their own entitlements through their own institutions, before it obtained deeds and made payments. That it could have done all of these things is demonstrated above all by the 1852 Pakawau hui at Nelson, and by proposals for advance title registration or dispute resolution by Maori-controlled courts. Its refusal to meet the bare minimum of its obligations under the Treaty enabled the Crown to obtain almost the entire land and resource base of Te Tau Ihu, in breach of the Treaty and to the serious prejudice of the eight Te Tau Ihu iwi.

**14.6.2 Was the Crown's failure mitigated if it identified right holders after accepting a decision to sell, or even by the end of a later transaction?**

It was clear from our discussion in chapter 5 that, by 1847, the Crown had accepted that it was bound by the Treaty, and by the Maori law governing customary rights in property. It had also often articulated the view that it would neither buy Maori land nor confirm the extinction of Maori title by Crown grant to others, unless there was proof that the correct right holders had been identified and paid. Further, it was the proposed practice of Administrator Shortland and Governors FitzRoy and Grey that the correct Maori right holders must be identified before either purchasing land or (in the case of private purchasers) confirming a purchase. We noted in chapter 6 the proposed purchase processes of Shortland and Clarke, the registration instructions of Russell and Stanley, the purchase instructions of Normanby and Stanley, and the proposed confirmation processes of FitzRoy and Grey. All required the identification of Maori title prior to the Crown's acceptance of a decision to sell or, in the case of confirmations, its acceptance that a sale had taken place and a Crown grant to the purchaser could ensue.

The Crown and claimants agreed that this did not happen in Te Tau Ihu. The Crown denied it at first but eventually conceded the point, particularly on the evidence of Dr Ballara. The evidence of its own witnesses, Dr Ashley Gould and Michael Macky, also confirmed the point. The Crown argued, however, that its failure was mitigated by identifying and paying all right holders by the end of the final (Waipounamu) purchase.

We did not accept this submission. The Crown, in Lord Stanley's words, had no right to grant lands that it did not itself possess. The idea that its transactions could somehow be validly or fairly completed after Maori land had been granted away to settlers, or after it was judged as irrevocably sold, was incompatible with either the Treaty or British principles of justice. We accepted Ngati Tama's submission that 'It is well settled in both Maori

customary law and English law that a person cannot convey to another that which is not theirs.<sup>7</sup> Anything less than the free and informed consent of Maori to the alienation of their land, given before the Crown claimed to own it or grant it to others, was in violation of articles 2 and 3 of the Treaty, the rights of all British subjects, and the tino rangatiratanga of Maori tribes. Compensation of ‘after-claimants’, after their land was counted as sold and with a non-negotiable sum, was in obvious violation of the Treaty principles of reciprocity (inherent in pre-emption), partnership, and active protection.

#### **14.7 THE NEW ZEALAND COMPANY AND THE SPAIN COMMISSION**

In chapter 4, we assessed the claims of Te Tau Ihu iwi that, to their lasting prejudice, the Spain commission incorrectly confirmed and validated the New Zealand Company’s pretended purchase of land. The Crown argued that it ‘consistently proceeded on the basis that there must be a valid extinguishment of Maori claims before it could legitimately acquire land or confer, or recognise the title of Europeans seeking land.’<sup>8</sup> It also admitted that ‘the Crown did not carry out adequate inquiries into customary rights in Te Tau Ihu even though there was expert advice on these matters available.’<sup>9</sup> These two concessions were of great importance to our consideration of the Land Claims Commission. In the Crown’s view, Spain and other officials ‘considered themselves bound by the Treaty and the British Government’s instructions to protect Maori interests by a full investigation,’<sup>10</sup> but these standards, Crown counsel conceded, were not met. Spain acted with a ‘degree of ruthless pragmatism that saw the Treaty either sidelined or made secondary to the needs of the settlers and the New Zealand Company.’<sup>11</sup>

##### **14.7.1 The Crown’s concessions and agreements between the parties**

Overall, the claimants and the Crown agreed that Spain’s inquiry into customary rights and Maori understanding of – and agreement to – the New Zealand Company’s transaction was totally inadequate, and that this had prejudicial effects for Te Tau Ihu Maori. We accepted this substantive agreement on the facts. Although the Crown did not concede specific Treaty breaches, we made findings as to those (summarised below).

Further, we accepted the parties’ agreement on the following details:

- ▶ In terms of informal inquiries, Meurant visited only some of the districts in Tasman Bay and went nowhere in Golden Bay, and Clarke did not have time to inquire informally.

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7. Counsel for Ngati Tama, closing submissions, [2004] (doc T11), p 46

8. Crown counsel, submissions concerning generic issues, 20 September 2002 (paper 2.371), p 8

9. Crown counsel, opening submissions, 14 November 2003 (paper 2.748), p 12

10. Crown counsel, submissions concerning generic issues, p 18

11. Crown counsel, closing submissions, 19 February 2004 (doc T16), p 2

- ▶ In terms of the formal investigation, Spain heard only one Maori witness, though there were many others present who could and should have been heard. And even the evidence of that one Maori witness, Te Iti, was not given its due weight, Spain dismissing it on the basis of an unsubstantiated accusation that it was untruthful. That accusation was made by the company agent and the protector, who did not call any evidence to corroborate it. Tasman Bay tribes, therefore, did not have a proper opportunity to put their evidence as to their understanding of what, if anything, had been agreed with Captain Wakefield, what rights, if any, Ngati Toa could or did alienate, whose rights had been affected, and who had the authority to decide such matters.
- ▶ The communities of Golden Bay had no opportunity to be heard at all and definitely did not consent in advance to an arbitrated settlement or to the amount of compensation determined for them to receive.
- ▶ The explanation for the inadequate inquiry was political; by the time it reached Nelson, the commission was determined to bring about a quick settlement, rather than to inquire and report fully on the validity of the company's transactions.
- ▶ At the time, the Crown should have inquired into and established how the customary rights of Maori related to their share of the Nelson and Motueka tenths. To have left it for 50 years was wrong and unfair.

The Crown made other concessions. First, it conceded that Spain and Clarke could (and should) have inquired into the rights of the Kurahaupo tribes, a point not necessarily accepted by the northern allies. Secondly, the Crown thought it 'probable' that Tasman Bay Maori were given no choice but to agree to arbitration and compensation, and even to the amount of the compensation, but it considered the evidence 'inconclusive'. Similarly, it was 'possible' that right holders were left out who neither consented nor were compensated. The claimants, on the other hand, considered the evidential foundation strong enough to take these conclusions further. They believed that the Tribunal could come to a definite view that Tasman Bay Maori did not consent to a switch from investigation to arbitration and compensation, and that the 'arbitration' was in fact a coercive process in which they were given no choice but to accept deeds of release and a dictated amount of compensation. Having reviewed the evidence, we accepted the claimants' submissions to that effect.

#### **14.7.2 The Crown's Treaty duty**

In chapter 4, we found that the Crown had a Treaty duty to ensure that the New Zealand Company had made a valid purchase of land (and from the correct 'vendors') before confirming its title. The Crown thought so too, both then and now. In its submissions in our inquiry, the Crown relied on Normanby's instruction that there be an investigation, the Colonial Office's insistence to the company that it could not have title without one, and Spain's own view that to award title without first investigating and confirming its validity

would have been in breach of the Treaty. We accepted this submission. These were the standards against which the Crown's actions must be judged.

The Crown conceded that it did not meet these standards but suggested that the switch from inquiry to arbitration was not necessarily in breach of the Treaty. Much depended on whether Maori supported that change and participated in (rather than were mere objects of) the arbitration, and, ultimately, whether they consented to the final arrangements. Much depended also on the objective of the switch. Was it carried out with a view to properly balancing the Crown's obligations to its Maori and settler subjects, and its commitments in the November 1840 agreement and the Treaty?

#### **14.7.3 Hobson's breach of the Treaty**

Prior to Commissioner Spain's investigation, Governor Hobson permitted the New Zealand Company to select land and form settlements in the northern South Island, in the mistaken view that the November agreement prevented him from interfering. The Crown's historical evidence was that Hobson's view was incorrect. In fact, there was nothing in the November agreement that guaranteed the company title to any lands within Te Tau Ihu, nor did the agreement impose any obligation upon Spain to find in favour of the company's claims within the district. Further, Chief Protector Clarke had advised Hobson that the company's claims were dubious. Hobson could (and should) have either waived pre-emption so that the company could acquire land from resident Te Tau Ihu right holders or arranged to obtain that land by Crown purchase. He did neither, instead permitting Captain Wakefield's gift and settlement arrangements, later erroneously interpreted as an extinction of Maori title by Spain.

#### **14.7.4 The relationship between the Crown and the New Zealand Company**

A significant matter for us to resolve was the nature of the relationship between the Crown and the New Zealand Company. Counsel for Ngati Koata in particular submitted to us that the company was an agent of the Crown and that its actions should therefore be deemed those of the Crown and assessed in accordance with Treaty principles. The evidence of both claimant and Crown historians pointed to a close relationship between Crown and company officials, albeit one subject to significant fluctuations depending on changes in government in Britain. To properly address this question, however, we needed to apply the control test, considering the extent of control over the activities of the company that the Crown was legally entitled to exercise. We concluded that neither the November agreement nor the company's charter of incorporation could be considered as giving the Crown *de jure* control over the company's affairs. The sole exception to this was with respect to the creation and administration of reserves within company settlements, which, under the terms

of the November agreement, the Crown was to assume full control of and which could also be seen as a particular governmental responsibility under the older functions test. Thus, the New Zealand Company was an agent of the Crown when it came to the creation and administration of reserves.

#### 14.7.5 Spain's report and award were in breach of the Treaty

Despite carrying out what the Crown admitted was an inadequate inquiry, Spain recommended an award of 151,000 acres to the New Zealand Company on the basis that:

- ▶ The 1839 Kapiti deed had transferred land and extinguished Ngati Toa's rights.
- ▶ Captain Wakefield's 1841 gifts were in fact understood by Maori to have been an absolute purchase of exclusive title to that land.
- ▶ Commissioner Spain's report was demonstrably wrong as to the facts in both instances. Nonetheless, his findings (and not the 'gratuitous' deeds and payments of 1844) formed the basis for the Crown's 1845 and 1848 grants of land to the company. This outcome was in breach of the Treaty. Neither the Kapiti deed nor the 1841 gift-giving was a valid absolute alienation of Maori customary rights. Under British law, the Kapiti deed was so faulty as to be invalid, and the Treaty's grant of pre-emption meant that only the Crown could buy land after 1840. Wakefield's 1841 gifts had no legal effect as payments for land. Under Maori law, the claimants' evidence was that they had made a customary tuku of land to the company, some of which was to be shared, other pieces of which were to be exclusive, but all of which remained under a layer of Maori rights and authority. We found from the historical evidence that these facts were discoverable at the time, had Spain inquired properly. The Crown grants, therefore, actively extinguished Maori customary title by granting it to others, without obtaining the consent of, or proper compensating, Te Tau Ihu rights holders. This violated the tino rangatiratanga of Te Tau Ihu Maori, expropriated their property, and breached the Treaty principles of partnership, reciprocity, equity, and active protection. This Treaty breach prejudiced all iwi with valid customary claims in the company districts.

The only way in which this Treaty breach might have been prevented or ameliorated was if the Crown had treated properly with Te Tau Ihu Maori for their surviving customary rights in 1844, during Spain's 'arbitration' process. We now turn to this process.

#### 14.7.6 Tino rangatiratanga and the arbitration process

As we noted in chapter 6, the 1852 Nelson hui about the Pakawau purchase was a good example of how the Crown could act with respect for tino rangatiratanga, by ensuring that all potential right holders had been visited and knew what the Crown wanted, followed by an inter-tribal hui for them to discuss, agree, and arrange the matter for themselves.

We therefore posed the question: Was this standard met at the Nelson ‘arbitration’ hui of August 1844?

In our view, there was nothing wrong in principle with a settlement ‘out of court’, provided both parties agreed to follow that procedure and fully participated in the negotiation or were represented by advisers of their choosing. In the case of Spain’s 1844 arbitration, the Crown conceded:

it cannot be said with confidence that there is evidence of a reasonable degree of Maori engagement with and consent over the shift from inquiry to arbitration. There may have been, but it is also probable that Maori believed they had little or no choice in the matter. The evidence one way or the other is inconclusive. For the same reason it is therefore possible that some groups of Maori were unwilling to alienate their land, and there is a possibility that the Crown did not consult, negotiate and compensate all Maori with rights in the land affected.<sup>12</sup>

We considered the evidence to be firmer than admitted by the Crown. Similar to the circumstances in Wellington, we found that the Crown acted in breach of Treaty principles in that it:

- ▶ failed adequately to consult with Maori having customary interests in Tasman Bay and Golden Bay before deciding to switch from an inquiry into the validity of the company’s transactions to a form of arbitration;
- ▶ proceeded to implement the arbitration process without the informed consent of such Maori;
- ▶ placed undue pressure on Maori at Tasman and Golden Bays to sign the deeds of release, under the non-negotiable terms and prices offered them;
- ▶ imposed a sum of compensation that was inadequate consideration for their interests in the land awarded to the New Zealand Company and represented an expropriation of their interests in favour of the company;
- ▶ failed to ensure that a fair process, acceptable to Maori, would be followed by the arbitrator, in that he reserved the right to impose conditions and settle compensation without the willing consent of Maori, which was required by article 2 of the Treaty;
- ▶ failed to respect, protect, and provide for tino rangatiratanga when it imposed an amount of compensation, and it restricted the decision-making of the inter-tribal hui to a single point, that being the proportionate distribution of the set compensation;
- ▶ failed to permit even that exercise of tino rangatiratanga to Golden Bay hapu and leaders, whose refusal to accept or to divide up the compensation was followed by its being awarded anyway, and their land awarded to the company; and

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12. Crown counsel, closing submissions, pp 49–50

- ▶ accepted Spain's award as being a legitimate basis for a Crown grant to the company, even though that award was based on an inadequate inquiry and its decision was wrong on the facts.

As a consequence, all such Maori were prejudicially affected by the arbitration proceedings and award, with the expropriation of their title to 151,000 acres of land, without their meaningful consent, and to their social, cultural, and economic harm.

#### **14.7.7 Were customary rights nonetheless extinguished by the 1844 deeds of release?**

Having reviewed the circumstances of the 1844 negotiations, we were not satisfied that the deeds of release – explained as a gratuitous payment rather than an extinguishment of rights – can be shown to have changed the customary aspects of the tuku, to the certain knowledge of the Maori signatories. As in 1841, there was an avoidable failure to secure a meeting of minds. This time, the failure was mainly due to Spain, and it was soon evident to the Government in the 1850s. In the Maori view, there remained unalienated customary rights in the lands adjudicated by Spain and awarded to the New Zealand Company. In the Crown's view, all rights had been extinguished by purchase (as found by Spain), and the land was then legitimately granted to settlers (minus reserves). As a result of Spain's failure to inquire properly and to find the truth, and his subsequent explanation of the 1844 payments, Maori and the Crown were still 'talking past each other' by the 1850s. By then, however, all unalienated customary rights had, at law, been expropriated and granted to others by Crown grant in 1845 and 1848. The issuing of these Crown grants, based on the faulty Spain inquiry and award, compounded the Treaty breaches enumerated above. Moreover, although the company was permitted to reject the 1845 Crown grant out of concern for the extent of reserves set aside, the iwi of Te Tau Ihu were not similarly allowed to reject the faulty Spain award or the compensation payments subsequently imposed upon them.

#### **14.7.8 Who was affected by the Treaty breaches?**

All iwi with customary rights in Tasman and Golden Bays were prejudiced by these Treaty breaches. Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata were clearly among that number, and (at the time) had the leading authority in those districts.

Ngati Toa were also affected. They had customary rights in western Te Tau Ihu. The Kapiti deed marked an intention on the part of Te Rauparaha and other Ngati Toa leaders to make a tuku of western Te Tau Ihu land to the New Zealand Company, but there was no valid alienation of all of Ngati Toa's rights, nor even agreement on which parts of Te Tau Ihu were intended for settlement. There was no justification whatsoever for equating 'Taitapu' with any part of the Golden Bay land awarded to the company, and justification only for equating

‘Wakatu’ with that part of Tasman Bay accepted under that appellation by the resident iwi. Spain wrongly found otherwise, as we noted in chapter 4.

The Kurahaupo tribes also had surviving customary rights in Tasman and Golden Bays, and were wrongly overlooked by Spain, Clarke, Meurant, and the Wakefields, as the Crown conceded. These iwi also, therefore, were affected by the Treaty breaches. Further, the Crown’s historian pointed to the fact that Spain’s award was recommendatory and that Governor FitzRoy was aware of the Kurahaupo claim and could have intervened in Te Tau Ihu on behalf of the defeated peoples, as he had in Taranaki. We agreed, and we found the Crown to be in breach of the Treaty for this act of omission, compounding the earlier breaches with regard to the Kurahaupo iwi.

#### **14.7.9 Relative interests in the Spain award**

We considered that in 1844, Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata had the strongest customary authority in the lands awarded to the New Zealand Company. The rights of the first three tribes were based on take raupatu, followed by itinerant resource use, residence, cultivation, and the beginnings of intermarriage with the defeated peoples and the burial of placenta and the dead in the land. The rights of Ngati Koata were derived from take tuku, itinerant resource use, occasional residence in the company lands, intermarriage, and the burial of the placenta and the dead in the land.

The Kurahaupo tribes had surviving rights despite their defeat, and the potential for them to recover and strengthen with every year. Their leader, Tutepourangi, had made a tuku to Ngati Koata that was still live at the time and was a source of relationship and rights for both. It was not clear how far they were still in occupation, especially in Golden Bay. According to the evidence of Meihana Kereopa, Kurahaupo peoples were still in occupation of part of Tasman Bay until after the Spain award (as a result of which, it appeared, they had to leave the district). Ngati Apa families were scattered around, some still in ‘slavery’, despite the Treaty promise that they had the rights of British subjects. Their right to continue peacefully recovering from the conquest was, as with the Ngati Toa right to take up ahi kaa, foreclosed by the Spain decision of 1844 and the Crown grants of 1845 and 1848.

In 1844, Ngati Toa, as described in chapter 2, still had a latent right to visit for resource use or to take up residence and cultivation (which together or severally make up ahi kaa). The evidence was that, had they chosen to take up this latent right in the 1840s, their former allies in western Te Tau Ihu, especially their close relatives among Ngati Rarua and Ngati Koata, would likely have accommodated them with a tuku. There would have been little choice, given the leading role of Te Rauparaha in the raupatu (even if not personally involved in the west) and the way those tribes considered it tika to accommodate other conquest chiefs who came to settle after the first wave. However, without taking up this

latent right, Ngati Toa of the 1840s were too far away from western Te Tau Ihu to maintain any kind of authority over their relations or allies, nor could they claim primary or leading rights in the land.

#### **14.8 THE WAIRAU CONFLICT**

We saw in chapter 4 that the New Zealand Company's determination to proceed with surveys and the settlement of lands it claimed prior to receiving any legal title was largely condoned by the Crown. Although this caused few problems at Nelson itself, conflict ensued at Motupipi (near Takaka) in 1842, when local Maori sought to prevent the extraction of resources from lands which they had never surrendered. In the Wairau district, the company's unauthorised surveys, along with Spain's refusal to investigate title to the area despite repeated requests from Ngati Toa rangatira for him to do so, resulted in the tragic loss of many Maori and Pakeha lives at Tuamarina in June 1843. We found that Governor FitzRoy's response to the conflict was consistent with the Crown's Treaty obligations. His inquiry concluded that, although Ngati Toa had been wrong to kill prisoners, primary blame for the affair sat squarely with the company and its supporters. Nevertheless, the Crown's earlier failure actively to discourage the company from surveying lands whose ownership had yet to be inquired into was also a crucial factor behind the Wairau conflict. Moreover, FitzRoy's successor, George Grey, would later seek to blame Ngati Toa for causing the conflict as part of his efforts to secure utu in the form of land for those slain at Tuamarina.

#### **14.9 THE WAIRAU PURCHASE**

One of the most enduring of the claimants' grievances was Governor Grey's blanket purchase of the enormous Wairau block in 1847, followed by his grant of millions of acres to the New Zealand Company. There was broad agreement between the claimants and the Crown on many of the historical facts. The Crown made some important concessions, accepting criticism from various witnesses (including its own historian), but making only two concessions of Treaty breach: first, that Grey's detention of Te Rauparaha without trial was in breach of the Treaty and, secondly, that Grey's purchases were carried out with a ruthless pragmatism that sidelined Treaty promises and, in doing so, subordinated the interests of Maori to those of the settlers. Although the Crown did not specify the Treaty principles concerned, this was clearly a breach of the principles of equity, partnership, and active protection.

**14.9.1 The Crown's concessions**

The Crown conceded that:

- ▶ its indefinite detention of Te Rauparaha without trial was a Treaty breach and it used his detention to apply 'moral pressure on Ngati Toa chiefs to agree to a cession of land'<sup>13</sup>;
- ▶ Surveyor-General Ligar's investigation identified 13 principal 'owners' of the Wairau, along with many other claimants, but Grey ignored Ligar's report and purchased the Wairau from only three of the principal 'owners'; and
- ▶ payment may not have been distributed widely enough and Rangitane certainly were not paid.

The Crown also criticised Ligar's inquiry as inadequate (even if the Governor had taken any notice of it) because it failed to explain:

- ▶ the overlapping or relative interests of Ngati Toa, Ngati Rarua, and Rangitane;
- ▶ what authority the Kurahaupo rangatira Ihaia Kaikoura had over the land as an accepted leader of the Port Underwood community;
- ▶ why Pukekohatu was identified as Ngati Toa; and
- ▶ whether the Rangitane 'fugitives' living independently in the interior had rights.

