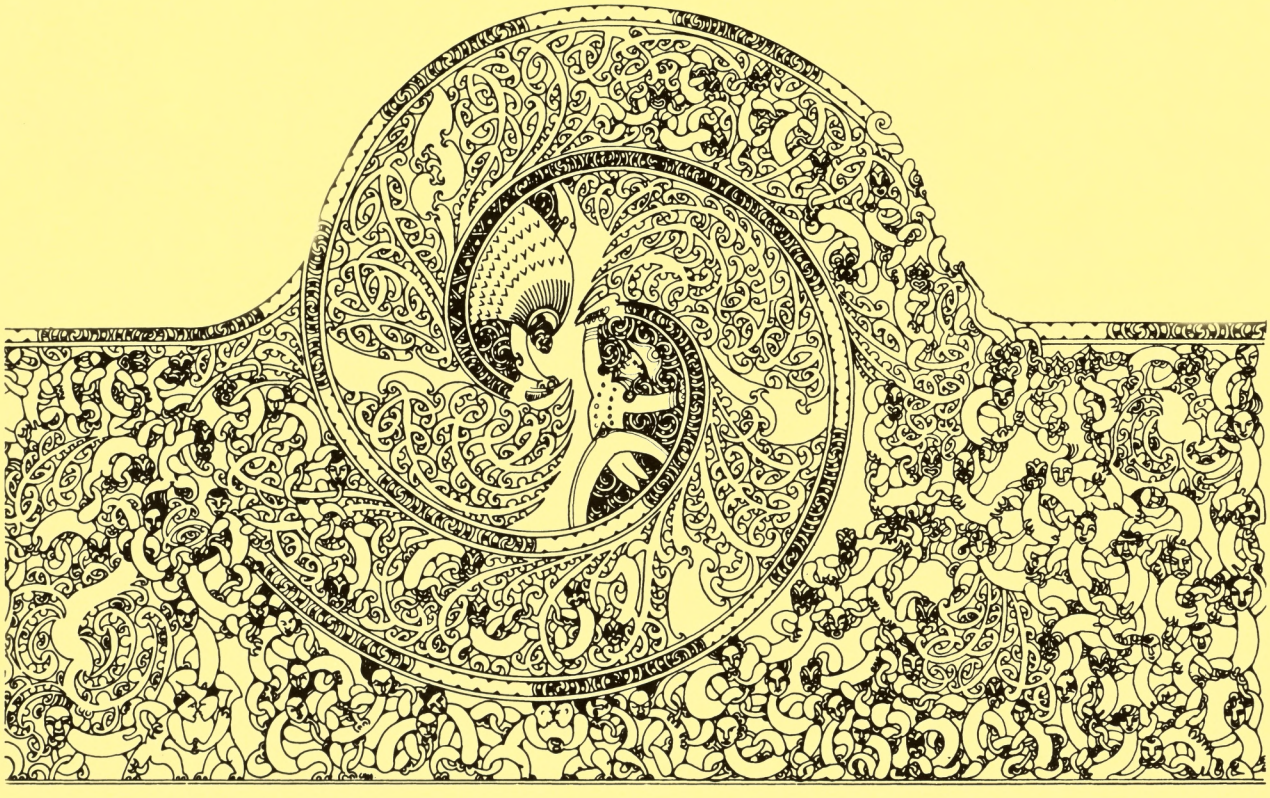
TE MAUNGA RAILWAYS LAND REPORT



WAITANGI TRIBUNAL REPORT 1994

TE MAUNGA
RAILWAYS LAND
REPORT

WAI 315

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

A Waitangi Tribunal report
ISBN 1-86956-148-1

First published 1994 by Brooker's, Wellington, New Zealand
Second edition published 1996 by GP Publications, Wellington, New Zealand
Reprinted 2000 by Legislation Direct, Wellington, New Zealand
Set in Times Roman

CONTENTS

The Honourable Minister of Maori Affairs
Parliament Buildings
WELLINGTON

Te Minita Maori

Tena koe e te rangatira

This report concerns the use of the Public Works Act 1928 and more particularly the offer-back procedures of sections 40-42 Public Works Act 1981 and sections 23 and 26 New Zealand Railways Corporation Restructuring Act 1990. The claim, lodged by Michelle Henare and others, was granted urgency, because the land involved at Te Maunga, Papamoa No 2 Section 10B2C2 Block, in the Tauranga district, was the subject of a revesting order of the Maori Land Court, with a condition of payment of $70,000 plus GST set by the Minister of Railways before it could be finally revested in the former 22 owners or their successors. The claimants sought relief from this condition.

The land had been taken in 1955 for railways purposes under the Public Works Act 1928, and used for housing Railways employees until about 1985, when it was considered to be surplus to Railways Corporation requirements. The historical and geographical context of urban growth and port development at Mount Maunganui in the 1950s, and earlier transactions on Papamoa Block are outlined in chapters 1 and 2. In chapter 3 we outline the circumstances of the taking of the Te Maunga land in 1955. In chapters 4 and 5 we provide a narrative of a confused sequence of events over the period 1985 to 1993 when the Maori Land Court revesting order was made. In chapter 6 we consider the issues that are central to the operation of public works legislation: the powers of the Crown (kawanatanga) in compulsory acquisition of Maori land for public purposes. In chapter 7 we consider public works and the principles of the Treaty of Waitangi: how kawanatanga may conflict with the Crown guarantee to Maori of rangatiratanga, and the fiduciary obligation of the Crown actively to protect Maori ownership of land unless Maori owners are willing to sell at an agreed price. When Maori land taken by the Crown for public works is no longer required for any public purpose, the fiduciary obligation of the Crown under the Treaty of Waitangi includes a discretion to make the offer-back conditions sufficiently reasonable that former Maori owners are not prevented from resuming their rangatiratanga of lands compulsorily taken from them.

The Railways land at Te Maunga is a small block but the issues raised in this claim involve important principles of the Treaty of Waitangi: the Crown right to make laws and take land in the public interest (kawanatanga), against the guarantees of protection of Maori ownership of lands (rangatiratanga). In chapter 8 we conclude that this claim is well-founded and make a specific recommendation for relief for the claimants. We also make some more general

recommendations for changes in public works legislation and offer-back procedures that would reflect more positively the principle of a fiduciary obligation of the Crown toward Maori in the Treaty of Waitangi.

Chapter 1

The Claim

The land which we have described as "Te Maunga Railways Land" for this report is an area of 1 acre 2 roods (6070 square metres) taken by the Crown in 1955 for railway purposes under the Public Works Act 1928 and used for housing. It was described in the proclamation as "part Papamoa No.2, Section 10B Block"[1] and in Maori Land Court records as Papamoa No 2 Section 10B2C2 Block. In 1955 it was an unoccupied piece of scrub-covered, sandy, almost level land beside the East Coast Main Trunk Railway, east of Mount Maunganui near the coast of the Bay of Plenty (figure 1). It was part of a much larger area of land in the Te Maunga — Papamoa district which was still owned by Nga Potiki, a hapu of Ngai Te Rangi, a tribe of Mataatua descent. Nga Potiki occupied the eastern shores of Tauranga Harbour from west of Te Maunga around Rangataua Bay to the Waitao Stream and out to sea between Omanu and Papamoa. Their principal marae is named from their ancestor Tamapahore, and located on the north facing slope of Mangatawa. This hill, which in profile appears like a whale, was once a large pa with extensive terrace formations, said to have been where Tamatea of the Takitimu waka established himself. But only the remnants of the fortifications remain. Much of it has been quarried away, because it was taken under the Public Works Act in 1946[2] and extended by another taking in 1964 for road construction in the district.[3]

In his oral statement before the tribunal at the 13 December 1993 hearing, John Farrell spoke of the relationship of Nga Potiki with their land and how there had been "a lot of problems with the land". He spoke of the "lethal weapon" of the Public Works Act "used on us", and reviewed other public works "within a two-mile radius" of the Te Maunga railway housing land — oxidation ponds, rubbish tip, easement for gas pipe line, power board depot, Mangatawa quarry, "Rifle Range" and railway land. "Enough is enough", he concluded. In her oral submissions at the 13 December 1993 hearing Michelle Henare spoke of the concern of her late father, Riki Taikato, that "the land would slip away". She said they found it difficult to get information about the status of the Papamoa No 2 Section 10B2C2 Block since it became known about 1985 that Railways Corporation intended to dispose of its housing stock. They were now faced in 1993 with what seemed to them a hopeless task of raising $70,000 plus GST to buy it back. The land had been unoccupied for some time, and the houses removed, when, to their dismay, some new construction work began in 1991, and they found Railways had agreed to sell it to a third party. Michelle Henare stated:

> I only want to express our concern about these things that have happened to us over a long time. My dad would like to have seen us give it our best shot. We felt it unjust that land be taken, pass from us, by Railways. We felt it has always been ours. We should not have to pay the $70,000. It is not the monetary value. It is the cultural tie that we do not want to lose .... My personal view is that the

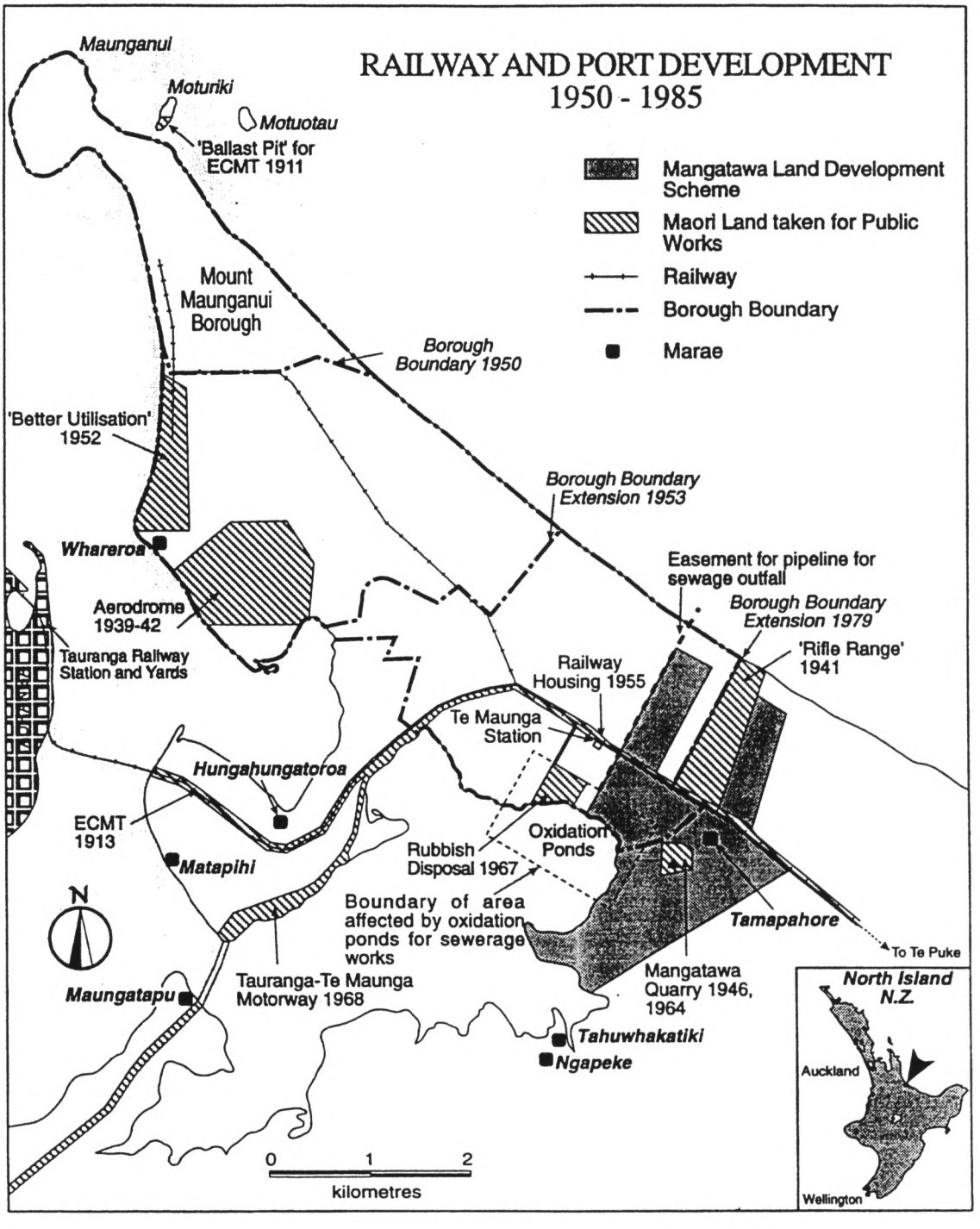
RAILWAY AND PORT DEVELOPMENT
1950 - 1985
Mangatawa Land Development Scheme
Maori Land taken for Public Works
Railway
Borough Boundary
Marae
Maunganui
Moturiki
Motuotau
'Ballast Pit' for ECMT 1911
Mount Maunganui Borough
Borough Boundary 1950
'Better Utilisation' 1952
Borough Boundary Extension 1953
Whareroa
Easement for pipeline for sewage outfall
Borough Boundary Extension 1979
Aerodrome 1939-42
'Rifle Range' 1941
Tauranga Railway Station and Yards
Railway Housing 1955
Te Maunga Station
Hungahungatoroa
ECMT 1913
Matapihi
Rubbish Disposal 1967
Oxidation Ponds
Boundary of area affected by oxidation ponds for sewerage works
Tamapahore
To Te Puke
N
Maungatapu
Tauranga-Te Maunga Motorway 1968
Mangatawa Quarry 1946, 1964
Tahuwhakatiki
Ngapeke
0 1 2
kilometres
North Island N.Z.
Auckland
Wellington

Figure 1

> land will always be ours. They may use it as and when. It does not cease to be ours because the Crown has used it.[4]

The tribunal acknowledges the claimants' view that the historical context of past takings of Nga Potiki lands by the Crown makes the matter of return of the Papamoa No 2 Section 10B2C2 Block one of much greater significance to them than its small area of 1 acre 2 roods (6070 square metres) might warrant, if measured in other terms.

The taking under the Public Works Act 1928 of "Additional Land at Te Maunga for the Purposes of the East Coast Main Trunk Railway",[5] which is the subject of this claim, is only one of a large number of Crown transactions in the 1950s, which occurred during the development of the Port of Tauranga at Mount Maunganui, the establishment of a pulp and paper mill at Kawerau to process the exotic timber of Kaingaroa forest, and the expansion of railway facilities to link the processing plant with an overseas export outlet (figure 1). In the late 1940s the New Zealand Forest Service investigated proposals for construction of a timber, pulp and paper mill, initially at Murupara, although a site at Kawerau was subsequently chosen. At the same time the Ministry of Works examined the needs for building a town at Murupara and construction of branch railways to connect with the East Coast Main Trunk Line at Edgecumbe from Murupara, and from Te Maunga to the proposed port at Mount Maunganui. After an inquiry into the alternative port sites at Whakatane and Tauranga, a government decision was made in 1950 to establish port facilities at Mount Maunganui. It was also envisaged that the expected expansion of agriculture in the Bay of Plenty would require facilities for landing bulk goods, such as fertilisers, and cool stores for meat and dairy products.

In the 1950s it was assumed that most of this increased movement of goods would be carried by rail. By early 1954 plans had been prepared by New Zealand Government Railways for additional yards and a station at Te Maunga, near the junction of the new branch line to the port at Mount Maunganui with the East Coast Main Trunk Line. The area of 1 acre 2 roods (6070 metres square) in Papamoa No 2 Section 10B2C2 Block was taken in 1955 to provide land for construction of 6 houses for Railways employees at Te Maunga. The houses were built in 1957 and tenanted by Railways for about 30 years. In 1985 the New Zealand Railways Corporation attempted to get Mount Maunganui Borough Council approval for subdivision of 6 residential lots with a view to sale of the land and houses. This approval was not forthcoming and by 1991 all the houses had been sold for relocation. The land was zoned Industrial C in the Mount Maunganui District Scheme. In 1991 Railways entered into a sale and purchase agreement with G H Bryce who proceeded to construct a concrete batching plant. However, because the land had been taken by proclamation under the Public Works Act 1928, it was subject to the "offer-back" provisions of section 40 Public Works Act 1981 and section 23 New Zealand Railways Corporation Restructuring Act 1990. Meanwhile, representatives of the original Maori owners had on several occasions sought the return of the land.

There had been a good deal of bureaucratic confusion since 1985 within the Railways Corporation over the offer-back process for the Te Maunga land. It was not until August 1992 that the Railways Corporation made a formal application to the Maori Land Court under section 436 Maori Affairs Act 1953 which complied with the offer-back provisions of sections 40-42 Public Works Act 1981 and sections 23 and 26 Railways Corporation Restructuring Act 1990. An order was made by the Maori Land Court in September 1993 but the land has not yet been revested in the 22 original Maori owners. The stumbling block is the condition imposed by Railways that a sum of $70,000 plus GST be paid to buy back the land that was taken from them. The compensation assessed by the Maori Land Court in 1955 was £430 (this translates approximately into $860, though this does not take into account inflation since 1955). The claimants contend that since the land was compulsorily taken from Maori owners it is not only unreasonable, but also a breach of the Treaty of Waitangi guarantee in article 2, that the land was taken, and that the Crown, having had the use of the land for all these years, now expects to benefit from the increase in value since 1955.

The central issue in this, and other claims concerning land taken by proclamation under various Public Works Acts, is the conflict between the obligation of kawanatanga in article 1 and the guarantees of protection of rangatiratanga in article 2 of the Treaty of Waitangi. In other words, the question that needs to be addressed is, under what circumstances can the Crown right to govern in the public interest over-ride the Crown obligation to protect the Maori interests guaranteed in the Treaty? And even when an over-riding public interest can be identified, if that public purpose for which the land was taken is no longer relevant, then what fiduciary obligation remains with the Crown to ensure that land compulsorily taken from unwilling sellers is returned to the original owners?

In the following chapters we provide a narrative of events, beginning with a history of the Papamoa Block and other public works in the vicinity of Te Maunga in chapter 2. In chapter 3 we outline the circumstances of the taking of Papamoa No 2 Section 10B2C2 for railway purposes in 1955. In chapters 4 and 5 we provide a narrative over the period 1985-1993, outlining firstly the transactions leading to the removal of the houses in 1991 and then the attempts to dispose of the land leading up to the Maori Land Court hearings of 1992-93. We are indebted to both Crown and claimant counsel in placing before the tribunal comprehensive documentation of transactions on this block, in particular the material from Ministry of Works and Railways files compiled by Dr Ashley Gould of the Crown Law Office, Wellington (A8a,b and c in the record of documents), and Maori Land Court records compiled by Jim Shepherd, Maori Land Information Office, Hamilton (A9 in the record of documents). In chapter 6 we consider public works legislation and in chapter 7 the principles of the Treaty of Waitangi in relation to public works. In chapter 8 we set out our findings and recommendations.

References

1. *New Zealand Gazette* (*Gazette*) 1955, p 1222

2. *Gazette* 1946, p 410

3. *Gazette* 1964, pp 2021-2022

4. As noted by Professor Evelyn Stokes, tribunal member, at the first hearing for the Te Maunga Railways Land claim of 13 December in Rotorua.

5. *Gazette* 1955, p 1222

Chapter 2

Historical Context: The Papamoa Block

The lands on the eastern side of Tauranga harbour from Mount Maunganui to the Waimapu river, including Matapihi and Maungatapu peninsulas, were included in the area confiscated under the New Zealand Settlements Act 1863.[1] This proclamation extinguished customary title in the whole confiscated block, but within it, some lands were returned to Maori ownership by way of Crown Grants. Between 1865 and 1886, various Commissioners of Tauranga Lands, appointed under the Tauranga District Lands Acts 1867 and 1868, investigated these lands and compiled lists of owners for the various blocks returned to Maori.[2] After 1886 jurisdiction over Maori lands granted in the confiscated area was transferred to the Native Land Court. During the 1880s the Crown acquired substantial areas, including the area of Mount Maunganui peninsula (which subsequently became the Borough of Mount Maunganui). The Crown purchase of Papamoa No 1 Block was completed in 1893 and most of the Horoipia and Wharawhara blocks to the west of Te Maunga acquired by 1900 (figure 2).

Most of the land in the Whareroa, Matapihi and Papamoa districts was returned to Maori after confiscation and remained in Maori ownership until the 1950s when expansion of the port and urban growth from Mount Maunganui began to encroach. In the 1950s, there were several Maori land development schemes around the eastern harbour including the Mangatawa Scheme (figure 1). These lands were administered under Part XXIV of the Maori Affairs Act 1953 by which blocks of Maori freehold land were vested in the Board of Maori Affairs for development purposes. In 1957 most of the blocks in the Mangatawa Scheme were vested in the Mangatawa Papamoa Incorporation, a Maori incorporation set up by the Maori Land Court under Part IV Maori Affairs Amendment Act 1967.[3] In 1968, the balance of Papamoa No 2, section A12, formerly part of section 10B, was included in an amalagamated title known as Mangatawa Papamoa Block, administered by the Mangatawa Papamoa Maori Incorporation (figure 3).

The original Papamoa Block, 12,655 acres, was awarded to 60 owners under the Tauranga District Lands Acts, on 2 June 1879, and a Certificate of Title issued on 2 April 1891.[4] In 1893 a partition into Papamoa No 1 and No 2 Blocks was ordered by the Native Land Court. The Papamoa No 1 Block was defined as the area comprising the individual interests acquired by the Crown and was vested in Her Majesty the Queen, 12 May 1893. On 12 June 1896, applications for partition of Papamoa No 2 Block were heard by the Native Land Court, Judge Wilson, at Tauranga.[5] The Papamoa No 2 Block was in two parts and the partition of sections 1 to 6 was made in the portion south of Mangatawa Block. The northern part was partitioned into sections 7 through to 11.

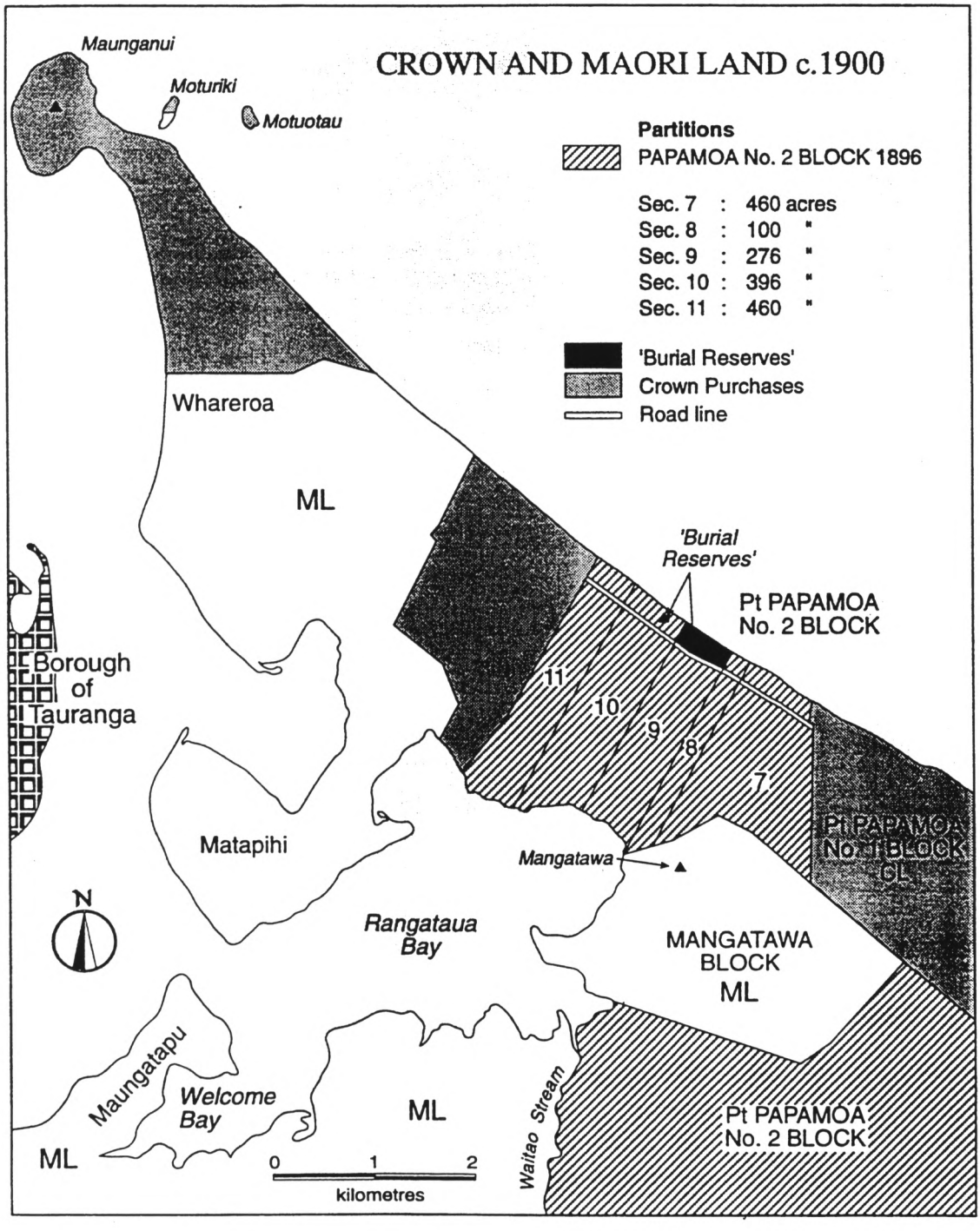
CROWN AND MAORI LAND c.1900
Maunganui
Moturiki
Motuotau
Partitions
PAPAMOA No. 2 BLOCK 1896
Sec. 7 : 460 acres
Sec. 8 : 100 "
Sec. 9 : 276 "
Sec. 10 : 396 "
Sec. 11 : 460 "
'Burial Reserves'
Crown Purchases
Road line
Whareroa
ML
'Burial Reserves'
Pt PAPAMOA No. 2 BLOCK
Borough of Tauranga
11
10
9
8
7
Pt PAPAMOA No. 1 BLOCK
Matapihi
Mangatawa
N
Rangataua Bay
MANGATAWA BLOCK
ML
Maungatapu
Welcome Bay
ML
ML
Waitao Stream
Pt PAPAMOA No. 2 BLOCK
0 1 2
kilometres

Figure 2

The partitions were allocated to separate "hapus", although this term probably refers here to an extended family, all belonging to Nga Potiki. It was acknowledged that the northern coastal block was of poorer quality, sand dunes and swamp, than the more elevated lands to the south. The partitions were allocated to six separate groups of owners as follows:

Sections 1	(720 acres)	and	11 (460 acres)	10 owners
Sections 2	(575 acres)	and	10 (369 acres)	8 owners
Sections 3	(432 acres)	and	9 (276 acres)	7 owners
Sections 4	(271 acres)	and	8 (100 acres)	4 owners
Section 5	(472 acres)			4 owners
Sections 6	(130 acres)	and	7 (460 acres)	5 owners

There was no over-lapping of ownership in the six separate lists of owners submitted. It can be inferred that the partitions were allocated to separate but related family groups. The "Burial Reserves" on sections 9 and 10 were not separately allocated to any group of owners at this sitting. The Partition Orders were dated 15 June 1896 (A9).

