

WAITANGI TRIBUNAL

WAI 261

CONCERNING the Treaty of Waitangi Act 1975

AND the Auckland Hospital Endowments claim

INTERIM REPORT TO the Minister of Maori Affairs

AND TO the Ministers of Health and Justice

Tena koutou

Maori have made a special contribution to the establishment of hospitals, well over and above the ordinary. That is a preliminary opinion-that emerges from some initial inquiries on this claim. Should it be later verified in more detailed examination, it will be an important consideration in the equitable rationalisation of Health Board assets and in the restructuring of health services.

**MAORI AND HOSPITALS GENERALLY**

In various parts of the country, our initial inquiries suggest, Maori have provided an economic base for hospitals in a variety of ways. In some cases Maori land was compulsorily taken, in an early period, to provide the hospital site. That may be innocuous in itself but not when ranked with the scarcity of Maori land then remaining in the area. In other cases, where Maori land was plentiful, the taking was without compensation because of the benefit accruing to Maori through the establishment of such services. That may seem fair except to the extent that no similar contribution was expected of settler land owners in predominantly pakeha communities. Elsewhere, Maori land was gifted, including sometimes both the hospital site and surrounding land to provide for an endowment. It may also have been the case that in certain Maori areas the gifting of Maori land was a pre-requisite to the delivery of hospital services. In Auckland we are concerned with another class of case, though it was also of general application, where the promise of hospital services was either a part, or should be deemed to form part of an early land sale arrangement. Thus, in giving evidence before the Ngati Tahu tribunal, D Armstrong, an historian for the Crown considered that the provision of schools, hospitals and other' permanent benefits was seen as a way of facilitating the continued purchase of land (Luiten Report p6}. In 1857, Governor Gore Browne mitted that such assurances

had long been government policy I am satisfied that from the date of the Treaty of Waitangi, promises of schools, hospitals, roads, constant solicitude for their welfare and general protection on the part of the Imperial government have been held out to the Natives to induce them to part with their land (Luiten Report p7). Preliminary research suggests that this was the situation that applied in Auckland.

#### **ORIGIN OF THE AUCKLAND CLAIM**

We were brought into this matter at the instigation of Eriapa. Uruamo who complained of the sale of 4 Domett Avenue Auckland by the Auckland Area Health Board. The Maori use of 4 Domett Avenue goes back to about 1950 when the then Department of Labour and Employment purchased the leasehold interest in the property and a brick dormitory unit was constructed as a Maori Youth hostel for Maori trade trainees. In 1965 the hostel was taken over by the Department of Maori Affairs and operated by the Presbyterian Church. The rental was then £650 per annum. In 1988, when the lease was due for renewal, the rental was assessed at \$55,000 per annum. The lease was consequently abandoned, by the Iwi Transition Iwi Authority as successor to the Department, although Maori lessees continued to occupy the property on a monthly tenancy basis. Currently the land is occupied by Te Taou Reweti Charitable Trust, under the chairmanship of Mr Uruamo. To those familiar with local tribal history, both names indicate a connection to the local Ngati Whatua iwi. The trust operates a centre for Maori health education and cultural training. Occupation alone does not establish freehold rights, except in a limited circumstance, and at the hearing of Mr Uruamo's claim this particular line of argument was not advanced. There had been a contention however that "the original sales need investigation" and the Tribunal commissioned an exploratory report on early Auckland land sales from J Luiten, a member of the Tribunal staff. She had only a few days notice and her report was accordingly tentative. It nonetheless introduces some necessary background.