It also failed to identify the 'many who have claims'.<sup>14</sup>

The Crown concluded that the Wairau purchase was 'not without its controversies such as to whether all right-holders were identified, whether consideration was distributed widely, delays in surveying and the coercive context associated with the Ngati Toa chiefs'.<sup>15</sup> Counsel suggested, however, that the 'fair' purchase price of £3000, the Wairau residents' desire for settlers, and the setting aside of a large and sufficient reserve for all the residents were factors in mitigation of the Government's actions. The Crown did not, therefore, draw a conclusion that the admitted 'controversies' were in breach of the Treaty.

**14.9.2 The abduction of Te Rauparaha**

Although the Crown accepted that the detention without trial of Te Rauparaha for nearly 18 months was contrary to Treaty principles, it was also put to us that there were pressing and valid military grounds behind his initial seizure. We accepted that the decision to apprehend the chief was based partly on military concerns, but we also noted that the falsity of Grey's suspicions that Te Rauparaha had been 'treacherously' aiding Te Rangihaeata's supposed 'rebellion' was fully apparent from Grey's failure to ever press charges for want of evidence. Compliance with the Treaty and its principles required the Crown to be fully satisfied that

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13. Crown counsel, closing submissions, p 101

14. Ibid, pp 103–104

15. Ibid, p 104

there was a strong prima facie case to answer before taking such a drastic step as to seize Ngati Toa's leading rangatira under the cloak of martial law. Moreover, Te Rauparaha was held long after any immediate military fears had eased. Ultimately, we concluded that the three young Ngati Toa chiefs who signed the Wairau purchase deed were more or less blackmailed into doing so as the price of Te Rauparaha's freedom. Both Te Rauparaha's seizure and his ongoing detention were in serious breach of the Treaty and its principles.

#### **14.9.3 Did the Crown carry out an adequate inquiry into customary rights before or during Grey's negotiations to purchase the Wairau?**

We accepted the claimants' evidence that customary right-holding was decided according to a system of law common to all districts (though with regional variations) and that sufficient Maori and settler expertise was available for the Government to have inquired adequately as to customary law and those who held rights under it. Such rights continued to change and evolve according to custom during the 1840s. This did not mean that things were in 'flux' or impossible to settle upon due inquiry or by the exercise of tino rangatiratanga through inter-tribal hui and other customary decision-making mechanisms. Nor did infrastructural limits prevent the Government from carrying out inquiries, given the fact that both the Spain and Ligar inquiries actually happened.

Of the two, Grey chose to rely on Spain's report, even though the commissioner had not actually investigated the Wairau, other than questioning Ngati Toa chiefs in 1843 on whether or not a 'sale' had taken place. Despite the absence of any investigation into customary rights, Spain concluded that the Wairau was in the 'bona fide possession' of Ngati Toa alone. Rangitane did not meet his criteria for customary rights, as he believed them all to be fugitives and not in occupation (which was demonstrably untrue). He made no mention of Ngati Rarua, who were also in occupation at the time. Ligar, on the other hand, visited parts of the district (on the Government's instructions) and identified the presence of Rangitane in occupation with Ngati Toa, the rangatiratanga of Ihaia Kaikoura, the ascription of primary authority over a sale to 13 chiefs, and the existence of 'many' other unspecified claimants.

The claimants and the Crown agreed on two fundamental criticisms of Ligar's report. First, they argued that it was incomplete and faulty – the 'many' unidentified right holders remained that way and tribal identities were not properly ascertained and explored. Secondly, the Government took no notice of the report in any case. Both criticisms were justified in our view. The former problem might have been overcome if the Government had respected tino rangatiratanga and ensured that right holders were properly informed of the planned purchase and had had an opportunity to assemble, debate it, and reach a consensus on whether it should go ahead. Instead, Grey forced through a purchase in the North

Island from just three of the 13 principal right holders and in a manner about which Crown counsel used the words ‘pressure’ and ‘coercive.’<sup>16</sup> All three of these chiefs were Ngati Toa.

#### **14.9.4 Treaty breaches in the Wairau purchase: Ngati Toa Rangatira**

The inquiries that took place were clearly inadequate in the circumstances, but that was only the beginning of the problem. As we noted, Grey ignored Ligar’s findings, such as they were, in favour of purchasing from Rawiri Puaha, Tamihana Te Rauparaha, and Matene Te Whiwhi. He did so in order to secure certain military, strategic, and political objectives, as we outlined in chapter 5. The Governor had already decided to buy from those three chiefs, even before the Ligar inquiry took place.

Grey’s actions knowingly violated the rights both of other senior leaders of Ngati Toa and of the tribe as a whole. Moreover, the three Ngati Toa chiefs who signed the deed were subject to coercive pressure that, in our view, amounted to duress. The Wairau purchase, as conducted by Grey, was an absolute and deliberate breach of article 2 of the Treaty, and of the Treaty principles of reciprocity, partnership, active protection, and equal treatment. Had the Crown had regard to its partnership with Maori, and its obligations under article 2, it would have given effect to tino rangatiratanga by convening a public hui at or near the district under negotiation (as it did for Pakawau). It would have ensured that the tribe or tribes had a chance to consider the Crown’s offer and come to a deliberate and informed decision by means of their own customary decision-making mechanisms. It would have ensured that the 13 principal leaders, as identified by its own inquiry, were present or consented to the transaction (or both). Above all, it would have given all legitimate right holders the opportunity for a genuine and informed choice. The Crown’s purchase of the Wairau from Ngati Toa failed to meet a single one of its Treaty obligations to that tribe, and was in very serious breach of Treaty principles.

#### **14.9.5 Treaty breaches in the Wairau purchase: Ngati Rarua**

In chapter 5, we accepted the submission of counsel for Ngati Rarua that the Ligar report put Grey on notice that the consent of 13 leading chiefs (including Pukekohatu of Ngati Rarua) was required and that there were ‘many’ other right holders yet to be identified. As with the wider community of Ngati Toa right holders and leaders, the Ngati Rarua people were entitled to participate in the decision-making, and to give a free and informed consent (or refusal) to the purchase. We found that the Crown knowingly and deliberately purchased the Wairau without the consent of its resident right holders, including Ngati Rarua, in serious breach of article 2 of the Treaty. This was a deliberate suppression of their

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16. Crown counsel, closing submissions, pp 101, 104

tino rangatiratanga and was in violation of the principles of reciprocity, partnership, active protection, and equal treatment.

#### **14.9.6 Treaty breaches in the Wairau purchase: Rangitane**

Rangitane clearly had customary rights in the district at the time of the Wairau purchase. Following the signing of the 1847 deed and the beginning of settler intrusion on the ground, Rangitane (and other residents) asserted their right to have been consulted and paid, and protested at being excluded. The Crown had already granted their land to others, and it ignored or actively sought to suppress their protests. The tribes residing in the Wairau appear to have worked together in the late 1840s and early 1850s to protest the sale of their land without their consent (and without them being paid).

We found that a layer of legitimate Rangitane rights had survived their defeat, although those rights were no longer exclusive. The fact that Rangitane, in common with others at the Wairau, looked to Ngati Toa chiefs (especially Te Kanae and Puaha) for leadership at this time did not change the existence of their rights. Those customary rights were guaranteed and protected by the Treaty. The Governor's predetermined decision to buy the Wairau from three select Ngati Toa chiefs meant that Ligar's failure to properly examine and identify Rangitane's claim was immaterial. The Crown's purchase of their land, without their participation or consent, was in serious breach of article 2 of the Treaty and of its principles. This breach was compounded by the Crown's failure to investigate their post-sale protest fairly or to uncover and satisfy their undoubted rights at that point. Rather, the Crown tried to enforce the sale by requesting Ngati Toa to remove the protestors.

#### **14.9.7 The validity of the Wairau deed**

The Wairau transaction initiated a new land purchasing policy whereby the Crown 'purchased' all the rights of a particular iwi over a large and vaguely defined area. We found that the Wairau deed did not in various respects measure up to the standard required for the Crown to make a valid purchase under the Treaty. The deed itself contained no description or definition of an inland boundary, while the boundaries of the reserve were far from clear, and the location of 'Kaiapoi' was later unilaterally shifted. In our view, it was incumbent upon the Crown, in purchasing Maori land under the Treaty, to spell out clearly and unambiguously the boundaries of the land involved. The boundaries needed to be clearly marked out on a map or plan in discussion with the vendors and walked in their company. Where feasible, boundaries had to have been surveyed prior to purchase. Just as importantly, the proposed purchase needed to be the subject of detailed discussion at hui to give all potential claimants a full opportunity to argue the merits of their claims. None of these things happened with the Wairau purchase. It was instead a deal done in Wellington behind closed

doors with three less-than-representative vendors, who were themselves subjected to coercive pressure to agree to the deed. These Crown actions were in direct breach of article 2 of the Treaty, which provided for the alienation of '*such lands* as the proprietors thereof may be disposed to alienate' (emphasis added).

**14.9.8 Treaty breaches in the Wairau purchase: the failure to ensure that all customary right holders shared in the payment and the inadequacy of the price paid**

Ngati Rarua, Rangitane, and the majority of Ngati Toa leaders and right holders were deprived of their tino rangatiratanga when they were not allowed any say in whether the Wairau would be sold. The Crown purchased the district from just three chiefs and then enforced that purchase on resident protestors. Was this action of the Crown in any way mitigated by ensuring that all right holders were at least paid, even if they were not consulted and had not consented?

From the evidence available to us, the Crown was aware that the three signatories were not distributing the money to other right holders or were at least accused of not doing so. Servantes investigated the complaints and recommended that further instalment payments be supervised, so that the Government could satisfy itself that the money was properly distributed. However, this recommendation does not appear to have been implemented. We found that the Crown had a responsibility to try to ensure that land purchase money handed over to a select few chiefs was equitably distributed to right holders and, where possible, invested in the productive development of land reserved to them. After all, this was what Grey promised would result from the instalment payment system that he initiated with the Wairau purchase, but he seems to have done nothing about it once he had got the block. Instead, the Crown failed to ensure that the instalment payments were properly distributed to right holders, Ngati Toa or others. This failure was in breach of the principles of active protection and equal treatment.

As a result, the great majority of Maori right holders were not consulted about the purchase, did not consent to it, were never paid as part of it, and were deprived of their tino rangatiratanga. Taken together, these Crown actions were in very serious breach of the Treaty of Waitangi and its principles, and resulted in significant prejudice to Maori.

We also found that the price paid in the Wairau transaction, £3000 in five annual instalments of £600, was inadequate and that the Crown acted contrary to Treaty principles in deliberately insisting on such a small sum. Although the relatively large reserve set aside was consistent with contemporary arguments that the 'real payment' would be reaped from the rising value of the lands retained by Maori as settlement increased around them, that justification for a low monetary payment held good only so long as those other lands were able

to be retained. Yet, the 117,428-acre Wairau reserve was within less than a decade itself purchased by the Crown as part of the Waipounamu purchase. Any 'real payment' received was thus little more than fleeting, and we therefore found the price paid as part of the Wairau deed to be contrary to the Treaty principles of partnership and active protection.

**14.9.9 Were these Treaty breaches mitigated by the inclusion of Wairau right holders in the Waipounamu purchase?**

In 1848, Governor Grey issued the New Zealand Company a Crown grant that included the entirety of the Te Tau Ihu land that he claimed to have purchased from Puaha, Te Whiwhi, and Tamihana Te Rauparaha. From that point on, the settlers had all legal rights to the land and Maori had none (save their reserve). In 1851, when the company affairs were wound up, any unallocated land reverted to the Crown. In the Waipounamu purchase of 1853 to 1856, the three iwi with rights in the Wairau – Ngati Toa, Ngati Rarua, and Rangitane – signed deeds purporting to sell all their rights wherever they happened to be. Whatever the circumstances of the Waipounamu purchase, it was certainly not a free and willing sale of rights in Wairau land already granted by the Crown to others. It was simply and clearly inconsistent with the Treaty guarantees for the Crown to grant land to settlers when there were unextinguished customary rights in that land. Whatever the Wairau purchase deed may have purported to do, it did not extinguish the customary rights of those Maori who were not a party to it. As we have found, that included the majority of Ngati Toa and also the resident Ngati Rarua and Rangitane. Their rights were extinguished at British law by the Crown's 1848 grant of their land to others in fee simple. In theory, there was no going back from that point. In practice, when the Crown resumed the ownership of a very large territory in 1851, it could have returned land to Maori who had not sold their rights and did not wish to do so without causing any injustice to settlers. Instead, it maintained and defended its title.

Thus, although the Crown may have paid some excluded right holders years later during the Waipounamu purchase, this did not mitigate the absolute suppression of their tino rangatiratanga in 1847 and 1848. We found that the Waipounamu purchase could not and did not make willing sellers of those whose rights had already been granted to others, in violation of the plain meaning of article 2 of the Treaty and of the principles of reciprocity, partnership, and active protection. Further, in favouring the company and settlers by granting the Wairau to them, despite knowing of the right holders identified by Ligar, and in maintaining that grant despite protest from Te Kanae and Rangitane, the Crown breached the Treaty principle of equity. As it conceded more generally, it subordinated the interests of Maori to those of the company and settlers.

**14.10 THE 1848 CROWN GRANT TO THE NEW ZEALAND COMPANY**

Grey's 1848 Crown grant to the New Zealand Company covered an area far in excess of the combined total of the FitzRoy grant of 1845 which it replaced (151,000 acres less reserves) and the Wairau purchase. Nor, as we suggested above, could the all-embracing yet seriously flawed Waipounamu purchase be considered an adequate extinguishment of customary rights to those additional areas included within the Crown grant in favour of the company. To the extent that the Crown grant encompassed land over which customary title had never been extinguished by way of purchase by either the company or the Crown, it was contrary to the plain meaning of article 2 of the Treaty. This breach could, as we noted, have been remedied when all lands not yet allocated to settlers reverted to the Crown upon the winding up of the company. That did not occur, however, and we concluded that this failure to restore the unalienated lands to their customary owners was contrary to the Treaty and its principles.

Although there was some attempt to extinguish customary title within the Nelson award and Wairau deed areas, similar considerations applied to both of these in our view. Grey's 1848 Crown grant to the company, which included Nelson and the Wairau district, effectively validated what we have already concluded were invalid transactions. We found this to be contrary to the Treaty and its principles.

**14.11 THE WAITOHI PURCHASE**

From 1848 to 1850, the Crown negotiated the purchase of Waitohi in Queen Charlotte Sound with the leaders and people of Te Atiawa. Ngati Toa and Rangitane did not pursue claims before this Tribunal that they should have been included in the Waitohi purchase. Nor did Te Atiawa claim that there were any issues with how their right holders were identified and represented in that transaction. Instead, their grievances were focused on other aspects of the purchase.

The Waitohi purchase, encompassing an area estimated at 7500 acres (including a reserve of some 2500 acres) was a direct consequence of the earlier Wairau transaction. Almost as soon as Waitohi had been identified as the most suitable site for a port for company settlers on the Wairau Plains, the pressure went on for its acquisition. Yet, Waitohi was already the site of an existing Te Atiawa settlement and cultivations. Te Atiawa were reportedly keen to see a new settlement established, from which they hoped to benefit in various ways, and they were willing to make the nearby Waikawa Bay available for that purpose. Company officials continued to much prefer Waitohi for a port, however, prompting Governor Grey to personally intervene in the matter. He decided that 'the interest of the natives did not in

any way require that they should retain Waitohi’, thus ignoring the clearly stated wishes of the owners to do precisely this.<sup>17</sup>

In December 1848, Te Atiawa rangatira signed an agreement surrendering an unspecified area at Waitohi in return for a new township and cultivations at Waikawa, to which they were expected to relocate in order to make way for the settlers. Given the context, we concluded that Te Atiawa likely presumed that this agreement had merely required the giving up of a deep-water anchorage and their foreshore pa and cultivations at Waitohi. This preliminary agreement left much to be subsequently arranged, and later instructions from Grey effectively enlarged the area subject to the agreement, which by as early as January 1849 had been redefined to encompass all of Waitohi and Waikawa.

A second agreement signed in March 1849 defined the area to be reserved for Te Atiawa at Waikawa. Given that this was already customary Maori land, this was hardly an act of great beneficence on the Crown’s part, however, especially considering that only a very small part of the estimated 2500 acres was suitable for cultivation. Furthermore, the company’s failure to plough land for Te Atiawa at Waikawa, as promised in the 1848 agreement, meant that local Maori were unable to plant new crops there the following summer. A higher priority was meanwhile given to surveying lots in the new township at Waitohi, and providing road access to it, than was the case for the reserve and township at Waikawa.

A third and final agreement was signed in March 1850, under which Te Atiawa were to receive £300, including £200 compensation for the failure to provide the ploughed land at Waikawa. Unlike the earlier documents, this latest agreement was deemed by Crown officials to constitute a deed of sale. The wording of the deed introduced the language of sale for the first time but purported to date the initial consent to an absolute alienation to the December 1848 agreement. An attached plan now stretched the area encompassed by the purchase from the original pa and cultivations at Waitohi to something in the order of 7500 acres. We concluded that, although the Crown had a responsibility to clarify the inadequate agreement of 1848, it had no right to unilaterally add a substantial area to that being given up, without further payment. While there were a number of signatories to the 1850 deed and plan, the whole thing appears to have been sprung on them without prior explanation or warning. We found the Waitohi deed in breach of Treaty principles in that it encompassed significantly more land than was included in the earlier agreements without adequately obtaining the consent of all right holders and with no additional compensation being paid.

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17. Grey to Earl Grey, 1 February 1849 (Dr Donald Loveridge, “‘Let the White Men Come Here’: The Alienation of Ngati Awa and Te Atiawa Lands in Queen Charlotte Sound, 1839–1856”, report commissioned by the Crown Forestry Rental Trust, 1999 (doc A53), p 84)

Ultimately, Te Atiawa were pressed into surrendering Waitohi and required to relocate to their own land at Waikawa. Te Atiawa consistently expressed a desire to have Pakeha settle near to them and were willing to share their lands for that purpose. But company and Crown officials evidently never considered the possibility that the two peoples might share Waitohi and the future prosperity that the port there was expected to bring. No tenths reserves were set aside for the vendors, who were more or less totally shut out from the new township. Although the Treaty envisaged a form of partnership for the mutual benefit of both Maori and Pakeha, the interests of settlers were consistently prioritised in the arrangements at Waitohi. As a consequence, Te Atiawa found themselves excluded from the future economic development of the port, and we found this to be contrary to the Treaty and its principles.

#### 14.12 THE PAKAWAU PURCHASE

In 1852, the Crown purchased the Pakawau block in western Te Tau Ihu for the sum of £550. The decision to sell was well canvassed among resident right holders and was eventually made by a large and representative hui, which also refused to sell the West Coast for the offered price. The Pakawau purchase was not the subject of claims that customary right holders were left out or unrepresented in the decision-making, but there were other aspects of the purchase process that reflected badly on the Crown officials involved in the negotiations. It was the discovery of gold in the area that had prompted the purchase. Nelson superintendent Mathew Richmond, who was asked to commence the negotiations on behalf of the Crown, subsequently reported that ‘the longer the purchase was delayed . . . the more difficult it would be of accomplishment, for I found the cupidity of the Natives had already been aroused by the reported value of the minerals upon their land’.<sup>18</sup> His efforts to obscure the anticipated mineral value of the land (the transfer of which to the Crown was further obfuscated in the wording of the deed), the low purchase price paid, and the reserves of just a few hundred acres over a block itself some 96,000 acres in extent were, we concluded, contrary to the Treaty and its principles. While the manner in which Maori were enabled to resolve matters of customary entitlement for themselves pointed to what might have been possible in other purchases, the transaction as a whole could not be said to have complied with the high standards for Crown purchasing set out in the Treaty and other contemporary documents.

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18. Richmond to Colonial Secretary, 5 January 1852, *Compendium*, vol 1, pp 289–290

### 14.13 THE WAIPOUNAMU PURCHASE

In 1853, Governor Grey left New Zealand. As part of the ceremony surrounding his departure, he met with Ngati Toa in August and requested that they surrender all their remaining customary rights in Te Tau Ihu to the Crown. Although the tribe was reluctant, their leaders eventually decided to agree to the proposed sale after two days of public debate at the well-attended farewell hui. The 1853 purchase deed acknowledged that resident tribes – including the defeated peoples – claimed the land ‘conjunctly’ with Ngati Toa and that reserves would be made for them (decided by the Crown). Two-fifths of the purchase price of £5000 was paid to Ngati Toa, with the remainder to be allocated to resident right holders at a proposed general hui in Nelson.

From that point on, the Government counted the entirety of Te Tau Ihu as ‘sold’. Although there were many overlapping customary rights known to officials, McLean’s view was that Ngati Toa had an unquestionable suzerainty and an undeniable primary right to sell the land. Other tribes and resident Ngati Toa would be compensated for their interests and have reserves made for cultivation and subsistence, but their land was sold and they could not repudiate that sale. Without their concurrence, on the other hand, McLean admitted that the sale would not be complete or valid.

The proposed Nelson hui of Ngati Toa and Te Tau Ihu residents did not eventuate. Instead, McLean paid the remainder of the purchase money during 1854 to non-resident Te Atiawa who had returned to Taranaki, and at a second North Island hui of Ngati Toa in December of that year. Finally, at the end of 1855 and the beginning of 1856, over 24 months after the land was counted as sold, McLean met with other Te Tau Ihu residents and signed deeds with them. He refused to vary the small amount of money they were allowed, which had been allocated to him after he had paid almost the entire purchase price to non-residents. After much resistance, he agreed to except Taitapu (in western Te Tau Ihu) and Wakapuaka (in Tasman Bay) from having been ‘sold’. Rangitoto was not included in 1853, and Ngati Koata (who therefore had a choice) refused to include it now, sticking to that resolution despite pressure from McLean. By early 1856, the Government had signed 13 deeds (or receipts) with Ngati Toa, Te Atiawa, Ngati Rarua, Ngati Tama, Ngati Koata, Rangitane, and Ngati Kuia. No deed was ever signed, or reserves allocated, for Ngati Apa. The entire region of Te Tau Ihu was then considered Crown land, apart from Taitapu, Wakapuaka, Rangitoto, and small occupation reserves.