In 1913 a strip of land was taken by proclamation under the Public Works Act 1908 from all the Papamoa No 2 Sections 7 to 11 Blocks, for "the East Coast Main Trunk Railway ... and for road-diversions in connection therewith ....".[6] On 13 October 1915, at Tauranga, Judge Browne ordered compensation for the 9 acres 3 roods 34 perches taken from Papamoa No 2 Section 10 Block be assessed at £7.5.8 and paid to the 12 owners.[7] In 1921 another piece of Papamoa No 2 Section 10, 5 acres 3 roods 0.42 perches, was taken under the Public Works Act 1908 "for the purposes of a post and telegraph storage-yard".[8] In 1929 another 2 acres 1 rood 7.1 perches were taken under the Public works Act 1928 "for the East Coast Main Trunk Railway ... and for a road approach thereto".[9]

We turn now to the partitions on Papamoa No 2 Section 10 Block (figures 3 and 4). In 1941, the block was before the Native Land Court and partitioned into sections 10A and 10B. Te Aohuakirangi stated on 20 February 1941:

> Land is not leased, not under development. One of Ngatai Erua's sons, Hoera Makarauri is living on the land — want a partition of my interest and that of Wharetoroa in order that my children can work their shares. It is agreed that we should cut off our interests on the western side of the Block.[10]

Papamoa No 2 Section 10A Block was ordered to vest in these two owners, Te Aohuakirangi and Wharetoroa, an area of 158 acres 2 roods 36 perches. The balance was to be called Papamoa No 2 Section 10B Block vested in the remaining 11 owners, and comprising an area of 195 acres 3 roods 15 perches.

In 1954 there were further partitions for house sites in Section 10B. On 19 February Hoera Makarauri, or Taipari, applied to vest 2 roods in his daughter, Haupina Taire Muru, "as a site for a dwelling for her".[11] This house site was partitioned out and called section 10B1, located in the south-western corner of the

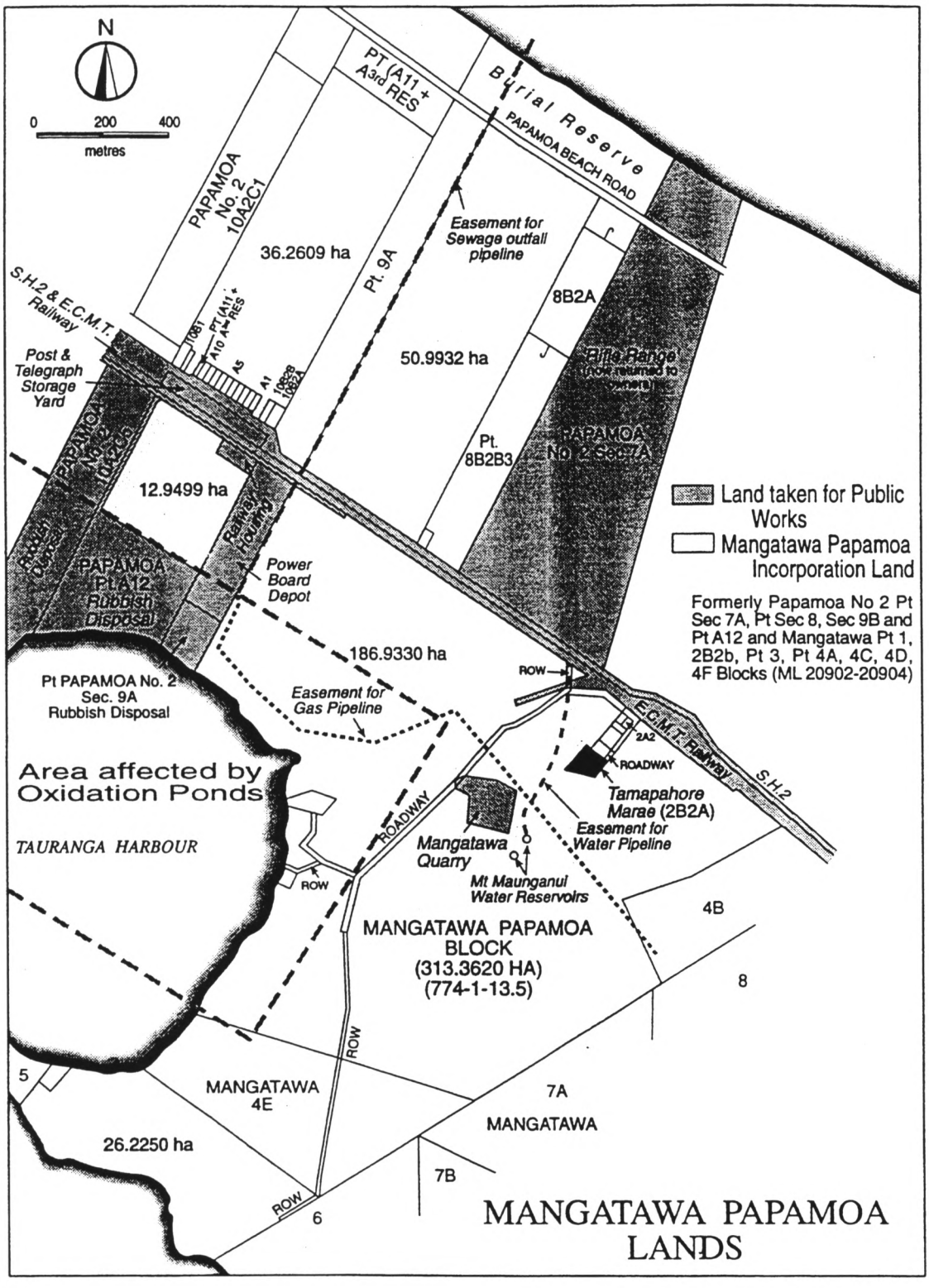
N
0 200 400
metres
PT (A11 + A3rd RES
Burial Reserve
PAPAMOA BEACH ROAD
PAPAMOA No. 2 10A2C1
36.2609 ha
Pt. 9A
Easement for Sewage outfall pipeline
8B2A
S.H.2 & E.C.M.T. Railway
Post & Telegraph Storage Yard
50.9932 ha
Rifle Range
Pt. 8B2B3
PAPAMOA No 2 Sec 7A
12.9499 ha
Railway Housing
Power Board Depot
PAPAMOA (Pt A12) Rubbish Disposal
Land taken for Public Works
Mangatawa Papamoa Incorporation Land
Formerly Papamoa No 2 Pt Sec 7A, Pt Sec 8, Sec 9B and Pt A12 and Mangatawa Pt 1, 2B2b, Pt 3, Pt 4A, 4C, 4D, 4F Blocks (ML 20902-20904)
186.9330 ha
ROW
Pt PAPAMOA No. 2 Sec. 9A Rubbish Disposal
Easement for Gas Pipeline
E.C.M.T. Railway
S.H.2
2A2
ROADWAY
Area affected by Oxidation Ponds
TAURANGA HARBOUR
Tamapahore Marae (2B2A)
Easement for Water Pipeline
Mangatawa Quarry
Mt Maunganui Water Reservoirs
ROADWAY
ROW
MANGATAWA PAPAMOA BLOCK (313.3620 HA) (774-1-13.5)
4B
8
ROW
5
MANGATAWA 4E
7A
MANGATAWA
26.2250 ha
7B
ROW
6
MANGATAWA PAPAMOA LANDS

Figure 3

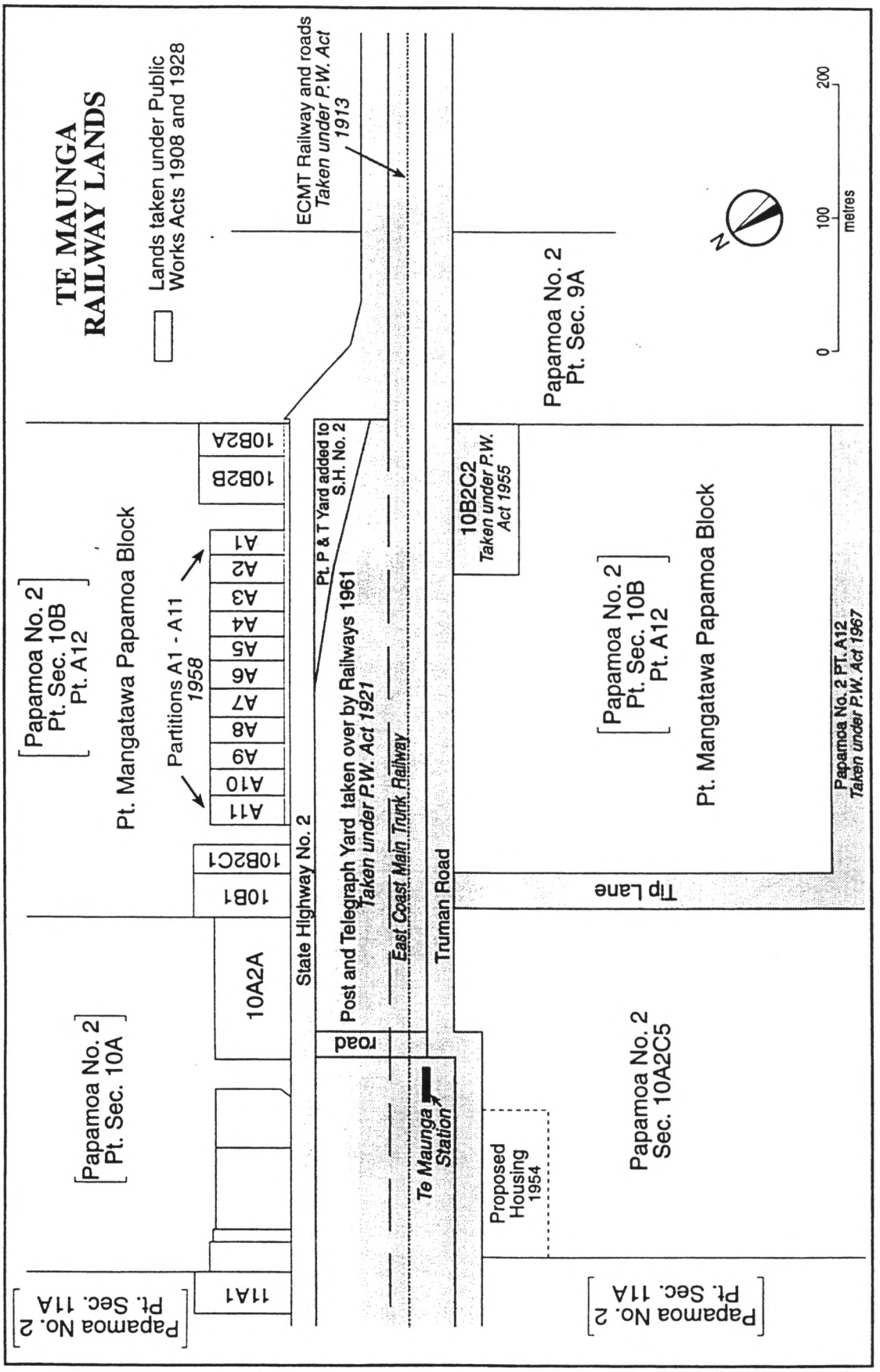
TE MAUNGA
RAILWAY LANDS
Lands taken under Public Works Acts 1908 and 1928
ECMT Railway and roads Taken under P.W. Act 1913
Papamoa No. 2 Pt. Sec. 10B Pt. A12
Pt. Mangatawa Papamoa Block
Partitions A1 - A11 1958
10B2B
10B2A
A1
A2
A3
A4
A5
A6
A7
A8
A9
A10
A11
Pt. P & T Yard added to S.H. No. 2
Post and Telegraph Yard taken over by Railways 1961 Taken under P.W. Act 1921
East Coast Main Trunk Railway
10B2C1
10B1
10A2A
State Highway No. 2
Papamoa No. 2 Pt. Sec. 10A
11A1
Papamoa No. 2 Pt. Sec. 11A
road
Te Maunga Station
Truman Road
Proposed Housing 1954
Papamoa No. 2 Sec. 10A2C5
Tip Lane
10B2C2 Taken under P.W. Act 1955
Papamoa No. 2 Pt. Sec. 10B Pt. A12
Pt. Mangatawa Papamoa Block
Papamoa No. 2 Pt. Sec. 9A
Papamoa No. 2 Pt. A12 Taken under P.W. Act 1967
Papamoa No. 2 Pt. Sec. 11A
N
0
100
200
metres

Figure 4

northern part of the block. The balance of the block was vested in remaining owners as section 10B2. On 12 November 1954 section 10B2 was partitioned into 10B2A and 10B2B blocks, comprising 2 roods each in the south eastern corner of the northern portion of the block, and the balance of 194 acres 2 roods 2 perches was called section 10B2C.[12] By now there were 22 owners listed for the latter block. On 24 May 1955 the Maori Land Court heard another application for partition of a house site:

> Hoeroa Taipari and Whanaukino Walker present — she says she has an application current for a Maori Housing loan — a site is a matter of urgency.
>
> Ordered that an area of 1 rood 13 perches be cut off on the main road to the East of and adjoining 10B1 ... to be called 10B2C No 1 in the name of Whanaukino Walker f.a.
>
> Bal[ance] to be called 10B2C No 2 for remaining owners.[13]

On 27 July 1955 a proclamation under the Public Works Act took an area at Te Maunga described as "part Papamoa No.2 Section 10B Block".[14] This appellation was incorrect, as the Maori Land Court records clearly indicate that the balance block after the partition of 24 May 1955 was called Papamoa No 2 Section 10B2C2. Nevertheless, a certificate of title was issued under the Land Transfer Act, dated 7 August 1989, in the name of Her Majesty the Queen, for a "parcel of land containing 6070 square metres ... being *part Papamoa 2 Section 10B Block*".[15] This is the same block as the one described as "Papamoa 2 Sec. 10B2C2" which was before the Maori Land Court on 16 September 1955 for assessment of compensation and so ordered by the court on 6 December 1956.[16] By this time a survey had been done for the block and there seems no explicable reason why a certificate of title should have been issued in 1989 with this incorrect appellation. We consider this taking in more detail in the next chapter.

On 27 May 1958 Judge Prichard heard an application for partition for housing sites presented by Pehiriri Reweti, an officer with the Department of Maori Affairs. The scheme plan proposed a partition of over 40 quarter-acre sections suitable for housing sites which had been approved by Tauranga County Council. At this hearing 11 sections were approved and new appellations given: A1, A2 etc up to A11, all located along the northern side of the road and railway and each vested in individual owners. The balance of the block known as Papamoa No 2 Section 10B2C2 was also given a new appellation: Papamoa A12, and vested in 48 owners. Thus, the Railways housing block of 1 acre 2 roods taken in July 1955 retained the appellation Papamoa No 2 Section 10B2C2 which formerly applied to the balance of the block, after partition of Papamoa No 2 Section 10B2C1 for a house site in May 1955.

The southern portion of Papamoa A12 Block, fronting on to Tauranga harbour, and a road access, now known as Tip Lane, from Truman road, was taken in 1967 under the Public Works Act 1928 "for rubbish disposal, and shall vest in the

Mayor, Councillors, and Citizens of the Borough of Mount Maunganui ....".[17] The area taken was 32 acres 3 roods and the vesting was dated from 13 November 1967. In 1975 the balance of Papamoa A12 Block in two parts north and south of the railway line and road was included in an amalgamated title now called Mangatawa Papamoa Block, administered by the Mangatawa Papamoa Incorporation.[18]

We list below in summary form the lands taken from Papamoa No 2 Section 10 Block under the Public Works Acts 1908, 1928 and 1981:

1913 for East Coast Main Trunk Railway and for Road-diversions in connection therewith[19]

3 acres	3 roods	1.2 perches	for railway
2 "	1 "	9.2 "	" "
1 "	1 "	14.1 "	for road-diversions
2 "	1 "	9.8 "	" "

1921 for the purposes of a post and telegraph storage-yard[20]
5 acres 3 roods 0.42 perches

1929 for the East Coast Main Trunk Railway ... and for a Road Approach thereto[21]
2 acres 1 rood 7.1 perches

1955 for the Purposes of the East Coast Main Trunk Railway[22]
1 acre 2 roods 0 perches

1961 Crown land set apart for Railway Purposes[23]
5 acres 3 roods 0.42 perches
(This is the former Post and Telegraph yard, taken in 1921, see above)

1967 for Rubbish Disposal[24]
32 acres 3 roods 0 perches

1985 for Refuse Treatment and Disposal[25]
24.0155 hectares (Papamoa No 2 Section 10A2C5)

In this brief review of public works takings we have established that Nga Potiki have lost a good deal of land by the Crown use, as John Farrell put it, of the "lethal weapon" of the various Public Works Acts.

References

1. *Gazette* 1865, p 187

2. *AJHR* 1886, G-10

3. Tauranga Maori Land Court Minute Book (MB) 20/29

4. CT59/292 a copy of which is in A9

5. Judge Wilson MB 9/68-69, 71-81; A9

6. *Gazette* 1913, pp 1594-1595; A9

7. Tauranga MB 8/365-370; A9

8. *Gazette* 1921, pp 2553-2554; A9

9. *Gazette* 1929, p 823; A9

10. Tauranga MB 14/196-197; A9

11. Tauranga MB 17/207; A9

12. Tauranga MB 17/333; A9

13. Tauranga MB 19/18; A9

14. *Gazette* 1955, p 1222; A9

15. CT44B/168; A9

16. Tauranga MB 19/93, 19/295; A9

17. *Gazette* 1967, p 1926; A9

18. DOSLI, Hamilton, plan ML20902 "Compiled Plan Mangatawa-Papamoa Block, 1974 (3 sheets)"

19. *Gazette* 1913, pp 1594-1595; A9

20. *Gazette* 1921, pp 2553-2554; A9

21. *Gazette* 1929, p 823; A9

22. *Gazette* 1955, p 1222; A9

23. *Gazette* 1961, p 945

24. *Gazette* 1967, p 1926; A9

25. *Gazette* 1985, p 4842

Chapter 3

Taking the Land

The land taken at Te Maunga in 1955 for Railways housing was part of the expansion of rail transport services to the port at Mount Maunganui. The specific proposals for Te Maunga station and yard were set out in a letter from the District Traffic Manager, Railways, to the Resident Engineer, Hamilton, dated 15 January 1954. The yard was to be laid out to provide a sufficient area to shunt wagons without interfering with the passage of "through" trains and to allow for additional yard space when required.

> In the main, the yard at Te Maunga will be shunted by Diesel Shunting engines based on Tauranga and/or Mt.Maunganui. Main line trains will also shunt at this station. At the present time the yard congestion at Tauranga is acute and there is little likelihood of relieving the position. In view of that and the anticipated increase in traffic, it is expected that a large proportion of the "through" tonnage and also a proportion of that for Mt. Maunganui which would normally be held at Tauranga will be put off at Te Maunga. (As a matter of fact, it is possible that with the accommodation being provided at Te Maunga, it may not be necessary to enlarge the yard at Tauranga). In the circumstances, it is anticipated that the main line services will perform a certain amount of shunting at Te Maunga.
>
> The station will be staffed throughout the day by three station agents working shifts. Automatic signalling will be in operation. A station building (to standard design) to accommodate the station agents and the small signal panel, together with a storeroom will be required. The General Manager has been advised that it is considered that three houses will be required by this Branch at Te Maunga.
>
> In view of the volume of shunting which will eventually be performed by the main line trains at Te Maunga, it is considered that loco watering facilities should be provided and it is thought that this source of supply should be availed of to provide a water source to the dwellings and station.(A8c)[1]

By November 1955 the District Traffic Manager was already seeking additional yard accommodation at Te Maunga:

> The congestion at Tauranga is most acute and in giving consideration to the accommodation to be provided at Te Maunga it is essential that this be kept in mind. There is no doubt that tonnage in the Bay of Plenty area will increase rapidly ....
>
> On one occasion during the past two months, it was necessary to hold 130 wagons of shipping traffic at Tauranga. If Te Maunga had been available for use, these wagons could have been held at that station. On another occasion recently, it was also necessary to store tonnage at Matapihi. It is inevitable that when any large numbers of wagons are required to be held at Tauranga, train delays are accentuated.

> With the rapid increase in traffic in the Rotorua — Kinleith — Bay of Plenty areas the Department should adopt a bold policy in regard to the provision of additional accommodation to handle the business. With this in mind and also the desirability of giving the maximum relief to Tauranga, ample provision should be made for storage accommodation at Te Maunga. I am therefore of the opinion that No. 4 loop is necessary at Te Maunga and should be provided at the outset.(A8c)

It was a long-established policy in New Zealand Railways to provide housing for employees, and it seems to have been assumed without question that housing would be needed as part of the construction of the branch line from Te Maunga to the port at Mount Maunganui. On 4 March 1954, Railways advised the Commissioner of Works that housing requirements for their employees had "been tentatively fixed at 22", of which 16 houses would be at Mount Maunganui and 6 at Te Maunga. The Ministry of Works in the same letter was asked to:

> arrange to acquire land for the building of these houses. In the meantime will you kindly arrange to build the following houses:
>
> Mt Maunganui — 8 No.
>
> Te Maunga — 3 No.
>
> The house[s] at both these localities will be required for the initial working of the Branch [line] .... (A8a)

The Works land officer reported on 6 May 1954 suggesting six sections comprising one and a half acres, fronting on the main highway to Mount Maunganui, located on Papamoa No 2 Section 11B Block, but no approach had been made to the sole owner. For reasons unexplained, this must have been an unsatisfactory location because another "Land Selection Report", dated 10 June 1954, suggested land for "N.Z.R Workers' Houses" be located behind Te Maunga Station on Papamoa No 2 Section 10A Block, owned by Te Wharetoroa (aka Paraire Paretoro or Paraire Pine) and Titia Tukairangi Te Kani as successor to Te Aohuakirangi. The land was not occupied, and no approach to the owners was recorded, although it was noted, "As a basis for discussion £150 per section suggested" (A8a).

There must have been further discussion between Railways and Works. The following telephone message, dated 17 June 1954, is recorded on the Works file in the Hamilton office. This office had been given responsibility for negotiating land acquisition and construction work:

> N.Z.Railways are taking over P & T reserve at Te Munga [sic] on account of possible station yard extension, is not agreeable to making part of it available for housing as discussed between Gumbley and Thomas [Works land purchase officers]. Suggest Gumbley proceeds with purchase negotiations with Maoris and allow approximately £150 to cover cost of roading. The standard of roading required by N.Z. Railways Department would be merely a carriageway, say 15ft.(A8a)

No record was provided to us, if indeed there was any kept, to indicate how and why the site finally chosen was moved from behind Te Maunga station on Papamoa No 2 Section 10A Block, eastward to Papamoa No 2 Section 10B2C2 Block (figure 4).

The first record of any contact with the Maori owners of Papamoa No 2 Section 10B2C2 Block is an unsigned, handwritten note from Works, Hamilton office file, dated 25 August 1954:

Papamoa	No.2 Sec 10B
Haimona Taite	44.62357
Makere Retima [sic]	35.69886
Ruihi Taite	44.62358

> Discussed with 3 owners above who are principal owners. The Maori Welfare Officer Mr Tangitu present. They are agreeable to sell 1½ acres. Took Simon Taite and Makere Retima [sic] to H.O.Cooney's office. Offered £200 per acre. We to write sending plan.(A8a)

This was followed up with a letter, dated 3 September 1954, from the District Commissioner of Works, Hamilton, to the Tauranga solicitors, Cooney Jamieson and Lees:

> With reference to the Land Purchase Officer's interview with you on 25th August, I forward herewith a plan showing the area of 1½ acres which this Department wishes to acquire from Papamoa No.2 Section 10B for railway housing.
>
> The principal owners in the block are Makere Retima [sic], Simon Taite and Ruihi Taite and they have indicated that they are willing to sell.
>
> It is suggested that the purchase price be £200 per acre, this Department to be responsible for survey.
>
> Will you please inform me as soon as possible whether the proposition is acceptable.(A8a)

No response from Cooney, Jamieson and Lees was included in the documents provided to us. However, on 2 March 1955 the District Commissioner of Works wrote again, referring to his 3 September 1954 letter and the discussion in the solicitors' office on 25 August 1954:

> I have to advise that the Railways Department will issue the necessary Proclamation but has asked this Department to attend to the matter of compensation and confirmation by the [Maori Land] Court.
>
> As requested, I enclose copy of the list of owners supplied by the Maori Land Court, together with a summary. You will note that the above named [Makere Retimana, Simon Taite], together with Ruihi Taite, own 2-4/5 of the 4-2/5 shares. The special Government valuation is £430 for the 1½ acres.(A8a)

The lack of documentation on any further discussion with owners suggests that it was assumed by all parties that the land would be taken by proclamation under the Public Works Act 1928.