#### **AUCKLAND SALES AND HOSPITAL ENDOWMENTS**

We are advised the first land transaction took place on 20 October 1840, when certain of Ngati Whatua transferred 3,000 acres of central Auckland to the Crown for cash and goods worth £281. six months later a mere 44 acres of that was on-sold to settlers for £24,275. Subsequently, in May 1841, 6,000 acres from Mission Bay to Tamaki Estuary passed from Ngati Paoa for cash and goods worth- £358, while on 7 October 1841, Ngati Whatua rangatira sold a further 13,000 acres from Waitemata to Manukau for £200 and some goods. The Protector of Aborigines negotiated these purchases for the well be considered that his assigned task to "watch over the interests of the Aborigines" and to ensure "fair and equal contracts" was simply not performed. The lands purchased from Maori one day were on-sold to settlers soon after at enormous profits with mark-ups of over 8,000 times. Any reaction of , outrageous

indignation must nonetheless be tempered and informed by proper acknowledgement of the Imperial Government's intentions. The gain to Maori, it was thought, was not the blankets, beads and other goods provided. That may be seen as a token offer. The profit, the Government thought, lay first in the increased value to Maori of the reserves they would keep for themselves, and secondly in the provision of special Maori services, particularly in the area of health care. The passage of time ought not to dim the Maori reliance on health services even before the Colony's establishment. With the introduction of uncustomary diseases, Maori were reported to be dying at an alarming rate. In Auckland, Lady Martin, wife of our first Chief Justice, established the first hospital at Judge's Bay, catering entirely to local Maori. The need for such facilities was well known to them before land sales were entered into. Accordingly, in his instructions to Governor Hobson in January 1841, Lord Russell stipulated that a proportion of the money obtained from the re-sale of Maori land should be held by the Protector as an endowment for Maori purposes. As often as any sale shall hereafter be effected in the colony of lands acquired by purchase from the aborigines, there must be carried to the credit of the Department of the Protector of Aborigines a sum amounting to not less than 15 nor more than 20% in the purchase money, which sum will constitute a fund for defraying the charge of the Protector's establishment, and for defraying all other charges for promoting the health, civilisation, education and spiritual care of the natives. Whether promises of schools and hospitals were in fact made on the execution of the land arrangements would require further research. It is arguable however that even without such proof, the promises should be deemed to have been given, for without such an arrangement the bargains would be unconscionable, and should never have been approved by the Protector. Health services might be seen as some compensation for the low prices paid, the more so since few reserves were created for the iwi involved. Grey became Governor in 1845. He abolished the Protectorate Department but did not abandon the policy of ensuring to Maori, from the profits of land transactions, the benefit of hospital services. The difference was that the arrangements would be under his direct control. He was regularly to contend in reporting to the Colonial Office, that he had provided amply for Maori and that the hospital services were primarily for their benefit. It is possible that Ngati Whatua leaders saw the need to formally record these arrangements in their land transactions. In any event the later land sale deeds contained a proviso by which ten per cent of the resale price was to be returned to Ngati Whatua in cash or services. More particularly, according to the Maori translation, the ten per cent was to provide for the founding of schools in which persons of our race may be taught, for the construction of hospitals in which persons of our own race may be tended, for the payment of medical attendance for us, for annuities for our chiefs, or for other purposes of a like nature in which the Natives of this country have an interest. There has since been a series of contentions that the ten per cent or an equivalence was not in fact given. It was to be the subject of a Commission of Inquiry report in 1927. In fact there is reference to Maori complaints of a lack of hospital services from as early as 1844 (Luiten p9). This provides some background to Governor Grey's reservation of 300 acres for the endowment of Auckland hospital, in 1850, from out of the 13,000 acres acquired from Ngati Whatua.

The endowment was the means by which the Governor could honour his undertakings to Maori, and accordingly, Maori have claimed a particular interest in the endowment lands. It is contended in similar vein, that the assurance of special hospital services for local Maori iwi was a part of the 'price' for Auckland. In the course of time the endowments were to pass, without payment, to the Auckland Area Health Board. An authority to sell the lands and apply the proceeds to capital expenditure, was then given by the Crown in section 70 (3) of the Area Health Boards Act 1983. The Commissioner for the Board is currently selling lands to fund a new capital works programme. We are told this is necessary to meet certain modern hospital needs.