#### 14.13.1 The Crown’s concessions

The Crown accepted that it did not inquire properly into customary rights during its major purchases, including this, the biggest one of them all. Grey and McLean were possessed of a good general knowledge of custom but exploited it to obtain land from Maori at the latter’s expense. The Crown also admitted that Grey and McLean set aside Treaty promises when

purchasing land and subordinated the interests of Maori to settlers. Further, the Crown conceded that occupation was discoverable on the ground upon proper inquiry and that, while some rights were contested, an inquiry had been feasible but was not properly undertaken. Given the complexity of the situation, however, the Crown qualified its concession by arguing that McLean eventually resolved undealt with or residual rights by purchasing all of them. This was, in the Crown's view, a proper and satisfactory resolution.

Based on the evidence of its own historian, the Crown accepted that McLean improperly tried to use his transactions with non-residents to pressure resident right holders to agree to sales. In the Waipounamu purchase, he dealt with non-residents first and then sent in surveyors to lay off reserves, treating the alienation of the land as a *fait accompli*. He also brought senior chiefs with him to support him when he finally had to deal with the resident right holders in person. The main difference between the Crown and the claimants was not that McLean tried to do this but how successful he was. In the Crown's view, the strategy was not always successful, and some Te Tau Ihu resident iwi were willing sellers.

The Crown described the failure to ensure Te Tau Ihu Maori were left with sufficient land for their present and future needs as a 'compelling' aspect of the claims, though its position on the point at which the inadequacy of the retained lands became apparent evolved during the course of our hearings. In its earlier submissions, the Crown suggested that the reserves were generally considered adequate at the time of the major purchases and that it was only much later that this belief began to wane. By the time of its closing submissions, the Crown was ready to concede 'a state of virtual landlessness by 1860', largely arising out of the failure to ensure more generous reserves were set aside.<sup>19</sup>

#### **14.13.2 Was there an adequate inquiry into customary rights before or during the Waipounamu purchase?**

The parties in our inquiry agreed that the answer to the question as to whether there was an adequate inquiry into customary rights before or during the Waipounamu purchase was 'No'. The follow-up questions were:

- ▶ Did the Crown know that Ngati Toa's claim was contested?
- ▶ Did the Crown fail to investigate a situation known to be controversial?

The clear answer to those questions was 'Yes'. During the late 1840s and early 1850s, Ngati Toa's claim to primary rights was disputed by Te Atiawa in eastern Te Tau Ihu and by a number of tribes in the west. Most notably, the Government ignored Ngati Toa's claim in the Waitohi purchase, and for the Pakawau purchase it sent Ngati Toa to Nelson to debate and resolve matters with their allies and relations on the spot. In the case of Waipounamu, however, it accepted at face value a claim that it knew to be contested in order to force through

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19. Crown counsel, closing submissions, p 4

a purchase of almost the entirety of the northern South Island. This was a deliberate and calculated Treaty breach, of enormous prejudice to the iwi of Te Tau Ihu.

#### **14.13.3 How representative were the 1853 and 1854 hui?**

McLean, aware of the dubiousness of his actions, tried to legitimise the foundational 1853 and 1854 deeds by claiming that they had been agreed and signed at hui representing all the tribes. This was a pure fiction. After assessing the evidence in chapter 5, we found that the 1853 and 1854 hui were adequately representative of the Ngati Toa tribe but were not representative of other iwi or communities resident in Te Tau Ihu. To proceed on the basis that the entire northern South Island was irrevocably sold as a result of these arrangements was a very serious breach of article 2 of the Treaty. McLean misrepresented the outcome to the Government – he pretended that the defeated peoples were represented when they were not and the chief whom he characterised as their leader was actually a southern Ngai Tahu chief who did not sign the 1854 deed in any case. Nor did the signatures of three chiefs – Tana Pukekohatu, Tipene Paremata Te Wahapiro, and Rawiri Te Ouenuku – suffice for the consent of the resident northern iwi. At best, the arrangement was still what it had been in 1853: an arrangement with Ngati Toa.

Proceeding as if his misrepresentations were fact, McLean cast a veil of legitimacy over what was an invalid transaction under both Maori and British law of the time. In doing so, the Crown committed a breach of the Treaty, and this had serious consequences for Ngati Apa, Ngati Kuia, Rangitane, Ngati Rarua, Te Atiawa, Ngati Tama, and Ngati Koata.

#### **14.13.4 ‘Hobson’s choice’: Did the Crown act correctly in paying resident right holders after the event?**

It follows from our findings (summarised above) that the correct process for the Crown in the circumstances of the time was to send officials to:

- ▶ investigate desired blocks and ascertain local kainga and chiefs;
- ▶ convene a tribal or intertribal hui at or near the places it wished to purchase;
- ▶ permit the tribes to decide their own entitlements and reach a consensus on the purchase at that (or at more than one) hui; and
- ▶ abide by the result; or
- ▶ alternatively, provide a Maori-controlled legal process to determine inter-tribal disputes if they could not be resolved by customary means.

We accepted expert evidence that this method of proceeding was known at the time and the submission of Ngati Rarua that it was correctly followed in the case of Pakawau and the West Coast in 1852. The Crown’s failure to respect tino rangatiratanga in this way during the Waipounamu purchase of 1853–56 and to purchase instead from non-resident chiefs and

then enforce that purchase on residents was a deliberate tactic employed by the Government to obtain the most land possible for as little money as possible.

The historical evidence was clear that Te Tau Ihu Maori wanted settlers, economic development, and a relationship with the Crown and were prepared to sell some of their land to obtain these things. The tragedy of the Waipounamu purchase was that they were denied their right to decide what and how much land they would sell, and for what price, through McLean's tactic of enforcing the 1853 transaction with Ngati Toa. McLean was willing to resort to anything short of physical force to obtain all their land. We relied on the evidence of the Crown's historian to that effect, and we noted that there was some agreement between Crown, claimant, and Tribunal historians on McLean's tactics and their effects.

Crown counsel conceded the tactic but not its outcome. In our view, the situation might have been mitigated to some extent if McLean had abandoned the tactic after concluding the first deed in 1853. The majority of the purchase money remained to be allocated at a proposed inter-tribal hui at Nelson. Although the resident iwi would have been at a disadvantage because of Ngati Toa's deed, they might still at that point have been able to repudiate or renegotiate the sale. As the leading Ngati Tama rangatira put it in October of that year, 'when these men meet here then we will dispute the matter with each other – for their act and deed is an intrusion.'<sup>20</sup> Major Richmond reported the locals' view that they ought to have been consulted before any sale. He feared that, if McLean did not hold the promised hui, the resident iwi might refuse the sale altogether.

Instead, the Government's leading purchase officer left the residents to wait for years while he paid the entirety of the remaining purchase money to non-residents (other than a small payment to Ngati Hinetuhi of Port Gore). At the same time, he sent officials to lay off reserves in Te Tau Ihu, explaining to local Maori that their land was sold and all that remained was for the Government to make reserves. Resident right holders resisted this tactic but put all their faith in McLean. By the time he actually arrived to get the residents to sign deeds individually (more aptly called receipts), over two years had gone by since Ngati Toa 'sold' the land in 1853 and the purchase money was all gone. The Government agreed – reluctantly – to an extra £2000 for McLean to compensate those whom he characterised as outstanding claimants.

In sum, the Government virtually forced Ngati Toa's 'sale' of everything everywhere on the resident iwi of Te Tau Ihu, who might otherwise have made willing and informed choices in accordance with their Treaty rights. In taking this action, we found the Crown in serious breach of the plain meaning of article 2 of the Treaty, and of the Treaty principles of partnership, reciprocity, active protection, equity, and equal treatment. The prejudice for Te Tau Ihu Maori was the loss of their land and resources without their free and informed consent.

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20. Wiremu Te Puoho to Richmond and Stafford, 19 October 1853 (Macky, p152)

**14.13.5 Did officials exploit custom to the disadvantage of Ngati Toa as well as the resident right holders?**

With the initiation of the Waipounamu purchase, we found that Grey exploited important Maori customs to obtain the initial vast cession from Ngati Toa. This was described as ‘an ohaaki within the context of a poroporoaki.’<sup>21</sup> Although Ngati Toa had been pressing the Government to recognise their claims, the evidence was clear that they did not wish to relinquish Te Hoiere and other valued districts in eastern Te Tau Ihu. Grey and McLean exploited Ngati Toa’s need to reassert their leadership and rights in the wake of their disastrous loss of mana to the Crown in 1846–47, accepting Ngati Toa’s claims to primary rights and authority without investigation, despite their certain knowledge that those claims were contested. In the circumstances, it was difficult for Ngati Toa to resist Grey’s request that they sell Waipounamu. Eventually, they gave in. Valedictory statements at farewell ceremonies in both Maori and Pakeha cultures are naturally given to excesses of emotions. But they should be left at that and not used as the basis for pressuring Maori leaders into a massive land transfer.

This disadvantaged Ngati Toa’s erstwhile northern allies, as well as the defeated Kura-haupo peoples, who were in occupation and increasingly assertive of their rights. The Crown clearly exploited and built upon its recognition of a Ngati Toa paramountcy. It initiated the purchase with them and forced the resident iwi to accept compensatory payments, just as Spain had done to ‘complete’ the company purchase from Ngati Toa. The cumulative effect of this exploitation of Ngati Toa claims to paramountcy in the 1840s and 1850s was to deliver nearly all of Te Tau Ihu to the Crown. This rewarded absentees at the expense of occupants, the very antithesis of Maori custom as Spain, Grey, and McLean understood it. A ruthless expediency had replaced the Crown’s Treaty-based obligation to respect Maori’s customary rights to land and their rangatiratanga over it.

Fundamentally, neither Ngati Toa nor the resident iwi were in a position to freely sell land to the Crown as they wished, as envisaged by article 2 of the Treaty. The Crown’s purchasing procedures were in breach of the principles of partnership – since both parties did not negotiate freely as equals – active protection, and equal treatment, since Ngati Toa and the resident iwi were not treated with equal fairness in terms of their respective customary rights.

**14.13.6 How representative were the 1855–56 arrangements with resident right holders?**

The claimants did not argue that there were deficiencies in the negotiations with the resident right holders, in terms of the proper involvement of their respective leaders and the negotiation of wide and representative consent to the deeds. We accepted this position,

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21. Tony Walzl, *Ngati Rarua Land Issues, 1839–1860* (Wellington: Ngati Rarua Iwi Trust, 1999) (doc A50(1)), p302

on the evidence, and concluded that the 1855–56 arrangements were not deficient in that respect.

#### **14.13.7 The unique claim of Ngati Apa**

Ngati Apa claimed that they were uniquely prejudiced by the Crown's admitted failure to investigate customary rights properly before confirming or conducting purchases. We found that the Kurahaupo tribes were treated alike in the failure of the Spain commission to carry out a proper investigation. In the Waipounamu purchase, however, the evidence was clear that Ngati Apa were indeed prejudiced in a unique way by the actions of Grey and McLean. The Government signed deeds with Ngati Kuia and Rangitane, paid them a small sum for their interests, and made reserves for them. It did none of those things for Ngati Apa.

The Crown conceded as a general proposition that it did not identify and deal adequately with the rights of defeated peoples. Also, counsel admitted that, by failing to investigate the hinterland, where free survivors of Ngati Apa were recorded as living, it may well have deprived Ngati Apa of customary entitlements. The Crown did not, however, make a submission on whether it should have signed a deed with Ngati Apa for their rights in Te Tau Ihu or made reserves for them.

In our view, too little time had gone by since the conquest for Ngati Apa's rights to have been entirely foreclosed as at the 1840s and 1850s. Ngati Apa survived as a people and have maintained a consistent (if under-investigated) claim to customary rights in Te Tau Ihu. A tributary community of Ngati Apa lived at Port Gore, while another community survived under its own chief (Puaha Te Rangi) on the west coast of the South Island, with claims extending into western Te Tau Ihu. Undefeated (though fugitive) Ngati Apa continued to reside and use resources in the interior of western Te Tau Ihu in the 1840s, eventually joining their settled relatives on the coast. Ngati Apa people were living at Taitapu and elsewhere in coastal western Te Tau Ihu, but their numbers must have been small. Critically, their rights and status were not investigated in the 1840s and 1850s, and they were overlooked by officials. By the time Ngati Apa made claims to the Native Land Court in the 1880s for a share of western Te Tau Ihu lands, Dr Ballara's view was that the evidence had become too slight for us to evaluate those claims fully today.

This Tribunal, therefore, faced a difficult task in evaluating Ngati Apa's claim against the Crown. On the one hand, it was no longer possible to say exactly what rights Ngati Apa retained in western Te Tau Ihu, since these were not investigated or recognised at the time. On the other hand, Ngati Apa found themselves written out of history as a result. Apart from Port Gore, Ngati Apa individuals had to come in under other lines to establish any kind of claim to land in Te Tau Ihu after 1856. Theirs was indeed a unique claim in this respect and their survival all the more remarkable for it.

We were not in a position to evaluate the relativity of Ngati Apa's claims and rights in

western Te Tau Ihu vis-à-vis the tribes that were recognised by the Crown. On the basis of the available evidence, we found that they did have surviving rights (of some degree), that McLean was on notice of their claims in both western Te Tau Ihu and Port Gore, and that the Crown failed to investigate their claims or ascertain their rights. This failure on the part of the Crown resulted in the extinguishment of Ngati Apa's customary rights during the Waipounamu purchase, without their consent and without paying them or providing them with even the minimal reserves made for other tribes. This was a very serious breach of their article 2 rights, and of the Treaty principles of reciprocity, partnership, active protection, and equal treatment.

#### **14.13.8 Was the price paid adequate?**

There was no Waipounamu block as such, but rather a series of blanket deeds for the most part purporting to extinguish all the remaining interests of the vendors within the northern South Island. The extent of those interests obviously varied, and under these circumstances there could be no meaningful consideration of price paid per acre. We concluded that the failure to even seriously contemplate such an approach reflected the influence of the 'waste lands' theory. Governor Grey argued that a 'nearly allied principle' involved the purchase of large tracts of land for no more than nominal sums. This approach reflected a prevalent belief that Maori claims to lands not under European-style cultivation or occupation were less than valid, especially in the less densely populated South Island. Thus, a small and arbitrarily chosen sum could instead be fixed upon. Maori were hardly in a position to argue against this, especially since McLean and other officials insisted that the land had been purchased from Ngati Toa in 1853, thus leaving all later claimants merely to decide whether they wished to receive compensation for lands which the Crown already claimed ownership of.

Although Crown officials acknowledged the small price paid in their correspondence with one another, the notion that the 'real payment' would be reaped from the rising value of the reserves was rendered more or less null and void from the outset owing to the inadequacy of the lands retained. We concluded that further promises of schools, hospitals, and other collateral benefits were likely to have also been made as part of the Waipounamu negotiations, as was consistent with the standard Crown purchasing policy of the time. Other inducements, including scrip and individual awards worth some £5950 in total, were also offered, mainly to the initial Ngati Toa signatories. Combined with the £4000 monetary payment, Ngati Toa received the lion's share of the payment. Other iwi who had expected McLean to honour his initial promise to call a hui at Nelson at which the distribution of most of the purchase money would be publicly debated and decided were clearly prejudiced as a result. But Ngati Toa also remained unhappy with the price paid and, notwithstanding the unevenness of the distribution, we concluded that in no instance could payments made as part of the Waipounamu purchase be considered adequate.

**14.13.9 Were the deeds valid?**

A significant issue for us to consider was whether the various flaws in the Waipounamu deeds were such that they should be considered invalid instruments of alienation. We concluded that this was the case. Although the signatories appeared representative of their communities, uncertainty and confusion over the lands being alienated and those being retained was greatly amplified by a general failure to document numerous verbal undertakings that had also formed part of the agreements. One such promise which Grey many years later confirmed he had personally made but failed to commit to the text of the deeds concerned the exclusion of a number of offshore islands from the area conveyed to the Crown. In other cases, boundaries mentioned in the text of the deeds were not marked on accompanying plans, while a great deal of confusion also arose between reserved lands and lands simply excluded from the transaction. Crown and claimant historians to appear before us were unanimous in agreeing that the deeds and their plans could not be taken as a reliable indication of what had been understood by the parties. One minimum requirement for any valid land transfer is mutual understanding and acceptance of what it is that is being conveyed. The Waipounamu purchase failed this test by some considerable margin.

We found the Crown's reliance upon invalid deeds as the basis for its title to land to be in breach of the Treaty and its principles. We further found the failure to fully document the verbal undertakings entered into by Crown officials to be contrary to the principle of active protection, and we found the later failure to respond adequately to requests from Te Tau Ihu Maori for the terms of the agreements to be upheld (through, for example, returning the offshore islands the Crown had wrongly assumed ownership of by virtue of the deeds) to be contrary to the principle of redress.

**14.13.10 Waipounamu and the western takiwa**

The Crown began negotiating with both the northern iwi and Ngai Tahu for the West Coast in the late 1840s and early 1850s. The Canterbury purchase deed of 1848, signed with Ngai Tahu, did not specify how far north the transaction extended on the West Coast, but the attached map appeared to give a northern boundary of the river mouth of Kawatiri. It is not clear how this boundary marker was decided upon, and the negotiations did not include Ngai Tahu resident on the West Coast. As a result, the Crown found it necessary to negotiate a new agreement with Poutini Ngai Tahu in 1860 to extinguish their interests.

During the negotiations for Pakawau (within Te Tau Ihu) in 1852, the Crown also considered acquiring the interests of Ngati Rarua and Ngati Tama as far south as Murihiku. The price ultimately proved a stumbling block, and the purchase did not extend so far in the end. Other iwi asserted claims in the takiwa at the same time. As noted earlier, Ngati Toa asserted their pre-eminence over their northern allies and objected to these offers to sell without their involvement. Ngai Tahu expressed anxieties about the proposed deal. There is

some evidence that one of their senior rangatira, Taiaroa, had consented to the northerners undertaking such a transaction, but eventually the Crown had to acknowledge that he was not the primary party to deal with for the West Coast. At the same time, Ngati Apa rangatira sent a letter to McLean, stating that they had customary rights in the north-western South Island districts, formerly controlled by Ngati Tumatakokiri, including places from Taitapu down to Karamea and Kawatiri.

The first Waipounamu deed signed by Ngati Toa represented their 'full and true consent' to the transfer of their 'land at the Waipounamu'. The interests referred to were not otherwise defined, but it was stated that they consisted of 'all our lands on the said Island'. The receipt signed in December 1854 by Ngati Toa chiefs was more specific: this was for 'all the lands which we have not sold in former times', and Arahura was included in the several places and districts mentioned. A receipt signed by Te Atiawa in March 1854 and the November 1855 deed with Ngati Tama and Ngati Rarua also mentioned Arahura and Kahurangi Point. The boundaries of these purchases were not precisely defined, the deeds merely referring to 'Arahura' without pinpointing what was meant by this term.

The Crown completed the Waipounamu purchase without an inquiry on the West Coast itself. The claims of non-resident Ngati Toa and their northern allies (who had invaded the region and still had a presence in it) were accepted and their interests acquired without investigation. Neither Ngai Tahu nor Ngati Apa were involved in the Waipounamu purchase, and while McLean stated the Crown's intention to deal with Ngai Tahu at Arahura at a later point, he said nothing of Ngati Apa. We did not accept the Crown's argument that customary rights were so unsettled as to be incapable of definition – that such an inquiry was feasible was demonstrated by James Mackay's investigations in 1860 during the Arahura transaction.

We found, therefore, that the Crown's failure to properly inquire into customary interests in the western part of the takiwa made it impossible for meaningful consent to be given and was a breach of the principles of active protection, partnership, and reciprocity.

The Crown did not treat the rights of the various iwi equally. The northern iwi were prioritised over Ngai Tahu, and Ngati Apa's rights were entirely disregarded, despite their having written to McLean in 1852 outlining their interests. Ngati Apa's rights on the West Coast remained uninvestigated, they were not consulted, and they received no payment. As in the case of the east coast, the signing of subsequent deeds could not and did not make willing sellers of those whose rights had been granted to others and did not mitigate the failures of the Crown in the conduct of its initial purchase.

#### **14.13.11 Individual awards and reserves**

Individual awards and scrip with a total value greater than the initial monetary payment made for Waipounamu were promised to selected rangatira as part of the process of

securing support for the purchase. We noted that discrimination on the part of officials prevented some recipients of scrip from exercising their right to select sections. There were also problems with selecting the 26 individual awards of 200 acres each promised to Ngati Toa, in large part due to the low priority accorded this undertaking relative to provincial and settler interests. By the late 1870s, Crown officials had decided that the unfulfilled promise was best met by a monetary payment. A total sum of £5200 (based on 1850s land values of one pound per acre) was invested and the interest distributed to members of the tribe. We concluded that the lengthy delay in giving effect to the original promise was unconscionable and contrary to the Treaty principle of equity.

#### **14.13.12 Further customary interests**

Although the Waipounamu purchase purported to be a ‘blanket’ extinguishment of all remaining customary interests, various exclusions and reserves tended to undermine this aspect of the transaction. We also noted evidence of further lands excluded from the purchase orally but later assumed to have been acquired by the Crown owing to the failure to fully document and record these verbal undertakings. Paruparu and other islands were a case in point and, notwithstanding the clear statements of Sir George Grey in 1884 in support of a petition alleging these islands had never been sold, the Crown refused to return these to Maori ownership or to adequately consider the merits of the case for doing so.