After the initial meeting on 25 August 1954 with three owners (of whom only two went to the office of Tauranga solicitor, H O Cooney, in the company of the Works land purchase officer), the District Commissioner, Works, sought a list of owners from the Department of Maori Affairs, Rotorua, on 28 September 1954. A response from the Maori Land Court dated 6 October 1954 was received by Works on 8 October. It enclosed a list of 22 owners, including the three referred to as "principal owners", meaning they held the three largest shares. The list of owners follows, but no evidence was presented to us that there was any discussion with any one of the other owners, or that a meeting of owners under Part XXIII of the Maori Affairs Act 1953 was ever called to consider a sale:

1. Haimona Taite	1	His own 13/20 plus 7/20 from Porina Tinitipia and Hoani Marara
2. Hori Rameka	3/25	
3. Kiwi Rameka	3/25	
4. Makere Retimana	4/5	Her own 1/10 plus 7/10 from Porina Tinitipia and Hoani Marara
5. Te Hoeroa Taipari	1/6	)
6. Rakapa Taipari	1/6	)
7. Tinia Taipari	1/6	)
8. Tatai Te Kakau	1/6	)
9. Tareha Makarauri	1/30	)
10. Te Pohoi Makarauri	1/30	)
11. Tarawhata Makarauri	1/30	)Partition of 1 share
12. Waka Makarauri	1/30	)held by Ngatai Erua
13. Toi Makarauri	1/30	)
14. Maehe Taikato	1/30	)
15. Puni Taikato	1/30	)
16. Hopa Taikato	1/30	)
17. Parete Taikato	1/30	)
18. Mere Maihi	1/30	)
19. Pine Ngatiwhainoa	3/25	
20. Te Rangiahoa Ngatiwhainoa	3/25	
21. Ruihi Taite	1	Her own 13/20 plus 7/20 from Porina Tinitipia and Hoani Marara
22. Tiwha Rameka	3/25	

On 12 November 1954, Makere Retimana and Ruihi Taite applied for partition of part of their interests "by consents". Orders were made by the Maori Land Court as follows:

> Papamoa No 2 Section 10B2A: 2 roods, vested in Keremeta Tarahina Kiwi
> Papamoa No 2 Section 10B2B: 2 roods, vested in Makere Retimana
> Papamoa No 2 Section 10B2C: balance of block of remaining interests.[2]

It was not until 16 November 1954 that the District Commissioner of Works, Hamilton, requested the Chief Surveyor, Auckland to survey the land to be taken. It is clear from this letter that proclamation under the Public Works Act was intended:

> I shall be glad if you will arrange for the survey and supply 7 coloured copies of the plan for proclamation purposes as soon as possible.
>
> The provision of accommodation for railway staff at this point is urgent and I shall be glad if this survey can be given priority.(A8a)

On 21 December 1954, Messrs Goulding and Benham, registered surveyors of Tauranga, who had been recommended by the District Commissioner, were authorised by the Chief Surveyor to proceed with survey: "the land is to be taken for Railway Housing therefore your plan will be a proclamation one ...." (A8a).

On 16 November too, the District Commissioner, Works, requested a special valuation from the Branch Manager, Valuation Department, Hamilton, and forwarded a copy of "information with plan" to the District Valuer, Rotorua. No evidence was presented to us to suggest that an independent valuation on behalf of the Maori owners was sought. They, or at least the three "principal owners", had already been offered £200 per acre, a total of £300. The "special Government valuation" assessed in December 1954 suggested a land value of £430, according to a letter dated 11 January 1955 from the District Commissioner, Works, to the Land Officer, Wellington Railways. A valuation report dated 8 September 1955 provided a description of the land. This report was probably prepared for the Maori Land Court hearing of an application for assessment of compensation (A8a):

> Contour: — Flat to slightly sloping, falling away to south. Soil light and sandy.
> General: — Section is virtually unimproved in rough native grasses and gorse. There is no formed access to section, though an unformed dedicated road lies between section and railway.
> There are no comparable sales of land in locality, and valuation has been based on obtaining six fair sites from the block, less development costs.
>
> Valuation: -
> Capital Value 430
> Unimproved Value 430
> Improvements -

A third letter was sent on 16 November 1954, to the Commissioner of Works, Wellington, by the Works Land Purchase Officer, W M Gumbley, on behalf of the District Commissioner, which raised the important issue of whether the

purpose of the proposed taking of the land for housing came under the Public Works Act or the Government Railways Act. The letter set out the Railways requirement of sites for six houses, and that the land was Maori-owned with 22 owners, "three principal owners" holding 2-4/5 of 4-2/5 shares in the block:

> The Land Purchase Officer has seen these three owners with the Maori Welfare Office [sic — Mr I Tangitu], and Mr H.O.Cooney who acts for them. The owners are prepared to agree to the taking of 1½ acres ....
>
> The Land Officer [Railways] also asked that this Department complete the whole transaction, i.e take the land and deal with the application to the Maori Land Court. However as we are unable to operate section 46 of the Government Railways Act, 1949, it would be necessary to take the land initially for housing or better utilisation and then change the purpose.
>
> Will you please take up the matter *urgently* with Railway Department and advise me what action is to be taken.(A8a)

The Commissioner of Works, on 22 November 1954, sent a copy of this letter and plan to the Land Officer, Railways:

> Will you please confirm that you hold approval to the acquisition of this land, and that you desire this Department to arrange for the land to be taken under the compulsory provisions of the Public Works Act for better utilisation, to arrange for compensation to be assessed, and then for the land to be declared Crown Land so that it can be set apart for the appropriate purpose by your Department.(A8a)

The Land Officer, Railways, responded on 25 November 1954:

> Approval is held for the acquisition of sites for six houses for this Department at Te Maunga and if possible I would be obliged if three of these sites could be made available this year.
>
> As the land shown on your plan appears to be within the limits of the centre line deviation it would seem that it could be taken directly for railway purposes.(A8a)

The Commissioner of Works was not satisfied and wrote again to the Land Officer, Railways, on 6 December 1954:

> If as you say this land is covered by a middle line proclamation under Section 216 of the Public Works Act, it could be taken for the authorised railway referred to in the middle line proclamation by a proclamation under subsection (1) (d) of Section 216.
>
> The land, however, is not required for the railway but is required for sites for houses for staff of your Department. The authority for taking land for such purposes is contained in the Government Railways Act, not in Section 216 of the Public Works Act.(A8a)

The commissioner also stated his preference for the procedure under the Public Works Act which he had suggested. However, a hand written note at the bottom of the Works file copy of the 6 December 1954 letter indicates there was further discussion with the Land Officer, Railways: "He agrees circumstances are unusual and outside the working arrangement for the acquisition of land for railway housing" (A8a). It was agreed that Works, Hamilton, proceed with the taking. On 13 December 1954 the Commissioner of Works advised his District Commissioner in Hamilton that:

> the Railway Land Officer agrees that in view of the inability of this Department to operate under Section 46 of the Government Railways Act, it will be preferable for the land to be taken by the Railways Department but that the District Land Purchase Officer [Works] will be asked to appear at the hearing of the Maori Land Court to assess the compensation.(A8a)

Housing for Railways employees was not among the public works listed in the Public Works Act 1928. However, section 46(1) of the Government Railways Act 1949 does provide for acquisition of land for dwellings for Railways employees:

> The Governor-General may, by Proclamation, take any land required for the accommodation of employees of the [Railways] Department, and, notwithstanding the provisions of section ten of the Public Works Act, 1928, the provisions of that Act (including sections twenty-two, twenty-three, and thirty-two), as well as of this Act, relating to the taking of land shall, with the necessary modifications, apply to the taking of land under the authority of this section.

The powers of the Minister of Railways in respect of land acquisition under the Public Works Act 1928, were set out in section 10(1) of the Government Railways Act 1949:

> The powers and duties conferred and imposed on the Minister of Works by the Public Works Act, 1928 are, so far as they are applicable and with the necessary modifications, hereby conferred and imposed on the Minister of Railways in respect of all matters and works under the control of or being carried out by the Minister or the Department, but without in any way limiting or interfering with the powers and duties of the Minister of Works under the said Act.

The provisions for compensation for any taking of land by proclamation for public works were contained in the Public Works Act 1928, and not in the Government Railways Act 1949.

In January 1955 the procedures for taking the Te Maunga land by proclamation under the Public Works Act 1928 were set in train. On 4 August 1955, a proclamation dated 27 July 1955, in the name of the Minister of Railways, was published in the *New Zealand Gazette*:

> Pursuant to the Public Works Act 1928, I, Lieutenant General Sir Charles Willoughby Moke Norrie, the Governor-General of New Zealand, hereby

> proclaim and declare that the additional land described in the Schedule hereto is hereby taken for the purposes of the East Coast Main Trunk Railway.[3]

The schedule described the piece of "additional land" taken as "1 acre 2 roods: Being part of Papamoa No.2, Section 10B Block".[4] As we have seen, this was not a correct appellation, because the Maori Land Court had ordered several partitions on Section 10B. As of the date of proclamation, the balance of the block was called Papamoa No 2 Section 10B2C Block, after the partition of two small sections on 12 November 1954. All the records of this taking describe the land as part Papamoa No 2 Section 10B Block.

The Crown application for assessment of compensation was heard in the Maori Land Court on 16 September 1955 by Judge Harvey:

> Papamoa 2 Sec 10B2C2 — Appln. for assessment of compensation for area of 1-2-00 taken for purposes of East Coast Main Trunk Railway by proclamation dated 27th July 1955 N Z Gazette 1955 p 1222.
> Mr Walton: Appln. for assessment lodged — not yet advertised — produce Govt valuation report dated 16/12/54 N.A. C.V.£430. U.V. £430. Land not under lease.
> Ask for an order fixing compensation @ £430.
> Mr H.O.Cooney: We are acting for the owners — we have investigated the position and consider the compensation offered to be adequate.
> Court: Will fix award compensation @ £430 when the appln. is advertised.
> Mr Walton: It has been agreed that Crown pay Mr H.O.Cooney £5-5-0 costs.
> Adj[ourned] for advertising.[5]

On 19 December 1955 the sum of £435.5.0 was authorised for payment to the Waiariki Maori Land Court. However, the advertisement was left out of the next Court "panui" (A8a), and the final order was delayed until heard by Judge Prichard, 6 December 1956: "Appln since gazetted — no known objns [objections]". Compensation to owners was assessed at £430, and £5.5.0 in costs to Mr H O Cooney, and the money was to be paid to the Maori Trustee for distribution.[6] The money had already been paid to the Waiariki Maori Land Court in mid January 1956, transferred to the Maori Trust Office, and credited on "beneficiary cards" in the usual way during February 1956 (A8a).

In summing up the transactions involving the taking of the land known as Papamoa No 2 Section 10B2C2 Block over the period 1954 — 1956, we note several issues:

- The transaction appears to have been a compulsory taking by proclamation under the Public Works Act, conducted in their accustomed manner by officers of the Ministry of Works in consultation with Railways.

- The only unusual feature is the discussion whether taking for railway purposes covered railway housing. The Ministry of Works had no

jurisdiction under the Government Railways Act 1949 which covered railway housing, which was not listed as a public work in the Public Works Act 1928. However, the compensation provisions for any taking for railway purposes were contained in the Public Works Act and the proclamation was issued in the name of the Minister of Railways.

- The procedures for assessment of compensation by the Maori Land Court and payment through the Maori Trust Office by way of credits on "beneficiary cards" were well established and were complied with. Since the 1880s, the Maori Land Court has had jurisdiction to assess compensation and make orders for any Maori land taken by the Crown under various Public Works Acts and Amendments.

- Consultation or negotiation with the 22 owners of the block in 1954 was minimal, and can not be construed as an agreement to sell. Only one "meeting", or "discussion" was held on 25 August 1954, between the Works Land Purchase Officer and three of the major shareholders in the block, with the Maori Welfare Officer for the Department of Maori Affairs also present. Only two of those owners then went with the Works Land Purchase Officer to talk with a Tauranga solicitor, Mr H O Cooney. No evidence was presented of any further meeting or discussion with Maori owners after 25 August 1954 which tends to infer that all parties perceived the transaction to be a compulsory taking.

- If there were a serious Crown intention of negotiating a purchase of this land, then the provisions of Part XXIII of the Maori Affairs Act 1953 could have been used to call a meeting of owners to consider a resolution to sell. No evidence of any attempt to call all the owners together, either formally or informally, was presented, which also tends to infer that the transaction was perceived as a compulsory taking.

- An offer was made to three owners by the Works Land Purchase Officer on 25 August 1954 at £200 per acre for compensation, before any valuation of the land was made. A "special Government valuation" was not requested by Works until 16 November 1954. The sum of £430, being the suggested unimproved and capital value of undeveloped scrub land with no improvements, appears to have been accepted as "adequate" by Mr H O Cooney, the solicitor appearing for Maori owners. No independent valuation for compensation purposes appears to have been sought on behalf of Maori owners. It is not possible at this distance in time to comment on whether this was a fair assessment, particularly as no comparable sales had occurred locally. However, Mr H O Cooney was also the lawyer who appeared for Maori owners in the "Whareroa Case", and took this litigation on the matter of compensation for land taken by the Crown through the Maori Land Court and Appeal Court to the Privy Council. It can be reasonably assumed that he would have a good understanding of land valuations in the district. He may well have chosen to save his clients further costs when the special

Government valuation produced a higher figure than the original offer. We also note that Mr Cooney would not have known that a Works land officer's "Land Selection Report" in June 1954 had suggested £150 per section as a basis for discussion for the six sections proposed behind Te Maunga Railway station on part of Papamoa No 2 Section 10A Block. We have been given no evidence to indicate that Maori owners were given enough information on which to base any objection, should they have wished to do so, to the compensation assessed by special Government valuation, accepted by the Maori Land Court and ordered on 6 December 1956. We note that compensation was already paid to owners in February 1956 by the Maori Trust Office, before the Crown application was advertised in the "panui" of the Maori Land Court. They may well have considered the matter a fait accomplit.

We find no evidence that this transaction, a compulsory taking under the Public Works Act 1928, can be construed as a voluntary agreement to sell, on a willing seller basis. Given the context of the number of other Crown takings under the Public Works Acts 1908 and 1928, in the immediate vicinity, Maori owners would be likely to perceive this taking as something outside their control. We also note that Crown policy on public works at this time was compulsory acquisition of freehold title. There was no attempt to explore alternative forms of tenure, such as a lease or licence to occupy, which would have preserved the parent title, and therefore their mana, and the rangatiratanga of the tangata whenua over their lands guaranteed to them in article 2 of the Treaty of Waitangi.

References

1. Documents A8a,b and c are compilations of copies from original Railways, Works and other files.

2. Tauranga MB 17/333; A8a

3. *Gazette* 1955, p 1222

4. ibid

5. Tauranga MB 19/93; A9

6. Tauranga MB 19/295; A8a; A9

Chapter 4

Disposal 1985-1991

The tribunal was not presented with any documentation about the land, or the six houses on it, for the years between 1957, when the houses were built, and 1985. We are satisfied, however, that the houses were built, maintained and tenanted by Railways within the provisions of the Government Railways Act 1949. By early 1985, they had become surplus to the requirements of the New Zealand Railways Corporation, the successor to New Zealand Railways under the Railways Corporation Act 1981. The following narrative of events from early 1985 on is derived from documents submitted by counsel for claimants in document number A5 of the record of documents, and a compilation of documents from Railways files submitted by Crown counsel to the tribunal and recorded as document numbers A8b and A8c in the record of documents.[1]

The earliest indication of a desire to dispose of the Railways houses and the land is a handwritten memorandum dated 8 April 1985, with several annotations, indicating that approval for a proposed sale of one of the houses for relocation would not be forthcoming from the Director, Land Division of Railways in Wellington (A8b:7). It was proposed that the house be rented out while the possibility of subdivision into six lots be investigated. On 30 May 1985 Railways submitted a scheme plan and planning application for a proposed subdivision to Mount Maunganui Borough Council. Railways sought to have the existing residential use of the land for over 30 years recognised, although the underlying zoning was Industrial C. The size of the lots, approximately 1000 square metres, complied with existing requirements for unsewered residential sites. All the houses were still occupied by tenants:

> The six houses were built in 1957 for Railways on a one and a half acre site purchased especially for the houses. Each house is individually served by a water connection and a septic tank while stormwater is to ground .... While it is agreed that the houses are not ideally located with respect to the surrounding land uses, these houses have considerable remaining life and every effort must be made in this day of housing shortages to retain them. Should our planning application not be successful then Railways would have little option but to remove the houses and sell or lease the land. The houses come within the lower price range and this is where the greatest housing need exists. Many houses within this price range are very old, substandard in most respects and do not meet normal criteria for loan purposes whereas these particular houses will comply with Housing Corporation type loan conditions. The houses are not isolated from other residential areas, in fact the Highway and the railway is the only physical barrier between these houses and the residentially zoned area of Te Maunga.(A8b:4)

Railways also sought a waiver of reserve contribution on the grounds of long existing residential use:

> This however is not a new subdivision in the sense that it has existed physically for nearly thirty years. Section 270(5) Local Government Act 1974 exempts the Crown and local authorities in cases where work for the purposes of a subdivision has been carried out prior to the commencement of that part of the Act .... (ibid)

The application for subdivision was processed and duly notified under the Town and Country Planning Act 1978. An objection was lodged by the adjacent land owner, Mangatawa Papamoa Incorporation. Cooney Lees and Morgan, solicitors for the Incorporation, suggested in a letter to Railways Corporation dated 2 September 1985 that the objection may be withdrawn if sufficient information was provided about how the land was originally acquired by Railways, and what was proposed once subdivision of the sections was achieved. More significantly, this letter was annotated in the Railways office, "Please investigate but check on housing file that we have not already done a s. 40", that is an "offer-back" under section 40 Public Works Act 1981 (A8b:10).

Section 40(1) provided for "Disposal to former owner of land not required for public work", whether no longer required for the purposes for which it was taken, not required for an "essential work" as defined in the 1981 Act, or for any exchange under section 105. The remaining clauses in this section are quoted in full:

> (2) Except as provided in subsection (4) of this section, the Commissioner [of Works] or local authority shall, unless he or it considers that it would be impractical, unreasonable, or unfair to do so, offer to sell the land by private contract to the person from whom the land was acquired or to the successor of that person, at a price fixed by a registered valuer, or, if the parties so agree, at a price to be determined by the Land Valuation Tribunal.
> (3) Subsection (2) of this section shall only apply in respect of land that was acquired or taken —
> (a) Before the commencement of this Part of this Act; or
> (b) For an essential work after the commencement of this Part of this Act.
> (4) Where the Commissioner or local authority believes on reasonable grounds that, because of the size, shape, or situation of the land he or it could not expect to sell the land to any person who did not own land adjacent to the land to be sold, the land may be sold to an owner of adjacent land at a price negotiated between the parties.
> (5) For the purposes of this section, the term "successor", in relation to any person, means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date of his death; and, in any case where part of a person's land was acquired or taken, includes the successor in title of that person.

Section 41 Public Works Act 1981 provides for disposal of former Maori land when no longer required for public works:

> Notwithstanding anything in sections 40 and 42 of this Act, where any land to which section 40(2) of this Act applies was, immediately before its taking or acquisition, —

(a) Maori freehold land or general land owned by Maoris (as those terms are defined in section 2 of the Maori Affairs Act 1953); and
(b) Beneficially owned by more than 4 persons; and
(c) Not vested in any trustee or trustees —
the Minister or local authority, as the case may be, shall —
(d) Comply with the requirements of section 40 of this Act; or
(e) Apply to the Maori Land Court for the district in which the land is situated for an order under section 436 of the Maori Affairs Act 1953.

Section 42 Public Works Act 1981 sets out procedures and conditions for disposal, including at section 42(3) provision for declaring, by notice in the *New Zealand Gazette*, the land to be Crown land subject to the Land Act 1948, and able to be administered and/or disposed of under that Act.

There were, therefore, in 1985, three possible routes for disposal of Railways land taken under any Public Works Act:

1) Negotiation with former owners or successors under section 40 Public Works Act 1981.
2) Application to the Maori Land Court under section 436 Maori Affairs Act 1953.
3) Declaration by *Gazette* notice as Crown land under the Land Act 1948 for administration and disposal by the Commissioner of Crown Lands.

The third option does not appear to have been considered by Railways, although it was suggested by the Minister of Lands, Hon Peter Tapsell, in 1989. The second option, under section 436 Maori Affairs Act 1953, was not seriously entertained by Railways until late 1991, and will be considered in the next chapter. This chapter covers the period from 1985 to the removal of the houses in March 1991.

On 19 September 1985, Railways replied to Cooney Lees and Morgan, indicating that the land had been taken under the Public Works Act, that H O Cooney had acted for at least some of the owners, and that compensation of $860 (£430) had been assessed by the Maori Land Court and paid. A list of owners as of 1955 was enclosed. The purpose of the proposed subdivision was "to formalise a situation that has existed for almost thirty years". The letter concluded with the statement that if the subdivision application was successful, Railways intended "to sell the land, subject to Section 40 Public Works Act 1981, as separate residential sections" (A8b:11).

About the same time or soon after, representations were made to Hon Peter Tapsell, Minister of Lands and MP for Eastern Maori, in whose constituency the land was located. On 8 November 1985, Tapsell, as MP for Eastern Maori, wrote to Hon Richard Prebble, Minister of Railways:

> With due respect I must tell you that if the information given to me is correct, then the Railways Department is in danger of embarking on what would I regard as an injustice. The land was apparently taken under the Public Works Act from

> unwilling sellers some years ago. It is no longer needed for that purpose and in my view, it ought now to be returned to the owners or to the descendants of the original owners. Moreover, I think it only just that the original compensation which they were forced to accept (I believe a miserable $860) should now be looked on as some small compensation for their having been deprived of the use of their land during all this time. In short, it is my view that in simple justice, the land should now be returned to original owners unencumbered.
>
> There will no doubt be numerous arguments, such as precedents why this course of action should not be followed, but I believe that this Government should be seen in cases such as this in taking a course of action which will ensure justice to the original owners of this land.(A8b:15)

Prebble's response on 16 December 1985 included the following statement:

> The planning application has yet to be heard, but the [Mount Maunganui Borough] Council Officer's report on the subject is not favourable and the sale of the individual houses and sites may not eventuate.
>
> Sections 40 and 41 of the Public Works Act 1981 contain provisions to offer land back to the original owners or descendants, or successors in title when land is no longer required for a public work, but subject to certain conditions. Whatever disposal procedures are finally adopted for the surplus house (or houses) at Te Maunga the [Railways] Corporation will be bound by the provisions of these sections of the Public Works Act 1981 and owners or successors in terms of that Act.(A8b:16)

The Mount Maunganui Borough Council declined the Railways application to subdivide the land into six residential sections. This was conveyed in a letter to Railways dated 23 December 1985, which included the following comments:

> The proposed subdivision does not conform to standard requirements for the zone and its acceptance would create a spot residential area within an area required for heavy industrial purposes. The present houses which were built in 1957 have existing use rights, but the subdivision would compound non-compliance with the [district] scheme which the Council considers would need to be changed as a result ....
>
> The Council notes the comment by N.Z. Railways that when the houses reach the end of their economic lives the sites can be repurchased for incorporation in the adjoining industrial development. This is discounted by the fact that once new titles are created they can remain forever and there is no way in which this can be made to happen. It appears that the industrial zoning is appropriate to the area and the formal agreement to what is a non-conforming use would be a retrograde step.(A8b:17-18)

The council planning committee concluded that:

> the subdivision would give formal recognition to an existing non-conforming use and the continuation of the use of the land for housing purposes in a location which will become increasingly undesirable for such use. An alternative which

> could be considered by Railways is for the houses to be sold for removal and for the land to be disposed of as a separate industrial lot.(ibid)

There was no comment on the Mangatawa Papamoa Incorporation objection except to note that it "appears to enjoy status as the original owner" (A8b:17). This is incorrect. The Incorporation was the owner of adjacent land (which did give it status to object) but the Incorporation had never been the owner of the Railways housing site, Papamoa No 2 Section 10B2C2 Block. This is a point which will be taken up again in our narrative.

The Mount Maunganui Borough Council opposition to allowing continued residential use of the land can be seen in the context of its acquisition in 1967 of part of Papamoa No 2 Section 10, now named Papamoa A 12 Block, for rubbish disposal.[2] In 1984 additional adjacent areas to the east and west on former Papamoa No 2 Sections 9 and 11 Blocks were also acquired for the extension of the tip area.[3] There were also plans afoot for sewage treatment works, including oxidation ponds on the shores of Tauranga Harbour and shown in the Borough of Mount Maunganui District Scheme. The "Power Board depot" was also an established use on land taken under the Public Works Act and adjacent to the Railways houses.[4] We can surmise that the Mount Maunganui Borough Council saw this as an opportunity to get rid of residential uses from an area already set aside for public utilities and possible industrial development, although demand for industrial land in the vicinity appeared to be limited at that time.

In February 1986 a summary report of the situation at Te Maunga was prepared by Railways staff for the General Manager (A8b:19-20). It noted that the land had been taken under the Public Works Act, that details were not available but it was "evident that an element of compulsion existed in this acquisition". Because the subdivision application was declined, Railways "now intended that when the houses become surplus they will be sold for removal and the land given up as one section". The report ended with the recommendation "that the land be offered back to the original owners or their successor; or the successors in title in accordance with Section 40 (2) and (5) Public Works Act 1981" (ibid).