### ISSUES

Because of the pending sale of 4 Domett Avenue a hearing was held on short notice, on 3 December, at Auckland. The research was necessarily tentative; and through lack of funds, claimant counsel could not be engaged until moments beforehand and appeared on a largely voluntary basis. Crown counsel likewise had no proper opportunity to prepare or examine the research and in the result the issues were not fully canvassed. It has been necessary nonetheless to formulate some preliminary opinions on such evidence as was available. We set them out as follows.

(a) As earlier stated occupation alone does not create a right to ownership. There is some opinion that Maori trade trainees built or repaired certain buildings and there has been some history of Maori user, but we are unaware of anything to derogate from the Board's lawful right to the ownership of the land and to any improvements on it.

(b) The substantive question appears to be whether proper arrangements were made for Maori when the endowments were created. Maori are entitled to the benefit of hospitals as members of the general public, but do local Maori have the additional right to specific funding for assistance? Were the early Auckland land sales effected on an understanding that the Governor would secure special health services for local Maori iwi, and if so, should part of the endowments have been specifically reserved for them? We thought there was a case to be argued here, and since it appeared to us that the 4 Domett Avenue property could well be utilised as part of a Maori programme, should the case be established, we wrote to you on 5 December seeking the deferral of that sale while the matter was further investigated.

(c) It does not follow that a claim to compensate any established deficiencies in the initial Auckland sales should be met from the Health Board property. It seemed to us that any claim based upon inadequate sale prices, insufficient reserves or failure to deliver certain promises would lie against the general Crown assets in Auckland, now surplus to requirements. The Auckland Hospital properties are not surplus. They are needed for essential purposes. The substantive question as we see it is not whether the Crown should intervene to recover the land for Maori, but whether it is appropriate, given the history, that part of the Board's assets should be specifically set aside for particular Maori health purposes.

(d) A question arose as to the Tribunal's jurisdiction. Can we deal with this matter when the land is vested in the Board? The Tribunal's jurisdiction as we see it is against the Crown. The question is whether the Crown should intervene to recover any part of the Board's assets given to it by the Crown, or otherwise secure it for particular Maori health programmes. The Crown had consistently maintained a control over these and other hospital lands. It has authorised the sales in section 70 of the Area Health Boards Act 1983, and in the same section has reserved the right to recover the same lands for the Crown.

## **RESOLUTION**

It appears to the Tribunal that this and other 'hospital claims' should be capable of resolution by negotiation. A number of Maori have an interest in these matters and Government too appears conscious of that. We understand for example, Government has established a National Provider Board to oversee the asset sales and with a particular brief to consider Maori claims to hospital properties. It further seems, there are questions to be addressed at both national and local levels. On 5 December we sent you an interim memorandum because of the urgency involved. We proposed that you intervene in the Auckland hospital sales process, and if it was not too late, in the disposal of 4 Domett Avenue in particular. We added that in the event that that property had been sold, the nett proceeds should be reserved until the claim had been better investigated. We have since been advised by the Deputy Commissioner of the Auckland Area Health Board that the sale has in fact been effected but that the funds from the sale are to be held in a Board Trust Fund until either the claim is determined or agreement is reached with local iwi. We recommend that Government might now proceed generally along the following lines (a) That the Minister of Health requests the National Provider Board or some other suitable body (i) to consult with an appropriate national Maori organisation for a general policy concerning the disposal of Health Board properties when Maori have or may claim a particular interest, and to consider whether any particular arrangement should be made to provide for or fund future Maori health needs; and (ii) through that national organisation to consult with particular iwi groups with regard to specific properties, and thus, to consult with appropriate -, representatives for the iwi in this case - (b) That the Minister of Health provides funding for the above and for the early research of prospective Maori claims to hospital lands, the research to be arranged in consultation with the Research Manager of the Waitangi Tribunal.

Dated at Wellington this 6th day of December 1991

Chief Judge Edward Taihakurei Durie

Professor Maurice Peter Keith Sorrenson

Georgina M un i Te Heuheu  
WAITANGI TRIBUNAL