There were also, as we noted above in relation to the West Coast, doubts as to how fully the Crown had extinguished Maori rights on the flanks of Te Tau Ihu by virtue of the Waipounamu purchase. It was a similar story on the east coast. Rangitane’s February 1856 deed purported to extinguish ‘all’ their interests ‘on the Island’, but qualified this by adding ‘all the lands of Rangitane from Wairau to Arahura’. We concluded that this meant all Rangitane’s claims north of the Wairau River and across to Arahura on the West Coast. The area south of the river had been included in the Wairau purchase deed without Rangitane’s approval. At no point, however, had Rangitane’s interests south of the Wairau River been purchased.

#### **14.13.13 The impact of blanket purchasing on customary resource-use rights**

The claimants argued that they had customary rights of migratory resource use extending throughout Te Tau Ihu, and which they did not wish to alienate in the transactions of 1847–56. The Crown, in their view, failed to investigate or ascertain those rights, and failed to make provision for them by reserving sufficient land (or access to land) for them to maintain their customary economy. As a result, much of economic, cultural, and spiritual value was lost.

The Crown largely conceded these points. It accepted that the reserves were insufficient

for either the customary economy or European-style farming, and that this arose from 'a failure to adopt a more generous approach to reserves in the Crown purchase era.'<sup>22</sup> In particular, the Crown adopted completely Dr Ballara's criticism:

The most serious fault of all revealed in the Crown's process of land acquisition was the failure to think far enough into the future; the failure to create an estate of reserves to replace what Maori had lost through Crown action in pressuring sales. The estates of land lost by Maori should have been replaced with an alternative source of wealth and prosperity for their people that was capable of expansion according to need.<sup>23</sup>

This criticism was not a new one. The Crown accepted Dr Ballara's point that Alexander Mackay had thought the solution obvious in 1874, and that it had been equally obvious to Normanby in his instructions of 1839. South Island Maori were impoverished because their reserves were too small and colonisation was cutting them off from their customary resources. The Crown, argued Mackay, could have foreseen this 'probable effect of colonisation on their former habits' of migratory resource use. 'All this might have been obviated,' he told the Government, 'had the precaution been taken to set apart land to provide for the wants of the Natives,' in anticipation of that probable outcome:

It would have been an easy matter for the Government to have imposed this tax on the landed estate, on [ie, at the time of] the acquisition of Native territory. Such reserves would have afforded easy relief to the people who [had] ceded their lands for a trifle, and formed the only possible way of paying them with justice.<sup>24</sup>

In addition, the Crown conceded that it had breached the Treaty principle of options by taking away the ability of Te Tau Ihu Maori to exercise their tino rangatiratanga and choose their path of development, whether it be by maintaining their traditional culture and economy, assimilating to the new economy, or walking in both worlds.

As well as this broad agreement between claimants and the Crown on some key issues, we had historical evidence that Governor Grey and other officials were aware of the need for Maori to retain a large land base. Without it, they could not continue their customary lifestyle. Both the Governor and the Colonial Office had accepted that to deprive them of it, without a full and fair alternative, would be unjust. Nonetheless, the Government applied a virtual 'waste lands' policy to its purchases and reserve-making. Perforce, its officials accepted Te Tau Ihu Maori continuing to exercise their customary rights on 'sold' land after 1856, until the spread of settlers and environmental modification restricted Maori to their inadequate reserves. The resultant poverty was soon obvious and, in the evidence of Alexander Mackay (as accepted by the Crown), entirely avoidable. Officials such as Mackay

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22. Crown counsel, closing submissions, p 4

23. Ibid

24. Ibid

nevertheless opposed the various efforts of Maori to assert claims to ownership of unalienated lands. This included the 1873 ‘hole in the middle’ claim and a large number of claims lodged with the Native Land Court a decade later but peremptorily dismissed by it on the testimony of Mackay that the lands in question had been purchased by the Crown.

We found, on the basis of broad agreement between the parties and our own review of the historical evidence, that the Crown acted in serious breach of Treaty principles. It did not allow Maori to retain sufficient land and access to land for the maintenance of their customary economy and resource-use rights, or indeed for their engagement in modern farming practices, thereby reducing their options to bare subsistence. This failure was avoidable in the circumstances of the time, as the Crown accepted. It was a breach of Treaty principles in its own right, and a prejudicial effect of officials’ ‘waste lands’ approach to Maori land, and of the Crown’s blanket purchase process (especially in the Waipounamu purchase). It was also a prejudicial effect of the Crown’s failure to properly inquire into Maori customary rights, and to therefore identify those lands and resources which they wished or needed to retain for (in Normanby’s words) their own comfort and subsistence. The result was serious and avoidable poverty, as reported to Governments of the day by its own officials.

In sum, we found that the Crown breached the Treaty principles of partnership, reciprocity, options, and active protection, to the serious prejudice of all Te Tau Ihu Maori. This was, in effect, conceded by the Crown. There was also, as explained in the claimants’ evidence, social and cultural prejudice in the prevention of Maori from exercising their tikanga, indeed their way of life as they preferred to live it. Again, this point was broadly conceded by the Crown, as a breach of the Treaty principle of options. These Treaty breaches, and the prejudice to Te Tau Ihu Maori, were serious and require large and culturally appropriate redress.

#### 14.14 THE ARAHURA PURCHASE

Negotiations with Poutini Ngai Tahu opened in the late 1850s, Ngai Tahu protesting that the Waipounamu transactions with the northern iwi should have extended as far south as Arahura. When the people based at Mawhera were told that Ngati Toa and Ngati Rarua had sold the West Coast area, Tuhuru’s son protested vehemently, that they were ‘thieves’ whose ‘feet had never trodden on this ground.’<sup>25</sup> Poutini Ngai Tahu then offered to undertake their own sale of the coast from Milford Sound to as far north as Kahurangi. James Mackay was subsequently instructed to settle their claims, Chief Land Purchase Commissioner Donald

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25. Tarapuhi and others to McLean, 15 March 1857 (Donald Loveridge, ‘The Arahura Purchase of 1860’, report commissioned by the Crown Law Office, 1988 (doc Q1), p 27)

McLean believing that the 'Arahura Natives' were 'the only section of the Natives that we know of in the Middle Island whose claims are as yet unextinguished.'<sup>26</sup> Although Kahurangi had been nominated by Poutini Ngai Tahu as the northernmost extent of their claims, the Crown's later selection of this as the boundary of the Arahura transaction was based not on any acknowledgement of exclusive Ngai Tahu rights up to that point but rather on the fact that this happened to coincide with the boundary of the Taitapu land excluded from the Waipounamu purchase.

After an unsuccessful attempt to negotiate a sale in May 1859, Mackay returned to Mawhera to negotiate with Poutini Ngai Tahu in January 1860. Mackay was accompanied by two rangatira of Ngati Rarua, Ngati Tama, and Te Atiawa lineage, from Golden Bay, and Puaha Te Rangi of Ngati Apa. Ngati Apa's interests were acknowledged in the Arahura transaction following Te Rangi's demand for their inclusion 'for lands at the Kawatiri and Buller districts' and Ngai Tahu's acceptance of the 'justice of their claims.'<sup>27</sup> Te Rangi was among the 14 signatories to the deed, which was recorded as a transaction with 'the chiefs and people of the tribe Ngaitahu'. Following the completion of the agreement, Mackay spent several weeks arranging reserves. Ngati Apa were allocated some at Kawatiri and Karamea, and Ngati Rarua, Ngati Tama, and Te Atiawa individuals were included in a number of those reserves and in others.

We concluded that, while the Crown adequately inquired into Poutini Ngai Tahu's interests, the inquiry into other customary interests in Arahura was inadequate. It had not been thought necessary to make fuller inquiries, since the objective was simply to extinguish the claims of the only tribe believed still to have such claims in the region. The Waipounamu purchase was used to an extent as a bargaining tool (with Ngai Tahu) and was considered to have extinguished any interests on the part of the northern iwi. Although no proper inquiry had been held then, the Crown did not reconsider the rights of Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa during the 1860 Arahura negotiations. Until then, the Crown had never inquired into Ngati Apa's customary rights, and it did not do so in 1860. Ngati Apa were included in the deed only because of Te Rangi's demand, and even then Mackay made no inquiry into the extent of their interests, simply accepting them when they were endorsed by Ngai Tahu's senior resident rangatira (the northern rangatira who had accompanied him apparently accepted them too). This failure to make proper inquiry at the time obscured the existence of rights other than those held by Ngai Tahu, most especially those of Ngati Apa.

We found that, in failing to adequately inquire into the customary rights of Te Tau Ihu iwi in the Arahura purchase, the Crown breached the principles of active protection, partnership, and reciprocity.

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26. McLean to Mackay, 15 January 1859 (Loveridge, 'Arahura Purchase', p 42)

27. Mackay to McLean, 21 September 1861, *Compendium*, vol 2, p 41

The failure to investigate Ngati Apa's rights was a breach of the principle of equal treatment. Ngati Apa cannot be regarded as willing sellers, acting of their own volition. The recognition of their rights on the West Coast was a first for this tribe in the whole history of Crown dealings with Maori in Te Tau Ihu. We found, however, that Ngati Apa's rights, though belatedly acknowledged, were recognised to only a limited degree. They had not been investigated or defined, and while the tribe received a payment and some reserves, this was done not as a separate agreement but as part of a transaction with Ngai Tahu. The procedure followed by the Crown meant that Ngati Apa had no real option other than to acquiesce in the sale and to accept the reserves as the limit of their interests. The northern boundary of the purchase area was determined by previous Crown purchase arrangements rather than by the existence and extent of tribal rights, but because it was set out in a deed with Ngai Tahu that made no reference to Ngati Apa, it permitted a later misapprehension that Ngai Tahu's rights up to the boundary had been recognised as exclusive. Again, these actions and omissions of the Crown breached the principles of active protection, partnership, and equal treatment.

We did not make specific findings in respect of the Crown's treatment of Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa in the Arahura purchase, since their rights had already been dealt with in the Waipounamu purchase. Members of these tribes were included in the reserves created in accordance with the Arahura purchase, but we saw this as a recognition of individual residential rights rather than of tribal rights.

#### **14.15 THE NORTH CANTERBURY AND KAIKOURA PURCHASES**

The Kaikoura purchase completed in 1859 overlay the North Canterbury purchase negotiated two years earlier, representing the Crown's response to the claims of Ngai Tahu (also named in the 1853 Waipounamu deed as conjoint claimants) to land north of Kaiapoi. Ngai Tahu did not sign a Waipounamu deed with the Crown and, just as the Arahura purchase could be seen as a replacement for this on the West Coast, the same could perhaps be said for the Kaikoura transaction on the east coast. In negotiations, the Crown did not consider Ngati Toa's or Rangitane's rights, which were thought to have been extinguished by means of the Wairau and Waipounamu purchases (although, as we noted above, this had not been the case for Rangitane).

We thus found the Crown's failure to consider and fairly extinguish Rangitane's rights during the Kaikoura purchase to be in breach of article 2 and the principles of active protection, partnership, and equal treatment.

#### 14.16 THE OCCUPATION RESERVES

By the end of the era of large-scale Crown purchasing in Te Tau Ihu in 1860, all that remained for local Maori were three large blocks excluded from the transactions, along with tenths and some 35,589 acres of occupation reserves. A major task for us was to consider the adequacy of this latter category of reserves, in terms of both size and quality, as well as the later administration and fate of these lands.

##### 14.16.1 The process of creating and allocating reserves

The process of creating reserves, which was largely driven by Crown officials and usually took little account of Maori understandings of what had been promised or 'agreed', was often defective. The intended recipients did have some say in the locating and laying-out of the reserves, but in the end the Government alone had the power to interpret the promises and agreements and impose its decisions on resident Maori. At Golden Bay, the area of land reserved for local Maori in 1847 was less than what had been stipulated by the Spain award and the Crown grant of 1845. We concluded that too small an area was set aside, and that additional reserves made in 1856 did not remedy the deficiency. In the Wairau district, the reserves created were smaller than what appears to have been promised by Donald McLean during negotiations in 1856. This injustice was compounded by the fact that the land reserved had to be shared by members of three iwi. It seems highly likely that one of these iwi (Rangitane) had been led to believe that the Wairau reserves would be theirs alone.

With regard to the reserves generally, the methods used when laying these out were often defective and resulted in outcomes that frequently did not match what the Maori signatories believed they had agreed to. A reserve that was probably promised at Pakawau in 1852 was not created, and the same may be said of one at Awaroa (south of Separation Point) promised in 1856 and one at Kaituna promised the same year. There is at least one instance (in the Pelorus area) of failure to include all cultivation sites used by Maori. Since the reserves were an integral part of the purchase transactions, their full nature and extent should have been marked by the walking of boundaries and then fully recorded in the signed deeds. To omit such a practice, and instead to leave unrecorded and (it would appear) incomplete arrangements to later officials, who had not necessarily been present, compounded this failure to properly record and obtain mutual agreement to the reserves at the time of signing the deeds. In these ways, that is by ignoring the terms of Spain's award and the 1845 Crown grant, and, in several instances, by setting aside the promises that had been made to Maori, the officers of the Crown did not always act in good faith, and the acts and omissions of the Crown breached the principles of partnership, reciprocity, and active protection. In particular, we note that the Maori cession of the power of pre-emption to the Crown gave it a monopoly over the purchasing of their land. This enjoined upon it a particular responsibility to ensure that the making of purchase reserves was scrupulously fair, mutually understood,

and entered into with knowing and meaningful consent. The failure to record, let alone keep, all (or sometimes any) of the reserve arrangements was in flagrant breach of Treaty principles.

#### **14.16.2 The adequacy of the reserves**

Overall, the quantity of land reserved was inadequate to ensure that the present and future needs of the people were met. Even at the time the reserves were created, they were often not extensive enough to permit the maintenance of traditional cultivation practices or customary access to natural resources (thus denying Maori their right to follow a way of life many of them valued), and more often than not too small to be developed for agricultural and pastoral farming (thus denying Maori a reasonable chance of prospering in the new economy). In later years this became abundantly evident. In some cases Maori themselves sought to remedy this situation by purchasing additional lands from the Crown, but that did not provide a long-term solution to the widespread landlessness which resulted from inadequate reserves set aside from the Crown purchases. For one thing, not all Maori were in a position to purchase lands, and those who did experienced precisely the same pressure to sell that all Maori landowners later felt.

Moreover, the quality of the land reserved usually left much to be desired, and this was known at the time, or very soon afterwards. The reserves were barely adequate for subsistence, and usually uneconomic for farming use. The progress of Pakeha farming development reduced access to and affected the quality and quantity of natural resources. The Crown has accepted that it failed to ensure that the reserves laid off during the purchases were adequate for the present and future needs of many of the Maori resident in the region.

The principles of active protection, good faith and partnership were breached, in that the obligation of the Crown to ensure the welfare of Maori was lost sight of. In a more specific way, the principle of active protection was breached by the Crown's disregard of its obligation to ensure that a sufficient endowment of land and other resources was retained and that an opportunity for Maori to develop these resources and share in the benefits of colonisation was provided. The denial of this opportunity represented a breach of the principle of options, in that Maori communities were deprived of a real choice between continuing their traditional lifestyle, entering fully into the new society and economy, or combining elements of both ways of living. The fact that Maori interests were given a lower priority than settler interests constituted a breach of the principle of equity. As a community and as iwi groups, Maori of Te Tau Ihu suffered enormous prejudice by these breaches.

**14.16.3 The ability of reserve owners to manage and control reserves and retain ownership**

Much, but by no means all, of the land reserved was soon removed from the control of its owners, by means of its vesting in the Crown under the native reserves legislation of 1856 and later years. The circumstances surrounding these transfers to Crown control are little known, but the procedures for vesting were directed by officials and provided little opportunity for the owners' viewpoint to be heard. Once vested, the lands produced an income for those with beneficial interests in them, but the 'owners' had no control over how this income was obtained or expended. This impacted on their mana, cultural identity, and community stability. They were no longer able to exercise rangatiratanga over the resources they owned. Again, the rights of Maori under the reciprocal principles of the Treaty were being disregarded.

Inadequate means were devised by the Crown to ensure that the reserves were not alienated against the wishes of their owners or contrary to their long-term interests. Restrictions and safeguards did exist, and were never entirely abandoned, but pressure to increase the productivity of the land by transferring it to Pakeha control led to a progressive weakening of the protective mechanisms. We particularly noted that the vesting of reserved land in the Crown or Public Trustee did not shield it completely from the risk of alienation. We reiterate that this land was held by the Crown in trust for its owners, which should have led to a much stronger official commitment to preserve it in Maori ownership. We pointed also to the practice of issuing Crown grants to one or a few owners of reserves – a procedure that conflicted with traditional ways of managing land rights and often resulted in early alienation. The bypassing of customary collective decision-making processes in this situation not only was in conflict with the Treaty guarantee of tino rangatiratanga but also contributed to the loss of the land.

The procedures of the Native Land Court, by which individual titles were awarded, both diminished the authority of chiefs and hapu over the land and promoted fragmentation (and eventually alienation). Fragmentation of interests in the reserves became so extreme that it often seemed that sale was the only viable option. In Te Tau Ihu fragmentation thus not only made economic use of the reserves more difficult (at a time when development assistance was available to Pakeha landowners but not to Maori) but also reduced the extent of Maori landholding. Later legislation (the Maori Reserved Land Act of 1955 and the Maori Affairs Act of 1967) made it possible, for a few years in which considerable damage was done, for the Crown to take action that further reduced the Maori land base.

Public works takings or Crown purchases for conservation purposes, and the creation of the foreshore reserve in the Marlborough Sounds, overrode the property rights of Maori in circumstances that were not sufficiently exceptional to justify these procedures. Land in these categories was acquired by the Crown with inadequate owner participation, without compensation (or sufficient compensation), and without consideration of alternatives that

**14.16.4**

would have made Maori retention of ownership and control possible while still ensuring environmental protection and wider public access. In respect of the foreshore reserve, we found that its creation by the Crown was discriminatory and in breach of article 3 of the Treaty which allowed Maori the rights and privileges of British subjects.

Our overall conclusion was that the mechanisms devised by the Crown for restricting alienation of the reserved land in Te Tau Ihu did not amount to active protection of Maori landownership, and that in many ways the policies and actions of the Crown contributed positively to alienation of the land. The failure to protect rangatiratanga over land was in breach of the principle of active protection of Maori resources, and great prejudice was suffered thereby. We found that over the long period up to the 1970s it was the Crown that was responsible for creating the conditions that made alienation of the reserved land likely and its retention near-impossible, and that the Crown had an active role itself in the alienation process. These acts and omissions of the Crown were a breach of the Treaty principle of active protection.

**14.16.4 West Coast issues**

Although the Arahura transaction conducted with Ngai Tahu in 1860 had to some extent recognised the rights of other tribes and individuals on the West Coast, especially by including non-Ngai Tahu people as sole or part owners of occupation reserves situated in many parts of the region, this recognition was modified when the reserve ownership lists were put under scrutiny before the Young commission in 1879. In evidence and submissions from the Te Tau Ihu iwi, it was alleged that the Crown did not protect the rights of these tribes in respect of their reserve entitlements in this process. We concluded that the process of determining ownership of the reserves was not conducted in an appropriately transparent manner. Not everyone with interests in the reserves was represented at the Greymouth hearings in January 1879, and it was not publicly demonstrated why so much reliance was placed on the evidence of prominent Ngai Tahu witnesses. This failure was compounded when the Crown later refused to entertain complaints that the commission's decisions were unfair. However, we received insufficient evidence to determine whether the rights of particular Ngati Rarua and Ngati Apa individuals were compromised by the decisions of the Young commission.

**14.16.5 The socio-economic status of Te Tau Ihu Maori and its relationship to inadequate reserves**

It was not impossible to prosper in nineteenth- and twentieth-century New Zealand without owning rural land – even in the farm-dominated economy that prevailed during much

of this country's history. From an early date there were many Pakeha New Zealanders who made a satisfactory living without owning land. Nevertheless, we agree with the many submissions stating that the insufficiency of the reserves has had a deleterious impact on the socio-economic situation of Maori in this region in the period since the middle of the nineteenth century. Their inadequate land base made entry into the modern economy difficult, and the opportunities offered by profitable land utilisation were cut off. This was a major factor in the economic and social marginalisation that followed.

#### **14.16.6 Landless natives reserves**

Even when the inadequacy of the land base in Te Tau Ihu (or at least in Marlborough and Buller) was officially recognised in the 1880s, the remedy devised by the Crown (the landless natives scheme) fell far short of what was necessary. Too little land was allocated – even less than the Crown itself regarded as sufficient in legislative formulations – and much of it was inferior. Most of it was in remote locations. A grievance had been acknowledged, and this was an important opportunity to put things right. In inadequately resolving it the Crown breached the principle of redress. In addition, the efforts of the Crown to implement the scheme fell short of the standards demanded by the principle of partnership, and disregarded the duty to act in good faith. Some of the land allocated was never made available. In that the provision made for 'landless Maori' contrasted unfavourably with that made for 'landless Pakeha', and even for other Maori in the South Island, the principle of equity was breached. These breaches undoubtedly meant that prejudicial effects were experienced by the people affected by the landless natives scheme – to say nothing of those whose needs were disregarded altogether.