It would seem at this stage that Railways staff dealing with this matter had the impression that the Mangatawa Papamoa Incorporation was the successor in title, presumably because of the objection to the subdivision application and correspondence from Cooney Lees and Morgan seeking information on behalf of the Incorporation as an adjacent land owner. The following comment in the February 1986 report conveys the impression that Railways thought they should deal with the Incorporation:

> The balance of Papamoa 2 No. 10 B Block, not acquired for Railway is now included with other land in Mangatawa Papamoa Block in C.T. 26B/57 ... and vested in the Mangatawa Papamoa Incorporation, members of which are the successors and successors in title to the original owners. The Incorporation have requested that the land be returned to them through their M.P .... (A8b:19-20)

Nothing appears to have been done by Railways to clarify the identity of "original owner" or "successors in title" of Papamoa No 2 Section 10B2C2 Block. The Mangatawa Papamoa Incorporation had been formed in 1957 and in 1968 the adjacent Papamoa No 2 Section A12 Block was included in an amalgamated title, Mangatawa Papamoa Block, administered by the Incorporation. The Mangatawa Papamoa Incorporation was never a former owner of the Railways land.

Railways went ahead with the proposal to sell the houses for relocation. In July 1986 a valuation was supplied by the Tauranga office of the Valuation Department for Railway House No B501. In addition to specific remarks on the house which was given a suggested value of $8000 for removal, the valuers also commented: "Demand for industrial land in this locality would be limited due to being situated on the fringe of the borough some distance from the main industrial area" (A8b:21-22).

Meanwhile, further representations to Crown Ministers were made by representatives of former owners. On 28 August 1986 Riki Taikato wrote to the Minister of Railways, Hon Richard Prebble, indicating he had been given a copy of Prebble's letter to Tapsell of 16 December 1985, and asking what progress had been made with returning the land to former Maori owners, and what was meant by "subject to certain conditions" (A8b:23). He also advised that some original owners and successors were "in the process of forming a committee to administer and look into the possible uses for the block and accordingly, will ask Dr Peter Tapsell to act on our behalf, to effect the return to owners". The Minister sought an explanation from the General Manager, Railways, and was told that one vacant Railways house was being sold for relocation. The remaining five houses were "currently occupied and are therefore still required for Railway purposes. It is not known when these houses will become surplus". The "certain conditions" were "those set out in subsections 2 and 4 of Section 40" of the Public Works Act 1981 but it was "not envisaged that these conditions will apply in this case" (A8b:25). In the Minister of Railways reply to Riki Taikato, dated 26 September 1986, this information was passed on. The Minister also stated:

> The General Manager intends to wait until all the houses in the block have been vacated at which time the land will be sold as one block along with any houses still remaining on the land. As required by Section 40 of the Public Works Act 1981, the land, when it becomes surplus will be offered first to the original owners, their successors and successors in title.(A5:App 8)

And there the matter seems to have rested for another year. On 22 December 1987 the resident administrative officer in Hamilton wrote to the manager of the Property Business Group of Railways in Wellington, suggesting "It is now time to reassess the future of houses in Te Maunga". There were now five houses, three of which were occupied by employees who had "recently been granted voluntary severance" and a six-month lease as part of the severance agreement. The other two were "occupied under normal service occupancies and we are getting the grand total of $18.80 per week per house". Since there were problems

over subdivision "and I understand there is a Section 40 tie-up", the options were limited to selling the houses for removal as they became vacant, selling houses to occupants with a lease of the land, or selling all the houses with the land. It was also noted that one of the occupants had local connections, "he is tied in with the local tribe who own adjoining land" (A8b:26).

On 23 May 1988 the Group Manager, Property, advised the Area Property Manager, Railways, in Hamilton, that the valuation obtained in March of Railway House No B504 at $9000 for relocation be accepted, and that house be offered for sale. He also reviewed the situation to date:

> ... Having gone through the procedure to initiate a subdivision we have found that there appears to be strong resistance from the local Maori people from whom the land was acquired with an element of compulsion. We have therefore discontinued that approach but I believe we could sell the houses on site in one unsubdivided block of land back to the original owners pursuant to Section 40 of the Public Works Act 1981 and the owners would be obliged to pay for land and improvements at valuation ....
>
> It is timely however, to assess the options available for the remaining houses and the vacant land at Te Maunga. It is suggested that you should contact Riki Taikato and also the solicitor whom [sic] acts for those Maori owners (Mr Morgan of Cooney Lees and Morgan, solicitors, Tauranga) and put a tentative offer to them for all the land plus the four remaining houses ....
>
> Details of the original owners etc etc can be obtained from the enclosed information however, rather than get too bogged down with the detail I think we can safely assume that the solicitors who acted for the Maoris in the purchase back in the fifties will still act for them at this point in time just as they appear to have done in September 1985. In other words put the matter to their solicitors and let them do the running around advising the appropriate people or beneficiaries of those original people. Minuting a copy to Mr Taikato will ensure some direct connection but he should be advised that we would prefer to deal through their solicitors. (A8b:29-30)

We note at this point the comment of counsel for claimants that this memorandum "supports the claimants' view that the Crown sought to trace owners through the offices of Mr Taikato primarily to save themselves the bother". Counsel later suggested

> In fact, the [Railways] Corporation was far better placed than Mr Taikato to "do the running around", and if it had taken seriously its legislative and Treaty duty to offer the land back to the entitled owners as expeditiously as possible, that is what it would have done.[5]

Railways sought a valuation of the land and the four houses and received a response from the Tauranga office of Valuation New Zealand, dated 8 July 1988. The land was "valued as one block of Industrially zoned land, and the houses have been assessed on a removal value basis only" (A8b:31-36, 35). The four houses were assessed at $8,000 each for two, and $8,500 and $9,000 for the other

two, but the valuer suggested a total of "say $35,000" for improvements. The land was valued on a unit metre frontage basis which was considered more accurate than a per square metre basis which would have given a total of $136,000. The valuation was:

Improvements	$ 35,000
Land	$130,000
Total	$165,000

The valuers concluded their report:

> There is only limited market evidence available that is relevant to the valuation of this property. This is not a particularly progressive area and only limited saleability can be attributed to the property, as evidenced by the very small amount of industrial development that has occurred in the vicinity. As a result we have considerably discounted the value levels established by the most comparable sales in this valuation assessment.
>
> We feel the value assessed represents the level likely to be attained if the property were sold on the open market and is a reasonable level at which to offer the property back to the original owners.(A8b:35-36)

On 15 July 1988, the Hamilton Area Property Manager for Rail Properties wrote to Cooney Lees and Morgan, offering the land with or without the houses at the above valuation. It appears from the first paragraph of this letter that Railways made this offer to the Mangatawa Papamoa Incorporation:

> In September 1985, you wrote to the Railways Land Officer advising that you were acting for the Mangatawa Papamoa Incorporation which owns land adjacent to the land the Railways proposed to subdivide at Te Maunga.
>
> Reply from the Railways Land officer was dated 19 September 1985.
>
> It has been presumed that you are still acting for the Incorporation.(A8b:37)

A copy of this letter was also sent to Riki Taikato.

On 17 February 1989 Cooney Lees and Morgan advised the Hamilton Area Property Manager that the Mangatawa Papamoa Incorporation:

> was not the original owner of the Papamoa No2 S10B Block. The Incorporation advises that the issue which you raise was raised approximately two years ago when you first gave notice of your intention to quit this Block. There was a list of original owners provided and the Incorporation contacted some of them to advise them to form a committee to negotiate with the [Railways] Corporation.
>
> It is assumed that your offer is available to the original owners only. If so, perhaps you could get in touch with them.

> Alternatively, we can get the Incorporation to approach those of them who are available.(A8b:39)

On 21 February 1989, the Area Property Manager notified the General Manager of Rail Properties in Wellington that the Mangatawa Papamoa Incorporation "were not the original owners" and sought advice, as there was another house due to become vacant on 28 March (A8b:40). On 2 March 1989 a letter was sent from Rail Properties, Wellington to the secretary of the Mangatawa Papamoa Incorporation noting there were 22 original owners, and listing the "three principal owners" as Makere Retimana, Haimona Taite and Ruahi [sic] Taite:

> We understand that many years ago your Incorporation purchased the interest of the majority of the surrounding land and hopefully you may have ready contact for either of the aforementioned owners or their descendants. Alternatively you may be able to direct us to a person or persons would could act as spokesman for those three people or their descendants and who could give a conclusive decision as to if the people or the descendants wish to purchase the land in question. Sections of the Public Works Act which deal with offering back provisions are quite explanatory and it is necessary for ourselves once the owners or their spokesman are located or appointed to make a formal offer at valuation after which there is forty days in which to accept the offer.(A8b:41)

On 19 April 1989 the secretary of the Mangatawa Papamoa Incorporation advised that he had given a copy of this letter to Riki Taikato (A8b:42). On 30 May, the General manager, Rail Properties, wrote to Riki Taikato, indicating "Railways Corporation are endeavouring to sell a 1500 m^2 block of land" but were required to offer the land back under section 40 Public Works Act 1981. This must have added to confusion because the total area of the block is 6070 m^2 and a subdivision application had been declined. The letter also stated:

> We would need to be assured that you are in fact a descendant of one of the three original principal owners, these being Makere Retimana, Haimoana [sic] Taite, and Ruihi Taite. Further we would also need information that you either act for all descendants of those three people or alternatively that all descendants have no other interest in repurchasing this land.
>
> As there could now be many descendants from those original three above mentioned it might be more appropriate to turn our attention to Section 41 Sub-section (e) and for Railways to apply to the Maori Land Court for an order under Section 436 of the Maori Affairs Act 1953. We fear that this could be a long drawn out procedure but welcome your comments on this in the first instance.
>
> Could you please indicate by return mail whether you or other descendants have any interest in this land and if in the affirmative furnish some details (eg birth certificates, court records, or the like) as to your and other intending purchasers relationship to the original three owners. It is important that Rail Properties know they are dealing with descendants of the original three owners and [you] are approved spokesman for all people who have an interest in this block of land.(A8b:43)

This letter requires some comment as the writer appears not to have understood the nature of Maori freehold title. The original block was vested in 22 owners at the time of taking in 1955. Whether all or only part of the block taken was offered back to the original owners, or their successors, the number of original owners remains at 22, although the proportion of shares held by each individual may vary. It is not a correct interpretation that Railways could only deal with descendants of the "three principal owners". Riki Taikato was the son of one of the other 19 owners, Maehe Taikato. The claimant before this tribunal, Michelle Henare, is a daughter of Riki Taikato. There is no evidence in the documents submitted to us that Railways had sought any assistance from the Maori Land Court, from the Department of Maori Affairs, or other expert legal advice, to establish who were the appropriate people to deal with. Indeed, by writing to Cooney Lees and Morgan with an offer to the Mangatawa Papamoa Incorporation on 15 July 1988 (A8b:37), Railways failed to establish the original ownership as required by section 40 Public Works Act 1981. Cooney Lees and Morgan could not act for the original owners or their successors without instructions from them, which at this stage they did not have. The Mangatawa Papamoa Incorporation, a client of Cooney Lees and Morgan, was neither the original owner, nor successor in title to Papamoa No 2 Section 10B2C2 Block, which Railways were still describing as Part Papamoa No 2 Section 10 B Block. On 7 August 1989 a certificate of title was issued with this incorrect appellation.[6]

In the letter of 30 May 1989 Railways shifted the onus of "doing the running around" on to Riki Taikato. Apart from quoting section 41(e) Public Works Act 1981, which provides for an application to the Maori Land Court under section 436 Maori Affairs Act 1953, no evidence was produced to suggest this option was seriously considered because of a feared "long drawn out procedure" (A8b:43). All "negotiations" appear to have been undertaken by letter from Railways officers in Hamilton and Wellington. No evidence was produced to suggest that any person representing Railways was sent to talk face-to-face with the original owners or descendants or their representatives. Riki Taikato replied to Railways on 12 June 1989:

> I reply to your letter 30th May 1989, and advise a committee of management is in the process of meeting with owners and/or descendants of the land concerned. In order that we may respond to your proposals, I shall be pleased to advise as soon as we have agreed on any matters.(A8b:44)

Riki Taikato also sent a copy of the Railways letter of 30 May 1989 to Hon Peter Tapsell, Minister of Lands, who wrote to the Minister of Railways on 23 August 1989:

> The [Railways] Corporation has indicated that in terms of Sections 40 & 41 of the Public Works Act 1981, it is obliged to offer the land back at current market value. Mr Taikato advises that the Maoris strongly oppose payment for the land and in effect desire its return at a nominal consideration.

> Section 40 (2) of the Public Works Act provides that the Corporation is to offer the land by private contract to the person from whom it was acquired or to the successor of that person —
>
> — at current market value of the land as determined by a valuation carried out by a registered valuer; or
>
> — if the Corporation considers it is reasonable to do so at a lesser price.
>
> I do not know whether there is a case for the Corporation to sell at a lesser price or at a nominal consideration .... I would be interested to know whether there is a case for the Corporation not to seek full current market value.
>
> You will be aware that the land related provisions of the Public Works Act 1981 at present administered by my department are to be included in the Land Bill. I have asked the Acting Director-General of Lands to investigate a possible policy change to provide that where land has been acquired under the Public Works Act with an element of compulsion, and is no longer required for the purpose for which it was acquired, it be returned to the former owner or successor free of cost; with the original compensation (if any) being regarded as rental for the use of the area for the period it was required for public purposes.(A8b:47-48)

The rest of Tapsell's letter indicates his belief that the Railways letter to Riki Taikato of 30 May 1989, suggesting that land be offered back to the "three original principal owners" had been interpreted at face value, and there was doubt that this offer back provision to only three of the original owners would comply with section 41 Public Works Act 1981. The Minister of Lands suggested that if the revesting provisions of section 436 Maori Affairs Act 1953 could not be met, then an alternative procedure could be for Railways to declare the block "Crown land subject to the Land Act 1948 and my department would then not be limited to the former land ownership definition as set out in Section 41 ..." (A8b:48).

At this point, the story becomes even more confused. At no stage can we perceive any clear statement of the procedures to be used by Railways to comply with the "offer-back" requirements of the Public Works Act 1981. Nor was any clear statement of procedure set out for the original owners or their successors. There was no clear line of communication, with letters from Railways proceeding from Hamilton and Wellington, no particular person charged with responsibility for seeing the matter through, and no person representing Railways appearing in person on the ground in Tauranga to talk things over. Railways wrote again to Riki Taikato on 24 July 1989, but another follow-up letter from Railways dated 25 September 1989 indicated that this letter had been returned unopened (A8b:49). At the bottom of the file copy of the 25 September letter was a handwritten note, "Arrange valuation. What houses are still standing?" We were not given a copy of any reply from the Minister of Railways to Tapsell's letter of 23 August 1989. Nor is there any other information in the otherwise comprehensive compilation of documents submitted by Crown counsel (A8b) to indicate any subsequent negotiations with representatives of the original owners

or successors of Papamoa No 2 Section 10B2C2 Block. In short, we did not have submitted to us any document which could be construed as an offer-back to the 22 original owners, or their successors, of the land taken in 1955 which would comply with the provisions of section 40 Public Works Act 1981.

On 20 June 1990, Railways Corporation signed an agreement with Stone Key Trading Limited to purchase the four houses on the land at a total price of $56,000, and remove them from the site no later than 60 days after vacant possession was given for each house. On 21 June 1990 letters were sent to the occupants of each house giving notice of termination of their tenancy on 10 August 1990, allowing the 42 days minimum notice required by the Residential Tenancies Act. On 25 July 1990, Stone Key Trading Limited paid $15,250, being the full payment and performance bond for the first of the four houses, which had been vacated ahead of time (A8b:62). On 15 August 1990 Railways advised that vacant possession was available for the other three houses, and the balance of $45,750 (including GST) was owing (A8b:63). The removal date, originally 15 August, was now set at 15 October, but a week before that it was extended again to 1 November 1990 (A8b:64). On 18 February 1991, a report from the Corporate Property Office, Auckland, to Railways Corporate Property, Wellington, stated that the four houses were still on the land: "No preparation work has been undertaken for removal and the houses are listed with Eves Real Estate for sale for removal" (A8b: 66). Apparently, the houses were removed by the end of March 1991. We were not told precisely what arrangements were made for their removal, or by whom. However, no offer appears to have been made to the original owners or their successors.

In a letter of 11 March 1991 from Railways to Graham H Bryce of Tauranga, and the annotations on the file copy, it is indicated that some discussions had already taken place with Railways representatives in the Northern Regional Office, Auckland, about sale or lease of "surplus lands" at Te Maunga for a "concrete batching plant". On 13 May 1991, Reid & Reynolds, registered valuers of Rotorua, supplied Railcorp Properties, Auckland (as it was now called), with a special valuation of the land, now bare of improvements, approximately 6070 square metres, on the assumption that an unencumbered freehold title would be produced (A8c). The underlying zoning was Industrial C, although the designation for railway housing purposes remained in the Mount Maunganui District Scheme. The Industrial C zone included manufacturing, processing, large scale storage, warehousing and transportation activities, with a wide range of conditional uses also allowed:

> The surrounding development provides mostly vacant industrial land although adjoining is the Tauranga Electric Power Board depot and warehouse, whilst adjacent to the Main State Highway 2 is a showroom complex for a building construction firm. The property is also within close proximity to the existing Mount Maunganui refuse tip and the oxidation ponds and the prevailing wind normally carries odours across the subject property.
>
> At present within the main industrial areas of Mount Maunganui there is a

> considerable oversupply of vacant industrial land and as the subject property is located further away from both the port and main industrial service areas, there exists limited demand for this type of property at present. Allowance for this factor has been made in our valuation.(A8c)

The valuer assessed the property on the basis of "limited comparable sales evidence" and "the property's fair market value for sale purposes" and exclusive of GST content. A calculation of 6070 square metres at $13 per square metre produced a total of $78,910, "Say $79,000". The valuer also suggested "that in order to effect a quick sale, you may be forced to accept a figure in the vicinity of $70,000" (A8c). This is in marked contrast to the figure of $130,000 for the value of the land, and $35,000 for the four houses on it, a total of $165,000 quoted in the Rail Properties letter to Cooney Lees and Morgan on 15 July 1988 (A8b:37). The general government valuation as of 1 July 1988 was (A8b:104):

Improvements	$105,000
Land	$132,000
Total	$237,000

The value of improvements would have included the six houses still on the land, although one had just been sold for relocation in July 1988.

On 28 May 1991 a sale and purchase agreement between Railways Corporation and Bryce was signed for the land (A8b:70-78). The Tauranga legal firm of Holland Beckett Maltby acted for Bryce, and on 17 June 1991 sent a deposit of $8,125 to the Sales Manager, Railcorp Properties, in Auckland (A8b:79). The purchase price of the land was $70,000, plus GST (A8b:76). The agreement appears to be in the standard format for Railways Corporation disposal of surplus lands, with the addition of two special conditions. One was "upon the Vendor obtaining the rezoning of the property from Industrial B to Industrial C" (A8b:75). This is curious because the underlying zoning was already Industrial C and the only change required was to uplift the railway housing designation. We do not know whether this has been done, but this is not material to this inquiry. The second condition concerned a proposed lease of adjoining land:

> This Agreement is conditional upon the Purchaser negotiating a lease of certain adjoining land containing 5000 m^2 more or less from the Mangatawa Papamoa Block Incorporation on terms and conditions satisfactory in all respects to the Purchaser by that date on which this Agreement becomes unconditional. In the event that the Purchaser is unable to negotiate a satisfactory lease then this agreement may be voided by the Purchaser in which case subject to the Vendor repaying any deposit and any other instalments of the purchase price paid by the Purchaser neither party shall have any claim against the other.(A8b:75)

We do not know what negotiations, if any, were entered into between Bryce and the Mangatawa Papamoa Incorporation. However, as events turned out, such information is not necessary for this inquiry.

One of the conditions set out in the standard printed form of the Railways

Corporation Agreement for Sale and Purchase is clause 8.1:

> The contract is subject to and conditional upon the Vendor notifying the Purchaser that the approval of the Board of the Vendor and the Minister of Railways has been obtained and that, where applicable, Section 23 of the New Zealand Railways Corporation Restructuring Act 1990 has been complied with, such notification to be given no later than the Vendor's Contract Confirmation Date specified in the Schedule.(A8b:72)

The "Settlement Date" was 1 December 1991 but the "Possession Date" was only described as "The date that this agreement becomes unconditional". In the next chapter we describe Railways efforts to comply with section 23 New Zealand Railways Corporation Restructuring Act 1990 and section 40 Public Works Act 1981.

References

1. Note only A8b is page numbered. For documents A8a and c, dates are provided within the text.

2. *Gazette* 1967 p 1926; A9

3. *Gazette* 1984, p 3620; 1985, p 4842

4. *Gazette* 1977, p 3144

5. Papers in Proceedings No 2.12, pp 15-16

6. CT44B/168; A9

Chapter 5

Land Transactions 1991-1993

At the time of the signing of the conditional agreement for sale and purchase of the Te Maunga land between Railways and Bryce, Railways had not made any formal offer to the former Maori owners or their descendants under the disposal provisions of section 40 Public Works Act 1981. There were also provisions for disposal of surplus lands in the New Zealand Railways Corporation Restructuring Act 1990 at section 23, which required that the Corporation:

> shall offer to sell the land by private contract to the person from whom it was acquired by the Crown or the Corporation, or to the successor of that person, at the current market value of the land determined by a valuation carried out by a registered valuer appointed by the Corporation ....

This was a requirement at section 23 unless it was "impracticable, unreasonable, or unfair to do so", or there had been "a significant change in the character of the land". Once the offer was made, the former owner(s) or successor(s) had 20 working days to give notice to the Railways Corporation that "current market value" should be determined by the Land Valuation Tribunal. Otherwise, 40 working days were allowed to accept the Railways Corporation offer. Only after that, and if the offer was declined, then the Railways Corporation was free to sell the land either to an adjoining owner or to another third party.

There were also specific provisions for Maori land at section 26, New Zealand Railways Corporation Restructuring Act 1990:

> Disposal of former Maori land — Where any affected land was, immediately before it became affected land, —
> (a) Maori freehold land or general land owned by Maori (as those terms are defined in section 2 of the Maori Affairs Act 1953); and
> (b) Beneficially owned by more than 4 persons; and
> (c) Not vested in any trustee or trustees —
> the Corporation or the transferee company, or railway operator, as the case may be, may, instead of making an offer under section 23 or section 24 of this Act, as the case may be, apply to the Maori Land Court for the district in which the land is situated for an order under section 436 of the Maori Affairs Act 1953 as if it were an authority for the purposes of that section.

In section 27 there was provision that sections 21-26 of the New Zealand Railways Corporation Restructuring Act 1990 did not affect any existing rights for land already offered under sections 40-42 of the Public Works Act 1981. Since no formal offer had been made under this Act by 1990 to the former owners of Papamoa No 2 Section 10B2C2 Block, then subsequent transactions would have come under the New Zealand Railways Corporation Restructuring Act 1990 which thus provided two options. One was to make a direct offer under

similar conditions to section 40 of the Public Works Act 1981. The other was an application to the Maori Land Court under section 436 Maori Affairs Act 1953, a provision that already existed in section 41 Public Works Act 1981. In effect, the New Zealand Railways Corporation Restructuring Act 1990 reinforced provisions already in the Public Works Act 1981.

In section 436 Maori Affairs Act 1953 there was already provision for revesting in Maori ownership former Maori land acquired for a public work:

> (1) Where any Maori land or any European land owned by Maoris has been at any time acquired by the Crown or by any local authority or public body for the purposes of a public work or other public purpose, and is no longer required for any public purpose, the Minister of Works or other Minister or authority under whose control the land is held or administered may apply to the Court to vest the land in accordance with the provisions of this section. In any application made for the purposes of this section the Minister or other applicant may nominate the person or persons in whom the land shall be vested, and may stipulate the price to be paid for the land, the terms and conditions of payment, and any other conditions subject to which a vesting order under this section may be made, or may leave all or any of such matters to be dealt with in the discretion of the Court.
>
> (2) An application may be made to the Court and the Court may exercise its jurisdiction under this section notwithstanding the provisions of any Act to which the land is subject and not withstanding any terms and conditions imposed by any Act on the sale or other disposition of the land.
>
> (3) On application being made under this section the Court may make one or more orders, subject to such terms and conditions as may have been specified in the application or subject to any other terms and conditions not inconsistent with any terms and conditions so specified as it may think fit to impose, vesting the land or any parts thereof, freed from any trusts and restrictions subject to which the land may previously have been held, in such person or persons as may be nominated by the applicant or, if no such nomination has been made, in such person or persons as may be found by the Court to be justly entitled thereto, for an estate of freehold in fee simple and, if more than one, as tenants in common in the relative shares or interests defined by the Court.

Thus, the provisions for disposal of former Maori land, taken under any Public Works Act and no longer required for the purposes for which it was taken, are set out clearly in three separate statutes: Maori Affairs Act 1953 section 436; Public Works Act 1981 sections 40-42; and New Zealand Railways Corporation Restructuring Act 1990 sections 23 and 26.

The sale and purchase agreement signed by Railways Corporation and Bryce on 28 May 1991 contained a condition, at clause 8.1, that it was subject to the provisions of section 23 New Zealand Railways Corporation Restructuring Act 1990. The first that the former Maori owners knew of the potential sale of Papamoa No 2 Section 10B2C2 Block was the appearance of construction work on the site. On 2 July 1991 Cooney Lees and Morgan wrote to Railways:

> We have been approached by Mr Riki Taikato who is Chairman of the Management Committee of Owners of Papamoa Part No. 2 S10B Block.
>
> Mr Taikato understood from correspondence received from you in 1989 that the land was surplus to requirements and would be offered back to the Maori owners.
>
> Currently, the main block where the railway houses once stood, is being excavated for a Transporter's yard. Can you please advise whether the land is or is not still required for Railway purposes and, if it is required, what those purposes are.(A8b:80)

Someone in Railcorp Properties annotated this letter "we could have a problem here" and sought further information (ibid). Another hand-written annotation on a Railcorp Properties memorandum forwarding relevant papers stated: "P.S. purchaser has cleared & fenced our property *as well as* the land proposed to be leased from adjoining Maori" (emphasis in original, A8b:81). On 23 July 1991, the Railcorp Properties sales manager wrote to Holland Beckett Maltby, solicitors for Bryce:

> I refer to our contract with your above client and note that a special condition exists relating to the lease of land adjoining ours by your client from the Mangatawa Papamoa Block Incorporation. We also refer to comments made by your client during negotiations of purchase wherein it was represented that the above incorporation would have no claim upon the New Zealand Railway Corporation property.(A8b:82)

The letter sought information on the status of the lease and "restraint of claims by the Incorporation upon our lands" and formal recognition of the underlying Industrial C zoning of the property.