#### **14.17 TE TAITAPU, RANGITOTO, WAKAPUAKA, AND THE NATIVE LAND COURT**

By 1883, when the Native Land Court sat for the first time in Te Tau Ihu, the only lands remaining under customary title within the entire district were at Te Taitapu, Rangitoto Island and Wakapuaka. These three land areas together contained 146,391 acres, or approximately 4.35 per cent of the total inquiry district. Given the very small amount of land in customary ownership, the land court inevitably played a far more limited role in Te Tau Ihu than it did in many North Island regions. Nevertheless, in a situation in which Maori retained very little land, the fate of that which they had managed to retain necessarily assumed considerable significance. In chapter 8, we considered these three blocks, along with the wider issues associated with the Native Land Court's title-adjudication work within Te Tau Ihu.

**14.17.1 Te Taitapu**

The 88,350-acre Taitapu block had been excluded from the Waipounamu deed signed by Ngati Rarua and Ngati Tama in November 1855. Gold was discovered on the land in 1862 and Crown official James Mackay soon after signed an agreement with two Ngati Rarua rangatira providing for an annual mining licence of one pound to be charged each miner, as well as allowing the Governor to make rules and regulations for the goldfield in future. This agreement, besides ignoring the rights of the wider Ngati Rarua community, also set aside the interests of Te Atiawa, Ngati Tama, and Ngati Apa in the area. Disputes over entitlement to the revenue led to an 1863 agreement in which 18 individual 'Members of the Ngati Rarua Tribe' were defined as owners, even though in practice some were mainly Te Atiawa or Ngati Tama.

It was not long before it became a significant problem to persuade miners to pay the licence fee, especially in the absence of any officer appointed to take charge of this task. Mackay maintained that abuses of the 1862 and 1863 arrangements prompted requests for Government intervention and the formal proclamation of the goldfield in 1873, but it was the discovery of a quartz reef, requiring greater infrastructure and security of tenure than a one-year licence, which undoubtedly prompted the move to strengthen the Crown's control of the field. The block was brought within the ambit of the Gold Fields Act Amendment Act 1868 without further reference or explanation to the Maori concerned. Yet, the powers involved were extensive in terms of the regulation of the goldfield and the uses to which the land could be put.

The almost total loss of control over Taitapu after 1873 was, we considered, a significant factor in the subsequent decision to sell the block. In 1883, the Native Land Court awarded the block to three members of Ngati Rarua, dismissing a claim from the Kurahaupo iwi on the basis that the court had 'no power to reinstate' them, along with a further claim from Te Atiawa. The block was promptly sold to a private consortium for the sum of £10,000.

We found the 1862 and 1863 agreements, along with the unilateral proclamation of Taitapu as a goldfield in 1873, to be contrary to the Treaty and its principles in that informed consent on the part of all the customary owners (or any of them, in the case of the 1873 proclamation) was not secured. The 1862 agreement was inequitable and contrary to the principle of partnership. The Crown failed to uphold its side of the agreement and did not collect or distribute licensing revenue in a diligent manner.

We further found that, although there were reasonable grounds for the Crown to regulate gold mining, this did not necessarily require Crown ownership of the resource. Further, the Crown's failure to ensure that the owners of Te Taitapu received an equitable share of the gold revenue raised from their land in the form of the gold duty was, we found, contrary to Treaty principles.

The 1883 decision of the Native Land Court to award the block to just three individuals

was, we concluded, contrary to the statutory requirement to identify every owner. Moreover, it was the clearly stated intention of Ngati Rarua that those three persons should hold the land 'in trust for others'. Instead, they received outright title and sold the block soon after. As Taitapu was one of the few large areas remaining to Te Tau Ihu Maori, there was a pressing need for it to be retained and for the land court to impose alienation restrictions towards this end. It did not, and there were no reserves set aside from the subsequent sale to private interests. Local Maori were deprived of an 88,350-acre block that they could not afford to lose.

#### **14.17.2 Rangitoto**

Rangitoto (D'Urville Island) covers an area of about 40,466 acres and was a key part of Tutepourangi's tuku. It was excepted from the Waipounamu deed in 1853 and again three years later when Ngati Koata signed their own deed. In 1883, title to Rangitoto and a number of smaller islands was awarded to 79 persons. Although they were supposedly all Ngati Koata, at least one Ngati Kuia individual made it on the list of owners, though for reasons not inquired into by the judge, Ngati Kuia made no claim for inclusion in the title. The family of one prominent Ngati Koata rangatira were excluded from the title, however, and it was not until 1901 that this matter was rectified.

In 1895, the Native Land Court made Rangitoto and the surrounding islands inalienable except by way of lease for a period not exceeding 21 years. The Native Land Act 1909 removed all existing alienation restrictions on Maori land. This was to have a dramatic impact on Rangitoto, with approximately half the island being sold over the next decade. Individualised interests and the fractionation of these over time contributed to further alienations, including some in which 'uneconomic interests' were compulsorily purchased. We concluded that the Crown's response to the problem created by its own land legislation merely compounded the sense of grievance for many Maori. We found the legislation introduced after 1953 allowing for the compulsory purchase of 'uneconomic' interests in Maori land, though perhaps well-intentioned, in breach of the Treaty in that it ran contrary to the clear and unambiguous guarantee to Maori contained in article 2 that they should be allowed to retain their lands for so long as they wished. We further found the Crown in breach of the principle of active protection for its failure to protect the island from alienation.

We also noted that the existence of Rangitoto in Ngati Koata hands was often cited by Crown officials as sufficient reason for the tribe's inadequate reserves elsewhere not to be extended. That being the case, it was incumbent upon the Crown to ensure that the island remained in Ngati Koata ownership and that the owners received reasonable assistance to farm and develop the island to the best of their ability. Access to development finance was critical in this respect, but it was largely beyond the reach of the owners. Instead,

approximately 85 per cent of the island was allowed to be alienated, most of it to private parties, but including some Crown acquisitions, including one as recently as 1967. We found this to be in breach of the principle of active protection.

### 14.17.3 Wakapuaka

The Wakapuaka block, containing some 17,575 acres upon survey, was the third case dealt with by Judge Mair in Nelson in November 1883. The court's decision to make Huria Matenga the sole owner of the land has generated what has been described as 'the claimants' most enduring grievance in their petitions to Parliament'.<sup>28</sup> Between 1896 and 1948 alone, the Wakapuaka controversy was the subject of at least 23 petitions. It remains today a matter of great concern to a number of parties to our inquiry.

We found that the award by the Native Land Court of the entire block to a single grantee was grossly at variance with custom. Even though the Crown may not be responsible for decisions of a court, the Tribunal can consider whether the latter's actions were consistent with the principles of the Treaty and, in the event of such inconsistency being found, it can then determine whether the Crown omitted to take appropriate action to remedy the situation to the extent that was practicable. We are of the opinion that this argument applies to Wakapuaka. More broadly, we found that a legislative regime which allowed such a large block of land, in occupation by a substantial number of people, many of whom had valid claims to the area according to custom, to be awarded to a sole owner without any trusteeship provisions in respect of the many other claimants was in breach of the principle of equal treatment. The Treaty required the Crown to act fairly as between different groups of Maori in a broadly similar situation, but that clearly did not occur in the case of Wakapuaka.

We also found the Crown to be in breach of the principle of active protection for its failure to intervene when the Native Land Court proceeded to investigate the title to Wakapuaka on the basis of an application which did not comply with the provisions of the Native Land Court Act 1880. That Act required at least three named applicants to any block. But the Wakapuaka investigation was held on the basis of an application lodged solely in Huria Matenga's name. The Crown failed to intervene to alert the court to this error, as a consequence of which even the meagre and short-lived safeguards of the 1880 Act – supposedly intended to prevent individuals from taking blocks to the court without wider support – were entirely ignored.

One of the key issues for us to decide was whether an abuse of power had occurred by reason of the actions of Crown agent Alexander Mackay appearing as a Native Land Court witness. We concluded that Mackay gave evidence at the 1883 hearing that he knew to be

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28. Dr Grant Phillipson, *The Northern South Island: Part 2*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc A27), p 49

false. But Mackay's appearance at the Wakapuaka hearing was as a supposed authority on land rights in the area and not, it would appear, as a representative of the Crown. Nor is there any suggestion that Mackay's evidence – partial, biased, and self-interested as it may have been – was of any particular benefit to the Crown.

On the other hand, Mackay's standing as a prominent local Crown official lent a certain weight to his testimony that it patently did not deserve. The Native Land Court's decision to privilege the evidence of a single Pakeha 'expert' over that of the many Maori witnesses to appear in 1883 served to ensure that a serious injustice would be done when it came to deciding the title to Wakapuaka. Clearly, that would never have been allowed to occur had Te Tau Ihu Maori and their own institutions been permitted to have a substantial role in the process of determining the title themselves.

Nor did we accept the Crown's submission that the Wakapuaka case only serves to show how it is almost impossible to determine who is right and who is wrong. There is little doubt that much of the evidence presented in 1883 was incomplete or appeared inconsistent. Yet, the court failed to follow up obvious lines of inquiry that in many cases may have explained some of these apparent contradictions, and failed to even clearly establish the basis of Huria Matenga's claim to the land. Even the binary notion of right and wrong claimants to the land fails, in our view, to appreciate the true nature of customary tenure, which in a circumstance such as Wakapuaka prior to 1883, appears to have been based on an inclusive model in which a wide range of rights could be accommodated. That stood in marked contrast to the Native Land Court's 1883 decision to exclude all but one customary owner from the title to the land.

That there were problems with the 1883 judgment was clearly indicated from the first (at the least, it had been established that more than one whanau had been living on the block), but no reinvestigation took place until over 50 years later. The failure of the Crown to respond to protests about the court's finding at Wakapuaka in a timely manner is very clear, particularly with respect to the repeated failure to address the concerns of Te Wahapiro's family. Other Maori with interests in the block were also left feeling aggrieved by the Crown's inaction even after the rehearing in the 1930s. We considered this tardiness of action to be in breach of the principle of redress.

Furthermore, by the time the case was heard, a very complicated situation was even less likely to be capable of resolution. Justice delayed ultimately meant justice denied, most especially in the case of Ngati Koata, while in the case of the Te Wahapiro whanau, a substantial area of land had already been alienated by the time they were eventually admitted into the title to Wakapuaka. Although the lengthy delay in reopening the title investigation now makes it difficult to assess the extent to which the claims of the Te Wahapiro whanau were adequately addressed by the award of a one-quarter share, one thing the 1939 decision of the Native Appellate Court could not achieve was to undo what had gone before and in this respect the decision could never entirely deliver appropriate relief for the whanau.

Following in the footsteps of Judge Mair, officials and members of the Native Affairs Committee had long opted to believe the evidence of Mackay over that of Maori who had been wrongfully excluded from the title, even when it ought to have been obvious by the time of the first petitions in the late 1890s that there were ample grounds for considering him at best a partial and biased witness. Instead, these initial rejections of the various petitions for a rehearing were used as precedent for denying later appeals along the same lines, thus compounding the grievance.

Legislation regarding succession, especially from 1909, had also greatly exacerbated the prejudice caused by the court's extraordinary decision to award title to a sole grantee. The law permitted firstly, Huria Matenga to leave all the remaining land to her husband who had no customary rights, and, secondly, for Hemi Matenga (the husband) to leave virtually all of it to other family members without any links whatsoever with the land. This completed the dispossession of the Te Wahapiro whanau and other Ngati Tama, Ngati Koata and Kurahaupo claimants to Wakapuaka. We consider this to be a further breach of the principle of active protection.

Controversy over the 1883 judgment and its aftermath have to a large extent overshadowed the subsequent history of the block. Yet, the cumulative impact of individualisation and succession laws and the failure to impose alienation restrictions on the title, even though one of just three areas of customary Maori land remaining to Te Tau Ihu Maori in 1883, has seen nearly 80 per cent of the block pass out of Maori ownership since that time. We found this to be in breach of the principle of active protection.

#### **14.17.4 Wider Native Land Court issues**

We concluded with reference to the question of whether the Native Land Court carried out an adequate inquiry as to who held customary rights in the three blocks that it did not, and further that it could not under the legislative regime in place at the time of the hearing. Crown officials freely admitted in the late nineteenth century that Maori would have had much fairer occupation of their lands according to their own customs and uages. As a number of previous Tribunals have clearly found, fairness was never so much the priority as facilitating the alienation of Maori lands. Any other objective would have required substantial Maori involvement in the design and implementation of decision-making mechanisms. That was not the case with the Native Land Court, and we concluded that this was an especially inappropriate body in a district such as Te Tau Ihu, where customary tenure was continuing to evolve and where rights were often multi-layered and nuanced.

We also found that the court's own rules and practices further weakened its capacity to recognise and respect customary rights. Of particular importance within Te Tau Ihu was the court's emphasis on conquest and its determination that the 'conquered' Kurahaupo iwi had no customary rights remaining. That was at odds with not just the evidence of Kurahaupo

witnesses, but also contradicted occasional acknowledgements of such rights on the part of the other iwi.

The court's 1840 rule was another important factor. In our view there was considerable justification for the injunction against recognising titles obtained by force after 1840, in that Maori custom was already to some extent evolving in that direction. But we cannot agree with the opinion expressed by historians for some of the 'conquering' tribes that Christianity and other developments after 1840 had inhibited the ability of such groups to continue to assert their rights over those of the Kurahaupo tribes. There was no shortage of examples of such assertions of rights in Te Tau Ihu in the period after 1840. Nor, with the exception of the sanction against violence, do we see any grounds for the freezing of custom as at 1840. There was nothing in the legislation under which the Native Land Court was established which required such an approach and, indeed, it was not one applied universally by judges of the court. It follows that the outcome of the Te Tau Ihu hearings may have been entirely different if a judge who allowed for peaceful developments after 1840 to be recognised in weighing up ownership had been appointed to decide on cases in the district. That in itself surely highlights the inappropriateness of the court as an arbiter of custom, given vital decisions impacting on entire Maori communities could be decided largely on the personal whims and prejudices of the European official appointed to hear the case.

We concluded that the Crown's chosen response to petitions and appeals, preferring to deal with these on an individual basis rather than legislating to remedy the systemic failings of the system as a whole, was inherently deficient in that in those cases where appeals or rehearings were granted this involved referring the matter back to the same flawed body which had made the original decision. In our view to intervene on just a selection of cases where the underlying problem was fundamental and recurring, leaving some miscarriages of justice extant and doing nothing to prevent future ones, was a policy clearly inadequate in Treaty terms.

Individualised titles, subject to fractionation as a consequence of succession rules, stripped Maori of the right to manage their lands as communities. The Treaty may have permitted Maori to alienate lands if they wished, as the Crown submitted, but it also guaranteed ongoing ownership without qualification or equivocation for however long this was desired. A title system profoundly weighted towards making it easier to sell lands than to retain them can hardly be considered anything other than a serious breach of the Treaty. In this respect, we found ourselves in agreement with a number of previous Tribunals.

#### **14.18 THE NELSON AND MOTUEKA TENTHS**

Besides occupation reserves and the three large areas excluded from the Crown's purchasing programme (but later subject to substantial alienation) the third category of retained

lands we were required to consider were the tenths. These arose from early New Zealand Company undertakings to set aside one-tenth of the lands it purchased for the benefit of Maori, a responsibility later assumed by the Crown. The subsequent administration of these reserves by a number of different agencies operating under various legislative regimes formed a further focus of our attention.

#### **14.18.1 The provision and protection of a full tenth**

From at least 1844, the Crown undertook to provide a full tenth. The Crown then failed to meet this undertaking. The 1848 grant only allocated 5053 acres as tenths reserves, substantially less than the 15,100 acres awarded by Spain. Spain's award was implemented as far as the company settlers were concerned but the same cannot be said for Maori. As Crown counsel acknowledged, the reserves allocated in the 1848 grant were an inadequate endowment for the future needs of Te Tau Ihu Maori. In our view, the total tenth ought to have been 17,200 acres, from the final 172,000 acres included in the Nelson settlement, with sufficient occupation reserves in addition. We found the failure to secure a full tenth to be in breach of the Crown's fiduciary obligations and its duties of active protection and the duty to act in good faith. In implementing the Spain award for settlers but not for Maori, the Crown breached the Treaty principle of equity. The Crown also failed to deliver on the Treaty promise of mutual benefit, which required the retention of sufficient land for Maori to prosper alongside settlers in the new economy. In company settlements, this was conceived as a tenth of all land, to form an inalienable endowment for all time. The failure to deliver on this was a critical Treaty breach.

Not only was the 'tenths' estate substantially less than a full tenth, it was also not protected from subsequent alienations. The Crown's failure to protect the estate breached the article 2 guarantee that lands would be retained by Maori for as long as they wished to retain them, and the duty of active protection. The reduction in the township reserves in 1847 was effected without consulting or obtaining the consent of Te Tau Ihu Maori, in breach of the article 2 guarantee, the duty of active protection, the duty to consult and the principle of equity. Transfers of endowment reserves into occupation reserves at Motueka were necessary because of the original small allocation of land, but they came at the expense of the endowment estate. The Crown admits that this was a critical failure on its part. In transferring endowment reserves into occupation reserves without adequate consultation, the Crown took from one group of Maori to meet obligations to another, and then failed to fully meet obligations to either group. This breached the Treaty principles of equal treatment and active protection and the Treaty duty to act in good faith.

There appears to have been some, albeit limited, consultation with Motueka Maori about the Whakarewa grant but not with the beneficiaries of the tenths estate. We found that the Whakarewa grant in 1853, made without the full, free, and informed consent of all right

holders, and not resumed after the closure of the school, was a significant blow to the tenths trust and to Motueka hapu, and was in breach of the Treaty. Subsequent alienations, including the 1864 exchange, public works takings and the legislation of 1967, were also effected without full consultation and were further examples of the Crown's failure to protect the tenths estate.

In particular, the Crown took land from the estate for public works, in circumstances where it could have limited its taking to the leasehold, and quite frequently where the work was not essential in the national interest, nor was it essential that it be trust land that was used. Further, there was no legislative requirement that beneficial owners be consulted or even informed or be given an opportunity to object, so neither the Maori Trustee nor the taking authority did so. The compulsory taking of inalienable reserves in these various circumstances was in breach of the Treaty, to the prejudice of all the beneficial owners.

Similarly, the compulsory purchase of uneconomic interests under the Maori Affairs Amendment Act 1967 was in breach of the Treaty. At least a quarter of the owners lost their interests in their ancestral lands by this means, in breach of the plain meaning of article 2, and of the principles of partnership, active protection, and equal treatment. Previously, the Maori Reserved Land Act 1955 had provided for those who lost their interests in this way to remain beneficiaries of the trust, but this was amended in 1967 and their interests on-sold. This was in breach of the principle of active protection, to their obvious detriment. While the Act provided for the Maori Trustee to sell these interests either to other Maori or to lessees, there was nothing that confined their sale to other beneficial owners (which would have kept the interests in the trust). The evidence is that the uneconomic interests were disposed to a lessee or lessees, in breach of the Treaty rights of the majority of owners. Finally, some individuals sold their interests under the 1967 Act, in circumstances that we found breached their Treaty rights, and also the rights of the majority, parts of whose land was thus alienated without their consent.

#### **14.18.2 Clarifying the status and beneficial ownership of the tenths**

The Crown's conception of how the tenths scheme would work slowly evolved during the first years of the trust's existence and the estate was not legally vested in the Crown until 1856. Further clarification of the status of the trust estate was necessary and it was not until the end of the century, with the identification of beneficial owners, that it was finalised. The ongoing lack of clarity about the status of the reserves, which extended beyond the enactment of the Native Reserves Act 1856, was a breach of the Crown's fiduciary obligations as trustee.

There was very little consultation with Te Tau Ihu Maori throughout this lengthy process. This breached the Treaty duties of acting in good faith and consultation, and the principle of active protection. Prior to the 1970s, the beneficial owners were not consulted

about the ongoing existence of the trust. The tenths reserves were vested in the trust of the Crown without the agreement of Te Tau Ihu Maori, and beneficiaries of the estate were not even identified until 1892, some 50 years after the trust had been established. The failure to obtain full and free consent from beneficial owners for their land to be vested in the Crown breached the plain meaning of article 2 and the Crown's Treaty responsibilities to act in good faith, to consult Maori on matters key to their interests, and to actively protect those interests and the tino rangatiratanga of the owners.

The failure to attempt this identification prior to 1892 was an omission that fundamentally affected the way in which the trust operated. In failing to identify the beneficiaries in a timely manner and thus ensure that the benefits of the trust went exclusively to them before 1892, the Crown breached its fiduciary obligations as trustee and its responsibility under the Treaty to actively protect the interests of the beneficiaries.

#### **14.18.3 Management of the trust estate**

The record of trust administration indicates that there were periods of laxity, particularly prior to 1848, but we would not go so far as to characterise this as mismanagement. In our view, the main issue with the trust's administration was the lack of consultation with, and involvement of, the Maori owners. The Crown's failure to ensure adequate consultation with beneficiaries, or enable their involvement in the administration of the trust, was a significant omission. The Crown breached its obligation under the Treaty to give effect to their tino rangatiratanga, and the principles of partnership and active protection. In our view, active protection required that the estate be held in trust for all generations and that it be kept inalienable. But, as Maori members of Parliament argued in the 1880s, this was possible alongside the management of the trust by its beneficial owners. At the very least, they should have been given a sufficient voice in its management and, from time to time, their consent was required to significant changes. The appointment of a minority of Maori (non-owners) to the boards of the Public Trust and the Native Trust did nothing to meet this obligation.

Further Treaty breaches were incurred through legislation enabling the establishment of the perpetual leasing regime, also imposed without consultation with (or the consent of) the beneficial owners. Nonetheless, Parliament did not act in ignorance – the contrary wish of owners to resume their lands and farm them was reported to the House by their member of Parliament. Perpetual leasing may well have been a common arrangement at the time, and an arrangement that had a sound economic rationale for 'immortal legal entities' like the Crown and municipalities, but the failure to consult with beneficiaries or obtain their consent to such a fundamental change to the administration of their estate was a serious omission. It effectively resulted in the permanent alienation of the reserves. The Westland and Nelson Native Reserves Act 1887 breached the Crown's obligations of active protection,

consultation, and partnership, as well as the guarantee in article 2 for the retention of land for as long as Maori wished. Then, in the post-Second World War period, the Crown failed to ensure that the perpetual leasing regime was resulting in the best possible return for the estate. Rents were based on hopelessly outdated valuations.

#### **14.18.4 The expenditure and distribution of trust income**

The endowment fund was clearly of material benefit to Te Tau Ihu Maori. However, some trust income was used as a replacement, rather than a supplement, to Government spending on health, education, and other welfare purposes. The Crown thereby failed to actively protect the interests of the beneficiaries, and breached the Treaty principle of equity by using the trust to fund services provided to others by the taxpayer. It did so, despite the protests of officials responsible for the trust (such as Alexander Mackay in 1877).

After the definition of beneficial ownership in 1892, a substantial portion of the endowment fund was disbursed directly to individual beneficiaries with no facility for community management of the income. Following Native Land Court rules of succession, shareholding became increasingly fragmented over time with the result that the vast majority of individual shareholders received insubstantial payments. Interests became increasingly uneconomic and owners were more and more unconnected with their land. These factors underlay the alienation of a significant portion of the tenths estate under the Maori Affairs Amendment Act 1967. The Crown's failure to prevent the Native Land Court system from having this impact on the tenths estate breached the principle of active protection. Also, as we have noted, there were alternative models for distributing the trust's income, such as the iwi trust boards provided to Rotorua and Taupo iwi in the 1920s (and to other iwi in the 1930s and 1940s.) In contrast, the Crown failed to provide for or protect the tino rangatira-tanga of Te Tau Ihu iwi in the allocation and distribution of the proceeds from their own land, in breach of article 2 and the Treaty principles of partnership, autonomy, and equal treatment.

#### **14.18.5 The inclusion and administration of the occupation reserves**

The Motueka and Moutere occupation reserves were wrongfully included in the tenths estate and the Crown's failure to return them to Maori, as recommended by trust administrators in the 1860s, was a serious omission. Motueka Maori consistently sought full control and authority over these reserves but the Crown refused to release the land from the trust.

Contrary to the wishes of Motueka Maori, the trust administration assumed greater control over the occupation land from the turn of the twentieth century. As with the endowment estate, the Native Land Court defined beneficial ownership of the occupation reserves. Alexander Mackay's definition of ownership in 1901 significantly circumscribed the extent of

**14.18.6**

land under direct control of Motueka Maori with most under Public Trustee management, leased in perpetuity. The Public Trustee distributed the rental income from these leases to individuals in accordance with the Native Land Court's definition of beneficial ownership.

The Crown's inclusion of occupation reserves in the trust estate, the failure to restore ownership over the occupation reserves and the increasing assumption of control over these reserves, particularly from the turn of the twentieth century, was in breach of the article 2 guarantee of tino rangatiratanga. Ngati Rarua, Te Atiawa, and Ngati Tama were prejudicially affected by this breach. The Crown's failure to prevent the effects of the Native Land Court system breached the principle of active protection.

The occupation reserves were also insufficient to sustain the Motueka Maori population, even after additions from the late 1840s through to the 1860s. The inadequate provision of occupation reserves breached the principle of active protection and thus denied Maori the socio-economic opportunities vital to their ongoing development.

**14.18.6 The Whakarewa grant**

Beneficiaries were neither fully nor adequately consulted about the Whakarewa grant. The Crown took a sizeable area of quality land from tenths and occupation reserves, it failed to ensure that those occupying the land either retained the land or were properly consulted about the grant and that the terms of consent were clearly understood by all parties. The Crown failed to ensure that local Maori were left with sufficient land for their present and reasonably foreseeable future needs and did not provide compensation to those whose occupation lands were taken. The Crown failed to ensure that the terms of the school trust were consistent with the tenths trust and for the exclusive benefit of the beneficiaries of this trust. The Crown also failed to ensure the return of land after the closure of the school. The Crown thereby failed to actively protect the interests of the beneficiaries, particularly those who were resident at Motueka – including Ngati Rarua, Te Atiawa, Ngati Tama, and the Georgeson whanau.

**14.18.7 The Public Trustee and the Native or Maori Trustee – Crown agency**

The Public Trustee and the Native or Maori Trustee, in respect of their actions within this inquiry district, are not agents of the Crown. We agreed with the Crown's submission that the legislative framework in which the trustees operated is 'a proper matter for inquiry by the Tribunal' and that consideration of the effect of the legislation involved some examination of the trustees' activities. Although strictly at law the trustees were not agents of the Crown, in reality they were performing the responsibilities of the Crown.

The Crown did not fully devolve its fiduciary and equitable responsibilities to the Public Trustee, Native Trustee, or Maori Trustee and it cannot, and should not, detach itself from

those duties carried out by the trustees in respect to Maori reserved land. In our view, this meant that the Crown had a duty to ensure that the trustees did not breach the principles of the Treaty in carrying out these responsibilities. This was particularly so because the function of actively protecting Maori in retaining sufficient land for them to benefit from settlement, through the particular mechanism of reserves, was so integral to the Treaty in our Te Tau Ihu district. The Crown had a responsibility to ensure that the trustees adequately fulfilled these obligations. Its failure to do so is in breach of the principle of active protection.

#### **14.18.8 The 1892 case**

As a result of faults in the court's process, the 1892 hearing was not a full inquiry into the customary interests of Te Tau Ihu iwi in the area encompassed in the Nelson settlement. The evidence also suggests that Judge Mackay's preconceptions about customary interests in Te Tau Ihu influenced his decision. Not only was the inquiry inadequate, but the Native Land Court and then the Government failed to adequately respond to requests from Kurahaupo iwi for a reinvestigation. There were questionable aspects to the way that the court inquired into customary ownership of the tenths and sufficient grounds to warrant a Crown investigation. The Crown's failure to adequately respond to calls for such an inquiry breached the principle of active protection.

As both Crown and claimants agree, the question of entitlement should have been determined as at 1844. We consider that Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata had the strongest customary interests at that date. The Kurahaupo tribes had surviving rights despite their defeat, and the potential for them to recover and strengthen with every year. Ngati Toa had still in 1844 a latent right to visit for resource use or to take up residence and cultivation. It is not possible for this Tribunal, at this distance in time from the events of the 1840s, to comment on the proportionate share to which the uninvestigated rights of Ngati Toa and the Kurahaupo iwi would have entitled them. Suffice to say that we think the leading share in the tenths was indeed correctly decided in 1892, although we reach no conclusion on the proportion as between the four northern allies. But as the tenths were considered part-payment for the company lands and an endowment for the 'vendors', we consider that Ngati Toa and the Kurahaupo iwi should also have had a share.

We found that Ngati Toa and the Kurahaupo iwi were wrongly denied a share in the tenths. We agree with the Crown's submission that it would not be appropriate to reopen the question of ownership of the estate at this late stage, even if that were possible. The lands of the Wakatu Incorporation are privately owned within the meaning of the Treaty of Waitangi Act, and we have no jurisdiction to make such a recommendation in any case. We recommend that the Crown negotiate with Ngati Toa and the Kurahaupo tribes to agree on an equitable compensation separate from the current tenths estate.

**14.18.9 The Wakatu Incorporation**

There is a strong case for the Crown's desire to negotiate directly with iwi rather than with the Wakatu Incorporation. Notwithstanding this, we wish to record here our recognition of the very important role that the Wakatu Incorporation has had in initiating and supporting claims to the Tribunal from Te Tau Ihu Maori. Furthermore, Crown actions that have directly affected the shareholders of Wakatu Incorporation since 1977 would need to be, and would appropriately be, resolved between the Crown and the incorporation. We note also Dr Mitchell's suggestion that the mana of the whanau who lost their interests in the 1970s could be restored from the 5.6 per cent of shares formerly belonging to the Maori Trustee, so long as the Crown compensates the incorporation. We note this suggestion without necessarily endorsing it, as a matter for discussion between the Crown and the incorporation.

The Wai 830 claim highlighted the anomalous position of non-tenths reserves which were included in the land vested in the Wakatu Incorporation in 1977. These six occupation reserves have a different history and ownership, and it is possible that their interests may not have been as well represented as the dominant group of beneficial owners. We did not receive sufficient evidence to reach any conclusions on the particulars, but we reached a preliminary finding of Treaty breach. In our view, the different status and beneficial ownership of these occupation reserves required a separate process, to obtain the full, free, and particular consent of the owners to the transfer of their reserves to the incorporation.

The Wakatu Incorporation inherited an estate that was overwhelmingly leased in perpetuity at rates that failed to reflect the value of the property. The Maori Reserved Land Amendment Act 1997 went some way towards remedying faults in the perpetual leasing system but did not immediately revoke the perpetual leases, which was the recommendation of the Ngai Tahu Tribunal and the expectation of the Taranaki Tribunal. Wakatu Incorporation raised a number of significant issues with respect to the current leasing regime. These include the continuation of perpetual leases, rent review periods that do not reflect the market conditions, and rents based on unimproved value. A number of issues remain outstanding. We therefore suggest that the Crown enter into discussions with the incorporation about these concerns with a view to a fairer arrangement, bringing these leases into line with current leasing practices.

The 2002 settlement that followed the 1997 legislation went some way towards providing recompense for the grievances around perpetual leasing, but did not represent a full and final settlement of these grievances. The payments were ex-gratia and aimed at post-1977 shortfalls. They were quite explicitly not intended to settle Treaty claims. The historical claims of the iwi concerned (and, it appears to us, the full claims of the incorporation) are yet to be settled.

The ex-Whakarewa School lands were leased under the same problematic conditions as the neighbouring land that had earlier been returned to the Wakatu Incorporation. NRAIT unsuccessfully sought the inclusion of their land in the schedule of leases covered by the

1997 Act. We found that it would have been reasonable to expect the Crown to intervene with legislation to put the NRAIT land on the same footing as the Wakatu land. Its failure to do so has compounded earlier Treaty breaches. The Crown has a responsibility to remedy the defects of the NRAIT leases. We make the same recommendation here as we have in the case of Wakatu: that the Crown enter into discussions with NRAIT about these concerns with a view to bringing the leases into line with current leasing practices.

Finally, although we have found significant Treaty breaches in the way the tenths policy was implemented, we would also comment that the concept of reserving one-tenth, as a minimum, was a good idea in the circumstances of the time. The creation of an inalienable endowment estate held in trust for present and future generations was consistent with the Crown's Treaty obligation of active protection. Furthermore, it should be noted that Te Tau Ihu Maori did get at least some benefit from the tenths. The administration was, as far as we can tell, usually honest and well-intentioned. As a result of all of these factors, a significant estate was returned to Maori ownership in the 1970s. Maori now have a significant asset, both in terms of commercial viability and ancestral land, that they might not have had if there had been no tenths policy.

#### **14.19 SOCIO-ECONOMIC ISSUES**

The socio-economic position of the Maori population of Te Tau Ihu after the major land purchases of the mid-nineteenth century quickly became one characterised by marginal economic status, poor health and low educational attainment. This was still the case in the mid-twentieth century, but we did not have enough evidence to ascertain precisely to what extent the situation altered after 1960. There were signs, however, that in the late twentieth century the Maori population still registered poorly across the range of social and economic indicators, and that the position of Maori culture and language was weak.

To a considerable extent, and principally, this socio-economic position was, we found, the result of the fact that the iwi of Te Tau Ihu were left with insufficient land for their present and future needs. This situation can be attributed in large part to Crown actions. Furthermore, the Crown's response to the socio-economic problems experienced by Te Tau Ihu Maori since the mid-nineteenth century has, on the whole, been inadequate.

These actions of the Crown were in breach of the Treaty principle of mutual benefit, which envisaged that both settlers and Maori would obtain or retain the resources necessary for them to develop and prosper in the new, shared nation state. These actions were also in breach of the Treaty principle of active protection, which required the Crown actively to protect the interests and tino rangatiratanga of Maori in the transactions that had resulted in such serious prejudice. The Crown's actions also breached the principle of redress, which required it to provide appropriate remedies to acknowledged grievances. In particular,

where the Crown's own actions have contributed to the precarious state of a taonga – including the language and culture of Te Tau Ihu iwi – there is an even greater obligation for the Crown to provide generous redress as circumstances permit. The Crown's actions in the nineteenth century, and its substantive failure to remedy the consequences of those actions, have resulted in significant social, economic, and cultural harm to the iwi of Te Tau Ihu.

We have already identified serious breaches of the Treaty in Crown acts and omissions that enormously diminished the land base of Te Tau Ihu iwi and left Maori in the region with inadequate reserves. These breaches were followed by the Crown's inadequate attempt, in the 'landless natives' scheme, to redress a grievance it had acknowledged. This was a missed opportunity to rectify the breaches of the land purchase period, and along with earlier acts and omissions, this failure had serious economic and social consequences. These outcomes must be recognised in any consideration of the Treaty breaches we have identified. To a large extent, the prejudice arising from the Treaty breaches described elsewhere in this report were set out in our chapter on socio-economic issues.

When we assess the Crown response to the social and economic situation of Maori in Te Tau Ihu, which was due, as we have said, in large part to Crown actions, we found a further series of breaches. Whether or not specific promises were made in Te Tau Ihu to foster Maori development and provide medical, educational, and other social services, the Crown had an obligation under the Treaty principles of reciprocity and active protection to guard the interests of all iwi from the negative effects of colonisation, promote and maintain the well-being of Maori, and provide all the benefits due to British subjects. Insufficient provision of health and education services was a breach of the principle of equity. Where this was a result of the isolated location of Maori communities, however, it was not necessarily such a breach since Pakeha residents of remote places suffered from their isolation also, although it should be noted that the Maori occupation of remote sites was sometimes itself the outcome of Crown action. The greater socio-economic need of Maori meant that greater efforts should have been made to reduce disparities between the Maori and non-Maori populations of the region and thus recognise all the rights of Maori as citizens.

Additionally, it was a breach of the principles of partnership, equity, and equal treatment for the Crown to rely on the tenths benefit fund to help provide health, welfare, and education services that should have been provided by the Government as they were elsewhere. Discriminatory policies that made it harder for Maori than Pakeha to receive pensions and emergency relief were a breach of the principle of equity.

It is clear that the Crown gave Maori insufficient assistance with economic development. The unavailability to Maori of the loan assistance offered to Pakeha settlers by legislation in 1894 was a breach of the principle of equity. The most prominent example of State assistance, the Wairau development scheme, had limited success and was characterised by inadequate consultation and opportunities for owner involvement. The hopes of the owners when engaging with the Crown to protect and develop their land were not fulfilled, and the

principle of partnership was very imperfectly observed by the Crown. In any case, the other iwi of Te Tau Ihu did not receive even the limited assistance provided to Wairau landowners and to iwi in other parts of the country from the 1930s onwards.

Te Tau Ihu Maori were prejudicially affected by these breaches of the Treaty and its principles. The economic and social situation in which most members of the Te Tau Ihu iwi found themselves as a consequence of the Crown land purchasing programme of the early colonial period was poor. Economic, health, housing, education, and other indicators have long been lower than those for the Pakeha of the region, and as a disadvantaged minority the Maori population has additionally experienced language and cultural loss, partly as a consequence of the loss of customary institutions such as *whare wananga*.

#### **14.20 NATURAL RESOURCES AND THE ENVIRONMENT**

In chapter 11, we considered claims regarding natural resources and the environment. We heard a wealth of evidence from *tangata whenua* in relation to their customary values, rights, and practices, and how those have been circumscribed by various actions (or by inaction) of the Crown. We were assisted in this by concessions from the Crown. In his closing submissions, Crown counsel conceded that the failure to reserve sufficient land and resources in the nineteenth century had breached the Treaty principle of options. This had impaired the ability of Te Tau Ihu iwi to maintain their tribal society and economy or to walk in two worlds, to their prejudice. He also submitted that there are problems in local authorities' implementation of the Resource Management Act 1991, and in the resources available for effective iwi participation in processes under that Act. To address these problems, Crown counsel advised that the Ministry for the Environment has devoted significant resources to fixing them.

##### **14.20.1 Loss of access and control**

In section 14.13.13, we summarised the Crown's Treaty breaches in respect of the Waipouamu purchase and customary rights of access to, and use and management of, natural resources. In chapter 11, we expanded on the aftermath of this purchase, outlining how increased settlement (and the delegation of authority to settler-dominated local bodies) resulted in modification of the environment. We concluded that the Crown was repeatedly made aware of a situation requiring its intervention for the active protection of Maori interests. From the 1870s to the 1890s, the reports of officials, parliamentary committees, and commissions of inquiry indicated that Te Tau Ihu Maori were facing serious difficulties. Settlers and their local authorities were draining swamps and lagoons, modifying rivers, clearing land, and stocking waterways with imported fish. Also, Maori access to surviving

mahinga kai was being restricted by the spread of settlement – if there was no reserve in the locality, private landowners often prevented them from camping to hunt or fish. At the same time, legal access was further circumscribed by the effective loss of the large remaining blocks on the mainland – Taitapu and Wakapuaka – in 1883. The attrition of reserves in the nineteenth and twentieth centuries continued to reduce Maori access to their valued resources. At the turn of the twentieth century, the Crown's landless natives reserves were provided as a remedy. Although, as we noted above, these reserves were mainly a 'cruel hoax', they did at least provide some additional access to mahinga kai.

The Crown's failure to protect a sufficiency of natural resources for the customary access, use, and management of Te Tau Ihu Maori was in breach of Treaty principles. In the nineteenth century, this included a failure to reserve sufficient land for that purpose in the 1850s; protect the surviving Maori estate from further attrition (including the active purchase or taking of some reserves); provide redress through the landless natives reserves; and protect Maori interests from the reported effects of settlement and environmental modification. The latter point included the failure to ensure that Maori interests were protected either by settler-dominated local bodies, or by the Native Department and Forest Service. Te Tau Ihu Maori were denied participation in the decisions which led to serious modification of the environment, and their interests were neither considered nor protected. This situation persisted until at least the 1970s, and was not seriously altered until the passage of the Resource Management Act in 1991. We relied on a 1935 decision of Judge Acheson for guidance on how seriously decision-makers could or should have taken the protection of Maori food supplies. In the judge's view, the Government should (in the instance before him) have gone to 'extreme trouble' to do so, and we agreed that this was a standard that should have applied in the twentieth century.

While we did not assess the Crown's actions in light of current environmental knowledge and standards, we did question whether there was a Maori interest known to it and in need of its protection. We found that such an interest was brought to the Government's attention repeatedly in the nineteenth and twentieth centuries, both nationally and in Te Tau Ihu. We found the Crown in breach of Treaty principles for failing to provide either active protection or redress. The State was predominantly governed by development imperatives, being determined to provide the necessary means for settlers to clear and farm the land, but this did not take away its Treaty responsibilities to Te Tau Ihu Maori or mitigate its Treaty breaches.

Those responsibilities included the protection of Maori exercise of their customary rights of access to, use of, and management of their valued resources and resource-sites. Those rights have never been alienated to the Crown and are protected by the Treaty. We found that Te Tau Ihu iwi have continued to exercise those rights to the fullest extent possible, including on private and Crown land. Rather than taking action to protect those rights – as, for example, with the Maitai River in 1943 – the Crown relied on decisions such

as *Waipapakura v Hempton* to defeat them. That was in breach of its Treaty obligations to Maori. The experience of Te Tau Ihu iwi in the twentieth century has been that private landowners often agree to access, especially where the resources are not of interest to them. There is, however, no legal protection from landowners refusing access or deciding to modify or destroy the resources. We cited Ngati Koata's experience with Moawhitu as a prime example. Access to, use of, and care for resources on Crown land, on the other hand, has proven difficult because of the actions of the Forest Service and other agencies – more so since the Conservation Act of 1987. We found that the Crown should take appropriate steps today to protect customary rights of access to, use of, and care for (kaitiakitanga) valued resources and resource-sites. In our view, it may be better to rely on joint management and partnership rather than legal instruments to protect Maori rights on conservation land, but we leave any recommendations to the Wai 262 Tribunal. The ability to continue exercising customary rights is a vital component of any tribal restoration that takes place in Te Tau Ihu.

#### **14.20.2 Customary fisheries and marine resources**

The single most important and valued resource to Te Tau Ihu iwi was their customary fisheries. We found that, apart from particular species and valued sites, Maori generally retained sufficient access to this resource until the 1960s. Since then, the Crown's management of this resource has permitted serious over-fishing by recreational and commercial users. For freshwater fisheries, this has happened in conjunction with significant modification of inland waterways. As a result, inland customary fisheries have become depleted and access has been affected. We found the Crown to be in breach of the Treaty for its failure to protect either freshwater customary fishing rights or the fisheries themselves.

For sea fisheries and kaimoana, we found that the Crown is not in breach of the Treaty. The quota management system has had some success but has not entirely remedied the extent or the legacy of over-fishing. The evidence suggests that these resources are still sufficient for customary rights and obligations (so long as there is access), but the tangata whenua – many of whom were professional fishers – agreed that this is under threat. We found that the Crown may be about to breach the Treaty, and we urged it to investigate the situation jointly with Te Tau Ihu iwi and to agree on remedial steps in partnership with the tribes. We also suggested that there was a need for dialogue between Te Tau Ihu iwi and the Ministry of Fisheries, and for the tribes to have a greater say in the overall management of fisheries in their waters. We accepted the claimants' evidence that the regulatory regime for the management of customary fishing is consistent with the Treaty. We expressed concern, however, at what appears to be the prohibitive difficulty of establishing taiapure and mataitai. We suggested that the Crown and the claimants should negotiate to make the system more practicable.