An internal Railcorp Properties memorandum, dated 25 July 1991, reviewed the situation: "It would appear from my file that no formal offerback was ever made and the matter has been left in abeyance until now" (A8b:83). The memorandum went on to note that the original offer under section 40 was still relevant, and that it still needed to be determined that the "Committee of Owners", of which Riki Taikato was chairman, represented all or the majority of former owners and descendants before a formal offer could be made. The memorandum concluded:

> The successors in title should also be offered the land or a disclaimer obtained stating that they have no interest in it. (From our recent telephone conversation I believe the proposed purchaser is already seeking this).
>
> You may wish to establish a lease first in favour of Mr Bryce to protect his interests eg 13 year lease.
>
> Part of the Sale and Purchase Agreement requires a zoning change. You may wish to abandon this until the offerback is sorted out otherwise it may be of no benefit to Mr Bryce.

> As this matter has gone to the Minister before, it is likely to again unless we sort out the offerback soon ....(A8b:83-84)

On 8 August 1991 Railcorp Properties wrote to Cooney Lees and Morgan seeking "Documented evidence" that Riki Taikato did represent all the former owners and that Cooney Lees and Morgan did indeed act for him. The letter stated that Railways were "proceeding with a valuation for the property" preparatory to a formal offer under section 40 Public Works Act 1981. On 16 August 1991, Cooney Lees and Morgan wrote back:

> Unfortunately, Mr Taikato has recently passed away. We are seeking further instructions and will be in touch with you as soon as possible.(A8b:86)

On 21 August 1991 Railcorp Properties wrote to Holland Beckett Maltby concerning Bryce's activities on the land:

> It has been brought to our attention that your client has effected possession of the property subject to this Agreement for Sale and Purchase and has indeed completed construction to such an extent that a concrete batching operation is operating from the property.
>
> These circumstances are unacceptable to New Zealand Railways Corporation and we require that your client desist and indeed remove himself from possession of the property forthwith.
>
> We appreciate that possession date is the date that the above Agreement becomes unconditional, but we wish to point out quite clearly as per Clause 8.1 that the contract is subject to and conditional upon the vendor notifying the purchaser that approval of the Board of the vendor and the Minister of Railways has been obtained and that where applicable, Section 23 of the New Zealand Railways Corporation Restructuring Act 1990 has been complied with.
>
> Neither of these circumstances have been satisfied, New Zealand Railways do not consider the contract unconditional and we look forward to your clients compliance with this request.(A8b:87)

On 12 September 1991 Holland Beckett Maltby responded:

> We find the first two paragraphs of your letter somewhat surprising in view of the fact that our client has been in possession of the property with your agreement and approval.
>
> We ask that you supply details of what progress has been made towards satisfying the condition contained in clause 8.1 of the contract. Furthermore, we would like to know whether or not New Zealand Railways Corporation intends to use its best efforts to see that the abovementioned condition *is* satisfied or whether New Zealand Railways Corporation now regards the present contract with our client as being at an end.

> If New Zealand Railways Corporation regards its contract with our client as still being on foot, then we would like to know precisely what difficulties are anticipated by you in respect of the fulfilment of the condition contained in clause 8.1.(A8b:88)

On 16 September 1991 Railcorp Properties summed up the situation for the purpose of obtaining a legal opinion before replying to this letter:

> In short, the problem is
> 1 The purchaser had given verbal insurances [sic] in the course of the transactions that New Zealand Railways would not be subjected to any claims by adjoining or former Maori owners.
> 2 After entering in to the Agreement for Sale and Purchase, Mr G H Bryce verbally requested and was verbally given permission to enter onto the property to effect clearing and construct a fence.
> 3 Mr G H Bryce is now two-thirds of the way through completion of a concrete batching plant and associated facilities.(A8b:89)

On 18 October 1991 Railcorp Properties wrote to Sharp Tudhope, the Tauranga solicitors now apparently acting for Bryce:

> The Agreement between your clients and NZRC is conditional upon a number of factors which included obtaining rezoning the property from Industrial B to Industrial C within 6 months of the date of contract. In this regard this condition has been satisfied as it has been established that the underlining [sic] zoning of the property was already Industrial C.
>
> Another condition of sale included the purchaser negotiating a lease of certain adjoining land by the time all other conditions of the contract have been satisfied. As yet we have had no correspondence on your clients success for this negotiation and could you please inform us of the progress that your client has made in satisfying this condition.
>
> As yet NZRC has been unable to obtain a consent from the Minister of Railways due to a moratorium which has been placed on our land and until such a time that this moratorium has been removed, we will be unable to dispose of this parcel of land. Due to this moratorium in place, we have also been unable to satisfy Section 23 of the Public Works Act.(A8b:91)

On 29 November 1991 Railcorp Properties wrote again to Sharp Tudhope, "that it would be unadvisable for your clients to continue any construction work on the property", and stated, "We can guarantee no time frames for when and if the Sale and Purchase Agreement becomes unconditional .... "(A8b:92).

Meanwhile, on 10 October 1991, an agreement had been signed between the Crown and the National Maori Congress to set up a "Joint Secretariat and Joint Working Party" to determine whether any surplus Railway lands were subject to valid Maori claims, or would be used in settlement of any valid Maori claims, and carry out any necessary research. This group became known as the

Crown/Congress Joint Working Party (CCJWP). Included in the Recitals to this agreement were the following statements:

> The Iwi have claimed that the Crown has breached the principles of the Treaty of Waitangi ("The Treaty") and have consequently been prejudiced and seek compensation for such breach.
>
> The Crown, desiring to act honourably to Iwi, has resolved to consider such claims and where validated to negotiate an appropriate settlement with Iwi including the possible return of some of the surplus lands.
>
> In order to progress resolution of the claims and enable the Crown to dispose of the surplus lands expeditiously, the Crown and Congress have agreed to a procedure under which Iwi claims are considered fairly and the disposition of the lands agreed upon wherever possible whether to Iwi or to third parties.

Nga Potiki, the claimants' hapu, is part of Ngai Te Rangi which is listed with other iwi in schedule 2 of this agreement. On 13 February 1992 the CCJWP advised Bryce's solicitors in response to their request that the Te Maunga land was "not Wahi Tapu" and went on to state:

> I understand however, that clearance from the Crown Congress Joint Working Party process is not the end of your client's troubles, as the Agreement for Sale and Purchase is clearly subject to a section 40 Public Works Act 1981 offer-back.(A8b:93)

The letter also suggested that this matter should be discussed directly with Railcorp Properties. On 17 February Sharp Tudhope sought clarification from Railcorp Properties of when and in what form an "offer-back" would be made:

> We would be grateful for your urgent attention to this matter as our client has a half-constructed building on this land which is deteriorating day by day because it is exposed to the elements.(A8b:94)

Through February and March there was further correspondence and telephone conversations among Railcorp Properties, CCJWP, Sharp Tudhope and Holland Beckett Maltby.

On 1 April 1992 another valuation of the property was sent to Railcorp Properties (A8b:103-108). The valuer considered the 1991 Government valuation of the land at $162,000, with nil for improvements, as too high. The valuers had enquired of Valuation New Zealand, who had "advised the land was assessed on the basis of six separately identifiable Railways Corporation lots for residential purposes" (A8b:104). There had been no subdivision into residential lots. The 1992 special valuation assessed the land value as freehold, unencumbered, vacant and unimproved at $91,000, based on $15 per square metre. The valuer added the comment:

> We consider that in a true market situation, willing buyer/willing seller, it is

> unlikely a prospective purchaser would be prepared to pay anything for the semicompleted, abandoned and now weather damaged structures on the land. The chances of finding another purchaser wanting exactly those improvements are remote indeed in our view and one prepared to pick them up and complete them even more unlikely.(A8b:108)

Although some of the site works could be of some value, the valuation was assessed at a maximum for land and improvements of $100,000. The improvements were valued at $9000, although expenditure could well have been 10 times that amount. There were more letters and telephone conversations. The solicitors for Bryce suggested the offer-back be of land without improvements which could be removed, or could remain if a lease was successfully negotiated (A8b:111).

In spite of their investigations, Railcorp Properties had still not understood the difference between the original 22 owners of Papamoa No 2 Section 10B2C2 and the shareholding in Mangatawa Papamoa Incorporation, the owner of the adjacent land. The Incorporation administered an amalgamated title made up of several blocks with various owners and, in any case, had been established after the land was taken by Railways in 1955. On 8 June 1992, Cooney Lees and Morgan, acting for Michelle Henare, daughter of Riki Taikato, wrote to Railcorp Properties, pointing out that she was indeed a successor in title:

> We note your advice that you have had a legal executive employed by the Corporation investigate this matter and that it has been concluded that the [Railways] Corporation would fulfill its statutory obligations under Section 23 of the New Zealand Railways Corporation Restructuring Act by offering the land to the [Mangatawa Papamoa] Incorporation (who owns adjoining land) as the "successor in title". If we understand your argument correctly, you are saying that the [Mangatawa Papamoa] Incorporation is the "successor in title" to Papamoa Part [2] No. 10 B Block because there are elements of common ownership in the Incorporation and the Block's original owners.
>
> With respect, we cannot agree with your view of your Statutory obligations under Section 23. The [Mangatawa Papamoa] Incorporation is a separate legal entity and did not own Papamoa Part 2 No. 10 B Block at the time it was compulsorily acquired by Railways.
>
> In our view it is quite clear that the [Railways] Corporation is obliged to offer the land back to the original owners or their successors in title. The owners of the Block would have held shares (not necessarily in equal shares) in the Block as tenants in common. The procedure for succession to those shares is set out quite clearly in the Maori Affairs Act 1953 and the Maori Affairs Amendment Act 1967. Those persons entitled to succeed to those shares are the "successors in title". It is to those persons (that is the original owners if still alive, or, if they have died their successors in title) to whom the [Railways] Corporation is obliged to offer the land back to.
>
> If you offer the land back to the [Mangatawa Papamoa In]corporation pursuant to Section 23 (on the basis that the [Mangatawa Papamoa] Incorporation is the

> successor in the title) we consider that you will [have] breached the provisions of Section 23 of the New Zealand Railways Corporation Restructuring Act 1990 and we put you on notice accordingly.
>
> You also raised the view that the [Railways] Corporation may not be obliged to offer the land back to the owners pursuant to Section 23(1)(a). For the reasons we outlined to you, we do not consider the Corporation can rely on that. The only basis you suggested was the "impracticability" of ascertaining ownership of the Block. As we advised we do not consider this to be impracticable as all it would take would be an application to the Maori Land Court to determine ownership. Once ownership has been determined then the Corporation can comply with its Statutory obligations under Section 23.(A8b:113-114)

There was a great deal more correspondence among Railcorp Properties, CCJWP and the three Tauranga legal firms. The New Zealand Railways Corporation was finally persuaded to lodge an application with the Maori Land Court under section 436 Maori Affairs Act 1953 in August 1992 (A8b:127). This was heard by the court at Tauranga on 13 October 1992 (A5:App 10).

The Railways Corporation application to the Maori Land Court was made under section 436 Maori Affairs Act 1953 and section 26 New Zealand Railways Corporation Restructuring Act 1990, and sought the revesting of the land in either, the successors to the persons named in the compiled list of 22 owners as at 11 January 1955, or in "Graham Hilton Bryce and/or his nominee being the named purchaser in a certain conditional sale and purchase agreement ...." (A1). There were several conditions proposed to be attached to the revesting:

1. That "the current market price of the land without improvements" be paid to the Railways Corporation. This price was set at $70,000.

2. That if the land was revested in former Maori owners or descendants then they "be required as a condition hereof to enter into a lease agreement" with Bryce and/or his nominee "as lessees upon such terms as may be mutually agreed upon and if no agreement can be reached, upon terms determined by the Court" (A1).

3. "That it be a condition of such vesting order that the land be vested without vesting any of the improvements thereon" (A1).

In seeking to impose these conditions, Railways was trying to find a solution to the situation which might satisfy all parties.

Over the period July-September 1992 there had been attempts in meetings, telephone conversations and correspondence between the four Tauranga legal firms representing respectively the former Maori owners, Bryce, Richards, and the Railways Corporation, to negotiate a lease on mutually agreeable terms. Railways appointed a Tauranga solicitor, Peter Jones, to represent their interests. It is not clear just when Richards, as Bob Richards Heavy Transport Ltd, came into the picture but he appears to have been intending to use a part of the land

that Bryce did not require for his concrete batching plant for a transport depot . By the time the Maori Land Court heard the Railways application on 13 October 1992, there was still no agreement on the conditions of the lease but it seems that representatives of former Maori owners were agreeable in principle to a lease. The court adjourned the application to allow time for further negotiation (A5:App 10).

However, by early October it appeared that negotiations were frustrated by the conditions being sought, in particular the payment of $70,000 to Railways, a requirement for compensation for improvements to Bryce and Richards, and some debate over rental, terms of lease and rent reviews. On 7 October 1992, Michelle Henare and others lodged a claim with the Waitangi Tribunal (Wai 315) that, among other things, their interests were prejudiced by Railways delay in making the offer-back, requiring payment of $70,000, and imposing lease conditions on them.[1] On 19 November 1992, the Waitangi Tribunal advised that while an application under section 436 Maori Affairs Act 1953 was before the Maori Land Court, the tribunal should not intervene.[2]

By December 1992 both Bryce and Richards were having second thoughts about the lease proposals, although both were still willing to purchase the land (A8b:168-169). In January 1993 Richards withdrew from the lease proposal, and Bryce's solicitors expressed the opinion that Bryce would have some difficulty in proceeding with a lease on his own (A8b:171-174). The former Maori owners sought assistance by way of mortgage finance or deferred payment from Railways but this was declined (A8b:165). On 26 February 1993 Sharp Tudhope wrote to Peter Jones, on behalf of both Bryce and Richards, advising that they did not wish to proceed with a lease, but they did want to own the land and to be in possession by 3 March 1993. The partially completed buildings were deteriorating and Richards' transport business was suffering from lack of a depot. They felt there had been a change of attitude among the former Maori owners, indicated by the claim to the Waitangi Tribunal, and they did not want to enter a long-term legal relationship with reluctant parties, a relationship which required a basis of trust (A8b:178-179).

On 23 March 1993 the Maori Land Court considered an amended application by Railways to revest the land without any lease provisions but subject to the following conditions:

> 1. A payment of $70,000.00 plus GST be made to the New Zealand Railways Corporation by the 27th of April 1993.
>
> 2. That the land be vested without any improvements thereon save those improvements as shall be situated on the land at the actual date of payment of the land, access to be given for the removal of improvements until that date.
>
> 3. That the vesting be subject to the approval of Minister of Railways pursuant to Section 24(a) Railways Corporation Act 1981.(A3:7)

Michelle Henare, on behalf of former owners and descendants, sought to have the land revested in them, and requested eight years to pay any consideration. She objected to the price of $70,000 plus GST, which moreover the former owners could not raise within five weeks. The court reserved its decision (A3:7-8).

On 8 July 1993 the Maori Land Court made a "preliminary determination" on the matter.[3] Having reviewed previous hearings, the court reviewed its own role:

> The Maori Land Court is a specialist Court set up for the purpose of dealing with Maori land. It recognises the difficulties that Maori owners have in dealing with multiply-owned Maori land and many of its procedures are aimed at facilitating the administration, management and use of multiply-owned Maori land for the benefit of its owners. This Court therefore holds that where it is required to come to a determination under Section 436 for revesting of land pursuant to Section 26 of the New Zealand Railways Corporation Restructuring Act it is not bound to follow the strict provisions of Sections 23 and 24 of that Act but is entitled to draw on its own experience as to what would be reasonable terms and conditions to be imposed in respect of any such application for Vesting Order.
>
> The Court in coming to a decision in respect of the application has only two alternatives. It can make the Order sought or it can decline to make the Order. Under Section 436(3) it can impose other terms and conditions but can only do so if they are not inconsistent with any terms and conditions that are specified in the application. This leaves it very little scope.[4]

The court in this preliminary determination also commented on the difficulties facing Maori owners in this and similar cases in raising funds to buy back lands compulsorily taken from them.[5] This issue will be referred to again later. The court also noted that this case was complicated by the conditional agreement made by Railways with Bryce in 1991:

> The price at which the land is offered back to the owners has been known to them for some time. The owners have had an expectation that they might negotiate in respect of that price and that they might have a claim before the Waitangi Tribunal. They have lodged an application to the Waitangi Tribunal. During the course of negotiations the situation has been complicated by the added factor that Mr Bryce and Bob Richards Heavy Transport Limited had taken possession of the land and had partly constructed buildings on it. The Corporation in seeking to have the land vested in the owners or their descendants had sought to impose on them a condition which denied them actual possession of the land but provided for it to be leased to Mr Bryce and Bob Richards Heavy Transport Limited. The Court does not believe that such a condition accords with the requirement under the New Zealand Railways Corporation Restructuring Act that the land be offered back to the original owner. If, at the time the land is declared surplus to requirements, it is held free from any lease or encumbrance then it is not compliance with the Act to offer it back to the owners subject to a lease to other parties who have no rights of pre-emption under the Act.[6]

The court noted that the lease conditions were not removed until 23 March 1993,

and that in order to reach settlement by 27 April 1993 more time was needed. The court suggested that a period of four months from the date of any order of the court was more appropriate. It was also noted that until such an order was made "there is no certainty that the land might come back and no documentary evidence upon which the owners can work to endeavour to arrange such funds".[7] The application was "adjourned to Chambers" so that Railways could consider the proposal of four months to pay, and provide the court with evidence of consent by the Minister of Railways (A3:13-14).

In the meantime, two other factors were influencing the Railways desire to hasten matters. One was the preparation of the Railways Corporation for sale and the winding up of the Rail Properties section of it. The second was the development of the "Consultative Clearance Process" (CCP) (now called the Protection Mechanism) for surplus Crown lands to be administered by the Department of Survey and Land Information (DOSLI). In a letter to Peter Jones, dated 6 August 1993, Railways explained the implications for the Te Maunga land:

> There is one last matter which we would like you to bring to the attention of the Judge and that is the fact that Government is presently implementing new Maori clearance mechanism to replace the now defunct Crown Congress Joint Working Party. The effect in this instance will be that if the offerees take up the offer then the Section 23 obligations will have precedence over Maori land claims and we are able to apply for Minister's consent. If on the other hand the offerees turn down the offer, then although we have satisfied Section 23 obligations we must still comply with the new Maori clearance mechanisms. In effect, this means that the claimants will still have a further opportunity to express their interest at some future date if they turn down the offer. However, there will be a different set of rules and procedures tha[n] existed previously. The only guarantee of getting the land is to accept the offer and pay the purchase price.
>
> Please make the above points to Judge Carter in Chambers and advise me in due course of results of your discussions. Please also advise him that the Corporation has expended a large amount on legal fees and it is very quickly diminishing our expected profit. This is another reason why we are keen to settle the matter early.(A8b:186)

On 2 September 1993 the Maori Land Court issued an order under section 436 Maori Affairs Act 1953 vesting the land in the owners from whom it was taken in 1955 under the Public Works Act 1928. The order was conditional, requiring the following conditions to be met within four months:

> 1. The payment of $70,000 plus GST by way of purchase price to the New Zealand Railways Corporation.
>
> 2. The approval of the Minister of Railways being given pursuant to Section 24(a) Railways Corporation Act 1981 to the vesting of the land.
>
> 3. The right of the New Zealand Railways Corporation to authorise removal of any improvements erected on the land prior to the date of the purchase of the land.

> The attention of the applicant is drawn to the fact that the Order made constitutes an Order of the Court and does not automatically lapse upon non-compliance of any of the above conditions. If the conditions are not complied with then there would need to be an application to cancel the Order under Section 34(8A)/53 or its equivalent section under the 1993 Act (Section 73) [Ture Whenua Maori Act 1993].[8]

This order was promulgated in the Maori Land Court at Thames on 6 September 1993.[9]

On 1 October 1993 the Minister of Railways consented to the vesting of the land (A8b:212). By mid November, all the improvements put on the land by Bryce and Richards had been removed (A8b:216). On 17 December 1993, Railways returned deposits to Bryce and Richards ($4062.50 each, a total of $8,125) "and accordingly the Corporation considers that this is full and final settlement with regard to the sale and purchase agreement and we now consider that this matter is at an end" (A8b:218-219). There remained the matter of the claimants' ability to raise the $70,000 plus GST. On 3 December 1993 counsel for claimants applied to the Waitangi Tribunal for an urgent hearing of their claim.[10] This was granted and a hearing was held in Rotorua, at the Maori Land Court, on 13 December 1993. Written submissions were sought by the tribunal from both counsel for claimants and the Crown and a further hearing of Crown submissions was held in Wellington on 17 June 1994.

References

1. Papers in Proceedings No 1.1

2. Papers in Proceedings No 2.1

3. Tauranga Minute Book 52/116-129; A3:1-14

4. Tauranga MB 52/123-124; A3:8-9

5. Tauranga MB 52/126-127; A3:11-12

6. Tauranga MB 52/127-128; A3:12-13

7. Tauranga MB 52/128; A3:13

8. Tauranga MB 52/202; A8b:209

9. Hauraki MB 94/296; A8b:210

10. Papers in Proceedings No 2.4

Chapter 6

Public Works Legislation

In chapter 1 we identified the central issue in this claim as the conflict between the article 1 principle of kawanatanga and the article 2 guarantee of tino rangatiratanga in the Treaty of Waitangi. Indeed, this is the basis of many other claims which have involved the compulsory taking of Maori land by the Crown under "Public Works" legislation. In this chapter we examine these matters of principle in more detail.

First, we consider the kawanatanga principle, the Crown right to govern and make laws, the public interest generally, and the power of the Crown to take land by compulsory acquisition of the freehold title of private citizens. We also consider what is a "public work" and whether it is necessary to obtain a freehold title to construct a public work or preserve a piece of land in a specified state for a public purpose. Article 2 of the Treaty of Waitangi guaranteed protection of tino rangatiratanga. This was a promise made by the Crown that Maori would remain in possession of their lands and resources unless and until Maori themselves willingly decided to dispose of them at an agreed price. On the face of it, a Crown right to compulsory acquisition of land cuts right across this guarantee of Maori rangatiratanga.

Secondly, we consider the Railways Corporation's disposal of assets against the Crown's fiduciary obligation to protect the rights and interests of Maori. This fiduciary relationship, we believe, becomes the central issue when lands taken by proclamation, and no longer required for the purposes for which they were taken, are made available for disposal.

Thirdly, we address the issue of compensation, the bases for valuation of land and improvements, and related matters in the context of the offer-back procedures of the Public Works Act 1981 and the New Zealand Railways Corporation Restructuring Act 1990.

Kawanatanga: The Powers of the Crown to Take Land

The doctrine of tenure imported into New Zealand with British sovereignty in 1840 assumes that the Crown is the ultimate owner of all land. In other words, the parent or radical title lies with the Crown. An individual property owner is seized of a freehold estate in fee simple which is derived from the Crown. Even Maori freehold title is in legal terms derived from the paramount title of the Crown. In 1215 A D in the Magna Carta the powers of the Crown were curbed, and among other things, the Crown was restrained from acquiring the property of any citizen unless it was by the law of the land. The Crown has always had the power to acquire land for defence or other public purpose: "In few other fields

of law is the conflict between public interest and private right brought into such sharp relief than in the law relating to compulsory acquisition of land".[1]

Modern law relating to acquisition of land for public works evolved in the early nineteenth century in England, with the construction of canals and roads and railways during the Industrial Revolution. The parent statute was the Lands Clauses Consolidation Act 1845 (8 Vict cap 18) which in its long title was described as "An Act for consolidating in one Act certain provisions usually inserted in Acts authorizing the taking of Lands for Undertakings of a Public Nature". This Act did not provide any definition of a public work, but merely established the procedures to be used when a "special Act" was passed to authorise "the Works or Undertaking of whatever Nature which shall by the special Act be authorized to be executed". The 1845 Act covered provision for notice of intention, negotiation, arbitration of disputes, payment of compensation and related matters. The New Zealand version of this Act which was almost identical was the Land Clauses Consolidation Act 1863:

> In New Zealand the right to take land has always been regarded as deriving from statutes giving that power. It is accepted in New Zealand that the owner of private land is entitled to protection from arbitrary decisions by the executive in respect of his [sic] land. It would be unrealistic however, to argue that the compulsory acquisition of land is a power which no government should possess. The use to which land is put is of vital importance to the whole community. Discussion on the subject must assume a basic acceptance of the proposition that land in private ownership may be properly required for public purposes from time to time ....
>
> In order to facilitate the execution of the public works schemes of Sir Julius Vogel, provisions in regard to compensation were incorporated in the Immigration and Public Works Act of 1870, and in an Amendment Act of 1871. The Public Works Act, 1876 consolidated the existing legislation, and the provisions of that Act have been repeated with additions from time to time in the Public Works Acts of 1882, 1894, 1905, 1908, and 1928.[2]

A "public work" was defined in section 2(a) Public Works Act 1928 as that which:

> His Majesty, or the Governor-General, or the Government, or any Minister of the Crown, or any local authority is authorized to undertake under this or any other Act or Provincial Ordinance, or for the construction or undertaking of which money is appropriated by Parliament ....

There followed a wide-ranging list of public works (section 2(b)): "Any survey, railway, tramway, road, street, gravel-pit, quarry, bridge, drain, harbour, dock, canal, river-work, water-work, and mining work"; also hospital, school, university, college, and associated teachers' residences; "electric telegraph, fortification, rifle range, artillery range, lighthouse, or any building or structure

required for any public purpose or use, including lands necessary for the use, convenience, or enjoyment of the same" (section 2(e)); and also Ministerial residences and other public buildings. Sections 10-41 contained procedures for the taking of land required for any of these public works.