For the particular issue of marine farming, we noted the effect of the Maori Commercial Aquaculture Claims Settlement Act 2004 on our jurisdiction. We found that the Crown should settle pre-1992 claims alleging that it has failed to ensure Te Tau Ihu Maori a fair share in the industry. We noted the difficulty that iwi faced from their lack of capital and resources, and we found that such a difficulty was anticipated and could have been mitigated. We also found that customary kaimoana and fishing grounds were not protected from the siting of marine farms before 1992, nor was any compensation due for damage or loss of access. Again, these effects were anticipated at the inception of the Marine Farming Act 1971 and could have been prevented. Maori success in stopping the siting of marine farms at Pariwhakaoho in the 1980s appears to have been an exception.

Loss of access to, and depletion of, valued resources as a result of the Crown's Treaty breaches included forest birds, waterfowl, and seabirds. Ngati Koata and Ngati Kuia had a particular grievance in respect of the latter. We found the Crown to be in breach of the Treaty for cutting off Ngati Kuia's access to islands in the 1960s without consulting them and without negotiating a change to the 1933 access agreement. We recommended that the Crown consult with tangata whenua and establish a process for monitoring titi populations, agreeing levels of sustainability for eventual harvest, and providing access for the transmission of cultural knowledge and practices.

#### 14.20.3 Prejudice

We found that Te Tau Ihu iwi have been prejudiced by these breaches of the Treaty. We found that the ability of Maori to sustain themselves economically and culturally from their forest and inland resources had been significantly prejudiced by the early twentieth century. Various species had either been eliminated or were gone for all practical purposes, such as the upokororo and the kereru. Maori had insufficient access to the bush for regular reliance on forest products for food, rongoa, or raw materials. In some places, such as Rangitoto, enough indigenous forest was still accessible to highlight what had been lost. We discussed the cultural effects of these losses, which included the loss of some tikanga and knowledge, the loss of culturally significant foods, the loss of the means to transmit knowledge and skills to future generations, and the loss of mana. Te Tau Ihu iwi also suffered harm to tribal cohesion and identity.

The customary economy and society were truncated by these losses but were still operating in the first half of the twentieth century. Up to the 1950s, the Maori people of Te Tau Ihu continued to sustain themselves primarily by customary means: fishing and gathering kaimoana, hunting (by then mainly pigs, deer, and seabirds), and gathering remaining wild plants such as watercress and harakeke. Vegetable gardens and cropping substituted in part for what had been lost. So, too, did domesticated animals. Seasonal work provided some money for the necessities that now had to be bought and for the rates that had to be paid.

Poverty was endemic but there was usually enough to eat. This was in part because coastal food sources were still able to supply a key part of the diet. As well, improvements in technology (especially motorboats) had made those resources more accessible to some.

From the evidence of the tangata whenua, we determined that, although some tikanga and knowledge had been lost, or was being lost along with te reo, their society continued to be underpinned by whanaungatanga, manaakitanga, and kaitiakitanga. The skills and knowledge of customary gathering proved resilient because they were vital to physical survival. Along with new substitutions like poultry, customary foods continued to play an important part in exchanges and manaakitanga. 'Barter' in the form of reciprocal gift giving between Maori communities continued, as did barter with Europeans. There were enough raw materials for weaving to substitute for the purchase of clothing and other items where necessary. Rongoa was still practised but not so much in the old way – forest products were not immediately available to most, so it became, to some extent, the preserve of home-grown plants. Some taonga, such as kereru and other forest birds, had been lost, but the customary economy survived in truncated form. It is important to note that the resources sustained tribal culture for only a minority. The majority had to leave their ancestral land.

Further inroads were made on this society and economy, and on the values and resources that sustained it, in the second half of the twentieth century. In particular, the depletion of fisheries has had a profound effect. Also, there has been a decline in the plants that had still been accessible in the first half of the century. Harakeke, pingao, and many other species are now rare, often found in an uncontaminated state only on conservation land. Also, as resources became depleted and harder to access, damage to or destruction of key sites began to have pronounced effects. The loss of an important kaimoana site, such as Waikawa Bay, could have significant consequences in general, over and above the personal loss of mana and culture suffered by those with a close relationship to that place.

The claimants accept that some social change would have happened anyway. They described the process of assimilation and acculturation that took place in Te Tau Ihu. Most witnesses, agreed, however, that the home whanau are still exercising their customary rights to the fullest extent possible and have not stopped getting customary resources by their own choice. It is their role to maintain a tribal base for the whanaunga who wish to come home or to reconnect (however often). They blame their difficulties in maintaining their whanaungatanga and manaakitanga on the depletion of resources and the cumulative loss of access. They would still be maintaining a tribal base and transmitting core values, knowledge, and skills to coming generations if they could. There has to be a turangawaewae for people to return to, there have to be customary resources to sustain whanaunga and to manaaki guests, and there has to be capacity to pass these taonga to mokopuna. All these things have been undermined and are still at risk.

We found that the claimants have experienced economic, social, and cultural prejudice as a result of Treaty breaches. We recommended that steps be taken to restore a tribal base

for the iwi of Te Tau Ihu. Fundamental to that restoration will be the ability to exercise customary rights of access to, use of, and care for valued resources and particular resource-sites. The transmission of cultural knowledge, practices, and skills must be done in situ for it to have mana and full effect. This is vital for the continued survival of Te Tau Ihu Maori as tribal peoples, which is a right guaranteed to them and protected by the Treaty. Also, as part of tribal restoration and in fulfilment of its obligations of active protection and redress, the Crown has a Treaty duty to restore highly valued sites (taonga). While it does not appear practical for the Crown to restore every damaged or polluted site, we recommend that the parties negotiate for the restoration of those most highly valued.

#### 14.20.4 The Resource Management Act 1991

Finally, we considered the modern regime instituted by the Resource Management Act 1991. The claimants support many of the core concepts of the Act, including the sustainable use of resources and the making of decisions by local communities (including iwi). They reported some successes in consultation and the prevention of development to which they had been opposed. There was also a concern, however, that the Treaty relationship is with the Crown and not local bodies. We found that the Crown, in choosing to delegate authority to local bodies, must do so in a manner that ensures the protection of Maori interests and the fulfilment of its Treaty duties. The implementation of the Resource Management Act by the unitary authorities (and relevant central government agencies) in Te Tau Ihu is not meeting its objectives. Proper or sufficient regard is not being paid to the principles of the Treaty, to kaitiakitanga, and to the relationship of the Maori people of Te Tau Ihu with their ancestral lands, waters, and resources. Consultation is not always carried out sufficiently, or to a high enough standard. The values of Te Tau Ihu Maori are not being properly or fully regarded in decision-making. We found the Tapu Bay sewerage pipe issue to be a prime example of this. The intention that the Act should serve as ‘a partial statutory incorporation of Maori customary law into resource management decision-making’, providing for ‘effective participation by Maori in resource management decision-making’,<sup>29</sup> is an important one and it is not being met.

Further, iwi do not have the resources to participate effectively in resource management processes, even to the extent allowed them under the Act. At the time of our closing hearings, Te Tau Ihu iwi had not been able to obtain such resources from the councils (to any significant extent), from applicants, or from the Crown. This was having a serious effect on their ability either to participate at all on matters of importance to them, or to have appropriate influence on the outcome when they did participate.

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29. Crown counsel, closing submissions, p156

The Crown accepted much of the substance of the claimants' allegations in these respects, but argued in mitigation that it had provided 'significant resources to improving the practice of local authorities, and increasing the capacity of iwi and hapu to participate in processes under the Act'.<sup>30</sup> We found little evidence of that as at 2004 and the Crown did not give us any specific examples. We recommended that the Crown provide fairer and more effective means for Maori participation in resource management, including in decision-making.

#### 14.21 WHANAU AND SPECIFIC CLAIMS

In chapter 12, we considered a number of whanau and specific claims not addressed elsewhere in the report. The grievances alleged were many and varied, but a common thread to a number of the whanau and specific claims concerned the aftermath of the period of very heavy land loss prior to 1860. Many of the claims were focused on the ownership and management of the few lands remaining to Te Tau Ihu Maori after that time. Other claims raised issues that might be described as matters of social and cultural marginalisation. Such issues were accentuated as the iwi, hapu, and whanau of Te Tau Ihu became a small minority of the total population of the district. Their ability to manage and control their own affairs declined accordingly, as Crown agencies increasingly came to decide matters previously resolved by rangatira and their communities in accordance with Maori tikanga. Moreover, although the small area of land remaining to local Maori became doubly important to tangata whenua for precisely this reason, the Crown found itself able to compulsorily acquire significant areas of that land for a variety of public works purposes. We noted that, in the particular circumstances of Te Tau Ihu after 1860, there was an especially strong Treaty requirement for it to think long and hard about the necessity for such takings before implementing these. Consideration of the extent to which the Crown did follow such a path was therefore a major focus of several claims examined in the chapter, along with some more recent efforts to restore lands to Te Tau Ihu Maori and the extent to which these were undertaken in a manner consistent with the Treaty and its principles.

The first claim discussed was that of the Te Kotua whanau on behalf of the descendants of George and Thomas Toms, the children of early Cook Strait settler Joseph Toms and Te Ua Torikirikiri, the daughter of senior Ngati Toa rangatira Nohorua. Joseph Toms had married Te Ua in accordance with Maori custom some time before 1840 and had been gifted lands by Nohorua, along with other Ngati Toa and Ngati Rahiri (Te Atiawa) rangatira, by two documents executed in 1838 and 1839. With the exception of lands at Titahi Bay deemed to have been given in trust for the children, Commissioner William Spain concluded (wrongfully,

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30. Ibid, p157

in our view) that these transactions were absolute land sales. This decision, combined with Toms' later remarriage following the death of Te Ua and the non-disclosure of an 1840 will in which he had stipulated that all his children would inherit his estate equally, served to ensure that the intentions of Nohorua and the other rangatira were subverted. Neither the Marriage Ordinance 1847 nor the Marriage Act of 1854 recognised customary Maori marriages, thus rendering George and Thomas illegitimate in the eyes of the law and ineligible to succeed to Joseph Toms' estate. A younger half-sibling from Joseph's later, legally recognised, marriage to a Pakeha woman was instead deemed the sole heir. While we do not need to detail here the extraordinary lengths to which Joseph Toms' older sons from his marriage to Te Ua went to in order to secure what they perceived to be their rightful inheritance, we found that legislation rendering the children of customary Maori marriages illegitimate was discriminatory and contrary to the Treaty and its principles. Although this was partly remedied in 1867 through legislative amendment, this provision took no account of ongoing hapu and iwi interests. We further found the Crown's delay in dealing with petitions in relation to the Toms' estate to be contrary to Treaty principles.

The second issue examined concerned the 1993 return of the Whakarewa lands to NRAIT. According to the claim of the Georgeson whanau, on behalf of the descendants of Hohaia Rangiauru, the lands should instead have been returned to the descendants of the original owners. The claimants maintained that they were not fully consulted over the vesting in NRAIT, which they regard as effectively a transfer to Ngati Rarua. We noted that all parties to our inquiry agreed that the Whakarewa lands should have been returned to their former owners once these were no longer required for 'native purposes' from the 1880s. The failure to return the lands prior to 1993 was, we found, in breach of the Treaty principle of redress. The question of whether NRAIT was an appropriate entity in which to vest the lands once finally returned and whether the process by which this occurred was consistent with Treaty principles was a more complex matter. For one thing, the trust deed negotiated between Anglican Church authorities and Motueka Maori, which saw interests in the new body split at 80:20 in favour of Ngati Rarua over Te Atiawa, was not a matter in which the Crown was involved. Legislation was nevertheless required to give effect to this deal, and although this was in the form of a private member's Bill introduced by the Minister of Maori Affairs, we concluded that the Crown nevertheless remained responsible for ensuring that any such legislation remained consistent with the Treaty. We received too little evidence to make any finding as to whether the Crown adequately discharged this responsibility, most especially with respect to the claim that Te Atiawa had accepted a 20 per cent share under duress, and in the belief that this could be revised at a future date. In our view the return of the lands to an iwi trust was, however, appropriate and we do not accept that any individual right requiring the separate return of lands to the descendants of Hohaia Rangiauru was required. We did, though, urge the trust to consider ways in which the relationship of whanau groups with their ancestral lands might be provided for. Finally, we also noted our view that the 1993

arrangements can not be seen as a settlement of Treaty claims with respect to Whakarewa. That will remain a matter for negotiation between the Crown and Motueka Maori.

We also considered a number of whanau and specific claims from Te Atiawa groups concerning lands at Waikawa taken for various public works purposes. The first of these concerned an area of 133 acres taken for a rifle range in 1912. We concluded that this taking was excessive and probably unnecessary, in that alternatives to the taking were not fully explored. Earlier Tribunals have concluded that the compulsory acquisition of Maori lands for public works could be justified only as a last resort in a matter of national interest. We concur with this analysis and found the rifle range takings did not meet this test. We also found the lengthy delay in returning these lands to their original owners once they were no longer required for the purpose originally taken to be contrary to Treaty principles, but concluded that there was insufficient evidence for us to make a finding on the transfer of a small part of the land to the Waikawa Marae Trustees. We applied the same test of Treaty consistency pertaining to public works takings with respect to the compulsory acquisition of just over 305 acres for waterworks purposes in 1957 and again found the taking contrary to Treaty principles. In this case the area taken was more than twice that identified as necessary for the work, and some of the owners had offered to sell the required area. The taking was thus both excessive and unnecessary, and this has been further compounded by the lengthy delay in any decision as to whether the land is still required or should be offered back to the owners under the relevant provisions of the Public Works Act 1981. Lands taken for roading purposes in the 1880s, most likely under legislative provisions allowing up to 5 per cent of any Maori block to be reserved for these purposes without consultation or compensation, was the next matter considered. We noted the findings of previous Tribunals concerning the discriminatory nature of this provision. We found that the land in question, occupied since the 1920s by a number of dwellings, should have been returned to the owners once it was no longer required for roading. Despite this, the Local Government Act 1974 provides a legal loophole whereby the offer-back provisions of the 1981 Act can be avoided. We concluded that there is a clearly Treaty obligation upon the Crown to ensure lands no longer required for the purposes for which they were originally taken are returned to their former owners in a timely manner.

We declined to make findings on a claim from the Stafford Whanau concerning succession to the interests of Inia Ohau and an error made by the Native Land Court in this matter in 1920, considering the appropriate course of action to be an application under the provisions of the Te Ture Whenua Maori Act 1993. Another part of the Stafford Whanau made a further claim concerning the realignment of a road through an urupa reserve at Wainui Bay. We concluded that the local council had no right to place a road through any part of the reserve, and the Crown was in breach of Treaty principles in failing to actively protect the owners from the incursion on to their property. The fact the land was an urupa required particular care to be exercised, but that was not demonstrated in this instance.

The next set of issues considered were focused the management of Takapourewa Island. A Ngati Koata iwi claim filed in 1989 raised a number of issues pertaining to the island and its resources, and alleged that the Crown had failed to protect Ngati Koata's control and ownership of the island and its endangered species. This claim was withdrawn following a 1994 deed of settlement with the Crown concerning the management of the island. Although no settlement legislation has formally withdrawn the Tribunal's jurisdiction with respect to Ngati Koata's historical claims concerning Takapourewa, we nevertheless deemed it inappropriate to comment further on these issues. We did, however, receive evidence suggesting considerable discrepancy between Ngati Koata and the Crown concerning the interpretation of the 1994 deed of settlement, and in particular the meaning of consultation within the deed. Ngati Koata maintained their understanding that the deed required more than a duty of consultation, and had accorded them a significant stake in decision-making. Crown counsel submitted that this was not DOC's understanding when it entered into the deed. We noted our view that, although it is appropriate for the Minister to have a final veto given the conservation issues at stake, there appeared little divergence between the parties when it came to how the island should be managed. The question is one of partnership and can be resolved, we believe, with further dialogue between the parties.

The second claim regarding Takapourewa Island came from Ngati Kuia and concerned their exclusion from the deed of settlement and from the management of the island. It was apparent, on the basis of the limited evidence presented to us on this subject, that the Crown was well aware of the Ngati Kuia claim for inclusion prior to the signing of the deed with Ngati Koata. The Crown had initially hesitated before, at some point prior to the 1994 deed, determining to rely on the Native Land Court's 1883 judgment in support of its single-iwi settlement. We noted that there is nothing about the 1994 settlement that precludes the Crown from seeking to settle Ngati Kuia interests with respect to Takapourewa, and nor should such acknowledgement be seen as in any way diminishing the mana of Ngati Koata. Indeed, in evidence to us Ngati Koata kaumatua expressed a willingness to consult and include other iwi with ancestral rights in the island.

We also more briefly traversed a number of other claims for which less evidence was presented to us. These included a number of further claims involving public works takings, including the loss of lands due to the provision allowing 5 per cent to be taken for roading purposes and others relating to takings for scenery preservation purposes, a claim concerning recent Crown policies with respect to the disposal of surplus Crown properties, a claim regarding historical adoption policies and the actions of the Maori Trustee, and finally a claim concerning succession to Maori land interests by a Pakeha spouse. We were able to make limited or no findings on several of these claims given the paucity of information available.

## **14.22 THE 1990 MAORI APPELLATE COURT DECISION AND THE SUBSEQUENT NGAI TAHU LEGISLATION**

### **14.22.1 The Maori Appellate Court hearing and decision, 1990**

In chapter 13, we considered the claims arising out of the Crown's involvement in the Maori Appellate Court hearing and decision of 1989–90. The case arose after Te Tau Ihu iwi sought to have their claims heard by the Ngai Tahu Wai 27 Tribunal. To resolve the competing claims, the Tribunal recommended legislation be introduced to enable it to refer such questions to the Maori Appellate Court. Accordingly, section 6A of the Treaty of Waitangi Act 1975 was enacted in 1988. This allowed the Tribunal to refer questions of Maori custom or usage, relating to rights of ownership, and calling for the determination of tribal boundaries to the Maori Appellate Court for decision.

On the basis of submissions from the Ngai Tahu Trust Board and the Crown, the Tribunal then prepared the case to be stated to the Maori Appellate Court. Te Tau Ihu claimants were not involved in the actual framing of the case stated for the court although their evidence was later heard on the matters being considered.

The Maori Appellate Court was asked to determine who held rights of ownership in the land purchased by the Crown in the Kaikoura and Arahura deeds in 1859–60. After a nine-day hearing in June 1990, the court found that the northern invasion had resulted in conquest, thereby extinguishing Rangitane and Ngai Apa rights, but that the northern iwi had then failed to follow up their incursions into Ngai Tahu territory with occupation. The court concluded that Ngai Tahu had 'sole rights of ownership' in Kaikoura and Arahura at the time of sale to the Crown.

In assessing the Treaty claims arising out of this process, we emphasised that our role was not one of an appellate body. We were not attempting to revisit this decision, which was in effect answering a different set of questions to the one with which we were concerned. The Maori Appellate Court was considering the case as stated, that is, customary ownership after 20 years of Crown purchasing, and it thus focused on transactions dominated by Ngai Tahu, discounting the significance of earlier Crown transactions with other iwi. We were more concerned with the situation at 1840 – whether rights were fully developed, or fully lost by then – and how that situation evolved in the next two decades. Thus, we did not see the matter as so clear-cut. Both Kaikoura and Arahura were the last of a series of 'blanket' purchases, representing the last acquisition of overlapping interests of one iwi after another. We were not simply focused on those two final transactions and we did not think that the evidence generated on those occasions could negate that generated in other negotiations with Te Tau Ihu iwi. In our view, it would only be possible to accord exclusivity to the last seller if we impugned the title of the first seller and we saw no cause to do that.

Also we were able to take a different approach to the question of boundaries and were not tied to those set by the last two of several transactions, beginning with the one first undertaken with Ngati Toa by the New Zealand Company in 1839 and then by the Crown from

1847. We have concluded that the boundaries set by such purchases were both uncustomary and not very clearly defined in any case.

Te Tau Ihu iwi claimants argued that the Crown had breached the Treaty in a number of ways. They alleged that the amending legislation of 1988 was in breach of the Treaty. In their view, section 6A prevented Te Tau Ihu iwi participation in formulating the case stated and provided no avenue in which to appeal the appellate court decision.

We did not accept that argument, and we found that section 6A was not in breach of the Treaty and its principles. The legislation did not prevent Te Tau Ihu iwi involvement in the case stated (that was the Wai 27 Tribunal's decision) and there were, in fact, avenues for appeal.

We did see this attempt to establish ownership within tribal boundaries set by purchase deeds as poorly conceived. In our view, the legislation expressed an uneasy mix of customary and non-customary concepts. We discussed the shift in thinking since 1990 to greater acceptance of more than one iwi exercising rights in the same land or resources, and noted that interpretations of customary rights now place more emphasis on marriages and ongoing ancestral rights despite conquests. A boundary line as suggested within the legislation was not appropriate. It represented a straight line driving a wedge through whakapapa and between whakapapa relationships. However, there was no requirement that the boundary line be based on Crown purchase deeds, and the legislation acknowledged that the court could make such a determination only to the 'extent practicable'. Nor did the legislation require that the Maori Appellate Court find in favour of only one iwi to the exclusion of all others in the area defined by that boundary – the key objection of the Te Tau Ihu claimants to its decision.

Te Tau Ihu iwi also claimed that the procedures of the Maori Appellate Court breached the Treaty and its principles, a claim that we also did not uphold. We noted that the High Court, the Court of Appeal, and the Privy Council have closely considered this question, and they have concluded that Te Tau Ihu iwi were represented and had reasonable opportunity to be heard at the 1990 hearing. The courts have found that the rules of natural justice had not been breached and we did not think it is necessary to revisit this question.