There was no debate when the Public Works Bill passed through both the House of Representatives and the Legislative Council in 1928. It was described by the Minister of Public Works as "entirely a consolidating measure".[3] A similar phrase, "a pure consolidation", was used by the Leader of the Council.[4] The legislation was sufficiently acceptable that there was no dissent, suggesting that the basic assumptions within it were well established and the politicians saw no need for debate. There were further amendments, described by Barker in 1969 as a "patchwork of some 40 different amending statutes in as many years".[5] Barker outlined the powers of the Crown to take land for public works:

> The power to acquire land must always be given by statutory authority. The Public Works Act [1928] itself sets out a fairly exhaustive definition of Crown public works and then provides that the Governor-General may declare any work or undertaking to be a "public work". Section 30 of the Finance Act (No. 2) 1945 permits the taking of land by the Crown for such vague purposes as "subdivision, development, improvement, regrouping or better utilisation; provision or preservation of amenities; public safety in respect of any public work" ....
>
> In so far as local bodies are concerned, the statute constituting the local body usually gives certain general powers of acquisition. Local Acts, promoted by the local bodies themselves, frequently give additional powers of acquisition for particular cases. Almost invariably the empowering Act, general or local, requires the mode of acquisition and assessment of compensation to be that laid down in the Public Works Act 1928.[6]

The assumption of the Crown right to acquire the freehold title of private citizens to land required for a wide range of public purposes was well entrenched in New Zealand law and practice in the 1960s. The comments of an authority on the English law were relevant to the New Zealand situation:

> The law of compulsory purchase and compensation now resembles a rambling manor which successive owners have altered and enlarged according to the fashion of the moment and without regard to symmetry or proportion. The original structure was erected in 1845 in elaborate Victorian style and still partly survives despite drastic changes and numerous attempts at modernisation. It now urgently requires, in the words of the planners, laying out afresh and redevelopment as a whole.[7]

Salmon, with reference to Barker's 1969 review, commented in 1982 that there had since been:

> further additions to that edifice in more contemporary style which served only to make a walk through the structure fraught with difficulties and dangers as one negotiated hazards only removable by complete demolition and rebuilding. This was the task faced by those responsible for drafting the 1981 legislation.[8]

The Public Works Bill was introduced in Parliament in December 1980 by the Minister of Works and Development, Hon W L Young:

> The present Public Works Act was passed in 1928, and has been amended many times in the intervening years. The Bill thus represents the first major review and consolidation of the public works legislation in more than 50 years. The Public Works Act is the Act that sets out the procedures for the acquisition of land required by either the Crown or a local authority for any public work. It also provides for the payment of compensation to landowners whose land is acquired for a public work, or whose land is injuriously affected or damaged by a public work. In addition, the Act makes provision for a number of miscellaneous matters including railways, roads, motorways, defence works, drainage, and irrigation. During the 1970s the Act was amended so as to liberalise the compensation provisions. Although the Act was working well, it was not appropriate to current thinking because of the age of the Act and the frequency with which it had been amended ....[9]

There were substantial changes in this Bill. One was the restriction of the definition of public works for which land may be compulsorily acquired to what was described as "essential works":

> When land is required for essential work, the Bill specifies that a formal notice is to be sent to the owner, inviting the owner to sell the land, and advising the owner of the estimated value of the land. Every effort must be made to negotiate in good faith with the owner in an attempt to reach an agreement acceptable to him [sic]. Unless these steps are taken, it will not be possible compulsorily to take any land for an essential work. I emphasise that, irrespective of those public works that are not essential works, land can be acquired only by agreement with a willing seller ....
>
> The compensation provisions have been thoroughly revised and brought up to date .... This will enable compensation to be awarded far more flexibly, having regard to all the circumstances of each individual case.[10]

Another significant change was made as a result of submissions to the Lands and Agriculture Select Committee and was described by Hon W L Young when he introduced the Public Works Bill for a second reading in September 1981:

> That clause will now give effect to the general principle that when land has been acquired by the Government or by a local authority for a public work, and subsequently ceases to be required for a public work in respect of which there is a power of compulsory acquisition, the land should be offered back to the original owner, or his [sic] representative, except in circumstances when there was no element of compulsion at the time the land was originally acquired.
>
> If land becomes surplus to the work in respect of which it was acquired, but is required for another essential work, it may be set apart for that work without being offered back to its former owner. In such cases, however, the former owner is declared to have a standing for the purpose of making an objection to, or appeal against, any application that might arise under the Town and Country Planning Act. Clause 39A makes it clear that when the surplus land was

> originally Maori land, or general land owned by Maoris, the land must either be offered back under the general provisions of clause 39, or application must be made to the Maori Land Court to revest the land in its former owners or their successors under the procedures set out in section 436 of the Maori Affairs Act.[11]

Clauses 39 and 39A referred to here subsequently became sections 40 and 41 of the Public Works Act 1981.

A long debate ensued, much of which is not relevant to our concerns here. Hon M Connelly questioned the effectiveness of restricting the definition of essential works, since some additions to the list of works had been made by the Select Committee:

> Central government and local government have always made laws and bylaws providing for a balance between the right of the individual to buy and sell property and his [sic] responsibility to the community through local or other authorities. Further tinkering with the definition of essential works will not solve the problem. The principle of limiting the Bill in that way is unsound.[12]

Mr T J Young took up a similar theme:

> Inevitably, there comes a clash with the rights of the property owner when the use he [sic] wants to make of his [sic] land conflicts with the demands that could be made for the community at large, whether through the Government or some other agency. We also realise that New Zealand has a system of land holding whereby all the land belongs to the Crown. The greatest title or interest that any person can hold is in fee simple, but fee simple is only a special system of title direct from the Crown, so that the Crown has a particular basic ownership within New Zealand. That has not been altered by the Bill, and I did not think it would be.
>
> The Bill sets out to limit the powers that existed, for the local bodies in particular and for the Government to a very limited extent, in the acquisition of private property for public works. The policy in that part of the Bill is bad. The committee considered many representations about that matter, but Government members said that it was unnecessary to debate the subject at length because it was already Government policy ....[13]

Support was not therefore universal for the restriction of the uses of the compulsory acquisition provisions of the Public Works Bill.

An alternative to acquisition of freehold was the negotiation of a leasehold for public works. This was suggested by Mr J Ridley who referred to Government acceptance of a long-term lease arrangement for the Ohaaki geothermal power project in his Taupo electorate, and noted that adequate provisions for such an arrangement already existed in the Electricity Act 1968.[14] The specific provision was in section 11 which set out the powers of the Minister of Electricity to construct and maintain electricity generation works. At section 11(2)(j) the Minister was empowered to:

> Hold, manage, purchase, exchange, take on lease, or hire, acquire, or otherwise obtain any property whatsoever which in the opinion of the Minister is necessary for the exercise of his functions under this Act: Provided that, in the case of land or any estate or interest in land, acquisition shall be undertaken on behalf of the Minister of Electricity by the Minister of Works under the provisions of the Public Works Act 1928.

However, Ridley's suggestion was not taken up, and the tenor of much of the debate assumed Crown acquisition of the freehold for "essential" public works, however defined.

There remained, of course, the provision in section 3 of the Public Works Bill for the Governor-General, by Order-in-Council, to "declare any specific public work to be an essential work for the purposes of this Act". In the brief debate on the third reading of the Bill, Mr Caygill noted this section 3 provision:

> The Governor-General has the overriding power to designate a particular work as an essential work. Once that residual power is focused on, it is realised how illusory the limitation is in its protection of local authorities. If the Governor-General can suddenly declare any work to be an essential work, and hence the property for it is capable of being acquired compulsorily, where does the landowner stand? What protection is there for the landowner?[15]

In his exposition on the Public Works Act 1981, Salmon summed up the major changes in approach to the compulsory acquisition of land for public works:

> The most significant departure from tradition contained in this legislation is a *restriction on the circumstances under which land can be acquired compulsorily.* Land may now be acquired compulsorily only if it is *for an essential work.* "Essential work" is defined in the Act; but there is also a provision (which one would hope, or even expect to be sparingly exercised) enabling the Governor-General to declare any specified work to be an essential work. Local authorities and the Crown continue to have the power to acquire land for a wide variety of purposes but unless the work proposed is an essential one they must negotiate for that land in the same way as any private purchaser. Naturally there is still controversy as to which works should have been included in the definition of essential works; but there is no doubt that in the process of balancing the public against the private interest the change has resulted in a strong swing of the pendulum in the direction of the private property owner.
>
> In the area of compensation, too, there have been a number of important changes which restore the balance in favour of the private interest, not least amongst these being the increasing recognition of circumstances where compensation is inadequate and where an attempt should be made to provide "a house for a house".[16]

But there were still significant omissions in the Public Works Act 1981. There was no requirement to consider alternative forms of tenure, such as leasehold, licence to occupy, easement or other arrangements whereby something less than the freehold could be acquired by the Crown in order to use the land for a public

purpose. The most significant omission was the failure to acknowledge in any way in the Public Works Act 1981 the Crown obligations and responsibilities toward Maori as a partner under the Treaty of Waitangi.

Among several subsequent amendments to the Public Works Act 1981 was the repeal of the concept of "essential works" in 1987. In his introduction to the second reading of the Public Works Amendment Bill, 24 March 1987, the Minister of Works and Development, Hon Fraser Colman stated:

> The main provisions in the Bill allow the Ministry of Works and Development to undertake activities other than public works, and abolish the concept of essential works ....[17]

He went on to state:

> I now deal with the repeal of the "essential works" concept, which was introduced by the former Government in 1981 and was vigorously opposed by local authorities at that time and has been ever since. Works on the list were identified by reference to a class — for example, police stations and police training colleges. Compulsory powers of acquisition were not available for any public work not on the list. The Government and local authorities alike consider that the concept is effective, in that the land requirements of a work, and not its type, are the important consideration. The other difficulty is that it may be necessary to extend an existing non-essential public work, such as a school, library, Government or local authority administrative building, or works depot, but that that may prove impossible if adjoining owners will not sell.
>
> It is proposed to revert to a position in which compulsory powers are available for all public works. That step will be accompanied by a strengthening of the Planning Tribunal's ability to decide whether a proposed acquisition should proceed. Accordingly, I am pleased to say that the Minister of Works and Development will no longer have the power to veto a report and finding of the Planning Tribunal under section 24 of the principal Act. In other words, the Planning Tribunal will now be the deciding forum as to whether acquisition should proceed.
>
> It was thought desirable to introduce a power to enable the tribunal to require the Minister or local authority and a landowner to arbitrate differences outside the scope of the tribunal in order to resolve differences by conciliation. The 1981 criteria, by which the tribunal judged the need for compulsory acquisition, were whether it was fair, sound, and essential to achieve the objectives of the acquiring authority. Previously, the tribunal could not inquire into the stated objective of the authority, but the Bill will give the tribunal that power. The criteria have now been changed to "fair, sound, and reasonably necessary".
>
> The present essential criterion caused no judicial belt-tightening on its introduction, about six years ago. Similarly, it is not thought that the proposal to reintroduce the term "reasonably necessary" as a criterion will result in a lower standard of proof being placed on acquiring authorities. Given the

> Planning Tribunal's now decisive function *vis-à-vis* the Crown as proposed in the Bill, and the proposed powers to remit the matter back to the parties for further consideration and to inquire into the acquiring authority's objectives, it is felt that the Crown and local authorities will now face a greater burden than ever before in satisfying the tribunal that compulsory acquisition should proceed.[18]

Much of the debate focussed on the structure and functions of the Ministry of Works and Development, with comment on competition between Government and the private sector. There was some comment on the repeal of the concept of "essential works", and concern about a potential increase in local authority powers of compulsory acquisition. This was countered with reference to the wider scope of inquiry provided for the Planning Tribunal whose decisions were binding on the local authorities and the Crown. The section 40 offer-back provisions of the Public Works Act 1981 were not changed.

In the Public Works Amendment Act (No 2) 1987, at section 2(1) the definition of the term "essential work" was repealed and at section 2(2) substituted:

> "Government Work" means a work or an intended work that is to be constructed, undertaken, established, managed, operated, or maintained by or under the control of the Crown or any Minister of the Crown for any public purpose.

At section 2(5) the new definition of "public work" and "work" was:

> (a) Every Government work or local work that the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain, and every use of land for any Government work or local work which the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain by or under this or any other Act; and include anything required directly or indirectly for any such Government work or local work or use.

There were also further provisions for Works related to Education and Universities. At section 2(6) a new definition of railway work was provided which did not include railway housing.

Sections 23 and 24 Public Works Act 1981 provided for notice of intention to take land and objections to be heard by the Planning Tribunal. The term "essential" in section 23(1)(b)iii was repealed and the phrase "reasonably necessary" substituted by section 7 Public Works Amendment Act (No 2) 1987. In section 8 of this 1987 Amendment Act were provisions for the Planning Tribunal to investigate: (a) the objectives of a proposed Ministerial or local authority taking; (b) adequacy of consideration, alternative sites, routes or methods of achieving objectives; (c) reference back to the Minister or local authority for further consideration, (d) to decide whether the proposed taking was "fair, sound, and reasonably necessary" for achieving the stated objectives; (e) prepare a report; and (f) submit this to the Minister or local authority. The Planning Tribunal report was binding on both Minister or local authority.

This brief outline of public works legislation does not purport to be a comprehensive review. There has been, however, a significant shift in emphasis, away from arbitrary proclamation of a compulsory acquisition of land required for public works, to a more considered approach which can be reviewed by the Planning Tribunal. At the same time there has been a shift in policy away from a centralised Government role in public works. There is still no specific reference to Crown obligations under the Treaty of Waitangi in public works legislation.

The Railways Corporation and Disposal of Assets

Railways have always been defined as public works but since the 1870s have been governed by separate legislation. The Government Railways Act 1949 at section 46(1) included a provision for Railways housing. The various Public Works Acts provided the procedures for acquisition and compensation for any land required for railway purposes. The New Zealand Railways Corporation Act 1981 provided the framework for restructuring New Zealand Railways as a State-owned corporation to be operated on a commercial basis rather than as a service department of Government.

By the mid 1980s Railways Corporation had begun disposing of assets not considered part of its commercial operation. This included housing stock. In March 1990, the Minister of Railways, Hon Richard Prebble, introduced the New Zealand Railways Corporation Restructuring Bill into Parliament:

> The Bill empowers the restructuring of the Railways Corporation. It will allow the corporation's core railways business and other business units to be placed in a fully commercial environment. The Bill empowers the Minister of Finance and the Minister for State-owned Enterprises to form one or more limited liability companies under the Companies Act and to hold shares in those companies. The Bill also enables the corporation's assets and liabilities to be transferred from the Railways Corporation to the Crown or to those new companies, or the Crown from one company to another, or to the Crown ....
>
> Provisions similar to the offer-back provisions of the Public Works Act will apply to the new companies, with the exception that the offer-back provisions will not apply to the transfer or sale of land that continues to be used for railway purposes ....[19]

Prebble described the Railways Corporation as "a strange hybrid". It was still "an executive arm of the Government" and "it has most of the aspects of a State-owned enterprise ... but it does not have all the freedoms of a State-owned enterprise".[20] In due course the Bill became the Act, the Railways Corporation was restructured, and in 1993 the core Railways business was sold to a private operator.

During the debate on the Railways Corporation Restructuring Bill, the disposal of non-core assets including land was a central issue. Prebble stated:

> New Zealand Railways owns very substantial landholdings in most cities and

> towns served by the railways. There is a very good reason — the railways opened up the country. The early engineers were good Scots; they pegged out very good land. They pegged out considerably more land than was needed to run a railways system. That issue was brought before the Government some years ago. As Minister of Railways I made it clear that those landholdings could be sold ....
>
> I am prepared to sell the land to people who are able to pay a good price for it .... The Government is continuing with those land sales because the taxpayers have had to put $1.1 billion into Railways. The taxpayers are entitled to get back as much of that money as possible. I make it clear that the landholdings are not worth anything like $1.1 billion; they are worth hundreds of millions of dollars. That sales programme will continue. It is not a new policy; it has been in existence for some time. For example, the Railways Corporation has sold its houses....[21]

There were claims by Hon W F Birch that it was "a liquidation sale", and questions were asked about where the funds realised from asset sales would go and who would buy in a depressed property market. Mr Doug Kidd (the member for Marlborough who later became Minister of Maori Affairs) raised the issue of Maori land claims:

> If I understand the Bill correctly so far, at present when land — I will call it railway land — is transferred to a Crown transferee company, which might be the bus company or the train company or whatever, it is subject to memorial and open to resumption under the established procedures if a Waitangi Tribunal claim is accepted. That would make it consistent with the other land in the hands of State-owned enterprises, and that gave effect to the famous case of *New Zealand Maori Council* v. *Attorney General.*
>
> As to the land that is kept by the present corporation in its 1981 Act, and sold by it to third parties in the private sector, am I to understand that the sale process would not be affected .... it seems to me that much of Railways' most valuable surplus land will be able to be sold off without being subject to any Maori claims and subsequent hassles; the Government would be able to take the money, and the buyer would obtain a clear freehold title. The Bill seems to be designed to that end. I wonder whether the concept of making sure that Maori do not get their hands on very much is not deliberately advanced in clause 6 — which deals with assets transferred — by the notion of separating assets and the land. Normally a building goes with the land — that is the law ....
>
> Clauses 22 to 24 relate to the departure from the Public Works Act procedures in relation to the disposal of lands to third parties. In what way are the provisions that are written in relation to rail land different, and why is there the difference? The corporation can be excused from selling the land — seeking it out and offering it to a former owner or its successors — under several criteria. What are the differences, and what justification is there for a different regime for the disposal of rail land compared with other land that the Government might have declared surplus from, for instance, a former Government department?....[22]

Hon Richard Prebble explained:

> In relation to land generally, the Government has said that the Public Works Act should apply. That means that if land is no longer required it must be offered back to the original owners. However, the Government has made an exception. In clauses 20 and 21 it has said that the Public Works Act should not apply to the land required by the operator to run the railway.[23]

A similar sort of exemption applied to prevent the Crown land which is part of a railway line being subject to a Maori claim under the Treaty of Waitangi (State Enterprises) Act, to ensure continuing Crown ownership of the rail corridor.

There was a good deal more debate when the Bill was returned to the House for its second reading, but little of it concerned Maori claims. Hon Richard Prebble stated:

> Clause 23 defines conditions under which the Railways Corporation must offer land back to its original owner. The principles behind those clauses are essentially the same as those underlying the Public Works Act offer-back provisions, the main exception being that land would not have to be offered back if it was sold to a railway operator or a former owner of land and if the successor of that person was a local authority.
>
> Clauses 33 to 35 relate to Maori land claims under the Treaty of Waitangi Act 1975. Those clauses provide for the resumption of land and interests in land owned by the Crown that have been invested in a Crown transferee company under the Bill if the Waitangi Tribunal recommends that the land be returned to Maori ownership, with the exception that such land or interest in land that is held by a railway operator and used for the purposes of a railway is not subject to a resumption. That exemption will ensure that railway operations will not be interrupted by the resumption of land or interest in land that is required to operate the railways.[24]

Now that the core Railways Corporation business has been sold, any land formerly owned by Railways Corporation, but not included in the assets sold, and not otherwise allocated or disposed of, has become Crown land subject to the Crown protection mechanism, described as the "Consultative Clearance Process" (CCP) (now known as the Protection Mechanism) (A8b:187). The intention of this process, approved by Cabinet in April 1993 and applying to all Crown lands declared surplus and available for disposal after 1 July 1993, is to ensure that surplus properties which both Maori claimants and Government agree could be used in settlement of claims are not sold. The CCP is administered by the Department of Survey and Land Information, but does not include any land which is already protected by the memorial on title under the Treaty of Waitangi (State Enterprises) Act or Crown Forest Assets Act. It is intended as a protection mechanism on Crown lands for iwi which are outside the existing "land banks" already negotiated for the Tainui, Ngai Tahu and Muriwhenua claims.

The CCP procedure means that when any Crown property is available for disposal, it is advertised by public notice and by notification to relevant iwi and claimant groups in the region who are invited to indicate whether they have an

interest. The properties may be classified into three protection categories: A — sites of historical, cultural or spiritual significance that deems them essential to settlement of a claim; B — sites that are of special importance but do not meet category A criteria, and may include lake and/or riverbeds, pounamu and mountains; C — lands outside A and B categories but which are particularly sought by claimants. As part of the clearance process, officials are required to ensure that section 40 Public Works Act 1981 offer-back procedures have been complied with before a property is advertised for disposal. Responses from iwi and/or claimants are collated and then referred for consideration by the Officials Committee convened by the Department of Justice which is responsible for determining whether or not the grounds for seeking protection fall within the Crown criteria. The final decision on whether a property is to be protected or released for sale is made by the Cabinet Committee on Treaty of Waitangi Issues, on the recommendation of the Minister of Justice.

This summary of CCP procedures has been derived from documents supplied by Crown counsel from the Departments of Survey and Land Information and Justice (A8b:187, 220). At the time this claim was heard in December 1993 the CCP procedures were still being put in place and it was too early to comment on their effectiveness or implications for Crown and claimants. However, the tribunal was assured by Crown counsel that the Te Maunga Railways land, Papamoa No 2 Section 10B2C2, would be subject to CCP procedures if the current offer-back conditions in the Maori Land Court Order cannot be met (A6).

Compensation and the Value of Land

The stumbling block which has prevented completion of Public Works Act offer-back procedures in this claim has been the condition imposed by the Minister of Railways that the sum of $70,000 plus GST be paid by the former owners and/or their successors to get their land back. In this and in similar cases the Crown has argued that compensation was paid and the land transferred to the Crown. Given current market values, then it is to be expected that in a buy-back situation a current market value should be paid. There are two questions inherent in this argument: one is, why should the Crown obtain the total benefit from the increased market value? and secondly, what was the basis of valuation at the time the land was taken and how has it been assessed since? A third complicating factor is how to take into account inflation of money values since the time of taking.

The question of disposing of Crown land at current market value is linked with obtaining the best value for the tax payer, and the Crown not being seen to favour a particular purchaser by selling at anything less than a fair market price. Such ideas assume a willing seller/willing buyer situation, which can be expected in most transactions. However, when land has been compulsorily taken from "unwilling sellers", a distorting factor has entered the transaction. The term "unwilling sellers" may imply there was some consultation, but no agreement to sell. For the purposes of this discussion the phrase "unwilling sellers" includes

owners of land compulsorily acquired by the Crown under public works legislation or other provision, including proclamation without prior consultation. Other questions are raised: Was it necessary to acquire the freehold title? Could the public work or other public use of the land have been carried on with something less than freehold, such as a lease, licence or easement? And years later, when the land is no longer required for public purposes and the market value of the land has increased, for whatever reason, can the sum paid to former owners in compensation be interpreted as a payment by the Crown for the use of the land?

Further, the question might well be asked whether the original value of the land paid as compensation really equates with the owners' loss of the use of that land, for whatever purpose, during the intervening years. Many Maori owners see the compulsory acquisition of their land for public purposes as another form of raupatu, confiscation. They argue that such lands, when no longer required for the purposes for which they were taken should be returned to former owners or their successors, and that any compensation paid at the time of taking should be regarded as a payment by the Crown for the use of the land for a public work.

Public works legislation in New Zealand has always included provisions for compensation to be paid to owners when their land is compulsorily taken for a public purpose. This assumes that a payment in money will be made for the "value" of the land taken. Under the Public Works Act 1928 compensation was normally paid on the basis of the current government valuation or a special valuation of the land at the time it was taken. In other words, valuation, and therefore the payment made, was on the basis of the current market value of the land in its existing state, with no account taken of potential alternative uses, or the public use intended for it. Thus the Te Maunga land, Papamoa No 2 Section 10B2C2, was valued at £430 ($860) in 1954 as undeveloped rural land. By 1984 the land value had risen to $12,000. Between 1988 and 1992 the various land valuations assessed have ranged from a low of $70,000 to a high of $162,000 as shown in the table on page 63. Some of this variation can be attributed to different valuations on the basis of industrial or residential use.

Papamoa No 2 Section 10B2C2 Block: Valuations

Date	*Land*	*Improvements*	*Total*	*Comments*
16/12/54	£430 [$860]	—	(land only)	Special valuation for PW Act taking.
1/7/84	$12,000	$25,000 (6 houses)	$37,000	General government valuation
1/7/88	$132,000	$105,000 (6 houses)	$237,000	General government valuation
8/7/88	$130,000	$35,000 (4 houses)	$165,000	Special valuation for disposal
20/6/90	—	$56,000 (4 houses)	(houses only)	Sale price to Stone Key Limited
13/5/91	$79,000	—	(land only)	Special valuation for disposal
28/5/91	$70,000	—	(land only)	Sale price to Bryce
1/10/91	$162,000	—	(land only for 6 residential lots)	General government valuation
1/4/92	$91,000	$9,000	$100,000	Special valuation (includes Bryce's improvements)
4/9/92	$70,000	—	(land only)	Special valuation for lease

The range of valuations produced by different valuers over a period of years (shown in the table on page 63) suggested a need to consider the basic assumptions for concepts of land value. The "government valuation" of land, and the improvements on it, the sum of which is the capital value of a property, is carried out at regular intervals for the purpose of assessing revenue payable on the property, principally the "rates" paid to a local authority. Property ownership was formerly the basis for voting rights, and to some extent still is a measure of wealth. In the years since Pakeha settlement, when the concept of a money economy was introduced, prices for land have been set, and fluctuated, under the influence of various economic forces. Sometimes this is expressed in terms of "supply" and "demand", but there is only a fixed amount of land. Market prices are influenced by a concept of "best" or "most economic" use of the land. Prices may relate not only to actual, but also the potential use of the land. There may also be restrictions on the use of the land imposed by local planning requirements, such as zoning, proximity to urban area, or the physical nature of the land such as poor soil, swampy or steep terrain, risk of flooding or erosion, and so on. For any block of land, a combination of physical, institutional and economic factors will influence the valuation that may be assigned to it at any given point in time.