We did agree with the claimants' allegation that the Crown failed to take a sufficiently active role in the appellate court hearing. Although the Crown held a 'watching brief', it made no effort to provide evidence or information that would have assisted the court in assessing the rights of Te Tau Ihu iwi. The Crown had been involved in preparing the case stated and held evidence that was crucial to assessing customary rights in the northern takiwa. In particular, it failed to bring evidence it held that supported Ngati Apa's claims in the West Coast to the attention of the court.

In our view, it was not necessary for that omission to have been deliberate for it to have breached the Crown's obligations under the Treaty and we found that failure to be in breach of the principles of active protection and equal treatment.

#### 14.22.2 The Crown's treatment of rights during negotiations and settlement

Chapter 13 then turned to a consideration of the Crown's treatment of Te Tau Ihu iwi rights in the course of negotiations and settlement with Ngai Tahu.

After reporting its findings, which included that the Crown had breached the Treaty in its negotiations for Arahura and Kaikoura, the Ngai Tahu Tribunal recommended that legislation be passed to enable the establishment of a tribal structure to negotiate a settlement. Accordingly, the Te Runanga o Ngai Tahu Act was passed in 1996. Section 5 of that Act defined the Ngai Tahu takiwa in terms of the boundaries defined by the Maori Appellate Court in 1990.

These boundaries were also adopted in the Ngai Tahu Claims Settlement Act 1998, which recognised Ngai Tahu 'as the tangata whenua of, and as holding rangatiratanga within, the takiwa of Ngai Tahu whanui'. Under the 1998 Act, the Waitangi Tribunal's jurisdiction to inquire further into Ngai Tahu claims was removed. The 1998 Act did not, however, prevent the Tribunal from inquiring into other claims in the area defined as the Ngai Tahu takiwa. This was clearly established by the Court of Appeal in 2000.

Te Tau Ihu iwi claimed that this legislation breached the Treaty because it enacted Ngai Tahu's exclusive customary rights in the Ngai Tahu takiwa. We did not agree that this was what the legislation provided for. The Court of Appeal has made it clear that the 1996 and 1998 Acts do not prevent Crown recognition and settlement of claims of other iwi in the takiwa. Thus, the legislation is not in itself in breach of the Treaty, rather the breach lies in the way in which the Government has interpreted it. Te Tau Ihu iwi interests were ignored during the negotiation and settlement of the Ngai Tahu claim. The Crown failed to adequately consult with Te Tau Ihu iwi during this process, and assets that could potentially have been included in future settlement with Te Tau Ihu iwi were vested in the sole ownership of Ngai Tahu. This exclusive treatment has continued post-settlement, to the detriment of the mana of Te Tau Ihu iwi.

Accordingly, we found the Crown to be in breach of the principles of active protection and equal treatment and that Te Tau Ihu have been prejudiced as a result.

We also agreed with the argument of the Te Tau Ihu claimants that they will be further prejudiced by the statutory definitions based on the Maori Appellate Court findings, if this should mean that their claims in the northern part of the takiwa are rejected outright, when they come to negotiate their own settlement.

#### 14.23 RECOMMENDATIONS

In our first preliminary report we concluded that the breaches of Treaty principles outlined were serious, and had resulted in significant economic, social, cultural, and spiritual harm to the iwi of Te Tau Ihu. Our comments at that time related solely to the issues associated

with customary rights and entitlements within the Te Tau Ihu district and the Crown's treatment of such matters. Now that we have reported comprehensively on the Treaty claims of Te Tau Ihu iwi, further breaches of the principles of the Treaty of Waitangi have been identified, and we have summarised our findings relating to these in the preceding sections of this chapter. We consider the totality of Treaty breaches outlined above to have been very serious, and, as we found in our first preliminary report, to have caused significant social, economic, cultural, environmental, and spiritual prejudice to all of the iwi of Te Tau Ihu. We further consider that these Treaty breaches and the prejudice arising from them require large and culturally appropriate redress.

Since our hearings concluded in March 2004, we understand there has been progress made towards a resolution of the claims on the part of the Crown and iwi representatives. We also understand that the Crown is currently in negotiations with three large 'natural groupings' representing the Te Tau Ihu iwi:

- ▶ Tainui Taranaki ki Te Tonga, which has been mandated to negotiate on behalf of Ngati Rarua, Ngati Koata, Ngati Tama, and Te Atiawa. (Wakatu Incorporation is also a member of this collective).
- ▶ A Kurahaupo collective which is negotiating the settlement of Rangitane, Ngati Kuia, and Ngati Apa claims within Te Tau Ihu.
- ▶ Ngati Toa Rangatira are separately in negotiation with the Office of Treaty Settlements in respect of their claims in both the South Island (including Te Tau Ihu) and the lower North Island.

We should note at the outset that any recommendations we make with respect to the settlement of Te Tau Ihu claims are advanced with the intention of assisting parties towards this goal. We are not in possession of full information concerning the practical workings of these collectives towards settlement, the nature of their relationships with one another or the current status of their respective negotiations. However, broadly speaking we endorse the groupings noted above as an appropriate negotiations framework, while expressing no view on the practice of these negotiations to date. It is, of course, open to parties to return to the Tribunal in future with respect to remedies in the event that current negotiations should fail to achieve settlement and we reserve our opinion on such matters in the absence of evidence or submissions received on the current status of negotiations.

As we have discussed at some length in this and in our first preliminary report, it can be stated with certainty that all eight descent groups within Te Tau Ihu had customary rights and interests in that area. Also, as we found in this and our second preliminary report, certain Te Tau Ihu iwi had customary rights within the Ngai Tahu takiwa. It is also clear that particular rangatira and hapu were associated with, and had acknowledged rights to, particular places. In other cases, however, rights were contested, overlapping, fluid, or not fully defined. Moreover, customary rights and understandings of these continued to evolve

peacefully after 1840. There is thus considerable overlap between the rights of different iwi, and in some cases ambiguity and uncertainty regarding the full extent of such rights and their limits.

Because of the overlaps between the customary rights of Ngati Toa and their northern allies on the one hand, and of Kurahaupo iwi on the other, we recommend that cultural and site-specific redress should be discussed with all groups in common in the first instance. After that, it may then be appropriate to negotiate specific matters with particular groups, outside the framework of the collectives. It would emerge from such discussions, for example, that arrangements for Takapourewa should be negotiated with Ngati Koata and the Kurahaupo iwi. Other examples of sites of importance to various iwi have been noted in many instances throughout our report.

We have already noted our view that, in terms of the total quantum of settlement, the iwi of Te Tau Ihu require substantial compensation and redress. One of the most contentious matters in any set of settlement negotiations is often the relative value of settlements between different iwi within the same district. Clearly, the Treaty breaches identified in our report are various, and some impacted more on some groups in certain areas, including, for example, the exclusion of Ngati Toa and the Kurahaupo iwi from a share in the ownership of the Nelson and Motueka tenths. However, the evidence recited in chapter 10 indicates a relatively even spread in terms of social and economic prejudice across all of the iwi of Te Tau Ihu. Taking these factors into consideration, we recommend that, in terms of financial and commercial redress to be provided, the total quantum should in principle be divided equally between the eight iwi of Te Tau Ihu. By way of clarification, our recommendation applies solely with respect to the settlement of Treaty breaches arising within the Te Tau Ihu inquiry district.

Our kaumatua recalled a pepeha (proverb) to tautoko (support) such a remedy:

*Ko te Puu o Te Wheke  
Te Kai Whakaruru  
I te ia ngote  
O oona KaweKawe*

In translation, this means, simply:

*The head of the Octopus  
guides, strengthens, and protects  
its tentacles*

We would also note that the individual components which constitute that redress need not be exactly equal or correspond across all iwi. In this way, redress for particular Treaty breaches can be accommodated within an overall package. By way of example, those groups

wrongly left out of the tenths might be offered a first right of refusal on some surplus Crown lands within the original tenths estate (subject to any overriding cultural redress matters with respect to sites of significance to particular iwi).

There is a need for special recognition of the unique claim of Ngati Apa, whose customary interests within Te Tau Ihu were never extinguished by any kind of deed of cession. We leave it to Ngati Apa and Crown representatives to agree on what form such recognition might take, but for the record note here that our recommendation should not be taken as supporting a greater share of financial redress for the iwi. We believe there are other ways in which appropriate recognition might be given to the Ngati Apa claim.

We also need to consider the position of non-iwi claimants before our inquiry. In particular, the position of Wakatu Incorporation relative to its constituent iwi has to be addressed. In our view the settlement of historical grievances is most appropriately a matter between the Crown and Te Tau Ihu iwi. We note that counsel for the incorporation ultimately agreed with this position during our hearing of closing submissions. We recommend that matters directly affecting shareholders in the Wakatu Incorporation since its establishment in 1977 should, on the other hand, be resolved between the incorporation and the Crown.

A number of whanau and specific claims have also been considered in our report. Again, we are of the view that these are appropriately resolved as part of the wider iwi negotiations. We also recommend, however, that due consideration be given to cultural or site-specific redress with respect to the Treaty breaches of whanau groups within these broader negotiations where appropriate.

We noted the concerns expressed with respect to the return of the former school lands at Whakarewa to NRAIT in 1993. Those lands were, like the Wakatu Incorporation lands, vested in NRAIT encumbered with perpetual leases, but were not included in the schedule of the Maori Reserved Land Amendment Act 1997. As private lands vested in the Anglican Church in trust in 1853, there were reasonable grounds for excluding these from the 1997 Act, but we also concluded that there were compelling reasons why the Crown should intervene to now place the Whakarewa estate on the same footing as the Wakatu land. We recommend that the Crown enter into negotiations with NRAIT with a view to bringing the Whakarewa leases into line with the current regime. We also note that the 1993 return of the Whakarewa lands was not a Treaty settlement but a private arrangement between the Anglican Church and Maori. It did not involve any compensation in respect of the lengthy delay in returning the lands to local iwi. We recommend that such compensation should be included in the iwi entitlements recommended above.

Our report has highlighted a number of shortcomings with respect to the current 'offer-back' regime under the Public Works Act 1981 and subsequent legislation. First, we recommend the amendment of section 134 of the Te Ture Whenua Maori Act 1993. This section enables the Maori Land Court to vest any Maori land acquired by the Crown or a local authority for public works purposes, for which it is no longer required, in those Maori

found by the court to be entitled to receive it. However, under section 134, only the Crown or a local body may make such an application to the court. We recommend that the Act be amended to enable the owners from whom the land was originally taken or their descendants to apply to the court for the return of such land.

Secondly, we recommend that the Public Works Act be reviewed and its terms amended to ensure that central and local authorities undertake the speedy and fair disposal of land that is clearly no longer needed for the purpose for which it was originally taken.

We also recommend that iwi and the public should be consulted on the appropriateness of returning former Maori land to descendants of individuals, whose title was created in breach of the Treaty as a consequence of processes wrongly imposed on Maori communities by the Crown. It may be more appropriate to offer former Maori land back to iwi or hapu communities instead of the descendants of named owners. But, because this cuts across private property rights created by the courts, it is necessary to consult Maori, who may prefer to keep the current offer-back to descendants of those awarded title by the court.

Thirdly, we think that there are legitimate concerns about the price at which lands taken for public works and no longer required for these purposes should be offered back to Maori and, especially, whether prevailing market rates should be applicable in such circumstances. We recommend that the procedure for determining whether 'original owners' should have to pay for such lands, and, if so, how much, ought to be made consistent with the Treaty and take into account the breaches involved in the original takings. The mechanisms by which this could be achieved might be made the subject of the review into the Public Works Act we have recommended above.

Fourthly, a set of issues arises with respect to lands compulsorily acquired for one purpose and at some future point used for another purpose. We have endorsed the findings of previous Tribunals that, having regard to the Crown's Treaty obligations, lands should only be compulsorily acquired from Maori as a last resort in a matter of national interest. In our view such a guideline should also apply to the decision to use lands for purposes other than those for which they were originally acquired. We recommend that the Public Works Act be amended so that formerly Maori-owned land taken for a public work cannot be used for another purpose without applying the full process of consultation, opportunity to object, and fresh compensation. In our view, this is especially so where land was taken without compensation originally. Under the Treaty, the Crown needs to ensure that, in situations where the ongoing retention of the land – and its application to another purpose – is justified in the national interest, this does not involve fresh Treaty breaches. It should be noted that, because of our jurisdiction, these recommendations are made solely with respect to Maori land. It would be a matter for the Crown to consider as part of any review of existing legislation whether similar provisions should not also apply with respect to general land.

Fifthly, a specific provision of the Local Government Act 1974 was identified by us as a matter of concern. We recommend that section 342 of, and schedule 10 to, the Local

Government Act should be amended or repealed to prevent local bodies from avoiding the requirements of the Public Works Act to offer back lands to their former owners once no longer required for public works.

We have noted in our report serious failings with respect to the Crown's repeated failure to properly recognise and deal with the Kurahaupo iwi as the legitimate tangata whenua (alongside the northern tribes) of Te Tau Ihu. We recommend that the Crown take steps to fully recognise and restore the mana of the Kurahaupo iwi.

In terms of resource management and fisheries, we made a number of specific recommendations and suggestions in chapter 11. We summarise those here. First, we recommend that the Crown and claimants negotiate mechanisms to recognise and protect customary rights of access to, use of, and care for valued resources and sites. Where these resources or sites are now located on Crown land, we suggest that joint management in partnership might be preferable to legal instruments such as registration of mahinga kai rights. We leave any specific recommendations on that matter to the Wai 262 Tribunal. In terms of the titi, however, we recommend that the Crown consult tangata whenua and establish a process for monitoring titi populations, agreeing levels of sustainability, and providing means of access for the transmission of cultural knowledge and practices.

Secondly, we found that the Crown may be about to breach the Treaty in respect of the depletion of customary fisheries and kaimoana. We urge the Crown to consult with Te Tau Ihu Maori, to carry out a joint assessment of the state of the fisheries, and to agree in partnership any steps necessary to redress this problem. There needs to be dialogue between iwi and the Ministry of Fisheries, and iwi need to be involved in the overall management of fisheries in their region. We further cautioned that a Treaty breach may arise if mataitai and taiapure are not made more obtainable. We advise the Crown to consult with Te Tau Ihu iwi for a way to overcome the present difficulties in that respect. We also found that customary regulations under the Fisheries Act 1996 cannot provide for exchanges of valued resources between iwi. In our view, this may have been an oversight but it should now be corrected.

Thirdly, we recommend that the pre-1992 aquaculture claims be settled in a fair and equitable manner. We urge the Crown to ensure that, in carrying out its 2004 settlement, it provides for non-commercial (as well as commercial) interests in aquaculture. Iwi want to use marine farming to improve stocks and to supply customary obligations and events. This needs to be provided for alongside commercial objectives, to assist the restoration of fisheries and a tribal base.

Fourthly, we recommend that the importance of customary rights and resources be acknowledged in negotiations between the Crown and claimants, so as to provide generally for the restoration of a tribal base. The ability to exercise rights of kaitiakitanga, access, and use of customary resources is integral to restoration. Where a resource is too fragile for sustainable use, creative ways need to be found for the survival and transmission of culture. As an example, we suggest that means might be found for teaching new generations on

the titi islands, without actually harvesting any birds. We also found that the Crown has a Treaty duty to restore damaged or polluted sites of great value to tangata whenua. This duty arises from the principles of active protection and redress. We acknowledge that not every site can be restored, but we recommend that the parties negotiate the restoration of the most highly valued sites. Further, the Crown has an important role to play in assisting the recovery of resources – in chapter 11, we noted such diverse examples as the potential uses of marine farming, restoration of depleted fisheries and kaimoana beds, and propagation of rare plants (such as the harakeke for Omaka Marae).

In terms of the Resource Management Act 1991, we recommend that the Crown take immediate steps to provide fair and effective means for Maori decision-making in resource management. Included among those steps should be action on the 2002 opinion of the Privy Council that there should be a ‘substantial Maori membership’ in Environment Court cases involving Maori issues. We also make some suggestions, based on the evidence provided to us. First, we note that each iwi organisation appears to need a fulltime resource management professional with access to legal and other expertise as necessary. A distinct central government fund may well be appropriate to assist with that need. We recognise that this is a wider matter than can be arranged in negotiations between Te Tau Ihu iwi and the Crown, but it is clear that action must be taken if prejudice is to be avoided in the future. Secondly, we agree with the claimants that the Crown should be monitoring the effectiveness of the resource management regime directly with iwi. Thirdly, we note our agreement with the central North Island Tribunal that the Resource Management Act should be amended to require decision-makers to give effect to the principles of the Treaty.

Finally, we make recommendations with respect to Te Tau Ihu iwi customary interests within the statutorily defined takiwa. We note that Te Tau Ihu iwi have lost the ability to recover their interests in lands within the takiwa which have been vested in Ngai Tahu as a result of earlier Crown settlement, and consequently we strongly recommend that the Crown take urgent action to ensure that these breaches do not continue. We also recommend that the Crown negotiate with those Te Tau Ihu iwi identified in our report as having customary interests within the statutorily defined takiwa to agree on equitable compensation.

#### **14.24 CONCLUSION**

As at 1840, Maori customary rights in Te Tau Ihu were regulated by their own law, and were protected and guaranteed by the Treaty of Waitangi. The Crown had sufficient resources and expertise to have investigated those rights, which were discoverable upon due inquiry. Above all, the Crown needed to respect and provide for tino rangatiratanga, by working in partnership with Maori leaders and institutions, so that Te Tau Ihu Maori could decide their own customary entitlements and whether they wished to alienate them to the Crown.

Instead, the Crown failed to investigate customary rights properly, failed to provide for partnership or tino rangatiratanga, and exploited custom where possible to obtain almost the whole of Te Tau Ihu. Purchases were negotiated with a minority of right holders and subsequently presented to other customary owners as a fait accompli. Full, free, and informed consent to the alienation of most of the district was not secured. The iwi of Te Tau Ihu were left with insufficient lands for their own requirements and the Crown failed to protect them in their ownership of what little was left. Natural resources upon which Te Tau Ihu Maori customarily relied for their support and well-being were removed from their ownership or control and in some cases subject to significant environmental degradation.

Overall, we found that the Crown committed numerous and serious breaches of the plain terms of the Treaty, and of the principles of partnership, autonomy, reciprocity, active protection, options, mutual benefit, redress, equity, and equal treatment. These Treaty breaches were serious, resulting in significant economic, social, cultural, environmental, and spiritual harm to the iwi of Te Tau Ihu. Substantial and culturally appropriate compensation and redress are required.

Dated at Wellington this 18<sup>th</sup> day of September 2008



W W Isaac, presiding officer



J Clarke, member



P E Ringwood, member



MPK Sorrenson, member



R Tahuparae, member





**Figure 54: Miriama Tahī of Ngati Rarua, as pictured here, appears on the Waitangi Tribunal website. She appears again in this report because she represents the women's contribution to generations of surviving communities in Te Tau Ihu.**

## APPENDIX

### RECORD OF APPEARANCES

#### **THE TRIBUNAL**

The Tribunal constituted to hear claim Wai 785, the combined inquiry for the northern South Island, comprised Judge Wilson Isaac, Pamela Ringwood, Roger Maaka (resigned May 2003), Rangitihī Tahuparae, Professor Keith Sorrenson, and John Clarke (replaced Roger Maaka).

#### **THE COUNSEL**

##### **For the Crown**

Mike Doogan, Simone Rasmussen, Helen Carrad, Kirsty Millard, and Andrew Beck appeared for the Crown.

##### **For the claimants**

Michael Hardy-Jones and Kirsten Maclean appeared for the Wai 44 claimants (Rangitane); Jamie Ferguson, Jamie Tuuta, Ebony Duff, and Susannah Sharpe appeared for the Wai 723 claimants (Ngati Tama); Tim Castle, Bridget Miller, and Elizabeth Shaw appeared for the Wai 594 claimants (Ngati Rarua); Deborah Edmunds, Kim Bellingham, Kate Mitchell, and Bridget Ross appeared for the Wai 207 claimants (Ngati Toa Rangatira); Martin Dawson, Teale Crossen, Liana Poutu, and Ana Morrison appeared for the Wai 566 claimants (Ngati Koata); Ron Crosby, Don Mathieson QC, and Quentin Davies appeared for the Wai 521 claimants (Ngati Apa); Pamela Davidson and Brian Smythe appeared for the Wai 648 claimants (the Te Kotua whanau); Leo Watson appeared for the Wai 851 claimant (Matiu Love); Kelly Hennessy and Ian Smith appeared for the Wai 469 claimants (Ngati Awa); Kath Ertel, Hilary Unwin, Meg Poutasi, Clare Maihi, Tira Johnson, and Liz Cleary appeared for the Wai 607 claimants (Te Atiawa) and for several Te Atiawa whanau claimants (Wai 379, Wai 822, Wai 830, Wai 920, Wai 921, Wai 923, Wai 924, Wai 925, Wai 926, and Wai 927); Gina Rudland, Julie McDonald, Alison Mills, and David Jenkins appeared for the Wai 561 and Wai 829 claimants (Ngati Kuia–Ngati Tutepourangi hapu); Graham Allan appeared for the Wai 56

TE TAU IHU O TE WAKA A MAUI

claimant (the Wakatu Incorporation Trust); Peter Johnson and Hemi Te Nahu appeared for the Wai 956 claimants (the Warren Pahia and Joyce Te Tio Stephens Whanau Trust) and for the Wai 1002 claimants (the Georgeson whanau and Te Atiawa ki Motueka Trust); John Upton QC, Sandra Cook, Christopher Hall, Rachael Brown, John O'Connell, Christopher Finlayson, and Lani Matahaere appeared for Te Runanga o Ngai Tahu; and Kirsten Maclean appeared for the Marlborough District Council.

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