One of the important elements in assigning a valuation to a piece of land is to consider the price that might be paid by an imaginary buyer in an open market. In other words, it is assumed that the transaction is between a fictitious willing buyer and an equally fictitious willing seller. Some guidance may be obtained from other sales of similar land in the neighbourhood. But it is also recognised that many other factors may influence a sale price — buoyant market, fashionable demand for a specific type of property that may inflate a price, or government-imposed price control mechanisms, or a special arrangement for transfer within a family at a price lower than market value. Sometimes there is no comparable sale, but for valuation purposes an assumption of a bona fide purchase from a not unwilling seller has to be made. We all know, of course, that there may be many other factors which can not be measured in monetary terms, but which contribute to the value of a property in the eyes of the owner. Perhaps this is best illustrated in the following rhyme, quoted by S L Speedy as a "frontispiece" to his book *Land Compensation*:

> "So you want to buy my farm" he said
> "You'd buy my farm" said he
> Well, how do you value the light and shade?
> What is your price for the dream I've made?
> And how would you buy on size or grade -
> The children whose shouts you hear?
> "You haven't the money to buy" he said
> "This bit of a farm" said he
> You haven't the money to buy the worth
> Of the joy and prayer, of the death and birth,
> The power that blessed this fruitful earth,
> And the love that made it dear.[25]

In the Maori world there are also values attributed to land and identity, ancestry and occupation, over many generations, which can never be translated into monetary terms. This is why Maori land, compulsorily acquired, is not seen by Maori as paid for, or adequately compensated, by a mere sum of money. There was no concept of compulsory taking in customary Maori tenure systems. Occasionally, after a battle, land may have been surrendered, and the former occupants departed. More often, accommodation between the parties was reached, conditions of occupation perhaps imposed, and strategic marriages made, to ensure the continuity of ancestral lines of occupation. In the words of Richardson J "possession of land and the rights to land are not measured simply in terms of economic utility and immediately realisable commercial values".[26] He also quoted with approval the statement of the New Zealand Maori Council:

> [Maori land] provides us with a sense of identity, belonging and continuity. It is proof of our continued existence not only as a people, but as the tangata whenua of this country. It is proof of our tribal and kin group ties. Maori land represents turangawaewae.
>
> It is proof of our link with the ancestors of our past, and with the generations yet to come. It is an assurance that we shall forever exist as a people, for as long as the land shall last.[27]

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18. ibid pp 8023-8024

19. NZPD 1990, vol 506, p 921

20. NZPD 1990, vol 506, p 922

21. NZPD 1990, vol 506, pp 923-924

22. NZPD 1990, vol 506, pp 930-931

23. NZPD 1990, vol 506, p 934

24. NZPD 1990, vol 510, p 3649

25. S L Speedy *Land Compensation* (Wellington, 1985)

26. *New Zealand Maori Council and Latimer* v *Attorney General and others* (1987) 1 NZLR 641, 674

27. ibid p 674

Chapter 7

Public Works and the Treaty of Waitangi

Article 2 of the Treaty of Waitangi was an unequivocal statement of the Crown's obligation to protect the interests of Maori:

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess as long as it is their wish and desire to retain the same in their possession ... (Treaty of Waitangi Act 1975, First Schedule).

The Maori version of the Treaty is equally clear: the Crown guaranteed (ka wakarite ka wakaae) to Maori te tino rangatiratanga, the full authority over their lands until such time as they chose to dispose of them at an agreed price. There is in the Treaty, therefore, no assumption of a fictitious willing seller for the purpose of compulsory taking of Maori land by the Crown.

In article 3 of the Treaty the Crown extended to Maori "royal protection and imparts to them all the Rights and Privileges of British Subjects". In article 1, Maori ceded to the Crown the right to govern and make laws for the benefit of all New Zealand citizens. There has been no suggestion that Maori land should not be used, if needed, for public purposes, or for public benefit. The sticking point has been the compulsory acquisition of the freehold title when something less than freehold would have served equally well. For Maori people, their land and ancestral identity are central to their view of the world. Quite apart from the considerable financial burden imposed if full market prices are expected to buy back ancestral land, there is a principle involved. The land was compulsorily taken from "unwilling sellers". The Crown has the discretion to decide on what terms it may be returned when no longer required for any public purpose. We believe that it is inherent in the fiduciary obligation of the Crown under the Treaty of Waitangi that this discretion be used positively, to ensure that Maori are not prevented from having their ancestral land returned to them by the requirement to pay full market value as a condition of return. The Crown has a duty of active protection of Maori rangatiratanga. It may be interpreted as a positive and pro-active use of the discretion of the Crown toward the Maori partner in the Treaty of Waitangi to return Maori lands compulsorily taken, and no longer required for the purposes for which they were taken, without requiring payment at market value.

The Railways Corporation was governed by separate legislation, but it also shared many similarities with the State-owned enterprises set up by the State-Owned Enterprises Act 1986, which at section 9 stated:

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent

with the principles of the Treaty of Waitangi.

The interpretation of section 9 and section 27 of this Act was the subject of the case brought by the New Zealand Maori Council before the Court of Appeal. Cooke P. stated, "The Treaty signified a partnership between the races". He elaborated on the nature of this partnership.

> In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty .... If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Maori claims do not require retention of certain land, no principle of the Treaty will prevent a transfer ....
>
> What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.[1]

A fiduciary relationship is founded on trust and confidence in another, when one side is in a position of power or domination or influence over the other. One side is thus in a position of vulnerability and must rely on the integrity and good faith of the other. When the Treaty of Waitangi was signed the Crown undertook to protect and preserve Maori rights in lands and resources in exchange for recognition as the legitimate government of the whole country in which Maori and Pakeha had equal rights and privileges as British subjects. Because the Crown is in the powerful position as the government in this partnership, the Crown has a fiduciary obligation to protect Maori interests.

When a State-owned corporation such as Railways chooses to dispose of surplus land then it must be bound by the Crown obligation to act reasonably and in good faith, to satisfy itself that known or forseeable Maori claims are properly investigated before negotiating disposal to a third party. We consider that any piece of land which has been taken from Maori owners by proclamation under a Public Works Act is likely, ipso facto, to be the subject of a known and forseeable Maori claim, when the land is no longer required for the purpose for which it was taken.

The Waitangi Tribunal has not previously considered the issue of compulsory public works takings in general principle but has certainly referred to it in several reports. The particular circumstances of a taking and the reasons for it are relevant in considering Crown fiduciary obligations as a Treaty partner. In the *Orakei Report* the tribunal stated:

> On the face of it the Crown's action in compulsorily taking this land appears to be in clear breach of Article 2 of the Treaty which requires the consent of the Maori proprietors to any disposition of land. At the same time the Preamble to the Treaty speaks of the anxiety of the Crown not only to protect the just rights and property of the Maori but also to secure peace and good order. It is arguable that the sovereign act of the Crown in taking land for defence purposes with a view to securing peace and good order is acting for the benefit of all citizens, Maori and European alike, and is not inconsistent with the principles of the Treaty.[2]

However, in the same report, in respect of land taken for housing, the tribunal stated:

> the Crown prejudicially affected .... Those Ngati Whatua owners whose land was compulsorily acquired against their wish and without their consent and thereby acted inconsistently with the principles of the Treaty which guaranteed the Maori families and individuals the undisturbed possession of lands they wished to retain.[3]

In the *Mangonui Sewerage Report* the tribunal noted that it was not required to consider whether Maori land should be exempt from compulsory acquisition:

> A nice point arises however, requiring the aid of legal debate, on whether the Treaty forbids the compulsory acquisition of Maori land in any circumstance. We are relieved from that debate in this case however, since it seems to have been accepted that a distinction should be drawn between lands long held and those acquired already subject to a works designation.[4]

In both the *Ngati Rangiteaorere Report* and the *Mohaka River Report* the tribunal considered the taking of lands for roads and railways. While it was acknowledged that there were general public benefits from use of a public road or railway, a related issue was the failure of the Crown to negotiate with Maori owners before proclaiming compulsory acquisition. The taking of a road was considered by the tribunal to have "infringed Ngati Rangiteaorere's rangatiratanga which included the right to control entry to as well as ownership of their land".[5] In the *Mohaka River Report* the tribunal considered that in Public Works Act takings for roads and railways, "apparently without any negotiations with Ngati Pahauwera, the Crown was ignoring their rights of rangatiratanga".[6]

This claim concerns a mere 1 acre 2 roods (6070 square metres) at Te Maunga. The smallness or insignificance in area is no impediment to consideration of underlying principles, however. There are numerous other claims before the Waitangi Tribunal which involve compulsory acquisition of Maori land by the Crown under public works legislation for various purposes. The extent of each of these individual claims in acres or hectares may not be great. The principles underlying the issue of compulsory acquisition, whether kawanatanga overrides the guarantee of tino rangatiratanga, lie at the heart of the Treaty relationship between Maori and the Crown.

The nature of the fiduciary obligation of the Crown was considered by the Supreme Court of Canada, which addressed the use of discretion in this relationship. The circumstances of the surrender of aboriginal title were such that the Indian interest in Indian reserve land in British Columbia held by the Crown was described as "sui generis". This unique interest gave rise to a special Indian relationship with the Crown, and "a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians".[7] The court went on to note that from the Royal Proclamation of 1763, and confirmation in the Indian Act, derived "the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties". A discretion had thus been conferred on the Crown to decide "where the Indians' best interests really lie". This "discretion" had "the effect of transforming the Crown's obligation into a fiduciary one". The court then quoted Professor Ernest Weinrib, who suggested that the fiduciary relationship was dependent on the manner in which this discretion was used: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion".[8]

When land is considered for compulsory acquisition for a public work the Crown exercises a discretion whether to take by proclamation, negotiate purchase, or agree to an alternative arrangement for use (such as lease, easement or licence), or not to take and find an alternative site. Equally, when that land, once compulsorily acquired, is no longer needed for the purpose for which it was taken, then the Crown also exercises a discretion in how it may be disposed of. The procedures are set out in sections 40-42 Public Works Act 1981 and sections 23 and 26 New Zealand Railways Corporation Restructuring Act 1990. Implicit in these clauses is a discretion for the Crown to decide the terms on which such land is to be offered back to the original owners. In exercising this discretion in situations concerning land formerly owned by Maori, the Crown should be guided by its fiduciary obligation as the Treaty partner, whether or not there is a special clause in the Public Works Act or other legislation that refers to the Treaty of Waitangi. In other words, the national economy, the market place, and other matters that in other circumstances normally influence the sale and purchase of land, are subservient to the greater fiduciary obligation of the Crown toward Maori in the Treaty of Waitangi. This obligation in respect of return of land may be greater now than in the past, because so little land remains in Maori ownership.

The Privy Council has recently remarked on the principles of the Treaty of Waitangi with reference to the Treaty of Waitangi Act and State-Owned Enterprises Act:

> In their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty)....

> Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in 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....[9]

Their Lordships also suggested that changes in the national economy could be such a situation. They also suggested that if a taonga such as Maori language is in "a vulnerable state" then in fulfilling its obligations the Crown may well be required "to take especially vigorous action for its protection", especially if a past breach by the Crown, including legislative action, had contributed to the situation. Their Lordships concluded that "any previous default of the Crown could, far from reducing, increase the Crown's responsibility".[10]

While it is conceded that there may be circumstances when the compulsory taking of land for a public purpose (kawanatanga) constitutes a more significant public interest for both Maori and Pakeha than the guarantee to Maori of tino rangatiratanga, it is usually possible to negotiate a mutually agreeable solution. The fiduciary obligation of the Crown, the active protection of Maori rangatiratanga, and duty of reasonableness on both sides, suggest a more consultative approach to negotiation is appropriate. The maintenance of the principle of kawanatanga in article 1 includes a Crown right to acquire the *use* of land for a public purpose which is of benefit to all. A negotiated approach to the use of Maori land for public purposes which acknowledges Maori rangatiratanga, and does not extinguish Maori title, is the way forward to reconciliation of the apparent conflict between the principles of kawanatanga and rangatiratanga in articles 1 and 2 of the Treaty of Waitangi. And when the public use of the land is no longer required, the return of the land to Maori use can be so much more easily negotiated.

References

1. *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR, 664

2. *Report of the Waitangi Tribunal on the Orakei Claim (Wai 9)* (Wellington, 1987), p 166

3. ibid p 162

4. *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim (Wai 17)* (Wellington, 1988) p 57

5. *The Ngati Rangiteaorere Claim Report* (Wellington, 1990) p 48

6. *The Mohaka River Report* (Wellington, 1992) p 70

7. *Guerin et al* v *The Queen* [1984] 13 DLR (4th), 321, 339

8. ibid p 340

9. Privy Council Appeal No 14/1993 *The New Zealand Maori Council and Others* v *Attorney-General and Others from the Court of Appeal of New Zealand*, p 5

10. ibid

Chapter 8

Conclusions and Recommendations

We have set out in some detail a narrative of transactions on Papamoa No 2 Section 10B2C2 Block since it was taken in 1955 under the Public Works Act 1928 (chapter 3), disposal over the period 1985-1991 of the six Railways houses built on it (chapter 4) and efforts by the Railways Corporation to dispose of the land 1991-1993 (chapter 5). In chapter 6 we reviewed public works legislation, and in chapter 7 the principles of the Treaty of Waitangi in relation to legislation providing for compulsory acquisition of land by the Crown for public purposes. In forming our conclusions we consider first the issues related to the taking of the land; secondly, the offer-back procedures in the Public Works Act 1981 and New Zealand Railways Corporation Restructuring Act 1990; and thirdly, the context of Nga Potiki land losses and the fiduciary duty of the Crown in this claim.

The Taking of the Land by the Crown

Counsel for claimants argued that the powers of the Crown in public works legislation to take land by proclamation for public purposes are inconsistent with the principles of the Treaty of Waitangi, in that the Crown guaranteed to Maori te tino rangatiratanga, full authority, over their lands and resources until such time as Maori wished to part with them at an agreed price. Papamoa No 2 Section 10B2C2 Block was taken by proclamation for railway purposes with the intention (not stated in the proclamation) of building six houses for Railways employees at Te Maunga Station.[1] A Ministry of Works land purchase officer spoke with only 3 of the 22 owners of the land, who between them held 56 percent of the shares in the land, and reported that they had agreed to sell. However, no form of agreement was produced by the Crown before the tribunal. Nor was there any evidence that a full meeting of owners called by the Maori Land Court under Part XXIII Maori Affairs Act 1953 had been held to consider a resolution to sell.

Counsel for the Crown argued that there had been no breach of the Treaty, that the three principal shareholders had been willing sellers, and the land had been taken by proclamation because that was the most convenient path for all concerned. We note that Railways pressed urgency on Ministry of Works to obtain the land and construct the houses. We were given some evidence that at least two alternative sites were considered, one of them also Maori land, but no indication why this particular site was chosen over the others. Counsel for the Crown also argued that the owners had shown willingness to sell because they had subdivided land in the vicinity. This is not relevant because in the 1950s the various partitions of house sites on the block adjacent to state highway 2 had been for individual owners and their families to obtain a freehold in order to meet the requirements of Department of Maori Affairs housing loans.

We do not accept the Crown counsel submission that from the Maori owners' point of view the taking by proclamation was merely a convenient mechanism rather than a forced purchase. Neither Railways nor Ministry of Works felt any need to consider a meeting of all owners because they thought they had the agreement of 3 owners who controlled a bare majority of 56 percent of the shareholding. No consideration was given to the interests of the other 19 owners who held 44 percent of the shares. We reiterate that we were given no evidence that the three owners were "willing sellers", that they had actually "agreed" in a signed document, a legal contract, setting out the terms of agreement. The test of "willing sellers" is not whether they engaged in negotiation, but whether they concluded a legal contract in circumstances free of duress, fraud or misrepresentation.

As to the suggestion of counsel for claimants that owners did not know what was being taken because the *Gazette* notice described the land as "Part Papamoa No. 2 Section 10B Block", we note that although partitions and new appellations had been ordered by the Maori Land Court, the survey of these was not complete in 1955 when the land was taken. We do not know whether the three owners were aware of precise boundaries. What is more significant is that because there had been no meeting of owners, it is quite likely that many of the 19 other owners did not know that the land was being taken at the time. However, by the time Railways sought a certificate of title for the block in 1989, the land had been surveyed and the correct appellation, Papamoa No 2 Section 10B2C2 Block, should have been included on CT44B/168 which is clearly the title issued for this land.

Counsel for claimants also suggested that the original owners did not know whether the compensation money (£430) had been distributed. On the basis of the documents presented to us by counsel for the Crown it would appear that once the proclamation taking the land appeared in the *Gazette* the procedures followed the normal path of application to the Maori Land Court for assessment of compensation. Payment was made to the Maori Land Court, passed on to the Maori Trust Office and credited to the various owners, according to their shareholding, by means of entry on the individual "beneficiary cards". The entry on the cards stated only the block name and an amount, and if an individual was also receiving payments from other lands, it would not have been clear that this payment was from a compulsory purchase rather than income such as a rental when a total payment of all income to a beneficiary was made. We are satisfied that the Crown complied with the normal procedures in this aspect of the claim. The Maori Land Court heard the Crown application for assessment of compensation in September 1955 and it was adjourned so that it could be advertised in the Court "panui". We note, however, that payment was made in January 1956, credited to beneficiary cards by the Maori Trust Office in February, but the Order of the Maori Land Court assessing compensation was not issued until December 1956.

Counsel for claimants also questioned whether taking the land for housing was an appropriate use of the compulsory acquisition provisions of the Public Works Act 1928. On the face of it, employee housing is a marginal use of the term public work, especially as Te Maunga is in reasonably close proximity to an urban area at Mount Maunganui. Employee housing was not an "essential work" under the Public Works Act 1981. However, the Government Railways Act 1949 at section 46 did give the Minister of Railways powers to take land for Railways housing. The Public Works Act 1928 provided the procedures for taking and paying compensation. Counsel for the Crown suggested that these two Acts should be read together, and in the context of the legislation as it was in 1955 we have to agree. However, under current legislation it is unlikely that Railways housing would be regarded as a public work.

We conclude that Papamoa No 2 Section 10B2C2 Block was taken by the Crown by proclamation under the Public Works Act 1928 for Railways housing because it was the most convenient way for Railways to acquire land in a short time. The Ministry of Works was asked to implement this taking but the proclamation was issued in the name of the Minister of Railways. There was minimal negotiation with Maori owners (one meeting with only three of the 22 owners) and no agreement reached to sell in which all or a majority of owners participated. We do not consider this was a transaction by agreement with willing sellers. Even Railways, in several memoranda, acknowledged there was "an element of compulsion" in the acquisition of this land (A8b). At no stage did the Crown consider the possibility of negotiating with owners, or suggest alternative forms of tenure, such as a leasehold or licence to occupy, which would have preserved the Maori title and rangatiratanga of Nga Potiki owners, and still allowed the use of the land for housing.

The Crown "Offer-back" Procedures

In sections 40-42 Public Works Act 1981 provision was made for offering back to former owners any Crown land that was no longer required for any public work. Similar provisions were also included in sections 23 and 26 New Zealand Railways Corporation Restructuring Act 1990. In April 1985 Railways first indicated that the Te Maunga land and six houses on it were surplus to requirements and might be disposed of as separate lots. This was consistent with a policy decision of Railways Corporation to dispose of housing stock. An application for subdivision of Papamoa No 2 Section 10B2C2 Block was declined by Mount Maunganui Borough Council, and Railways then sought to dispose of the houses for relocation as they became vacant. By early 1991 all the houses had been removed and a conditional sale and purchase agreement was signed by Railways and G H Bryce for sale to Bryce of the whole block as an industrial lot. Bryce immediately began construction of a concrete batching plant. Although some desultory efforts had been made by Railways to comply with section 40 Public Works Act 1981, no formal offer had been made to the original owners. The sale and purchase agreement with Bryce included a condition that section 23 New Zealand Railways Corporation Restructuring Act 1990 (the equivalent of section 40 Public Works

Act 1981) should be complied with. It was not until August 1992 that Railways Corporation applied to the Maori Land Court for revesting of the land without improvements, stipulating several conditions which included a lease arrangement with Bryce and payment of $70,000 for the land. Bryce subsequently withdrew from the transaction and the former owners and their successors were confronted with the obstacle of raising $70,000 plus GST in order to get their land back.

We will not rehearse in detail the transactions that have been described in chapters 4 and 5 but simply make some general observations. As soon as they knew in 1985 that the land was no longer required by Railways, representatives of the former Maori owners indicated their desire to have the land returned to them. However, we consider that the documentation presented to the tribunal indicates that the Railways Corporation did not take seriously the requirements of section 40 Public Works Act 1981. It seems that the directive to dispose of surplus Railways assets at a market value and to act commercially was a stronger influence than any consideration of Crown fiduciary obligations toward Maori as a partner in the Treaty of Waitangi. If Railways intended to comply with section 40 in the disposal of the land and houses, then it should have sought out the former owners or their successors in 1985. When Railways did make a section 40 offer-back in July 1988 it was to the adjacent land owner, the Mangatawa-Papamoa Incorporation, which was not the former owner of Papamoa No 2 Section 10B2C2 Block. Even when the solicitors for the Incorporation, Cooney Lees and Morgan, pointed out the error, Railways did nothing to rectify it. Indeed, throughout this process officers of the Railways Corporation displayed a lamentable ignorance of Maori land tenure and Maori land law. Nor did they seek expert advice from the Maori Land Court or anyone else.

There has been a tendency throughout for Railways to shift the onus back on to representatives of former owners, Riki Taikato in particular, and the Tauranga solicitors Cooney Lees and Morgan, to resolve matters for them. This was expressed most blatantly in an internal Railways memorandum in 1988: "In other words put the matter to their solicitors and let them do the running around advising the appropriate people or beneficiaries of those original people" ie the 22 former owners of the land (A8b). We believe that the offer-back provisions of section 40 Public Works Act 1981 and section 23 New Zealand Railways Corporation Restructuring Act 1990 place the onus on the Crown to seek out former owners or their successors, and ensure that the offer-back is made to the right people. This can be done by direct negotiation, but at no stage in this case did Railways allocate this task to a particular individual, or have such a person talk face-to-face with former Maori owners. Another option of declaring land to be Crown land and transferring administration to the Minister of Lands was not considered by Railways, presumably because current policy was to sell surplus Railways assets at market prices. The option of taking the matter to the Maori Land Court in an application for revesting under section 436 Maori Affairs Act 1953, as provided for in section 41 Public Works Act 1981 and section 26 New Zealand Railways Corporation Restructuring Act 1990, was rejected by Railways as being too time consuming: "We fear that this could be a long drawn out

procedure...." it was stated in a Railways letter to Riki Taikato in 1989 (A8b). By not taking effective action at an early stage Railways Corporation officers have ensured that the process has dragged on over several years. They then confused the issue still further by agreeing to a sale of the land to a third party in 1991, compounding the frustration and sense of grievance felt by Nga Potiki generally and in particular the "Management Committee" set up by Riki Taikato which was trying to resolve the matter.

The Context of Nga Potiki Land Losses

In chapter 3 we noted the areas of Nga Potiki lands that had been compulsorily acquired by the Crown or local authority. Counsel for the Crown argued that the major alienations occurred after 1955, and were therefore irrelevant in consideration of this claim. Counsel did concede that these later losses may well have affected the claimants' present views, but stated that it could not be assumed that Nga Potiki owners held such strong views against alienation in 1954 when Papamoa No 2 Section 10B2C2 Block was being considered for Railways housing. We believe that the tribunal is required to consider this claim in a broader context beyond the specific area of 1 acre 2 roods (6070 square metres) compulsorily acquired by the Crown in 1955. Nga Potiki have suffered the loss of a good deal of their land through compulsory acquisition by the Crown and local authorities, both before and since 1955. Some of their remaining lands have been adversely affected by public works, especially by the location of the Mount Maunganui rubbish tip, sewage treatment works and oxidation ponds on their land. They have also had to withstand the pressures of urban expansion in trying to retain what is left of their lands.

Nga Potiki have actively sought the return of lands taken compulsorily under the Public Works Act and no longer required for the purposes for which they were taken. In 1988 the "Rifle Range", Papamoa No 2 Section 7A, an area of 139 acres 2 roods 18 perches (56.4 hectares) taken in 1941 under the Public Works Act 1928 for defence purposes, was returned to 38 Nga Potiki owners. The Minister of Lands, Hon Peter Tapsell, appeared in person at the Maori Land Court, and made the following statement of Crown policy before the formal hearing of the application for revesting the land:

> In the course of our history, there have been areas of land acquired by the Crown quite properly. Some of the time for important Public functions and since that time, some areas of that land have not needed to be used for that function and are no longer necessary for that, or any other urgent essential Public Works.
>
> It is my policy and will be, to return those lands which were acquired by the Crown either under the Public Works Act, or under any other power of the State, such that the original sellers could not be seen as free willing sellers; where the power of the State was taken, it seems to me, that that is quite different from those occasions where there was an arrangement between willing sellers and

willing purchasers.

> Where the people were required to be divested of land, it is my view that if it is not essential for a Public Work, it ought to be returned to them. It is, moreover, my view that the land ought to be returned to them unencumbered. That is it seems to me an injustice to say that we took your land eighty years ago and gave you fifty pounds, and now you can have your land back, provided you pay half a million dollars. That seems to be grossly unjust.
>
> So your Honour, might I say that I intend to the limits of my authority where land was acquired by the Crown compulsorily and is no longer needed for an important Public Work, to see what I can do to return that land. At the same time I would like to make the point that I hope that those lands which are returned to the people, that they will see fit to use in their own best interests in part, retaining the land as a whole, in the memory of their elders who owned it, and seeing that they use the land in a way that will be beneficial to them all.[2]

The compensation paid for the "Rifle Range" in 1944 was £1,523 ($3,046) for the 139 acres (56.4 hectares). In 1976, about the time when Nga Potiki were making representations to Government for the return of the land, part of which was leased for grazing, the Government valuation was $665,000, made up of $585,000 for 50.9 hectares in the leased area (including $2000 for improvements) and $80,000 for the 5.5 hectares of unimproved Crown land. When the Crown applied for revesting of this land in Nga Potiki owners in 1988, a sum of $20,400 had been negotiated as payment to the Crown by Maori owners for the return of the land. In 1988 the Railways Corporation offer to the Mangatawa Papamoa Incorporation (which was not the former owner of Papamoa No 2 Section 10B2C2 Block) was $130,000 for the Te Maunga land (plus $35,000 for the four houses on it), an area of 1 acre 2 roods or 6070 square metres, just over half a hectare. In August 1988, Hon Peter Tapsell wrote to the Minister of Railways, Hon Richard Prebble, suggesting that the Te Maunga land be declared Crown land and transferred to the administration of the Minister of Lands under the Land Act 1948. This was not done by Railways. Nga Potiki had sought the assistance of Hon Peter Tapsell in negotiating the return of Te Maunga Railways land, and given the successful outcome of the protracted negotiations on the "Rifle Range" near by, probably hoped for a similar solution at Te Maunga.

The Crown has a discretion to determine the conditions on which land compulsorily acquired by the Crown may be returned to former owners or their successors. In this instance, in the same Cabinet in 1988, the Minister of Lands was prepared to exercise this discretion in the revesting of the Rifle Range for a payment much less than Government valuation, but the Minister of Railways also exercised his discretion and directed that the Railways Corporation should dispose of surplus assets at market prices. The Railways Corporation is no longer involved with the former Railways housing land at Te Maunga. Papamoa No 2 Section 10B2C2 Block is now Crown land, transferred to the Department of Survey and Land Information for implementation of disposal procedures. The Crown may exercise a discretion in disposal of this block, as it did for the "Rifle Range",

without prejudice to any other negotiations on disposal of Crown lands.

The Fiduciary Obligation of the Crown in this Claim

The status in December 1993 of the land known as Papamoa No 2 Section 10B2C2 Block is that it is bare land, zoned Industrial C, and all the construction work started by Bryce and Bob Richards Heavy Transport Limited in 1991 has been removed. The Maori Land Court has issued an order revesting the land in the 22 former Maori owners as of 1955, when it was taken under the Public Works Act 1928. The only outstanding condition preventing return of this land is the requirement to pay the sum of $70,000 plus GST. Judge Carter, in his preliminary determination on the application for this revesting order in July 1993 commented on this issue:

> Possibly the argument for the owners will be over the question of price for the return of the land and the claim that where land is taken under kawanatanga from the treaty partner, then where the land becomes surplus to requirements the Crown has a duty to its treaty partner to return the land on reasonable terms and conditions and for a reasonable price having regard to the cost of acquisition and a reasonable return on that cost. There would seem to be room for argument that any additional increase in the value of land which is beyond any expenditure placed on the land by the Crown or a reasonable return having regard to interest and inflation rates should be returned to the owners.
>
> I make comment on those factors as the difficulty that the Court perceives the owners have in this case is finding the $70,000.00 plus GST to pay to the Crown. GST also imposes a further factor. This is a tax which is now imposed on the land because of the Crown's use of it. There is little likelihood that the owners will use the land for any activity which will involve GST and so will be faced with finding and paying the GST as an additional imposition on the return of the land to them ....
>
> Without wishing to stereotype owners of Maori land it must be said that many of them simply have not the means to raise finance to purchase land in situations such as this. If the land is worth $70,000.00 it is most unlikely that the owners will be able to arrange any finance to purchase the land. Where surplus lands are to be returned to owners at a price then perhaps there is an obligation on the Crown to recognise this and to endeavour to come to arrangements which might facilitate the owners in being able to take up any offer which is made to them. Purchase by deferred payment over a reasonable term would be one way where the Maori owners could be thus accommodated.
>
> No doubt such a procedure would evoke the argument as to why should Maori owners receive preferential treatment to other New Zealanders in repurchase of surplus lands. The simple answer would seem to be that where tribal or ancestral lands were compulsorily acquired by the Crown, such acquisition, although perhaps justifiable in terms of government, was contrary to the guarantees to Maori under the Treaty of Waitangi of retention of their lands. Other New Zealanders who hold or acquire land do so without the benefit of such guarantee and with full knowledge of the possibility that at any time all or any part of their land may be compulsorily acquired for public purposes.

> The Crown in the past has certainly recognised the difficulty of dealing with multiply-owned Maori land and developed acquisition procedures involving the Maori Land Court and the Maori Trustee so that it would not have to deal with individual owners. Where former Maori land becomes surplus and is to be offered back, the difficulty of multiple ownership, which the Crown had previously recognised, reappears, leading to the argument that there is perhaps a duty on the Crown to put into place procedures which will facilitate the repurchase of Maori land so that the owners will not be unfairly disadvantaged by the buy-back process.[3]

We concur with Judge Carter that there is a fiduciary obligation on the Crown to facilitate the return of former Maori land taken by the Crown when no longer required for the purpose for which it was taken. In the Crown Consultative Process (CCP — now called the "Protection Mechanism") a protection mechanism was put in place to establish procedures to ensure that surplus Crown land which could be used to settle Maori claims is not sold. Counsel for the Crown suggested that Papamoa No 2 Section 10B2C2 Block would come into the ambit of the Protection Mechanism. Counsel for claimants suggested that the Protection Mechanism was a new and untried procedure and it was not clear how it would assist former Maori owners in this instance. We note that the Protection Mechanism process will not be implemented until section 40 Public Works Act 1981 offer-back procedures have been complied with. In this instance, section 23 New Zealand Railways Corporation Restructuring Act 1990 procedures are equivalent to a section 40 offer-back.

The payment of $70,000 plus GST remains a stumbling block to the return of this land. Taking into account years of confusion and inaction by Railways Corporation over Crown obligations under the Treaty of Waitangi, and the statutory obligations of s. 40 Public Works Act 1981 and section 23 New Zealand Railways Corporation Restructuring Act 1990, over the years since 1985, we consider that the claimants have reason to feel aggrieved and frustrated. We also note that the claimants have incurred some costs over these years in trying to get their land back, in addition to the loss of any income they might have derived from the land if the section 40 offer-back provisions had been complied with more expeditiously by the Railways Corporation. We are also concerned about the amount of public money spent on legal fees, valuation fees, and various other expenses, because of the inept handling of this matter by officials of the Railways Corporation. We believe that Government needs to consider ways of streamlining procedures for disposal of surplus Crown lands, because for many small blocks the administration and other costs to the taxpayer may well exceed any return to the Crown on disposal.

We consider that the Te Maunga Railways Land claim is a situation where it is reasonable that the Crown return this land, Papamoa No 2 Section 10B2C2 Block, to the former Maori owners or their successors at no further cost to them. This should be without prejudice to any other claims related to public works takings. We see this action as a proper use of the Crown's discretion and the exercise of its fiduciary obligation actively to protect the interests of Nga Potiki. We have

noted that the fiduciary relationship, the obligation of the Crown actively to protect Maori interests, includes a discretion which may be reasonably exercised in the relationship between Treaty partners. We are also aware that there are other Maori claims and other Crown lands which were formerly owned by Maori and no longer required for the purposes for which they were taken and which involve similar issues. We note that changes were made in the Public Works Act 1981 to restrict the definition of a public work to an "essential work" and to include the offer-back provisions of sections 40-42. We note too that while the concept of "essential work" was repealed in the Public Works Amendment Act (No 2) 1987, the Planning Tribunal's role in reviewing any proposed compulsory acquisition of land has been strengthened, and its decisions are binding on local authorities and the Crown.

We do not suggest that Maori land should never be used for public purposes, but we emphasise that the compulsory acquisition of Maori land by the Crown cuts right across the guarantee of tino rangatiratanga in article 2 of the Treaty of Waitangi. We also emphasise that we do not believe that the Crown needs to acquire the freehold in order to carry out public works on any land. We note that in 1982 the Crown negotiated a lease arrangement with the Ngati Tahu Tribal Trust for the use of land on which the Ohaaki Geothermal Power Station and steam field is located. There are numerous other examples of leasehold tenure of land used for public purposes. There may well be times when the use of Maori land is required for public works. But there is no need to take the freehold by proclamation because there are alternative arrangements that can be negotiated. When land is no longer required for a public work then the lease, licence or other arrangement with the owners of the land can be terminated, and the return of the freehold, and the status of any improvements, can be more easily negotiated. We suggest that appropriate amendments to the Public Works Act 1981 and related legislation be instigated which express in a more positive way the fiduciary obligation of the Crown toward Maori and their land under the Treaty of Waitangi.

References

1. *Gazette* 1955, p 1222

2. Tauranga MB46/97

3. Tauranga MB 52/125-126; A3

Recommendations

We find that this claim is well-founded, but it also raises issues that are significant in the consideration of public works generally. Accordingly, we make the following recommendations in relation to the Papamoa No 2 Section 10B2C2 Block, which is the subject of this claim, and more generally in relation to the compulsory acquisition of land for public works, offer-back procedures, and the legislative provisions for returning Maori land no longer required for public purposes.

1. That the Crown take all necessary steps to ensure that the Te Maunga Railways land, Papamoa No 2 Section 10B2C2 Block, is revested, pursuant to section 134 Te Ture Whenua Maori Act 1993, in the former Maori owners without payment of the $70,000 purchase price required by the Minister of Railways.

2. That a moratorium be imposed on all dealings with lands taken compulsorily from Maori by the Crown for public works, and no longer required for the purposes for which they were taken, until such time as appropriate legislation is in place to facilitate the return of such lands to Maori.

3. That the Public Works Act 1981 and other relevant legislation be amended to achieve the following ends:

   (a) That all persons exercising functions and powers under the Public Works Act should act in a manner that is consistent with the Treaty of Waitangi.

   (b) That where Maori land is required for any public work, and an agreement has not been reached by negotiation, provision be made for the compulsory taking for a specific use of the land which is a partial interest in the land such as a leasehold, licence, easement, or other encumbrance, but not the full freehold title.

   (c) That provision be made to allow the Crown discretion, depending on the circumstances of each case, to negotiate the return to Maori of any lands compulsorily taken from Maori under public works legislation and no longer required for any public purpose, at no consideration, or at a negotiated price that may be less than the market value.

   (d) That provision be made to empower the Maori Land Court to decide, when a negotiated agreement cannot be reached, what compensatory payments may be made by the Crown, or Maori, when such land is returned to Maori. The quantum of such compensation is to be assessed on the basis of a fair return to Maori for the use of the land by the Crown, and the length of time the land has been used for any public purpose.

(e) That the Maori Land Court be empowered to impose a charge on the land if any compensation be decided that is payable by Maori for lands returned under the above provisions.

The Director of the Waitangi Tribunal is requested to serve a sealed copy of this report on:

(a) The claimant Michelle Henare
(b) The claimant's solicitors
(c) Minister of Maori Affairs
Minister of Justice
(d) Solicitor General

Dated at Wellington this day of August 1994

Judge H K Hingston, presiding officer

Pamela Ringwood, member

Evelyn Stokes, member

Makarini Temara, member

Appendix A
The Claim

A claim in relation to Papamoa No 2 Section 10B2C2 Block was lodged with the Waitangi Tribunal by Michelle Henare and six others on 7 October 1992, and registered as Wai 315. An amended statement of claim which is reproduced below was prepared by counsel for claimants, Carrie Wainwright, and lodged with the tribunal on 7 December 1993.

Amended Statement of Claim

1. THE claimants are known as the Ngapotiki Interim Committee and are affiliated with the Ngapotiki Hapu and Ngaiterangi Iwi. Their names are:

Mrs Michelle Eva Henare, housewife	12 Vosper St, Matamata
Mrs Mutu Cooper, orchardist	Kairua Rd, R D 5, Tauranga
Mr Matini Taikato, orchardist	8 Wikitoria St, Tauranga
Mr Ken Palmer, watersider	15 Haukore St, Tauranga
Mrs Waitai McLeod, retailer	R D 5, Te Maunga, Tauranga
Mr George Rameka, farmer	R D 5, Te Maunga, Tauranga
Mr Tau Taiapa, drainlayer	12D, Te Wati St, Tauranga

2. THEY claim to be prejudicially affected by the Public Works Act 1928, the Public Works Act 1981, the New Zealand Railways Corporation Restructuring Act 1990, and acts of the Crown undertaken pursuant to those Acts. They claim that the Public Works Act 1928, the Public Works Act 1981 and the New Zealand Railways Corporation Restructuring Act 1990, and the acts of the Crown undertaken pursuant to those Acts, were and are inconsistent with the principles of the Treaty of Waitangi.

3. THE claimants have been prejudicially affected in their capacity as former Maori owners, or descendants of former Maori owners, of a block of land known as Papamoa 2 Section 10B2C2 ("the Land").

4. THE Land was acquired by the Crown in 1955 under the Public Works Act 1928. The Land was taken for the purposes of the Railway.

5. THE Land is currently the subject of an Order made by the Maori Land Court pursuant to section 436 of the Maori Affairs Act. The Land will be vested in the claimants provided they pay $70,000 to New Zealand Railways Corporation ("the Corporation") before 6 January 1994. The claimants do not have the money required to complete the purchase.

6. ONCE the time period has expired the Corporation may apply to have the order cancelled for non-payment by the claimants. The order may be cancelled on the basis that the claimants have rejected the buy-back offer. Section 23(3) New Zealand Railways Corporation Restructuring Act 1990 permits the Corporation then to "sell or otherwise dispose of the land to any person on such terms and conditions as it thinks fit".

7. THE claimants believe that the Public Works Acts 1928 and 1981, and the New Zealand Railways Corporation Restructuring Act 1990, are in their policy and provisions inconsistent with the principles of the Treaty of Waitangi in that

(1) Article the Second of the Treaty of Waitangi guarantees to Maori their right to keep their land until such time as they wish to sell it. The powers of compulsory acquisition granted by Parliament to the Crown and enshrined in the Public Works Acts 1928 and 1981 and the New Zealand Railways Corporation Restructuring Act 1990 are inconsistent with this promise.

(2) Because of its commitments under the Treaty of Waitangi, the Crown should, where land is required for public works, proceed on the basis that Maori land should not be compulsorily taken.

(3) If it is accepted that the Crown is entitled to exercise its right of compulsory acquisition of Maori land as a necessary incident of the exercise of kawanatanga (which the claimants reject), the claimants argue that the right should be exercised.

  (a) only where no non-Maori land is available as an alternative;

  (b) only after all practical alternatives to purchasing the land, including the alternative of taking a leasehold interest in the land required, have been exhausted; and

  (c) where provision is made to return the land to Maori ownership at the earliest possible opportunity.

(4) The claimants believe that compulsory acquisition of the Land in 1955 was inconsistent with these principles, and with the principles of the Treaty of Waitangi, in that the owners were unwilling sellers, and were and are not aware of alternatives having been explored by New Zealand Railways Department (as it then was). Moreover, they do not consider that Railways housing is the kind of exigency which would justify an exercise of kawanatanga to take Maori land.

(5) The current legislation is particularly weak in the provision it makes for the return of compulsorily-taken land to Maori ownership.

(6) Section 40 of the Public Works Act 1981 provides that where any land held for any public work is no longer required for that or any other public work, an offer to buy back the land should be made to the

original owners or their successors. Where the land is held by the New Zealand Railways Corporation ("the Corporation") the New Zealand Railways Corporation Restructuring Act 1990 applies. Section 23 of that Act is essentially the same as section 40 of the Public Works Act 1981.

(7) There is no policy imperative behind these provisions to return compulsorily-taken land to Maori owners at the earliest opportunity. It is available to the Crown to take land for one purpose, and then convert it to another purpose. Neither is there any recognition of the special difficulties of re-purchase applying in situations where the land that was taken was in multiple ownership.

(8) The difficulties of raising money on multiply-owned land are well known and arise principally from the difficulties of enforcing securities. This circumstance, combined with the widespread poverty of Maori people, means that from a practical point of view they will often have little or no prospect of recovering land which was compulsorily taken from them or their forebears, because they are unable to raise the purchase price within the time limit of forty days prescribed by the legislation.

(9) Section 23(1)(a) of the New Zealand Railways Restructuring Act 1990 excuses the Corporation from making a buy-back offer where it considers it would be "impracticable, unreasonable, or unfair to do so." The Corporation may then "sell or otherwise dispose of the land to any person on such terms and conditions as it thinks fit." In such cases, the interests of the former Maori owners may simply be ignored.

(10) In circumstances where the Corporation has difficulty in identifying the successors of former Maori owners, section 26 of the New Zealand Railways Restructuring Act permits the Corporation to apply for an order under section 436 of the (former) Maori Affairs Act 1953 vesting the land in whoever they wish. Such an order may be subject to any conditions which the Corporation wishes to impose.

(11) Section 436 places all the rights in the hands of the Corporation and none in the hands of the former owners of compulsorily-taken land or their successors.

(12) None of the offer-back provisions in the legislation referred to takes into account any overriding tribal interest which there may be in the land which was compulsorily taken. If the former Maori owners or their successors cannot raise the money required to purchase back the property, the offer-back right should not immediately lapse. It should pass to a related tribal group or incorporation which might have the necessary assets to effect the purchase. Such a policy would at least be more consistent with the Treaty promise to allow Maori to retain their land for as long as they wished to do so.

8. IN the present case, the owners of the Land and their successors were denied even such procedural protection of landowners as exist in the relevant legislation. The claimants believe that there is a duty on the Crown to be even more scrupulous in its observance of procedural requirements where Maori land has been compulsorily taken, but their experience has been that a conspicuous lack of scrupulousness has applied. In particular

(1) The Gazette notice of 1955 inaccurately described the block as "Part Papamoa No.2, Section 10B Block." This description refers to a larger block of which the land, properly described as Papamoa No.2 Section 10B2C2 is only a small part.

(2) As a result of the above misdescription, it is not apparent that the owners understood what land was being taken.

(3) The claimants are unsure whether any or all the entitled owners received compensation, and if so in what amounts. They are therefore unable to make a judgement as to the adequacy of any compensation paid.

(4) In the present case, when the Land became surplus to the purposes of Railways Corporation, they did not immediately attempt to offer it back to the original owners, or their successors, in accordance with section 40 of the Public Works Act 1981. Instead, the Corporation

(a) entered upon processes to alter the zoning of the property;

(b) later entered into a conditional contract for sale of the property to Bob Richards Heavy Transport Limited and Graham Hilton Bryce; and

(c) allowing the conditional purchasers to erect improvements on the Land;

all prior to any contact being made with the owners to whom the Land should have been offered back.

(5) The eventual offer to buy back was not made until July 1988 and was then inadequately carried out in that it was not made to the original owners, of whom at least six were still alive, or their successors. The offer was instead made to the Mangatawa Papamoa Incorporation who owned the adjoining land. In the context of its consideration of the Corporation's section 436 Application, the Maori Land Court observed that the whole process could have been much more expeditiously handled by the Corporation (as recorded in the Court's Minute Book at Tauranga, Volume 52, Folio 24). It appears that no concentrated search through Maori Land Court records was ever carried out by the Corporation. In short, the Corporation failed to apply the necessary expertise to trace the successors to owners and compile a fairly up-to-date list from materials freely available.

(6) Having failed to make the appropriate enquiries to locate the original

owners and their successors, Railways Corporation made use of the procedure in section 26 of the New Zealand Railways Corporation Restructuring Act 1990 and made an application under section 436 of the Maori Affairs Act 1953. Under this section they are able to leave to the Maori Land Court the task of locating the owners and their successors.

(7) The Corporation's section 436 Application requested that the Maori Land Court vest the land subject to onerous and unreasonable conditions and encumbrances.

9. IN summary, therefore, the claimants take the view that

(1) the legislation under which the Land was taken and eventually offered back is inconsistent with the principles of the Treaty of Waitangi;

(2) the legislation should not have been employed to take the Land by compulsory purchase without full exploration of other sites and other land-holding mechanisms;

(3) the legislation was in any event imperfectly followed, and the procedural defects which have been identified in themselves amount to a serious breach of the Treaty in relation to this Land and these claimants;

(4) the improper use of the legislation, the procedural defects in its use, and insensitivity with which the legislation has been employed, have all caused the claimants heartache, inconvenience, and expense.

10. THE claimants cannot pay the $70,000 required to purchase the land from the New Zealand Railways Corporation.

11. IN light of the foregoing, the claimants seek

(1) an immediate recommendation that the Minister of Railways refuse his consent to a vesting of the Land in any person or persons other than the claimants;

(2) return to the claimants of the Land without payment; and

(3) reimbursement for their legal costs and disbursements both before the Maori Land Court (in respect of the Corporation's section 436 Application), and in these proceedings.

DATED this 7th day of December 1993

Carrie Wainwright
Counsel for Claimants

Appendix B
Record of Inquiry

Record of Proceedings

1 Claims

1.1 Wai 315
Date: 7 October 1993
Claimants: M E Henare & 6 others
Concerning: Papamoa 2 section 10B 2C2

1.1(a) Amended statement of claim, 7 December 1993

2 Papers in Proceedings

2.1 Tribunal directions to register claim, 19 November 1992

2.2 Notification list of persons notified of claim

2.3 Letter, Cooney Lees and Morgan to Registrar, 26 November 1992

2.4 Claimant application for urgent hearing incorporating further particulars of claim, 3 December 1993

2.5 Tribunal directions for hearing and constituting tribunal, 6 December 1993

2.6 Crown counsel memorandum, in response to tribunal directions of 6 December 1993, 8 December 1993

2.7 P K Trotman letter, Railcorp Properties to Crown Law Office, 9 December 1993

2.8 Memorandum for counsel, in response to issues raised by this claim and what was expected from counsel, 20 December 1993

2.9 Further submissions for claimants, 17 February 1994

2.10 Submissions of counsel for the Crown, 17 February 1994

2.11 Reply from counsel for the Crown to claimants' submission, 28 February 1994

2.12 Further submissions for claimants in reply to submissions of counsel for the Crown, 4 March 1994

2.13 Notice of second hearing at Waitangi Tribunal Division offices, 10 June 1994

2.14 Certificate of despatch of notice re second hearing, 10 June 1994

2.15 Reply from counsel for claimants re draft report, 31 May 1994

2.16 Letter from counsel for Crown giving general concerns re state of claim, 9 June 1994

2.17 Letter from counsel for Crown giving comments on draft report, 9 June 1994

2.18 Letter from counsel for claimants re counsel for Crown's request for additional hearing, 10 June 1994

2.19 Notice from presiding officer to counsels for Crown and claimants advising of additional hearing, for 17 June 1994

Appendix C
Record of Documents

* Confidential, unavailable without tribunal order
L Held in Waitangi Tribunal Division library

A *First hearing, held at Maori Land Court, Rotorua, 13 December 1993*

A1 Documents accompanying application of 7 October 1992
Letter from Minister of Railways Dr P Tapsell MP, 16 December 1985
Letter from Mount Maunganui Borough Council to Cooney Lees and Morgan, 23 December 1985
Plan of land from cadastral maps
Proclamation taking land of 27 July 1955
List of owners of Papamoa 210B 2C2 at 8 November 1955
Application for order revesting land required for Public Work

A2 Draft working report to tribunal, S Green, November 1992

A3 Preliminary determination of Maori Land Court of 8 July 1993 at 52 TGA MB 116

A4 Minute of order of Maori Land Court of 21 September 1993 at 52 TGA MB 202

A5 Claimant counsel submissions

A6 Crown counsel submissions of 13 December 1993

A7 Extracts from *New Zealand Parliamentary Debates*
(a) Public Works Bill 1928, vol 219 p 651
(b) Public Works Bill 1928, vol 219 p 730
(c) Public Works Bill 1981, vol 436 pp 5920-5923
(d) Public Works Bill 1981, vol 440 pp 3165-3183
(e) Public Works Bill 1981, Vol 441 pp.3641-3643
(f) New Zealand Railways Corporation Restructuring Bill 1990, vol 506 pp 921-935
(g) New Zealand Railways Corporation Restructuring Bill 1990, vol 510 pp 3648-3676

A8 List of Documents relating to Papamoa Lands, supplied by Crown, 22 February 1994
(a) Part 1 - Acquisition of Land 1954 - 1955
(b) Part 2 - Events Since 1985
(c) Supplementary papers 1954-1988

A9 Report of the Maori Land Information Office, in respect of an application for research assistance lodged by the Waitangi Tribunal

B *Additional Hearing granted by Waitangi Tribunal, 17 June 1994, Waitangi Tribunal Division, Wellington*

B1 Outline of evidence from Peter Trotman, Acting Manager Railway Lands, DOSLI, formerly Manager Technical Services, NZRC

B1(a) Enclosure from B1 outlining structure of CCJWP

Bibliography

Note: Specific references to some official publications and Maori Land Court minute books are indicated in the text with the following abbreviations:

Appendices to the Journals of the House of Representatives (AJHR)
New Zealand Gazette (Gazette)
New Zealand Parliamentary Debates (NZPD)
New Zealand Statutes (short title of Act)
Tauranga Minute Books of the Maori Land Court (Tauranga MB)

The following plans held in the Department of Survey and Land Information, Hamilton, were also consulted:

ML 20902-20904: Compiled Plan Mangatawa-Papamoa Block, 1974 (3 sheets)
ML 10594: Plan of Papamoa No 2 Secs 7A,7B,7C,7D, 9A and 9B, 1917
ML 7136-7140: Plan of Part of Native Pt of Papamoa No 2, 1907

The following is a list of published sources which provided relevant background to matters inquired into in this report:

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Stokes, E *A History of Tauranga County* (Palmerston North, 1980)

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Waitangi Tribunal, *The Mohaka River Report* (Wellington, 1992)

Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report* (Wellington, 1990)

Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim (Wai 9)* (Wellington, 1987)

ISBN 1-86956-148-1

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